



Jessa & another v Official Receiver; Inspector General of the National Police Service & another (Interested Parties) (Winding Up Cause 22 of 2014) [2025] KEHC 483 (KLR) (Commercial and Tax) (24 January 2025) (Ruling)

Neutral citation: [2025] KEHC 483 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
WINDING UP CAUSE 22 OF 2014
JWW MONG'ARE, J
JANUARY 24, 2025
IN THE MATTER OF VALUE PAK FOODS LIMITED (IN LIQUIDATION)

BETWEEN

NASIR HAIDERALI JESSA 1ST APPLICANT

ZULFIKAR HAIDERALI JESSA 2ND APPLICANT

AND

THE OFFICIAL RECEIVER RESPONDENT

AND

THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE INTERESTED PARTY

THE OCS, CENTRAL POLICE STATION INTERESTED PARTY

RULING

1. The Applicants, the directors of Value Park Foods Limited (In Liquidation) (the Company), filed the Notice of Motion dated 7th June 2024, seeking the following orders:-
 1. Spent
 2. Spent
 3. Spent
 4. That the Honourable Court be pleased to lift the warrants of arrest and set aside any execution proceedings against the Applicants.



5. That in the first instance, the 1st and 2nd Interested Parties herein be restrained from arresting and detaining the Applicants herein in execution of the Order given by this Honourable Court on 14th May 2024, pending the hearing and determination of this Application.
 6. That the Order given by this Honourable Court on 14th May 2024 issuing warrants of arrest be set aside.
 7. That the costs of this Application be provided for.
2. The application is supported by the grounds on its face and the supporting affidavit sworn by the 1st Applicant, Nasir Haiderali Jessa on 7th June 2024. The grounds are that:-
- a. The Applicants are the Directors of Value Pak Foods Limited, which Company is currently under liquidation pursuant to the Court's Order of 18th October 2016.
 - b. On 14th May 2024, this Honourable Court issued an Order directing that arrest warrants be issued against the Applicants.
 - c. The Court, while sitting as a civil Court, lacks the jurisdiction to invoke the sanctions under Section 433 (8) & (9) of the *Insolvency Act* 2015.
 - d. When the said Orders were being issued, the Applicants were unaware that the instant proceedings were ongoing even after the issuance of the Liquidation Order on 18th October 2016.
 - e. Further, neither the Applicants nor their advocates were notified of the Court dates of this matter.
 - f. The Official Receiver only served the Applicants' Advocates with a copy of the Court Order on 6th June 2024.
 - g. It is only after service of the Order that the Applicants became aware that an Order directing the interested party to arrest the directors of the subject Company was issued on 14th May 2024.
 - h. The Official Receiver has now informed the Applicant's Advocates that the warrants of arrest were issued due to a purported failure by the Applicants to furnish a Statement of Affairs of the subject Company.
 - i. Whereas the requirement to procure a Statement of Affairs to the Official Receiver is not compulsory but subject to the Official Receiver making a formal request to the directors, the Official Receiver has never approached the Applicants to furnish a Statement of Affairs of the subject Company, and any pleas by the legal representatives of the Applicants that a Statement cannot be filed for various reasons explained below, have been blatantly ignored and unconsidered by the Official Receiver.
 - j. Prior to issuance of the Liquidation Order in the instant proceedings, the High Court in Nairobi HCCC NO. 522 OF 2015; Imperial Bank Limited (In Receivership) vs W.E Tilley (Muthaiga) Limited & 21 Others, had, on 27th October 2015 issued an Order restraining the Applicants herein from operating and/or managing and dealing in any manner whatsoever, with the assets, accounts and affairs of the subject Company.
 - k. The said Order of 27th October 2015 are still in force and the suit (HCC NO. 522 OF 2015) is yet to be determined. As a result, the Applicants do not have access to the premises, assets and



affairs of the subject Company which is now in full control of the Official Receiver, pursuant to the Liquidation Order of 18th October 2016.

- l. In the circumstances therefore, the Applicants cannot furnish the Statement of Affairs and the Official Receiver is aware of this.
- m. It is the Official Receiver in total control over the affairs of the subject Company, and not the Applicants.
- n. The Applicants would be acting in contempt of the Court Orders of 27th October 2015, should they access the premises, assets, accounts and books of the subject Company for purposes of compiling a Statement of Affairs.
- o. The Applicants remain unaware of the circumstances leading to the issue of the draconian Orders of 14th May 2024.
- p. The Applicants have neither been served with Summons to appear before this Court nor invited to show cause why they should not be arrested.
- q. There exists an imminent threat that the Applicants may be arrested without being accorded a fair hearing.

Response

3. In response, the Official Receiver filed a preliminary objection (PO) dated 24th June 2024, on the ground that the Plaintiff's suit against the Defendant is fatally defective and a nullity as leave to institute the same was not obtained.
4. The Official Receiver also filed a replying affidavit sworn by the Assistant Official Receiver, Cyrus Njenga on 26th June 2024. He deposed as follows:-
 - a. That the Applicants' Application is fatally defective and a nullity as leave to institute the same has not been obtained.
 - b. That Section 433 of the [Insolvency Act, 2025](#) mandates the Official Receiver to call for a statement of affairs from the former directors of the company or from any prescribed person under the Act.
 - c. That an order for liquidation has precedence over other judgments, orders or judicial pronouncements other than the rights of a secured creditor. Consequently, the former directors cannot hide behind the orders made in Nairobi HCC No. 522 of 2015; Imperial Bank Limited (In Receivership) vs WE. They (Muthaiga) Limited and 21 others on 27th October, 2015 to frustrate the Official Receiver.
 - d. That an order for liquidation stays all other proceedings against a company and any proceedings can only continue after obtaining leave of the Bankruptcy Court and subject to the Court's terms and conditions. The proceedings in Nairobi HCC No. 522 of 2015; Imperial Bank Limited (In Receivership) vs WE. They (Muthaiga) Limited and 21 others therefore stand stayed as against Value Pak Food Limited (In Liquidation), the Respondent herein.
 - e. That the Official Receiver had accessed the Company's premises in the year 2017 with an intention of taking over the premises. The Official Receiver was immediately served with copies of security documents by Prime Bank Limited that the premises and its contents formed a



floating charge (debenture) to the Bank. The Official Receiver could not therefore interfere with the Bank's security.

- f. That the Official Receiver does not deal with charged property and the accusation by the former directors of the company that the Official Receiver was negligent in his duties over their security is unwarranted. The Official Receiver communicated this position to the Chargee, Prime Bank Limited and advised them to hire security to protect their security as the Official Receiver has no interest in it.
- g. That the Applicants pretend to be ignorant of the insolvency process to the extent of asking for the statement of affairs from the Official Receiver, a document they know too well that they have not submitted.
- h. That failure by the directors of the company to submit the statement of affairs has impeded the speedy resolution of this liquidation to the detriment of the creditors.
- i. That contrary to the averments made by the applicants, the directors were served with the application and have always known of the existence of this matter.
- j. That from the averments made by the applicants, the directors are not willing to submit the statement of affairs until this Honourable Court compels them to do so.
- k. That by failing to submit the statement of affairs, the directors continue to act in contempt of this Honourable Court's orders.
- l. That the Warrants of Arrest issued against the directors of the company should not be discharged until the directors submit to the Official Receiver the statement of affairs showing in full all the assets of the company, liabilities, bank accounts etc that the company was entitled to as at the date of liquidation order to the satisfaction of the Official Receiver.

Submissions

5. The Application was canvassed through written submissions. The Applicants and the Official Receiver filed written submissions dated 16th September 2024 and 20th August 2024 respectively.

Analysis And Determination

6. I have carefully considered the application, the responses and the parties' respective submissions. The issues for determination are:-
 1. Whether the Application offends Section 432 (2) of the [Insolvency Act](#).
 2. Whether the Applicants have made a case for the lifting of warrants of arrest, stay of execution and setting aside of the orders of 14th May 2024 for the issuance of warrants of arrest against them.
7. Flowing from the PO, the first issue which goes to the jurisdiction of the Court is whether the Application offends Section 432 (2) of the [Insolvency Act](#). Section 432 (2) of the [Insolvency Act](#) provides:-
 - “(2) When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate.”



8. The Official Receiver's position is that the instant application offends the above provision as it was filed without leave of Court. However, I note that the Official Receiver filed an application dated 14th May 2024, seeking orders of warrants of arrest to issue against the Applicants. Therefore, I am inclined to agree with the Applicant's submission that the instant application is not a fresh proceeding instituted by them but a continuation of the proceedings initiated by the Official Receiver. The PO therefore fails.
9. The next issue is whether the Applicants have made a case for the lifting of warrants of arrest, stay of execution and setting aside of the orders of 14th May 2024 for the issuance of warrants of arrest against them.
10. At the heart of this issue is whether the Applicants failed to comply with Section 433 (1) of the [Insolvency Act](#), which provides that:-
 - “ 433. Official Receiver may require certain persons to submit statement relating to company's affairs
 1. If the Court has made a liquidation order or appointed a provisional liquidator in respect of a company, the Official Receiver may require some or all of the prescribed persons to make out and submit to the Official Receiver a statement of affairs relating to the company.”
11. The Applicants relied on Section 433(4) of the [Insolvency Act](#) to assert that they did not have an automatic obligation to file a notice. They faulted the Official Receiver for not issuing a notice requiring them to issue the statement of affairs. They impugned the proceedings of 14th May 2024 as they were conducted ex parte claiming that they were not served with the Official Receiver's Application of 14th May 2024. They also lamented that they were neither sought to show cause why the warrants for their arrest should not be issued. They reiterated that they were prevented by a Court Order issued in HCCCOMM No. 522 of 2015 from dealing with the affairs of the Company and that to date, they have no access to the Company's assets, documents, information and records.
12. The Appellants also asserted that their right to fair trial under Article 25 (c) of [the Constitution](#) cannot be limited in any manner. They relied on the decision in *Munyui Kahuha v Ng'ang'a Kahuha* [2007] eKLR on the importance of ensuring that due process is followed before any kind of incarceration. They also relied on the decision in *Elijah Momanyi p/a Anassi Momanyi & Co. Advocates v Bartera Maiyo* [2006] eKLR to the effect that a person's liberty “should not be taken away easily and particularly in a matter relating to commercial transaction and civil litigation.”
13. On the other hand, the Official Receiver highlighted that it had been writing to the Applicants since 2016 personally and through their advocates to file a statement of affairs. It was upon their refusal that it filed the application dated 14th March 2024, seeking to compel them to do so and for issuance of warrants of arrest against them.
14. The Court's power to set aside an ex parte order is provided under Order 51 Rule 15 of the Civil Procedure Rules. It is a discretionary power that must be exercised on principles and not on a whim taking into consideration the unique circumstances of a case. The principles for consideration with regard to setting aside an ex parte order were discussed by the Court in *Alterfin CVBA v Timo &*



another (Civil Suit 447 of 2015) [2022] KEHC 11961 (KLR)(Commercial and Tax)(19 August 2022) (Ruling), as follows:-

“7. ... The principles applicable in such an application are; the reason for non-attendance and the prejudice, if any, to be suffered by the opposite party. In addition, the application should be made expeditiously.”

15. In *Wachira Karani v Bildad Wachira (Civil Suit 101 of 2011)* [2016] KEHC 6334 (KLR)(11 March 2016) (Ruling), the Court elaborated that:-

“Mulla, The Code of Civil Procedure[2] has illuminated the grounds for setting aside an ex parte decree and what constitutes sufficient cause for setting aside an ex parte judgement/decree. Essentially, setting aside an ex parte judgement is a matter of the discretion of the court. In the case of *Esther Wamaitha Njihia & two others vs. Safaricom Ltd*[3] the court citing relevant cases on the issue held inter alia:-

“the discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel vs E.A. Cargo Handling Services Ltd.*[4]) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise , to obstruct or delay the cause of justice(see *Shah vs. Mbogo*[5]). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration vs Gasyali.*[6])It also goes without saying that the reason for failure to attend should be considered.”

16. In this matter, the Applicants complained that they were not served with the Application leading to the impugned orders. Therefore, in order to set aside the orders, the Court must be satisfied that the Applicants were not served or failed to appear in court at the hearing of the application due to sufficient cause.
17. I have looked at the record. There is no affidavit of service of the Official Receiver’s application dated 5th February 2024, leading to the orders of 14th March 2024. There is also no affidavit of service of the hearing of the application. Therefore, I am of the considered view that the orders of 14th March 2024 are prejudicial to the Applicants who are entitled to be heard.

Disposal

18. In conclusion, I find and hold that the Application dated 7th June 2024 has merit and the same is allowed as prayed. The Applicants are granted 21 days to file a response to the Official Receiver’s application dated 5th February 2024, which is to be set down for inter partes hearing on a priority basis. Costs to be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JANUARY 2025

J.W.W. MONG’ARE

JUDGE

In the Presence of:-

Mr. Orwenyo for the Applicants/Directors.



Mr. Cyrus Njenga for the Official Receiver.

Amos - Court Assistant

