Karuturi Limited (In Receivership) & 2 others v Shri Krishna Overseas Limited (Civil Appeal E055 of 2021) [2024] KEHC 6359 (KLR) (29 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6359 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E055 OF 2021

GL NZIOKA, J

MAY 29, 2024

BETWEEN

KARUTURI LIMITED (IN RECEIVERSHIP) ..... 1ST APPELLANT

MUNIU THOITA ..... 2ND APPELLANT

KURIA MUCHIRU ..... 3RD APPELLANT

AND

SHRI KRISHNA OVERSEAS LIMITED ..... RESPONDENT

(Being an appeal against the decision of Hon. L. Saraipai Principal Magistrate (PM) delivered on 28th September 2021 in Naivasha Chief Magistrate Civil Case No. 221 of 2015)

JUDGMENT

1. By a plaint dated 2nd April 2015, the plaintiff sued the defendants seeking for judgment for:
    a. Principal sum of Kshs 4,053,705
    b. Costs of the suit
    c. Interest on (a) above at 3% per month from March 2015 until payment in full
    d. Any other or further relief which the Honourable court may deem just and reasonable
2. By a statement of defence dated 29th March, 2016 the defendants denied liability and sought for the plaintiff's suit to be dismissed with costs.
3. As the matter was proceeding on, the defendant's filed a notice of preliminary dated 14th July, 2021 on the following grounds verbatim reproduced:
    a. That the Honourable court lacks jurisdiction to entertain or determine the matters in this suit.

b. That the suit as filed is in contravention of the provisions of section 432(2) of the *Insolvency Act*.

c. That in the alternative, the suit as filed is in contravention of the provisions of section 734 (2) of the *Insolvency Act*.

d. That this suit herein is otherwise an abuse of the process of this Honourable Court and should be dismissed in limine with costs.

4. The notice of preliminary objection was disposed of vide filing of submissions. The defendant's submissions are dated, 6th August, 2021 while the plaintiff's submission are dated, 11th August, 2021.

5. By a ruling dated 28th September 2021 the learned trial Magistrate Hon. L. Sarapai (PM) held that:

"

"a) Section 432(2) of the *Insolvency Act* bar the commencement and continuance of proceedings against a company in receivership.

b) The objector has not tendered proof that the allegations that the 1st defendant/ objector is under the said receivership to back the objection.

Accordingly, the plaintiff's suit remains competent and the court remains seized of jurisdiction. The objection is dismissed."

6. However, the defendants are aggrieved by the decision afore and have appealed against it on the following grounds:

a. That the learned Magistrate erred in law and in fact by failing to consider the provisions of section 432(2) of the *insolvency Act* No. 18 of 2015.

b. That in the alternative the learned Magistrate erred in law and in fact by failing to consider the provisions of section 734(2) of the *insolvency Act* No. 18 of 2015.

c. That the learned Magistrate erred in law and in fact by failing to have due regard and take into account the various issues raised in the Affidavit of Muniu Thoiti sworn on the 2nd August 2016.

d. That as a consequence of ground 3 above the learned Magistrate failed to appreciate that there are very substantial issues of fact disclosed by the Affidavit including the attachment of the winding up Order dated 30th March 2016, duly annexed to the Affidavit of Muniu Thoiti sworn on 2ndAugust 2016 and marked MT 1.

e. That the learned Magistrate misdirected her decision by dismissing the Notice of preliminary objection on the ground that the winding up order of 30th March 2016 did not indicate that the Appellant had been wound up and thus finding contrary to all the evidence available in the Court record.

f. That as a consequence of ground 5 above the learned Magistrate misdirected herself by failing to consider the order of the Honourable Justice C. Kariuki in High Court Winding up cause No. 12 of 2013. In the matter of the winding up of Karuturi Limited. Wherein the Honourable Judge stated: "That there being no opposition to the Petition herein the same be and is hereby allowed as prayed".

g. That the learned Magistrate misdirected herself by failing to further take Judicial Notice that the Appellant had been wound up.

h. That the learned Magistrate misdirected herself by failing to consider the submissions made by Counsel representing the Appellants dated 6th August 2021 and proceeding to dismiss the Notice of preliminary objection dated 14th July 2021.

i. That the learned Magistrate erred in law and in fact by failing to consider the fundamental and mandatory nature of section 432(2) of the *Insolvency Act*.

j. That the learned Magistrate erred in law and in fact by failing to find that the Respondent ought to have sought the leave of the High Court prior to commencing or continuing the prosecution of its case.

k. That in all the circumstance of the case, the learned Magistrate failed to do justice before the Appellants/Applicants.

7. The appeal was disposed of vide filing of submissions. The appellants' submissions are dated, 10th February 2023, while the respondent's submission are dated, 10th March 2023.

8. The appellants submitted that, the trial Magistrate failed to consider the evidence on record at the time of filing the preliminary objection and erred in holding that the objector did not tender proof of the allegations that the 1st defendant/objector was under receivership.

9. That the affidavit of the 2nd appellant, Muniu Thoiti sworn on 2nd August, 2016 and filed on 8th August, 2016, with the winding up order dated 30th March, 2016 issued by Honourable Justice C. Karikui was annexed thereto marked as "MT1" was on the record at the time of filing the preliminary objection.

10. The appellants submitted that, the trial Magistrate erred in finding that the respondent's suit was competent despite holding that section 432(2) of the *Insolvency Act* bars the commencement and/or continuance of proceedings against a company in receivership.

11. That following the winding up order issued on 30th March, 2016 in Winding Up Cause No. 12 of 2010, the appellant company is in liquidation and therefore all proceedings against it were stayed. As such it is only the High Court that can grant leave to proceed with or commence a suit against a company in liquidation.

12. Reliance was placed on the case of; Ruth Wanjiku Kagiri vs Reliance Bank Limited (in Liquidation) & 2 others [2012] eKLR where the court stated that section 228 requires that where a winding up order is made against a company, all pending proceedings against the company are stayed while fresh proceedings are expressly barred until and/or unless leave is granted and conditions attached.

13. Further, reliance was placed on the case of, Alex Ngugi Mwaura & another vs Gikumba Investment Limited & 3 others [2021] eKLR where the Court held that failure to obtain leave under section 432 (2) of the *Insolvency Act* is not curable. That a party wishing to institute suit against a body under liquidation is required to obtain leave from the High Court prior to instituting a suit.

14. The appellant further relied on the case of; David Gilbert Hatie & another vs Trust Bank Ltd (in Liquidation) [2009] eKLR where the Court held that proceedings against a company in liquidation must be controlled by court to avoid disposing a company's assets for the benefit of only some creditors and therefore it is mandatory that leave is obtained before commencing a suit.

15. That in the present suit, the respondent had full knowledge of the winding up order dated 30th March, 2016 as the liquidators informed the public of their appointment through advertisements

in the Standard Newspaper on 16th and 19th April 2016, and the Nation Newspaper on 28th April, 2016 requiring all debtors to complete and submit proof of debt form number 61 by 16th May, 2016. However, no leave was sought from High Court prior to commencement of the suit in the trial court, a fact that the respondent does not deny.

16. The appellant further submitted that, the trial court ought to have taken judicial notice of the orders of the High Court in Winding Up Cause No. 12 of 2013 where Ochieng J (as he then was) acknowledged that the appellant company had been wound up following an order of the court made on 30th March, 2016.

17. Further, in the same matter Tuiyott J (as he then was) when dealing with an application seeking leave to proceed with an appeal against the appellant company acknowledged that the appellant company had been placed under liquidation on 30th March, 2016.

18. However, the respondent argued that, the appellants had the burden of proof that the 2nd and 3rd appellants informed the public of their appointment as liquidators and cited section 107 of the *Evidence Act* which states that whoever desires a court to give judgment has the legal right or liability to prove the facts that he asserts.

19. Reliance was placed on the case of; Evans Otieno Nyakwana vs Cleophas Bwana Ongoro [2015] eKLR where the court stated that the burden of proof lie on the party who invokes the aid of the law and substantially asserts the affirmative issue.

20. The respondent argued that, the alleged advertisement in the local newspapers to the public of the appointment of the liquidators was never produced in court. Similarly, the petition seeking to wind up the appellant company was never produced in court. Further, the appellant failed to produce the subject documents even after they had been requested to do so and are trying to rectify the same by producing the rulings in their submissions.

21. Further, the appellants failed to prove that the appellant company is under liquidation. The respondent maintained that the appellant company was under receivership and not liquidation and therefore the provisions of section 432 (2) of the *Insolvency Act* did not apply.

22. The respondent further submitted that, the suit CMCC 221 of 2015 in the trial court was filed before the commencement of the *Companies Act* of 2015 and the *Insolvency Act* of 2015. That, section 734 (2) of the *Insolvency Act* which is a transitional has savings provisions that provide for applications under the *Companies Act* (Cap 486). That in the circumstances, the appropriate law applicable is the *Companies Act* (Cap 486) (repealed).

23. The respondent relied on the case of; Matter of the Winding Up of Blue Bird Aviation Limited W.C. No. 7 of 2016 where the court stated that if winding up proceedings were commenced before the commencement of the new laws, it was deemed a past event.

24. The respondent further cited section 228 of the *Companies Act* (Cap 486) (repealed) which stated that, where a winding up order has been made or an interim liquidator appointed under section 235, no proceedings shall proceed or be commenced against such company expect by leave of court. The respondent argued that the section only applies to companies under liquidation and not receivership.

25. That, if a court finds that leave is required under section 432 (2) of the *Insolvency Act* before the institution of the suit, the same is curable under Article 159(2)(d) whose essence is that the court should not allow the prescription of procedure and form to overshadow substantive justice.

26. Reliance was placed on the case of; Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 6 Others where the Court of Appeal stated that, liberal application and interpretation of rules can be done in proper cases and under justifiable causes and circumstances as *the Constitution* and others statutes promote substantive justice by deliberately using the phrase that justice be done without undue regard to procedural technicalities.

27. The respondent further submitted that, the trial Magistrate did not err in dismissing the preliminary objection on the ground that the appellants failed to provide proof of liquidation as the winding order relied on does not expressly allude to the fact that the petition was one of liquidation and the petition was not produced. Furthermore, the appointment and gazettement of the liquidators was never produced.

28. Finally, the respondent submitted that section 60(3) of the *Evidence Act* gives the court the discretion to refuse to take judicial notice of a fact unless and until such person produces any such book or document it considers necessary to do so.

29. That, the appellant having failed to provide evidence of the alleged liquidation, the trial Magistrate did not misdirect herself and was correct in holding that the appellant failed to produce such evidence.

30. I have considered the appeal in the light of the arguments advanced by the parties. I wish to point out at the earliest that the role of the first appellate court is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; Selle & Another vs Associated Motor Boat Co. Ltd. & Others (1968) EA 123.

31. The Court of Appeal thus observed: -

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

32. Pursuant to the aforesaid the decision of the court herein will be confined to the materials before the trial court and its finding.

33. I say so because upon reading the submission on appeal, I realize that a lot of issues have been raised, including but not limited to; whether the 1st defendant was under receivership or liquidation; whether it is *Insolvency Act*, 2015 or *Companies Act* (Cap 486) (repealed) Laws of Kenya that is applicable herein. These issues are relevant were not raised or addressed in the brief ruling of the court.

34. From the ruling of the trial court the only issue that arose is whether the applicant/appellant had provided adequate evidence that the company was in receivership.

35. The appellants argues that, the 1st defendant had produce that evidence through the affidavit of the 2nd defendant, Muniu Thoiti sworn on 2nd August 2016, (produced at page 68-70 of the Record of

Appeal) and filed in on 8th August 2016, thus on the court record and in the trial bundle at the time of filing of the notice of preliminary objection as well as the time of delivery of the ruling.

36. That, reiterated the deponent had annexed a winding up order dated, 30th March 2016, marked as "MT1" (produced at page 70 of the Record of Appeal). As such, the trial court was hasty in dismissing the preliminary objection without inquiry into fundamental facts, documents already produced and readily found on record thus applying a wrong approach in law.

37. However, the respondent argues that, although the defendants produced a winding up order, issued on 30th March 2016, that, the "affidavit" failed to produce the section that sought to have the 1st appellant be wound up.

38. Pursuant to the afore submission, two issues arise for consideration in this matter. First, whether there is evidence that the appellant availed before the trial court that the 1st defendant in receivership and/or under liquidation. Secondly whether, the appellant company was under receivership or liquidation and whether the provisions of section 432(2) of the *Insolvency Act*, is applicable and/or should have been complied with.

39. As regards the first issue, I find that, the 1st defendant vide the affidavit of Muniu Thoithi at page 68-70 of the Record of Appeal, deposes at paragraph *5* that, the High Court issued a winding up order against the appellant company dated, 30th March 2016, in a Winding Up Cause No. 12 of 2013, and the order annexed the copy of the winding up order marked "MT1".

40. I have perused the subject winding up order marked "MT1" and note that, the High Court vide Winding Up cause No. 12 of 2013 stated that: -

> " That there being no opposition to the petition herein, the same be and is hereby allowed as prayed."

41. The question is: what was the petitioner seeking for? In my considered opinion, being a winding up cause, the logical conclusion is that, the petitioner was seeking for a winding up order against the 1st defendant company. Indeed, the order issued did exactly that, resulting in the subject winding up order herein.

42. The next question is: what is the legal consequences of a winding up order? In my considered opinion, a winding up order inter alia, stays any action or proceedings commenced against the company or its property or requires such proceedings be commenced only upon issuance of leave of the court and subject to such terms as the court may impose.

43. The argument as to whether the company was in receivership or liquidation though not canvassed in the trial court, is not difficult to resolve. Section of 432 (2) the *Insolvency Act*, No. 18 of 2015 Section 228 the *Companies Act* (cap 486) (repealed) expressly state that once a liquidation order is made, no proceeding can continue against the company against which the order is made nor such proceedings be commenced without the leave of the court.

44. As to whether the 1st defendant was under receivership or liquidation, I find that the issue would have been canvassed through a formal hearing but the matter was canvassed through submissions and therefore no viva voce evidence nor affidavits were availed. Thus applicant could not annex the winding up order or advertisement thereof to the submissions.

45. Be that as it may, the trial court was bound to consider the documents on record. Indeed, had the trial court done so, it would have taken note of the affidavit referred to herein, the order of the High Court allowing the petition for winding up; and/or the Newspapers advertisement alluded thereto (if any)

or any the documents supporting argument that, the 1st defendant was under receivership and not liquidation. The documents are stated to have been on the court file.

46. Furthermore, the court seems to have been aware of the evidence or record and the fact that the 1st defendant was under liquidation in that, by a ruling dated 24th October, 2016, the trial court disallowed an application for entry of judgment by the plaintiff on the ground that, the plaintiff had not sought leave of the court.

47. To recap part of that ruling the trial court stated as follows:

> "I have the grounds, evidence and submissions filed and against the application by the respective parties and find that, the application is unmerited for the reasons that the law on debts in receivership is that no creditor may obtain repayment or otherwise secure repayment of a debt, outside the process, other than the leave of the court. The court is guided by section 342(2) of the *Insolvency Act* and persuaded by the authorities cited for the 1st defendant/respondent to the application dated 24th June 2016 in Naivasha CMCC No. 221 of 2015 in submission filed herein on 5th September 2016."

48. Based on the afore ruling it is clear the court held the view that, the materials before it justified the need of the plaintiff's seeking leave of the court before filing the suit.

49. It is therefore contradictory to arrive at the holding in the ruling of 28th September 2021, that no adequate material was placed before the court to establish that the 1st defendant was under receivership or liquidation. In that regard the trial court fell in error.

50. Furthermore, the trial court having appreciated in the subject ruling that, indeed under section 432(2) (wrongly indicated as 342 (2) in the ruling) leave was required to file, and there was none, then there cannot have been a competent suit without such leave.

51. I also find that, as much as the 1st defendant is the one that raised a preliminary objection, it was for the plaintiff who instituted the suit to establish leave was granted as required. Section 107 of the *Evidence Act* require that he who alleges proves.

52. The respondent alleges the 1st defendant was in receivership and not liquidation at the time of filing the suit, it was for the respondent to prove the same especially after the applicant produced a winding up order.

53. I note that the respondent argues that, if leave was required then the provisions of Article 159 of *the Constitution* should cure absence of leave.

54. However, the provision of Article 159 was not meant to deal with substantive provisions of law but technical procedural issues. In the case of; Patricia Cherotich Sawe v Independent Electoral & Boundaries Commision (IEBC) & 4 others [2015] eKLR the Supreme Court stated that:

> "(31) Although the appellant involves the principal of the prevalence of substance over form, this Court did signal in Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others, Petition No. 14 of 2013, that "Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls." Not all procedural deficiencies can be remedied by Article 159; and such is clearly the case, where the procedural step in question is a jurisdictional prerequisite"

55. Similarly, in the case of, *Bogonko v Ndege (Civil Application E002 of 2021)* [2024] KECA 351 (KLR) (12 April 2024) (Ruling), the Court of Appeal held that:

> " 14. In addition to the foregoing, I must also add that the jurisdictional pre-requisite for a notice of appeal is not merely a technicality of procedure curable by invoking the provisions of Article 159 (2) (d) of *the Constitution*, which mandates courts to administer justice without undue regard to technicalities of procedure, and which I have taken to mind.
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> 15. In this regard, the cases of Jaldesa Tuke Dabelo vs. IEBC & Another [2015] eKLR; Raila Odinga and 5 Others vs. IEBC & 3 Others [2013] eKLR; Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others [2014] eKLR; Patricia Cherotich Sawe vs. IEBC & 4 Others [2015] eKLR, among others, are a constant reminder that Article 159 (2) (d) is not a panacea for all procedural ills even though "the exercise of the jurisdiction under Article 159 of *the Constitution* is unfettered especially where procedural technicalities pose an impediment to the administration of justice, save that Article 159(2) (d) of *the Constitution* is not a panacea for all procedural ills …."

56. The upshot of the aforesaid is that order of the trial court dated, 28th September 2021 is set aside and the appeal allowed. There are no orders as to costs, as the respondent did not occasion the circumstances that gave rise to the appeal. It is based on the order of the trial court.

DATED, DELIVERED AND SIGNED THIS 29TH DAY OF MAY, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:-

Ms Atsieno for the appellant

Ms Anyango for the respondent

Ms. Ogutu Court assistant