

TANZANIA / JUDGMENT

kijenge animal products limited vs dr frederick shadrack ringo and another 2020 tzhc 4352 14 december 2020

COURT
TZHCDECIDED
14 December 2020

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY
OF ARUSHA AT ARUSHA MISC. CIVIL APPLICATION NO 74 OF 2020 (C/F CIVIL CASE NO 13 OF
2020) KIJENGE ANIMAL PRODUCTS LIMITED.....APPLICANT VERSUS

1. DR. FREDERICK SHADRACK RINGO.....1st RESPONDENT
2. CRDB BANK PLC..... 2nd RESPONDENT

RULING

24/11/2020 & 14/12/2020 GWAE, J This ruling emanates from a Preliminary Objection (PO) canvassed by the 2nd respondent CRDB BANK PLC via her advocate from Joseph Nuwamanya (advocate) Mawala Advocates. Before hearing of the applicant's application, the 2nd respondent filed a notice of PO accompanying his counter affidavit based on eight (8) points of law as herein under;

1. That, the application is incurably defective for breach of section 253
(1) (e) of the Companies Act CAP 212.
2. The application is incompetent for being filed without consent of the Administrator or leave of this Court contrary to section 250 (3) (d) of the Companies Act CAP 212. i
3. The Application is incurably defective for want of locus standi to sue.
4. The application is misconceived for being brought by a non-existing party.
5. The court is functus officio. 6, The application is bad in law for being an abuse of court process.
7. The application has been overtaken by events.
8. The affidavit in support of the application is incurably defective for containing arguments and conclusions. When the matter was called on for hearing of the preliminary objection before me, the applicant was represented by Mr. Mein rad D'Souza (adv) whereas the 1st

Respondent with administration order of this court appeared in person and the 2nd Respondent was represented by Mr. Wilbard Massawe (adv). Addressing his points of PO, the 2nd respondent's counsel argued that he is basically challenging the competency of the application in the following grounds; firstly, the application before the Court offends section 253 (1) of Cap 212 since the administrator is the only person who is responsible to institute the matter as established at paragraphs 3 and 4 of the applicant's application and further that, the 1st respondent has applied for extension of time through Miscellaneous Civil Application No. 71 of 2020 therefore the 1st respondent is still in his position as an administrator. Secondly, the applicant's application lacks consent of either the court or the administrator as required by section 250 (1) of the Companies Act, Cap 212 R. E, 2 2002 ("The Act") for the reason that, the 1st respondent is the administrator of the applicant's company adding that, the applicant ought to have obtained first leave from either the court or the 1st respondent. Thirdly, the counsel for the 2nd respondent also submitted that this court is functus officio as the application is seeking the court to sit as an appellate court as all grounds raised in the applicant's application were determined by this court vide a former application filed by the administrator. The proper forum was to challenge the appointment within sixty (60) days. Fourthly, Mr. Massawe argued that this application has been overtaken by events since the 1st respondent has already filed Misc. civil application No. 71 of 2020 for extension of time which was filed on 17/07/2020 before the filing of the present application. According to the 2nd respondent's counsel this application is therefore overtaken by event, since there is already pending application for extension of time before this court. In reply to the P.O raised, Mr. D' Souza argued that the preliminary objection raised by the 2nd respondent is tainted with evidence; in support of his submission, the counsel cited the case of Mukisa Biscuit Manufacturing Co. Limited vs. Westend Distributors Limited (1964) E. A 696 More so filing of Misc. Appl. No. 71 of 2020 does not seize the applicant's right of filing of this application and that section 257 cited by the 2nd respondent of the Act is not 3 applicable on the ground that the administration order has expired and therefore there is no requirement to seek court's leave or consent from the 1st respondent. In his short rejoinder Mr. Massawe basically reiterated his arguments in chief that the application is incompetent and abuse of court process. Nevertheless, when I was about to compose this ruling, I observed a necessity of have been supplied with judicial authorities to enable the court to properly determine the points of law raised. Consequently, the applicant presented cases of Standard Chartered Bank (Hong Kong) Ltd v. Mechamar Corporation (Malaysia) Berhad and 7 others, Civil Revision No. 1 of 2012 (unreported-CAT), Chui Security Company Ltd v. Al Autdoors (T) Limited, Commercial Cause No. 141 of 2018 (unreported-Commercial Division), Islam Aliys Saleh v. Akbar and another, Civil Case No. 156 of 2016 Unreported- High Court), Chetty v. Harty, 20323/14 (2015) ZASCA and others whereas the 2nd respondent urged this court to make a reference to the following precedents; Allen Landey v. Dr. Fredrick Ringo, Misc. Civil Application No. 113 of 2019 Leornard Majura and 12 others v. TANESCO Limited, Civil Application No. 76 of 2015 (unreported-CAT) Foxcroft v. The Ink Group Ltd (1994) 12 ACLC 1,063 and another foreign jurisprudence. After the parties' presentation of the authorities for and against the 2nd

respondent's Preliminary Objection, the 1st respondent was temporarily given an 4 extension of administration order for a period of three months effectively from 14th Sept. 2020 hearing of the applicant's main case and the 1st respondent's application mentioned above. Having considered the rival arguments from the parties' advocate on the points of the preliminary objection raised by the 2nd respondent, I find that the main issue for the court's determination is on the competence of the application brought by the applicant without seeking and obtaining the requisite leave of the administrator now 1st respondent or of the court. Nevertheless, I could not meet the court schedule of composing this ruling expeditiously despite the fact that this application was filed under certificate of urgency that was due to the fact that I was attending criminal sessions in High Court-Moshi Registry. Looking at the provisions of the Companies Act (supra), a company may be into administration by an order of the court after a company or the company's director or its creditor has presented a petition for administration order and the same is issued by the court. In our case the 2nd respondent filed a petition and the 1st respondent was appointed administrator who then became mandated with numerous statutory powers as stipulated under provisions of section 253 to 256 of the Act. The essence of an administrator in a company is basically for the company's survival and realization of its assets as well as enforcement debts and rights. 5 When the administration order is in force, there is a complete freeze of any legal proceeding against the company under administration order as rightly submitted by the 2nd respondent's counsel and thereafter control of the company is given entirely to the administrator, directors of the company are prohibited from acting in their capacity as directors for the duration of the administration. (See the decision of the High Court, Commercial Division case of The National bank of Commerce & another vs. Mohamed Trans Ltd & another. Consolidated Commercial causes No. 320 & 321 of 2015 (unreported). In the chamber summons, the applicant relevantly seeks orders of the court granting interim injunction restraining the respondents or any other person acting on their instructions from exercising any of the rights under credit facility issued by the 2nd respondent to the applicant pending determination of the main suit filed by the applicant, costs of this application and any other orders deemed fit and just to grant. Provisions of the law cited by the applicants to move the court are; section 68 (c) and (e) and Order xxxvii Rule 1 (a) and 4 of the Civil Procedure Code, Cap 33 Revised Edition, 2019. In raising this PO, the 2nd respondent's advocate has patently urged this court to strike out this application by stating that this application is incompetent due to the fact that this application is incompetent simply because the applicant has neither sought and obtained leave of the administrator or of the court in filing 6 this application as required for under section 250 (1) (d) of the Act. I think the learned counsel for the 2nd respondent must be wrong since section 250 (1) (d) which reads and I herein under quote; "250 (3)

- (d) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as aforesaid". Pursuant to Section 250 (3) (d) of the Act, where an

administration order is in operative, it is only the administrator who can bring or defend any action or other legal proceedings in the name and on behalf of the company and any such other person is precluded from doing so unless section 250 (3) (c) and (d) of the Companies Act is complied with. Hence the making of an administration order prohibits any person from commencing any proceeding against the company which is under administration order (See decision of this Court in Allen Landey

- v. Dr. Fredrick Ringo, Misc. Civil Application No. 113 of 2019 (unreported), a decision of the High Court of Kenya at Mlimanu in Re Hi. Plast Limited and 2 others I & Bank Limited (2020) eKLR and decision of the Supreme Court, New South Wale in Ozrac Engineering (Pty Limited (In liquidation) (2013) NSWSC 740 cited by the 2nd respondent's counsel). 7 The records of this case reveals that the applicants company was put under administration following the petition filed by the 2nd respondent in which the 1st respondent was consequently appointed as an administrator of the applicant's company from 15th march 2018 to 15th May 2018, thus it is undoubtedly that by the time the applicant filed this application the time for the administration period had lapsed. It is at this juncture that, this court is obliged to answer the following question, what is the status of the of the administration order made by this court in favour of the 1st respondent after expiry of the time without undue regard to the fact that the 1st respondent in this application has vividly filed an application for enlargement of the administration order vide Misc. Application 71 of 2020 on 17th July 2020 whereas the applicant has filed her application on the 22nd day of July 202. In the former application the applicant is a party as respondent. Section 257 (2) of the Companies act provides for circumstances where the administrator may vacate office, one; If he ceases to be qualified to act as an insolvency practitioner in relation to the company or the administration order is discharged. More so Section 258 (1) (a) & (b) has provided that a person who has ceased to be the administrator of a company has his release with effect from the time; (a) in the case of a person who has died, the time at which notice is 8 given to the court in accordance with the rules that he has ceased to hold office
- (b) in any other case, such time as the court may determine. From the circumstances surrounding this case and from the above cited provisions of the law it is apparently clear that the 1st respondent's life time, as an administrator has expired from 15th May 2018, however from the wordings of the provisions of the law cited above I hasten to hold that the administrator ceases to hold the office of administration automatically after the lapse of the time of administration, and I do not think that is what was meant by the legislature. The Act is very clear on the procedures where the administrator may vacate his office or be discharged and nothing like expiry of time has been contended to amount to cessation of his powers as an administrator however whoever desire to bring any proceeding against the company must do so after he has sought and obtained the requisite leave of the administrator or of the court. The administrator in this case has not vacated his office nor has he applied for the administration order to be discharged, as per Section 256 and 257 of the Act, except that he has applied for extension of his administratorship which is subject to determination by this court. I wholly agree that where statutory provisions of the law are

unambiguously clear that leave or certificate must be applied for and be granted before taking any further step like institution of an appeal (See sect. 47 of the Land Disputes' 9 Courts Act, Cap 216, R. E, 2019) or any proceeding where leave is a prerequisite. This legal requirement has consistently been stressed in a chain of judicial decisions including the one correctly cited by the 2nd respondent's counsel in the case of Mufungo Leornard Majura and 12 others v. TAN ESCO Limited (supra). Equally, an institution by an employee of the company or any other person against the company. Next question to be asked and determined by the court is, whether the company which is under administration is completely precluded from lodging this application against the administrator and any other person including its creditor (2nd respondent) who petitioned for the administration order without first having sought and obtained leave of the court pursuant to section 250 (3) (d) of the Act, I am saying "leave of the court" by omitting leave of the administrator as envisaged by the above quoted provision of the law simply because the administrator of the applicant has been joined in this particular case, thus his leave was not therefore obtainable except that of the court. Section 250 (3) (d) of the Companies Act cited above, to my considered view, entails a preclusion or prohibition of any proceeding from being commenced or from being continued against the company which is under administration order and not prohibitional precedent to the company itself from instituting a case against the administrator or any other person who is in one way or other is a party to the administration. In the case of Standard Chartered Bank (Hong Kong) Ltd v. Mechamar Corporation (Malaysia) Berhad and 7 others (supra) at page 12 and 13 of the judgment, the Court of Appeal when approving a foreign decision in *Re Polly Peck International (PLC) (In administration) (No. 2) Marangos Hotel Co. Ltd and others Store and Others (1998) 3 ALL ER 812* where the making of an administration was equated with winding up order and taking recognizance of prohibition on proceedings being commenced or continued against the company, had these to say; "In view of the above, it is apparent that honorarium on commencing or continuing actions or proceedings is placed on those proceedings which are against or in opposition to the company, that is those opposed to the interests, rescue or survival of the company..... Therefore it would appear to us, odd, to say the least, to label proceedings instituted for the purpose of rescuing or resuscitating the survival of the company and the whole or any part of its undertaking, as a going concern or a more advantageous realization of its assets as an action or proceedings against" The same position was judicially emphasized by the Court of Appeal of South Africa in *Chetty v. Harty (supra)* it bears mentioning that the moratorium only suspends legal proceedings against the company under business rescue and not the company. According to the wording of section 250 (3) (d) of the Act and case law cited above, I am persuaded that the question of estoppel or requirement of consent to commence any proceeding or continue with any proceeding against the company/applicant should operate against the company's directors or her employees or creditors and not itself when striving for its interests or its survival. In the end result, the 2nd respondent's preliminary objection is thus not sustainable, it is overruled. The applicant's application is found competent before the court. Costs shall be in the course.

JUDGE 14/12/2020 12

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