THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

THE COMPANIES ACT CAP 85 LAWS OF UGANDA

IN THE MATTER OF WINDING UP

MUDDU AWULIRA ENTERPRISES LIMITED

COMPANIES CAUSE NO. 14 OF 2004

BEFORE : THE HON. MR. JUSTICE GEOFFREY KIRYABWIRE.

R U L I N G

This ruling arises out of information that has been brought to the court's knowledge when the case file was called. Originally two files had been fixed for hearing involving by and large the same parties and subject matter. Namely Arbitration Cause No. 04 of 2004 and Company Cause No. 14 of 2004. The last time the Arbitration Cause came up, Mr. Wakida for the Applicant told court that the parties were exploring a settlement of this matter and hence the court should adjourn the Arbitration Cause to today 13th July 2004, when the Company Cause was to be heard so that the parties would brief court on the progress of the settlement talks.

When the file was called court was informed that M/s Stanbic Bank (U) Ltd. had appointed a received under the debenture that they held. Mr. Odere Charles said

that this was a violation of my order/direction of the 25th May 2004, for all the parties to maintain the status quo under sections 227 and 228 of the Companies Act.

As had happened before, court took judicial notice of Mr. Kasozi, Company/Bank Secretary of M/s Stanbic Bank, sitting in court. Stanbic Bank had not responded to the advert of petition formally but had chosen to have a watching brief in the audience during the earlier proceedings. Clearly by their appointing a receiver they had shown interest in the affairs of the Respondent Company which was the subject of the petition. Court then on its own motion requested Mr. Kasozi as an officer of Court to appear before it and explain the effect of what they had done. Mr. Kasozi sought leave to provide court with legal authority for their actions. Considering the history of this petition, I granted Mr. Kasozi about one and a half hours to do so.

I then decided to hear all parties on effect of the appointment of the receiver when court was handling the winding up proceedings.

Mr. Charles Odere framed three issues to guide court namely –

1. Whether the winding up proceedings had commenced
2. What was the effect of the appointment of the private receiver by the bank
3. What remedies were available to the other creditors in light of this appointment

On the first issue Mr. Odere stated that in my ruling of 25/05/2004 I did observe that winding up proceedings had commenced within the meaning of Section 229 of the Companies Act so that was not in issue.

All concerned should take note of these legal consequences to allow for an orderly process to ensure.

As to the other issues, I agree with Mr. Kasozi that the commencement of a winding up proceedings in court does not preclude a debenture holder from appointing a receiver. Indeed the learned scholar *Kerr on Receivers and Administrators* 7th Edition at page 429 says that same would be true if a resolution for wind up by the company or a winding up order by court is made.

This has to be the correct position as to the law. To my mind when a winding up proceeding has commenced it is not the appointment of a receiver under a debenture that is important, but rather the time at which the appointment is done and the action that follows therefrom. The learned author *Hubert Picarda on the Law relating to Receivers, managers and Administrators* 3rd Edition at page 32 wrote –

> " The mere presentation of a winding up petition does not cause a floating charge to crystallize, nor indeed does the appointment of a provisional liquidator."

Clearly in my view much will depend of the wording of the debenture itself.

In this particular case the Receivers Kieran Day and David Ddamulira were appointed by the instrument dated 8th July 2004 by M/S STANBIC BANK (U) LTD; well after the winding proceedings had commenced. The winding up was clearly under the supervision of court by the 8th July 2004. I made that clear in my ruling of the 25th May 2004. I referred the parties to sections 227 and 228 of the Companies Act. Now in the words of my brother Judge, Justice James Ogoola, those sections

> "bind all and sundry."

The crystalisation of a debenture and the taking possession of all the companies assets both present and future during the currency of the winding up proceedings is an execution/attachment in violation of section 228 of the Companies Act.

To emphasize the supremacy of the court's supervision the learned author *Kerr* (Supra) at page 429 writes

> " ... but after the making of a winding up order, the receiver must apply to the liquidator or to the court in the winding up for liberty to take possession of any property of which he is not then in possession."

At the time of the commencement of the winding up the bank was not to the court's knowledge in possession of any property by way of crystallisation of any debenture of any of the Respondents assets. If it were in possession of any assets it would have responded to the advert in support of the petition, but they chose to take a back seat in court of their own free will. That being the case, the assets that the new receivers are said to have possession of are part of the assets of the Respondents for which a status quo had been maintained by court. The bank's receivers therefore have no access to them without leave of court. The court will not declare the appointment of the receiver's void, but their taking possession of any of the Respondents assets is hereby declared void.

I do disagree with the submission of Mr. Kasozi that the learned author Kerr (Supra) at page 430 said that section 127 of the Insolvency Act , 1986 of England (similar to our section 227) does not apply. The learned author was only referring to the original "disposition" being the actual charge by which the receiver was appointed. This could have been done some time earlier before winding up commenced. There is good reason for this because under section 318 of the Companies act, certain floating charges created within 12 months of the

commencement of the winding up are deemed invalid. The same is true for fixed charges done with 6 months before the commencement of the winding up are also deemed a fraudulent preference and are invalid. These charges whether floating or otherwise need close scrutiny and indeed in this case one such instrument of debenture dated 18/8/2003 was created less than 12 months ago, and requires closer scrutiny.

At first I was of the view based on the evidence before me that the Respondent could trade normally. If there was any problem with the disposal of cotton, all they had to do was to formally apply for orders to overcome any obstacle under section 227, along the lines of the *Re Clifton Place Garage Ltd.* case (Supra).

However, I am no longer confident of this position given the strong intervention of Stanbic Bank limited, a clearly significant creditor. I accordingly appoint The Official Receiver to be the provisional liquidator of the Respondent Company under Section 238 of the Companies Act. It will be for the Official Receiver to determine which fund belongs to the debenture holders and that which remains for the creditors. I also make the following consequential orders and directions –

1. That Mr. Kieran Day and David Ddamulira, receivers for M/s Stanbic Bank (U) Ltd. immediately hand over the control of the Respondent company to the Official Receiver.
2. That the Official Receiver is permitted to work with Mr. Kieran Day, Mr. Ddamulira and Mr. Godfrey Sentongo Ddungu to source the best market for the cotton lint and have it sold immediately.
3. The proceeds of the sale shall be held by the Official Receiver.
4. That Cotton Development Organisation an Uganda Ginners & Cotton Exporters Association endorse and release whatever export documentation that are required for the sale to allow the conversion

of the cotton to cash and hence avoid wastage. It is in their interest to do so anyway.

5. With regard to the assets of the Respondent, the Official Receiver is to take immediate charge of the assets shown in the Management Accounts up to 31st March, 2004 and the fixed asset list outlined in a letter dated 11th June 2004 from M/s Nangwala, Rezida & Co. Advocates to The Registrar Commercial Court within the meaning of rule 27(3) of SI 85-1.
6. That the petitioners make a deposit jointly and severally of Shs. 1,000,000/= to the Official Receiver within the meaning of Rule 28 of SI 85-1.
7. That the Official receiver make a report back to court on the 1st September 2004 on the affairs of the Respondent Company, its creditors assets and the orders given by this court.
8. That this matter shall be adjourned to the 1st September 2004 for further mention.

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G. KIRYABWIRE

JUDGE

13/07/2004

14/07/2004 :- Odere for the Petitioner
Byamugisha and Mayanja supporting the petition
Kemugisha h/b for Mr. Nangwala
Mr. Kasozi in court but not appearing

Court :- I shall read the ruling.

Ms Kemugisha :- I wish to apply for leave to appeal. I apply for the transcript and proceedings.

Court :- You have not given court reasons for leave so leave is not granted.

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G. KIRYABWIRE

JUDGE

14/7/2004.

THE REPUBLICE OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERICIAL DIVISION)

MISCELLANEOUS CAUSE NO. 8 OF 2004

YUMMY LOAF LIMITED::APPLICANTS

VERSUS

1. **INVESTMENT MASTERS LIMITED]**
2. **KAMPALA CITY COUNCIL LOCAL COUNCIL III]:::::RESPONDENTS**
   NAKAWA DIVISION]

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE

R U L I N G

The matter before court arose from an application by way of Notice of Motion under rules 6,7 and 8 of the Civil Procedure (Amendment) (Judicial review) Rules 2003 and section 35 of the Judicature Statute. The Notice of Motion was for Judicial review and an order for relief under the prerogative orders of certiorari.

The brief facts are that the applicant Yummy Loaf Limited had applied to the second Respondent for a trading licence. The trading licences are issued by the second Respondent through an agency being the first Respondent. The collection of various fees by agents for and on behalf of Kampala city Council (KCC) has now become a common feature of the administrative working of Kampala City Council (KCC). In this particular case the applicant paid for a bake

house licence but the 1st Respondent refused to issue it until the applicant also paid for a wholesale licence. The applicant refused to pay for the wholesale licence saying that it would amount to a double levy, which was contrary to the law. A stale mate then ensured leading up to this motion in court. At the hearing of the motion Mr. Kasozi appeared for the Applicant while Mr. Lule appeared for the 1st Respondent. The 2nd Respondent though served did not appear in court.

M. Lule raised a preliminary objection to the motion. Mr. Lule referred me to section 11(4) of the trade-licensing Act stating that the motion was premature, as the applicant should have appealed to the Minister first under the section. The section reads;

"Any applicant who is aggrieved by the refusal of the licensing authority to grant him or her a trading licence may appeal to the Minister whose decision shall be final".

Mr. Lule further argued that the motion was wrongly brought against his client who was enforcing the law as it is in the statue in respect of this dispute on double levy as it was alleged.