

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 349 OF 2016
(ARISING FROM CIVIL SUIT NO 364 OF 2014 AND 474 OF 2014)

HASS PETROLEUM (U) LTD}.....APPLICANT

VERSUS

1. KARIISA RICHARD}

2. B.O.K. RETAIL LTD}.....RESPONDENTS

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicants application was brought under Order 11 rules 1 & 2 of the Civil Procedure Rules and section 98 of the Civil Procedure Act as well as section 33 of the Judicature Act for consolidation of High Court Civil Suit Number 364 of 2014 between HASS Petroleum (U) Ltd vs. Kariisa Richard and High Court Civil Suit Number 472 of 2014 between B.O.K. Petroleum (U) Ltd vs. HASS Petroleum (U) Ltd. In the alternative the applicant prays that further proceedings in High Court Civil Suit Number 472 of 2013 between B.O.K Retail Ltd and Hass Petroleum (U) Ltd be stayed pending the disposal of High Court Civil Suit Number 364 of 2014 Hass petroleum (U) Ltd versus Kariisa Richard and for costs of the application to be provided for.

The grounds of the application averred in the chamber summons are: firstly, the two suits raise similar questions of law and fact with regard to the business relation of the applicant and the other involved parties. Secondly, consolidation of the suit shall help resolve the dispute among the parties and save this court's valuable time. Thirdly, there shall be no prejudice occasioned to

any of the respondents consequent to the court granting the orders sought in this application. Lastly, it is just and equitable that the application is granted.

The application is supported by the affidavit of Emmanuel Kaweesi, a lawyer working with Messieurs Okecha Baranyanga & Company Advocates. He deposes that the applicant had a dealership agreement with one Kariisa Richard to be in charge of the applicant's fuel stations in Namasuba, and Bakuli, manager and run the shops on the stations, pay for petroleum products supplied and clear rent for the said fuel stations. The said Kariisa introduced one Francis Otwemberere only as the manager of the two fuel stations according to a copy of the dealership agreement attached as annexure "A". The said Kariisa Richard defaulted in payment for the petroleum products supplied and rent thereby accumulating arrears amounting to Uganda shillings 685,826,710/= pursuant to which, the applicant terminated his dealership agreement and stopped his management of the fuel stations. The applicant has never dealt with the second respondent in any way or under the claimed transaction. Both the applicant and the second respondent sued Kariisa Richard and the applicant respectively seeking special and general damages emanating from each of the agreements between them and Kariisa Richard. Both suits relate to the business relationship of the applicant and Kariisa Richard and thus consolidating the two suits would resolve the dispute among the parties omnibus and save this honourable court's valuable time. Furthermore, no prejudice would be occasioned to any of the respondent's consequent to grant of the orders prayed for in the application. Lastly, he deposes that it is just and equitable and fair that the application is granted.

In reply Mr Francis Otwemberere deposed to an affidavit in which he says that he is the managing director of B.O.K Retail and states there under as follows:

The first Respondent filed Bankruptcy Petition Number 03/2015 before the Civil Division, High Court Kampala on 2nd September, 2015 seeking to be declared a bankrupt according to annexure "A". Secondly, the Bailiffs and Execution Division of the High Court granted an interim order on 15th September, 2016 staying execution proceedings against him by Oil Libya Uganda Limited and Uni Oil Uganda Ltd in the matter of Miscellaneous Application Number 2219 of 2015, Kariisa Richard versus Oil Libya and Unit Oil Uganda Ltd. The applicant's advocates were served and acknowledged receipt of the bankruptcy petition on the 2nd of October 2015. The

applicant has already filed an affidavit in reply to the bankruptcy petition seeking judicial recognition as an unsecured creditor. On the strength of the information of his counsel Mr Jimmy Muyanja, he deposed that the suit agreement between the applicant and the first respondent, in the matter of Hass petroleum (U) Ltd versus Kariisa Richard HCCS 364 of 2014 (in the commercial division) has an arbitration clause in annexure "B".

On the basis of advice from his counsel, a combination of the Arbitration Rules and the Bankruptcy Petition make it most inconvenient that High Court Civil Suit Number 472 of 2014 be consolidated with the case of Hass Petroleum (U) Ltd versus Kariisa Richard and High Court Civil Suit Number 364 of 2014 in the Commercial Division or stayed pending disposal of High Court Civil Suit Number 364 of 2014 Hass petroleum (U) Ltd versus Kariisa Richard. He therefore opposes the application.

The applicant is represented by Counsel Saad Seninde on brief for Counsel Michael Okecha and the respondent is represented by Counsel Jimmy Muyanja. The court was addressed in written submissions.

The gist of the submissions of the applicant's counsel relies on the grounds in support of the application detailed above and the facts in the affidavit in support. He submitted that the applicant executed the dealership agreement with the first respondent for the first respondent to be in charge of the applicant's fuel stations written above. Secondly, to manage and run the shops on the stations, pay for petroleum products supplied and clear rent for the said fuel stations. In accordance with the dealership agreement the first respondent could not sublet any part of either fuel station without the written approval or the consent of the applicant and without the applicant's said consent, the first respondent allegedly let out the shops on the fuel station to the second respondent. The first respondent later defaulted on its obligations to the applicant as established in the dealership agreement and the applicant shutdown/locked the fuel stations that the first respondent was running/managing and instituted HCCS 364 of 2011 against the first respondent for the default in paying for the fuel products supplied and non-payment of rent for the said fuel stations.

The applicant's counsel submitted that both Civil Suits 364 of 2014 and 472 of 2014 raise similar questions of law and fact with regard to the business relations of the applicant and the respondents. The second respondent instituted HCCS 472 of 2014 seeking for special and general damages against the applicant for allegedly locking up shops on the applicant's fuel stations that the second respondent was allegedly renting and managing but the applicant has never contracted or had an understanding with the second respondent to rent or manage the shops on the applicant's said station. The outcome of civil suit No 364 of 2014 will have a bearing on the outcome of the Civil Suit No 472 of 2014 as the applicant cannot be liable to the second respondent in Civil Suit Number 472 of 2014 because it has never contracted with it.

Alternatively for proper handling of both suits, this honourable court ought to stay proceedings in HCCS No. 472 of 2014 between B.O.K. Retail vs. Hass Petroleum (U) Ltd pending disposal of HCCS No. 364 of 2014 between Hass Petroleum (U) Ltd versus Kariisa Richard as the decision in the latter shall have an effect on the proceedings and outcome of the former and it was the latter that was instituted first. In the premises, the applicant's counsel prayed that the application is granted with costs to the applicant.

In reply the second respondent's counsel submitted that the applicant has not served the application upon the first respondent (referred to as the insolvent). Secondly, the applicant does not deny the arbitration agreement between it and the first respondent executed on 20th February 2013. The applicant having not filed an application under section 5 of the Arbitration and Conciliation Act Cap 4 laws of Uganda is estopped from denying that the dispute must be referred to arbitration by the court. He contended that the effect of the court recognised arbitration clause ought to be a consequential order or direction to the registrar to strike out the matter of Hass Petroleum Uganda Ltd versus Kariisa Richard HCCS No. 364 of 2014 from the pending list of cases. He submitted that such an order can be issued under section 17 (2) and 39 (2) of the Judicature Act being necessary for preventing an abuse of the process of court.

Thirdly, the effect of the pending bankruptcy order (Bankruptcy Petition Number 3 of 2015) is that the continuance of HCCS No 364 of 2014 is subject to the Bankrupt Trustee's written consent or conditional leave of the bankruptcy court under section 27 (1) (b) of the Insolvency Act Number 14 of 2011. As a matter of fact he submitted that the applicant would have to prove

its claims in HCCS No. 364 of 2014 against the first respondent before the trustee under section 10 of the Insolvency Act.

He submitted that in both cases the Richard Kariisa has chosen the restrictive statutory procedures of arbitration and bankruptcy. In common law these involve mobilisation of adjunct judicial (for arbitration) and statutory officers (for bankruptcy) whose meticulous detail of statutory work to be performed does not offer any convenience to either the commercial court or the second respondent.

Similarly, the second respondent's counsel submitted that the second respondent has made a choice to protect the company's legal rights by suing, which choice should not be interfered with through the consolidation or stay of proceedings sought by the applicant. He further submitted that it was professional misconduct when the applicant's counsel to refuse to guide and address the court under Regulation 17 (1) of the Advocates (Professional Conduct) Regulations on the implications of the arbitration clause or the Bankruptcy Petition No. 3 of 2016. Both matters were within their knowledge prior to filing HCCS No 364 of 2014 or Miscellaneous Application Number 349 of 2016.

In the premises, he prayed that the applicant's prayers are dismissed and an order for costs in any event taxable immediately is granted in favour of the second respondent/defendant.

Ruling

I have carefully considered the application together with submissions of Counsel. The respondent has raised two points of law to consider against the application. The first is that the applicant has not sought arbitration as against the first respondent under the dealership agreement dated 20th February 2013. He therefore seeks the striking out of HCCS No. 364 of 2014. If that was done the question of consolidation would not arise. It is an argument that suggests that consolidation would be in vain since the court is obliged to refer the dispute to arbitration or in either case strike it out.

The second point raised is that there is a pending bankruptcy petition No. 3 of 2015 against the first respondent and the claims against the first respondent can be made and proved against the trustee in bankruptcy. In the agreement Richard Kariisa chose arbitration and also in the second instance filed a bankruptcy petition to have himself declared a bankrupt and the application for consolidation would be useless on the grounds that the proceedings ought to be stayed and claims proved in the bankruptcy cause.

I have carefully considered the points of law. Starting with the Bankruptcy Petition, annexure "A" to the Affidavit in reply of Francis Otwemberere gives crucial facts. The petition was filed by Kariisa Richard on the 2nd of September, 2015. In paragraph 2 thereof he deposed that since October 2013 or thereabouts he has not been working, having had a business trading as Kariisa Richard Enterprises which collapsed and it was his only source of income. In the affidavit in support of the petition he deposes that he is the judgement debtor in respect of Civil Suit Number 008 of 2014 between Oil Libya Uganda Ltd vs. Kariisa Richard in the sum of Uganda shillings 457,728,180/= and which had been decreed against him. Secondly, Civil Suit Number 746 of 2013 between Uni Oil Uganda Limited versus Kariisa Richard is a claim for Uganda shillings 325,155,680/= against him with costs. Lastly there is the case of Hass Petroleum Uganda Ltd versus Kariisa Richard HCCS 364 of 2014. In paragraph 6 of the affidavit in support of the petition his known creditors are:

1. Orient Bank for Uganda shillings 1,489,467,333/=.
2. Hass (U) Ltd Uganda shillings 645,920,000/=.
3. Uni Oil (U) Ltd Uganda shillings 325,155,680/=.
4. Libya Oil (U) Ltd Uganda shillings 457,728,180/=.
5. Tosha (U) Ltd Uganda shillings 110,263,360/=.

He deposes that he was unable to pay as required all the outstanding debts. The statement of affairs attached to the petition tells it all. Annexure "B" to the affidavit of Francis Otwemberere discloses that on 15th September, 2015 an interim order was issued staying proceedings between Kariisa Richard and Oil Libya Uganda Ltd as well as Uni Oil Uganda Ltd before the High Court Bailiffs & Execution Division pending final disposal of the Bankruptcy Petition Number 3 of 2015 filed at High Court Civil Division. Furthermore by affidavit of Mr Mohammed Billow the

Country Director of Hass (U) Ltd, Hass (U) Ltd filed a response to the Bankruptcy Petition of Mr Kariisa Richard. Mohammed Billow affirmed that the petitioner is indebted to the applicant in the sum of Uganda shillings 685,826,710/= pursuant to a dealership agreement with Hass (U) Ltd for the supply of fuel for the period 1st January, 2013 and 31st December, 2013. A copy of the agreement attached shows that it is between Hass Petroleum (U) Ltd and Kariisa Richard. The commencement date is 20th of February 2013. Secondly, the affidavit discloses that there was failure to pay the above debt and the applicant instituted HCCS Number 364 of 2014 according to annexure “E” thereof. Annexure “E” is a summons in a summary suit for Uganda shillings 685,836,710/= instituted by Hass Petroleum (U) Ltd against Richard Kariisa. Lastly that it is just and equitable that priority is given to Hass (U) Ltd in the payment of the unsecured debtors by the petitioner.

I have carefully considered the pleadings in HCCS Number 364 of 2014 which was originally filed as a summary suit by Hass Petroleum (U) Ltd against Kariisa Richard. In that suit there is a claim for Uganda shillings 685,826,710/= for fuel supplied by the applicant to Richard Kariisa. In the specially endorsed plaint the applicant relies on a dealership agreement for the supply of fuel where the defendant would run the plaintiff’s outlets in the Banda, Namasuba and Bukuli for the period first of January 2013 and December 2013 and also pay rent for the premises leased. It is alleged that the second respondent issued some cheques which were dishonoured. The dealership agreement is dated 20th of February 2013 and it is between Hass Petroleum (U) Ltd and Kariisa Richard.

HCCS 472 of 2013 is between B.O.K Retail Ltd versus Hass Petroleum (U) Ltd and Eco Oil (U) Ltd. The suit against Eco Oil (U) Ltd was withdrawn by the plaintiff. It is alleged that the applicant has never dealt with the second respondent which is the plaintiff in the above suit. Both the suit of the applicant and the second respondent against Kariisa Richard emanate from breach of the agreement between the applicant and Kariisa Richard. That both suits relate to the business relation of the applicant and Kariisa Richard and consolidating would resolve the dispute among all the parties.

What are the pleadings in HCCS No. 472 of 2013? The cause of action is for breach of a tenancy agreement. The claim of B.O.K Retail is that one Kariisa Richard had a formal agreement with

the first defendant who is the applicant herein to run the fuel stations and shops at Bakuli and Namasuba respectively. B.O.K Retail operated the shops at the stations with the knowledge and consent of Hass Petroleum (U) Ltd. The Plaintiff Messrs B.O.K Retail started paying rent to Richard Kariisa. The applicant herein terminated the dealership with Richard Kariisa and also closed the shops at Bakuli, Banda and Namasuba respectively which were being run by the second respondent. It is alleged that the applicant took over the stock without any inventory. It is further alleged in the plaint that around March 2014 the second defendant entered into a deal with Hass Petroleum (U) Ltd and directed B.O.K. Petroleum to start paying rent directly to Eco Oil (U) Ltd. Thereafter Hass Petroleum (U) Ltd refused to reopen the three shops. The plaintiff claims to have a legally binding agreement. The defence of Hass Petroleum (U) Ltd is that it never entered into any agreement with B.O.K. Retail Ltd. That it always dealt with Richard Kariisa in relation to the management of the stations.

Before considering the application for consolidation, if necessary, I have considered the objection to consolidation on the basis of the Insolvency Act, 2011. Section 20 (1) of the Insolvency Act 2011 provides that:

“A debtor may petition court for bankruptcy alleging that the debtor is unable to pay his or her debts and the court may, subject to section 21 and 22 make a bankruptcy order in respect of the debtor.”

I do not have evidence yet of a bankruptcy order though the provision makes it discretionary after examination of the alleged bankrupt for the court to issue the order.

Secondly, section 20 (5) provides that the bankruptcy commences on the date on which the bankruptcy order is made. Section 21 requires a statement of affairs to be filed giving particulars of the debtor's creditors, debts and assets and any other information as may be prescribed. Thirdly, section 22 requires a public examination of the debtor. I do not have any information as to whether there has been a public examination of the debtor. The debtor Mr. Richard Kariisa complied with section 21 by providing a statement of affairs.

Upon the making of the bankruptcy order, section 27 of the Insolvency Act 2011 provides that the bankrupt estate shall vest firstly in the Official Receiver and then in the trustee, without any

conveyance, assignment or transfer. Secondly except with the trustee's written consent or with the leave of court and in accordance with such terms as the court may impose, no proceedings, execution or other legal process may be commenced or continued and no distress may be levied against the bankrupt or the bankrupt's estate. Last but not least section 20 (1) of the Insolvency Act 2011, confers on the court discretionary powers, whether to make a bankruptcy order upon the petition of a debtor or not after the filing of statement of affairs and public examination of the debtor.

The claim of the applicant against Richard Kariisa is for money and it would be affected by the Bankruptcy Petition. Moreover in the petition itself the alleged bankrupt admits being indebted to Hass (U) Ltd in the sum of Uganda shillings 645,920,000/=. Though there are no particulars of how the indebtedness arose, I can conclude that if the name Hass (U) Ltd actually was meant to refer to Hass Petroleum (U) Ltd, there is an admission which has the potential of leading to judgment. This is because the petitioner's deposition in the affidavit in support of the bankruptcy petition demonstrates from paragraph 5 thereof that Civil Suit No. 364 of 2014 is the basis of the suit against the petitioner and the indebtedness to the creditor Messrs Hass (U) Ltd. The different names could be a misnomer though I have no jurisdiction to determine that at the moment. The point is that there would be no need to try the suit on the merits if Richard Kariisa in his statement of affairs and affidavit in support of Bankruptcy Petition No. 3 of 2015 admits the debt. Consequently there would be no need to consolidate the suit. To further answer the second respondent's reference to arbitration, there would be no need for arbitration if the claim is now admitted.

In the premises, the prayer to strike out Civil Suit No. 364 of 2014 has not merit because the claim of Hass Petroleum (U) Ltd against Richard Kariisa is an admitted claim in another judicial proceeding where the question is relevant. Finally the affidavit of Mohammed Billow attached to the affidavit in reply to this application shows that Hass Petroleum (U) Ltd has indeed lodged a claim in response to the petition. The question is how to treat the claim admitted by the creditor among other creditors.

Having considered the above facts and the law of Bankruptcy quoted above my conclusion is that the application for consolidation would serve no useful purpose. If Richard Kariisa is a

necessary party, he can be added without having to consolidate any suits. The applicant's application lacks merit and is dismissed with costs.

Ruling delivered in open court on the 17th of October 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Seninde Saad for the Applicant

Francis Otwemberere MD of the Second Respondent

Counsel Jimmy Muyanja for the second Respondent

First Respondent absent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

17th October 2016