



Bhogals Garrage Limited v National Bank of Kenya Limited (Civil Case E004 of 2020) [2024] KEHC 11432 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11432 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE E004 OF 2020
HI ONG'UDI, J
SEPTEMBER 30, 2024**

BETWEEN

BHOGALS GARRAGE LIMITED PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED DEFENDANT

RULING

1. The Notice of motion application dated 1st December 2020 (the application is not in the court file) by the defendant herein prays for the following orders;
 - i. That the plaint dated 1st September 2020 and filed in Court on 27th October 2020 be struck out with costs for disclosing no reasonable and or actionable cause of action against the Defendant.
 - ii. That the costs of this application be borne by the plaintiff.
2. The application is premised on the following grounds:
 - i. That the Plaintiff's claim of Ksh 17,173,523.60 arises from a Judgment entered in favour of the Plaintiff against Sam Con Limited in Nakuru HCCC 39 of 2003, wherein the defendant was not a party.
 - ii. That the defendant's only relationship with Sam Con Limited was that of a Secured Creditor or a debenture holder.
 - iii. That since the defendant was not an agent of Sam Con Limited, nor of the Receivers and Mangers appointed over Sam Con Limited, the Plaintiff cannot seek to enforce a Judgment against Sam Con Limited from the defendant.
 - iv. That it is trite law that Receivers are not agents of the debenture holder, but agents of the company.



- v. That the plaintiff having sued the company that was placed under receivership, lacks valid cause of action against the defendant, and the plaint ought to be struck out.
 - vi. That the plaintiff herein having obtained judgment against a company that was placed under receivership their claim lies against the receivers or the company itself, and not the defendant.
3. In response to the application, the plaintiff/respondent filed a replying affidavit dated 20th March 2024. He averred that the basis of its claim against the defendant was the contention under paragraph 3 of the plaint. Further, that the seizure of its property was done by the defendant's agent and the Court in HCCC of 39 of 2003 found the said act to have been illegal.
 4. He averred further that the defendant/applicant under paragraph 3 of its defence admits that it placed Sam-Con Limited under receivership pursuant to some debentures. Therefore, that as a matter of law it should be held liable for the misfeasance of its managers or receivers who are in law its agents. He added that the receivers who was discharging their mandate wrongfully took possession of its assets and made it incur loss to the extent upheld by the honourable court is almost a foregone as a legal conclusion.
 5. He went to aver that apart from the pleadings, he was aware that at the hearing of the primary suit, the defendant's witness was indeed a retired manager of the defendant herein hence the nexus between the defendant and the plaintiff's claim. Therefore, that the defendant's liability for the illegal acts of its agents had been clearly established. He added that its claim was not as a creditor of Sam-Con Limited, but had stored its' assets at defendant's premises as the Court found. That the assets were not lost by Sam-Con Limited, but by the receivers appointed by the defendant and had refused to release the stored assets.
 6. He averred that the defendant's defence itself, even without more, identified a number of issues including the one on whether or not the plaintiff herein was a creditor of Sam-Con Limited, and whether it's claim is in respect of illegal and ultra-vires acts of the agents of the defendant herein. He urged the court to dismiss the application with costs.
 7. The defendant/applicant additionally filed an undated supplementary affidavit sworn by its managing director where he reiterated the contents of the replying affidavit. The same is dated 21st May, 2024. He averred that the suit by its pleadings alone was so hopeless and deserved striking out. Further, that the suit is so clear cut and should be allowed summarily as the amount due has already been determined while liability is clearly demonstrable if not so evident.
 8. The application was canvassed by way of written submissions.

Defendant/applicant's submissions

9. These were filed by Michael, Daud & Associates Advocates and are dated 8th April 2024. Counsel gave a brief background of the case and identified one issue for determination by this court, which is whether this honourable court should strike out the plaint dated 1st September 2020 for failing to disclose a reasonable cause of action.
10. Counsel placed reliance on Order 2 rule 15 (1)(a) of the Civil Procedure Rules, 2010 and the decisions in Dickson Maina v Kenya Electricity Generating Company & Another [2021] eKLR and D. T. Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1 at page 9. He submitted that the plaint dated 1st September 2020 sought to execute the sum of kshs, 17,173,523.60 being the decretal sum from a judgment in Nakuru HCCC No. 39 of 2003 Bhogals Garage limited vs Zahir Sheikh & Andrew Gregory (Joint Receivers & Managers) Samcon Ltd in receivership) delivered on 30th January 2020 and the defendant was not a party to the said suit.



11. He submitted further that executing against a non-party will be a violation of Article 50 of *the Constitution* of Kenya. Additionally, that the plaintiff/respondent in his replying affidavit has averred that the fact that the defendant/applicant appointed the receiver and manager, by law they became their agents. Further, that the debenture attached therein, clause 8 provided that a receiver manager shall be liable for their acts, defaults and remuneration. Therefore, that without a doubt the receiver and manager were agents of Sam-Con Limited and not the defendant/applicant herein.
12. He went on to submit that for the said reasons it was clear that the plaint disclosed no reasonable cause of action as the debenture instrument signed by Sam-Con limited defines them as the principal of the receiver and manager. Further, that as per clause 7 of the debenture, the defendant's/applicant's role was only limited to appointing the receiver and manager and that once that was done the defendant/applicant became a secured creditor whose only interest was to recover monies owed to it. He urged the court to allow the application with costs to the plaintiff.

Plaintiff's/respondent's submissions

13. These were filed by Sheth & Wathigo Advocates and are dated 11th April 2024. Counsel gave a brief background of the case and identified two issues for determination by this court.
14. The first issue is whether the application is merited. Counsel equally relied on Order 2 rule 15 (1) of the Civil Procedure Rules and the decisions in D.T. Dobie & Co. (Kenya) Limited v Muchina & Another (supra) and The Co-operative Merchant Bank Ltd v George Fredrick Wekesa (Civil Appeal No. 54 of 1999). She submitted that striking out of the plaintiff's /respondent's pleadings would be unjust and a violation of the constitutional edicts that promote access to justice. Further, that the illegal seizure of the plaintiff/respondent's property was done by the agents of the defendant/respondent and it was therefore liable for the said acts.
15. She submitted further that the cause of action against the defendant/applicant ought to be determined at the hearing stage and not at an interlocutory stage. She added that it was an elementary principle of company law that receivers appointed under debenture became agents of their particular appointing authorities. Further, that the agent of the debenture holders and their actions which they undertook in the course of the receivership automatically bound the said debenture holders who appointed them and for whose benefit they acted.
16. The court' attention was drawn to the scholarly work of Avin Lightman and Gabriel Moss titled "The Law of Receivers and Companies," London: Sweet & Maxwell [1986] at paragraph 202 on page 6 and the decisions in Surya Holding Limited & 2 Others v CFC Stanbic Bank Limited [2014] eKLR and Joseph Ashioya & 165 Others v Kenya United Steel Co [2006] Ltd & Another [2013] eKLR.
17. On who should bear the costs of the application, counsel urged the court to award the plaintiff / respondent the said costs.

Analysis and determination

18. I have carefully considered the application, the affidavits and the submissions by both parties. I find the main issue for determination to be whether the plaint dated 1st September 2020 by the plaintiff/respondent discloses a reasonable cause of action.
19. Order 2 Rule 15 of the Civil Procedure Rules which provides for striking out of pleadings states as follows:



Rule 15

- “(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.”

20. The Court of Appeal in *Swapan Sadhan Bose v Nyali Beach Hotel Limited & 3 others* [2011] eKLR held as follows;

“...As it has been stated in some of the cases cited to us, the power of the Court to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence and hence this power to strike out pleadings should be used sparingly and cautiously. In *D.T. Dobiie & Company (Kenya) Ltd. v. Muchina* [1982] KLR 1 at p. 9 Madan, J.A. said:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

21. The plaintiff/respondent in its plaint alleges that on 16th January 2003 the defendant/applicant appointed Zahir Sheikh & Andrew Grecorey to act as joint receivers and managers of Sam-con Limited. It further alleges that on the 30th January 2020, judgment was entered against the defendant (in the primary suit) in Nakuru HCCC No. 39 of 2003 for a sum of Kenya Shillings Seven Million One Hundred and Fifty-Six Thousand, Five hundred (Kshs. 7,156,500/=) as compensation for the value of the equipment and machinery stored in its premises from the year 2000 which equipment had been declared obsolete.
22. The plaintiff/respondent also alleges that the defendant's witness in the subject suit confirmed on oath in his testimony in court that he was an employee of the defendant/applicant herein and that the detainment of the plaintiff's/respondent's assets by the receivers aforesaid was on instructions and behalf of the defendant/applicant. Thus, upon entry of the said Judgment the defendant/applicant was liable to satisfy it by paying the plaintiff the aforementioned sum plus costs of the suit and interest at court rates.
23. In view of the above, it is evident that the plaintiff/respondent's claim is that of recovering sums awarded to it as compensation in the judgment delivered in Civil Case Number 39 of 2003 between it and Zahir Sheikh & Andrew Gregory (Joint Receivers & Managers) Sam - Con Limited in



Receivership. It is not in dispute that the defendant/applicant appointed the aforementioned receiver managers for Sam-Con Limited. The defendant/applicant has argued that upon the appointment of the said receivers it became a secured creditor and it was not liable for their actions. Further, that it was not a party in the primary suit and therefore not liable to satisfy the decree in the aforementioned case.

24. In *Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited (Supra)* also relied on by the plaintiff/respondent, the court observed as follows;

“74. The Receivers herein are agents of the company. On the prima facie material before me; they are competent and were properly appointed. They draw their powers and duties from the law and the debentures on which they are appointed which they must exercise throughout for the benefit of the debenture holders and the company to the extent of their respective interests in the assets he holds. I am guided by “Kerr On the Law and practice as to receivers” (16th Edition) London: Sweet and Maxwell (1983) at page 331 that:

“Although the receiver is technically the principal, yet of course he is not acting on his own behalf. He is still acting as receiver of the company, and his possession and control is throughout for the benefit of the debenture holders and the company to the extent of their respective interests in the assets he holds.”

25. Further, in *Kabiyet Agro and General Enterprises Limited (In Receivership) v Benard Rop & another* [2018] eKLR the court observed as follows;

“...Further clause 15 of the Debenture instrument thereof makes the Receiver and Manager an agent of the Company and grants him the power to sell the charged property in any manner he deems fit as follows :-

15. “Every Receiver so appointed shall be deemed to be the agent of the Company and the Company shall alone be liable for his acts, defaults and remuneration and he shall have the authority and be entitled to exercise the powers hereinafter set forth in addition to and without limiting any genera/ powers conferred upon him by law:-

(d) To sell or assign or concur in selling letting or assigning any of the property and assets hereby charged or agreed to be charged in such manner and generally on such terms and conditions as he shall think fit and in the name of the Company to carry any such sale letting or assignment into effect.

(i) To do all such other acts and things as may be considered to be incidental or conducive to any of the matter and powers aforesaid and which such Receiver can or may lawfully do as agent for the Company.”



26. In light of the above cited authorities, there is no doubt that the receivers and managers appointed by a bank (debenture holder) act as agents of the company (debtor). Further, a debenture is presumed to have a clause on appointment of receivers, their liability and their acting as agents of the company in receivership.
27. In the instant case, the defendant/applicant annexed in its application dated 4th April 2022 and filed in court on 22nd April 2022, the debenture instrument which reads under clause 8 as follows;

“A receiver and manager so appointed shall be the agent of the Company and the Company shall be liable for his acts defaults and remuneration and he shall have authority and be entitled to exercise the powers hereinafter act forth in addition to and without limiting any general powers conferred upon him by law.”
28. Clearly, the debenture instrument at clause 8 thereof makes the Receiver and Manager an agent of the Company and the said company is liable for their acts or omissions. The judgment was entered against Zahir Sheikh & Andrew Gregory appointed receivers and managers of San-Con (in receivership) and not the defendant/applicant herein. In the plaint dated 1st September 2020 the plaintiff/respondent has sought for a declaration that the defendant/applicant pay a total of kshs. 17,173,523.60/= this being the award, interest and costs in Nakuru HCCC No. 39 of 2003.
29. In view of the above, it is evident that the plaintiff/respondent’s claim in the said plaint is against the wrong party, that is the defendant/applicant who was not a party to that suit. Further, the debenture instrument shields it from any liability for the acts, defaults or remuneration of the receivers and managers. The company (Sam-Con Limited) under receivership is solely liable for their acts by virtue of them being its agents.
30. For the said reasons, it is my view that the plaint dated 1st September 2020 does not disclose any reasonable cause of action and the same is hereby dismissed with costs.
31. Orders accordingly

DELIVERED, VIRTUALLY, SIGNED AND DATED THIS 30TH DAY OF SEPTEMBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

