



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 214 OF 2015

CROP AFRICA LIMITED.....1ST PLAINTIFF/APPLICANT
STEPHEN CRESWELL COLLINS.....2ND PLAINTIFF/APPLICANT
DAVID LAWRENCE BROWN3RD PLAINTIFF/APPLICANT
JOHN SUTHERLAND LYALL.....4TH PLAINTIFF/APPLICANT

VERSUS

CFC STANBIC BANK.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. The Application before this Court is the Plaintiffs' Notice of Motion dated 5th May 2015 and filed in Court on 7th May 2015. It is expressed to be brought under Sections 3 and 3A of the Civil Procedure Act as well as Order 40 Rules 1, 2, 3, 4 and Order 51 Rule 1 of the Civil Procedure Rules.

2. The Application sought for various interim orders. On 8th May 2015, this Court granted interim Orders to the effect that the appointment of the Receiver was temporarily suspended for a period of 10 days. Within that period, the 1st Plaintiff was to pay the Defendant a total sum of USD 100,000. The said Orders were complied with. Therefore, the following are the remaining orders:-

1. ...
2. ...
3. ...
4. ...
5. **THAT pending the hearing and determination of this suit, an injunction do issue restraining the Defendant by itself, its servants, auctioneers, agents or Advocates or any of them or any person appointed by the Defendant dealing with any property and or machines and or crops of the 1st plaintiff.**
6. **THAT pending the hearing and determination of this suit, an injunction do issue restraining the Defendant by itself, its servants, auctioneers, agents or advocates or any of them or otherwise from appointing a Receiver, Manager or any other person whatsoever to interfere with the status, management, operations of the 1st Plaintiff.**

7. **THAT pending the hearing and determination of this Suit, an order lifting any form of receivership placed on the 1st plaintiff by or at the sentence of the Defendant and an injunction to compel any Receiver or managers or any other person authorized to act or appointed by them to immediately vacate the 1st Plaintiffs premises and hand over any control of the assets of the 1st Plaintiff.**
8. **THAT pending the hearing and determination of this Suit, an injunction do issue restraining the Defendant by itself, its servants and or agents from advertising and or make public in whichever avenue electronically or otherwise the placement of the 1st Plaintiff under receivership..**
9. **THAT the costs of the Application be provided for.**

THE PLAINTIFFS' CASE

3. The Application is based on the grounds stated in the application and is supported by the Affidavit of DAVID LAWRENCE BROWN, the 3rd Plaintiff and one of the directors of the 1st Plaintiff Company. It was sworn on **5th May 2015**. Pursuant to the Leave of this Court granted on 22nd May 2015, the 3rd Plaintiff also swore a Supplementary affidavit on **25th May 2015** and the same was filed the next day. Further, the Plaintiffs filed a List of Authorities on **26th May 2015** in support of their application.

4. The background to the current application is that the 1st Plaintiff executed a Debenture dated **9th December 2010** in favour of the Defendant in consideration for a banking facility or accommodation for the sum of USD 550,000.00 or the equivalent in which the sum would be denominated to. The 3rd Plaintiff has given an account of what led to the 1st Plaintiff's inability to settle the debt. In the year 2013, their crops failed to mature on account of severe drought and excessive rain. In addition, their insurer failed to compensate them and subsequently the 1st Plaintiff was unable to honor the payments to the Defendant as and when they fell due under the facilities granted.

5. It is the Plaintiffs' case that despite an assurance that the indebtedness of the 1st Plaintiff would be cleared in or around the month of September 2015 with an immediate payment of USD 15,000.00 the Defendant has purported to appoint a Receiver over the 1st Plaintiff. According to them, the purported Receivership is therefore not in the interests of the Defendant as a Debenture Holder. The 3rd Plaintiff averred that they had given several proposals to the Defendant on how to clear the debt including restructuring of the facility but the said proposals were rejected by the Defendant without considering the problems faced by the 1st Plaintiff.

6. It was further averred by the 3rd Plaintiff that on or about 30th April, 2015 he received a message that the 1st Plaintiff had been placed under receivership. His position is that besides the text message, none of the Directors or the 1st Plaintiff had received any notification that a Receiver would be appointed or that one had been appointed. He averred that there had been no Deed of Appointment of Receiver or any formal communication informing the Plaintiffs of the name and firm of the Receiver appointed by the Defendant. The Plaintiffs' case therefore is that the purported receivership is premature and will shut down the business completely thus clogging the 1st Plaintiff's right of redeeming itself.

7. It is the Plaintiffs' persuasion that knowing the specialized business of the 1st Plaintiff and the history of receivership in Kenya, the Receivership would fetter and clog the equity of redemption of the 1st Plaintiff. It is also Plaintiffs' apprehension that due to the unique business set up of the 1st Plaintiff any or continued state of receivership will irreparably and irreversibly cripple the 1st Plaintiff.

8. In light of the foregoing circumstances, the Plaintiffs urged the Court to lift the purported receivership placed upon the 1st Plaintiff and that the Directors of the Plaintiff do resume the management of the 1st Plaintiff.

THE DEFENDANT'S CASE

9. The Application is opposed. The Defendant opposed the application vide the Replying affidavit of its Manager Legal Recoveries, ANN K. MULI, and sworn on **14th May 2015**. The Defendant also put in a list of authorities dated and filed on **18th May 2015**.

10. The deponent averred that on **30th April 2015** the Defendant appointed Kolluri Venkata Subbaraya Kamasastri, as the Receiver and Manager over all the property and assets of the 1st Plaintiff. The documents appointing the Receiver were served upon the 1st Plaintiff's Accountant on the same day. As is stated by the deponent, the Accountant acknowledged receipt of the demand letter but declined to sign the Notice of Appointment of Receiver. (*Annexed to the Replying affidavit and marked "AKM1" are copies of the Notices of Appointment of Receiver, and the Deed of Indemnity and Affidavit of Service*).

11. It is the Defendant's case that there are absolutely no grounds for prohibiting the Receiver from entering the premises and from carrying out his duties as sought in the Application. The Defendant states that the Receiver, duly appointed, is a respected auditor of long standing and that he has handled many receiverships including Rolmil Kenya Limited, Afrolite Industries Ltd, Rising Sun Apparels EPZ Ltd, Kwality Candies & Sweets Ltd, Nyali Beach Hotels Ltd, Spraymaster Ltd in which the debts owing to the Banks were recovered and the Receivership lifted.

12. It is also the Defendant's position that the Plaintiffs' apprehensions of interference are misplaced and unfounded for the following reasons:-

"...

- a. *The Receiver does not intend to terminate the works of the 1st Plaintiff, but will work with Plaintiff as the requirements of the 1st Plaintiff's business shall dictate.*
- b. *He shall engage any skilled persons as necessary to assist him in his duties pertaining to the Plaintiff Company including but not limited to harvesting of the Chia crop.*
- c. *The Receiver's role shall be to ensure that the Defendant's interests are safeguarded and not to clog the business of the 1st Plaintiff.*
- d. *Further duties of the Receiver are donated by Clause 14 of the Debenture and are in essence powers donated jointly by the parties to the Contract of which the 1st Plaintiff is one part..."*

13. The Defendant's case is that the 1st Plaintiff is in arrears in terms of the loan facilities and that no payment had been forthcoming. It avers that the 1st Plaintiff made numerous promises to pay the Plaintiff all of which have not been honoured. According to the Defendant, the Debenture dated 9th December 2010 as executed between the parties provides for the Appointment of a Receiver at any time after the principal monies secured become payable as a result of a demand made by the Defendant. It is the Defendant's position that the loan facility is outstanding and they have made several demands to the 1st Plaintiff for repayment to no avail.

14. As a result, it is the Defendant's case that there are no grounds for the Court to lift the Receivership that is already in place and more particularly where the 1st Plaintiff has admitted owing the Defendant.

15. The Defendant therefore urged the Court to dismiss the current application with costs.

16. On 27th May 2015, the parties appeared before me to argue the current application. Ms. Matasi and Mr. Maruti appeared for the Plaintiffs while Mr. Kabaiko appeared for the Defendant. The oral submissions by Counsel essentially buttressed the parties' positions with regard to the application as stated in their pleadings.

LEGAL ANALYSIS

17. I have considered the Pleadings on record, the affidavits in support and opposition to the application, the list of authorities filed by both parties as well as the oral submissions by Counsel. Having done so, I take the following view of the matter.

18. It is not in dispute that a Receiver has already been appointed in this matter. The Plaintiffs had contended that the 1st Plaintiff had not been officially served with a Notice of Receivership. However, this has been rebutted by the Defendant who exhibited the documents appointing the Receiver as served upon the 1st Plaintiff. In the circumstances, the prayer by the Plaintiff seeking to restrain the appointment of a receiver is untenable. In fact, the only substantive prayer for determination is prayer no. (7) which seeks to lift the receivership in place. Counsel for the Plaintiffs admitted as much in his oral submissions.

19. In addition, it is not in dispute that the 1st Plaintiff is indebted to the Defendant. The 1st Plaintiff has admitted the debt and hence the proposals to the Defendant to clear the debt by September 2015. Clause 13 of the Debenture entitled “**Appointment of Receiver**” and dated 9th December 2010 executed by both parties, provides for the appointment of a Receiver at any time after the principal monies secured become payable as a result of a demand made by the Defendant. It is evident from the Court record that several demands were made to the 1st Plaintiff by the Defendant for the payment of the outstanding sum.

20. Therefore, the receivership herein is regular and legal in accordance with the Debenture between the parties.

21. It is trite law that a Receivership would not be stopped by the Courts except where it is oppressive in nature and where there are compelling reasons to require the intervention of the Court. See **Kenya United Steel Company Limited vs. Kenya Commercial Bank Ltd & Another [2005] eKLR** where the Court of Appeal referred to the case of **Hastings Irrigation Ltd Vs The Standard Chartered Bank (K) Ltd & Others [1987] KLR 280** in which it was held that Courts will not interfere with receivership unless it could be shown that the conduct of receivers and managers was seriously oppressive, or not in accordance with the recognised principles of law and of commercial practice, or clear and compelling reasons to do so are shown.

22. The Plaintiffs’ position is that no receiver including the current receiver manager has the needed expertise required to tend to and manage the Chia crops. Further, that the equipment and machinery being used to harvest the crop is a specialised one that can only be operated by 5 people in the Country, the 3rd Plaintiff being one of them. The Plaintiff is therefore apprehensive that the receivership as it is now will run down the management of the crops and subsequently the 1st Plaintiff.

23. The Defendant on the other hand has stated that the Receiver, duly appointed, is a respected auditor and has handled a number of receiverships. There is no evidence to the contrary. The Defendant further assured the Plaintiffs that the Receiver did not intend to terminate the works of the 1st Plaintiff but would work with them as the requirements of the 1st Plaintiff Company would dictate. The Defendant further indicated that the Receiver would engage any skilled persons necessary to assist him in his duties pertaining to the 1st Plaintiff Company. In that case, the 1st Plaintiff Company should not suffer any prejudice on the account that the Receiver does not have knowledge in agri-business.

24. The Plaintiffs also raised an issue to the effect that the Receiver had been found guilty of contempt by the Court in another matter and accusation of wastage had been made against him in other proceedings. I perused the decisions attached by the Plaintiff to this effect and I did not see any implicating the Receiver on wastage. As for the contempt of court proceedings, the same I believe was against the Receiver and two other parties. I however do not see any correlation of the said proceedings to the current application in Court and in particular to the Receiver’s competence in this matter. I will therefore not belabour on the same.

25. The *prima facie* evidence before the Court is that the Receiver is competent. The Defendant gave his credentials which have not been disputed. Therefore, it is not in doubt that the Receiver can recover

the debt on behalf of the Defendant and at the same time sustain the business of the 1st Plaintiff Company. In that case, the allegations raised by the Plaintiffs that the Receiver has no knowledge or skill to operate the 1st Plaintiff Company are merely apprehensive and premature.

26. The 1st Plaintiff is also concerned about the effect of the receivership on the contracts it has with third parties. It is the 1st Plaintiff's case that the contracts between it and the third parties will be frustrated. The 1st Plaintiff is of the view that the crops risk not to be sold as the companies would not wish to contract with a company under receivership. There was no substantial evidence to this effect and the said allegation by the 1st Plaintiff amounts to mere speculation. It is also the 1st Plaintiff's concern that it stands to lose the land on which it conducts its business if the receivership is not lifted. This is on grounds that the leasehold agreement between the 1st Plaintiff and Kakuzi Limited provided for termination of the same in the event that the 1st Plaintiff was placed under receivership. Unfortunately, even if that be the case, the same should not curtail the Defendant's right to appoint a Receiver which right has accrued. The Defendant was not privy to the Leasehold agreement and such an eventuality was also not considered in the Debenture agreement.

27. In the circumstances foregoing, it is evident that the Plaintiffs have not demonstrated any compelling reasons to warrant the lifting of the Receivership. In addition, the Plaintiffs have not demonstrated any oppressive conduct on the part of the Receiver or that he has conducted himself in a manner contrary to the law or the Debenture agreement. If anything, the Receiver has not yet been given the chance to perform his duties.

28. This Court has noted that the 1st Plaintiff through the Directors have proposed to settle the debt by paying half of the outstanding sum in July 2015 and the balance in September 2015. This is by all means a noble proposal. However, as earlier stated the 1st Plaintiff had obtained monies from the Defendant which monies were secured by way of the Debenture dated 9th December 2010. The monies are outstanding and have become due and payable. Therefore, the Defendant's right to appoint a receiver to manage the Company's affairs has arisen. The Debenture was an agreement entered into by the parties and indeed it is commonplace that this Court cannot rewrite or alter the same. The responsibility of the Courts is limited to only enforcing contracts within the law. In **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & another Civil Appeal No. 95 of 1999**, the Court of Appeal held that a court of law cannot rewrite a contract between the parties as the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

29. This Court also has a duty to balance the interests of the Defendant as the Debenture holder and that of the 1st Plaintiff Company. The Plaintiffs were already given the opportunity to harvest the Chia crop, when the Receivership herein was temporarily lifted. I believe the harvest was carried out. They had earlier alleged that the interference from harvesting the Chia crop had caused an estimated loss of USD 40,000. The Plaintiffs neither elaborated on the nature of the interference nor did they prove the alleged loss.

30. On the other hand, the debt owed to the Defendant is still outstanding and the same has to be secured. This can only be ensured by the receivership already in place. However, still in the spirit of balancing the interests of the parties this Court is of the view that even with the receivership in place, the 1st Plaintiff through its directors and any skilled personnel should have access to the harvesting and management of the Chia crops, the handling and management of the equipment but under the exclusive direction and control of the Receiver.

31. It is not lost to this Court that receivership is bound to come with negative consequences, but where the same is rightfully in place and there are no reasons to show any oppressive actions on the part of the Receiver then the Court's hands are tied. In any case, if indeed the Plaintiffs will pay the outstanding debt by September 2015 then they should not suffer any prejudice as the possible adverse effects of receivership will not hang over its head for a long time.

DISPOSITION

32. In the circumstances foregoing, the Plaintiffs' Notice of Motion dated 5th May 2015 and filed in Court on 7th May 2015 is hereby dismissed with costs.

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Maruti for the Plaintiff

Mr. Kabaika for the Defendant

Teresia – Court Clerk