



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
MILIMANI LAW COURTS
PETITION NO 8 OF 2014

KENYA PLANTERS' COOPERATIVE UNIONPETITIONER

VERSUS

KENYA COMMERCIAL BANK LTD 1ST RESPONDENT

DELOITTE CONSULTING LTD2ND RESPONDENT

HARVEEN GADHOKE 3RD RESPONDENT

SAMUEL OKECH ONYANGO4TH RESPONDENT

RULING

Introduction

1. In an application brought by way of Notice of Motion dated 9th January 2014 and filed under Certificate of Urgency, the petitioner sought various orders to safeguard its proprietary interests guaranteed under Article 40 of the Constitution which it states are under threat by the respondent. The application was placed before the Court on 10th January 2014, and the Court (Korir J), stated as follows:

'I have perused the application before the court and admit the application before this court for hearing during the court vacation. A conservatory order is issued in terms of Prayer No 2 of the Notice of Motion application dated 9th January 2014 as follows:-

"THAT pending the hearing and determination of this Application inter partes, a conservatory order do issue maintaining the status quo as at 31st of December, 2013, prior to the purported appointment of the receiver/manager of the 9th January 2014, by the 1st respondent".

All the other prayers to be determined after inter partes hearing or as the court may direct. The petitioner to serve the application together with the petition for inter pares hearing of the said application in the Constitutional and Human Rights

Division on 27th January 2014.'

2. On 16th January 2014, the respondent, which I shall hereafter refer to as KCB, filed an application of the same date under Certificate of Urgency. In the said application, it sought to have the orders of Korir J set aside on the basis that there had been material non-disclosure by the petitioner and that the orders issued by Korir J were mandatory in nature and resulted in the removal of the receiver appointed by KCB on 9th January 2014 without giving KCB a chance to be heard. The matter was placed before me and I directed that the application be served for hearing in the presence of both parties on 20th January 2014.
3. When the matter came up on 20th January 2014, Counsel for the petitioner, Mr. Ombati, sought an adjournment on the grounds that the application was served late on 16th January 2014 and that the petitioner needed time to file a response.
4. The application for an adjournment was opposed by Counsel appearing for KCB, Mr. Kamau Karori. He stated that he was ready to argue the application dated 16th January 2014, but that if the Court was to give the petitioner time to respond to the application, then it should discharge the orders issued on 10th January 2014.
5. Mr. Karori contended that the orders issued on 10th January 2014 had the effect of removing the receivers who had already been appointed by KCB, and the said orders were therefore in the nature of a mandatory injunction; that the orders were issued without jurisdiction as the petitioner failed to disclose to the Court that there was a dispute resolution mechanism agreed upon by the parties; that further, the parties were already engaged in previous litigation namely High Court Civil Case No. 779 of 2009 which was marked as settled and High Court Petition No 700 of 2009 which was determined by this court when it held that the dispute raised no constitutional issue.
6. Counsel argued further that the receivers appointed by KCB had been appointed pursuant to a Deed of Settlement between the parties hereto dated 19th November 2013; that the only remedy that KCB has in respect of the debt due from the petitioner is the appointment of the receiver; and that the effect of the orders of 10th January 2014 was to take away a contractual right without giving KCB the opportunity to be heard. He submitted therefore that granting the petitioner an adjournment without giving KCB an order to protect its interests would be extremely prejudicial to its interests.
7. Mr. Ombati conceded that indeed there was a Deed of Settlement between the parties which did provide for appointment of a receiver, but that the Deed also allowed either party to seek interlocutory injunctive relief. He conceded also that receivers had been appointed on 9th January 2014, and following the appointment, the petitioner had sought injunctive relief and orders issued in its favour on 10th January 2014; that the orders issued by the Court were to maintain the status quo as at 31st December 2013 when the petitioner was under the management of the petitioner's directors; that the debt owed to KCB is secured and the amount owed is admitted; and that the petitioner had disclosed the previous litigation between the parties at paragraph 77 of the petition.
8. I must state at the outset that I am not in this ruling dealing with the merits of the parties' respective claims. I am only concerned at this stage with the question whether, in granting the petitioner time to respond to the application by KCB, I should stay or discharge the orders issued by Korir J on 10th January 2014. In determining this issue, I must make two preliminary observations.
9. The first relates to whether or not I should accede to the application to stay or set aside the orders of 10th January 2014 as urged by KCB. As observed by Wendoh J in her ruling dated 3rd August 2010 in High Court Petition No. 700 of 2009 involving the same parties now before me, an ex parte order can be set aside by the Judge who issued the order or by another if the Judge is not

available.

10. In the present case, Korir J, who sits in the Judicial Review Division of the High Court and is currently on leave, heard the application and issued orders during the High Court vacation and directed that this being a constitutional petition, it should be heard before the Constitutional and Human Rights Division of the High Court.
11. The second observation is that it is this Court which heard and determined High Court Petition No. 700 of 2009. In my decision dated 28th March 2012, I dismissed the petitioner's claim as raising no constitutional issue.
12. In this ruling therefore, I will confine myself solely to considering, pending the inter partes hearing of the applications now before the Court, where the interests of justice lie: in allowing the orders issued on 10th January 2014 to stand, or in staying or discharging the said orders and giving KCB an opportunity to be heard before the receivers it appointed are removed from managing the affairs of the petitioner.
13. It is conceded by the petitioner that the receivers were appointed under the Deed of Settlement entered into between the parties dated 19th November 2013. While the petitioner claims that it has a right under the Deed of Settlement to seek injunctive relief, as correctly submitted by Counsel for KCB, a perusal of the Deed discloses that such right, granted under Clause 15.3.8, thereof, relates to relief in respect of the arbitration proceedings agreed on between the parties as the mode for resolving disputes between them.
14. It is also conceded by the petitioner that it does owe the respondent certain sums of money. In my view, the circumstances of the case would therefore require that KCB should be in a position to manage the affairs of the debtor in terms of the Deed of Settlement until both parties have been heard on whether or not the receivers should be in place.
15. It is also worth noting that in filing this petition and seeking the orders that it sought at an ex parte stage, the petitioner failed to disclose to the Court that a petition raising constitutional issues between the same parties had been heard and determined by this Court. I observe that the only disclosure made by the petitioner with respect to past litigation relates to High Court Civil Case No. 779 of 2009, in respect of which the petitioner states that the suit was ***“marked as settled in the terms of the settlement deed dated the 19th of November 2013 and filed into court on the 26th of November 2013.”***
16. Given the above facts and concessions by the petitioner, I believe that had full disclosure been made, the Court may well not have issued the orders of 10th January 2014 which did have the mandatory effect of removing receivers appointed in accordance with the Deed of Settlement between the parties.
17. In the circumstances, I believe that the interests of justice demand, and I accordingly order, that the orders issued by Korir J on 10th January 2014 be stayed pending hearing of the respective applications by the parties hereto on their merits. For the avoidance of doubt, the receivers appointed by KCB on 9th January 2014 shall manage the affairs of the petitioner pending hearing of the two applications now before the Court or further orders of the Court.
18. In the meantime, the two applications dated 9th January 2014 and 16th January 2014 shall be canvassed on their merits before Majanja J on 27th January 2014.
19. Orders accordingly.

Dated, Delivered and Signed at Nairobi this 21st day of January 2014

MUMBI NGUGI

JUDGE

**Mr. Omwanza Ombati instructed by the firm of Kariuki Muigua & Co. Advocates for the
Petitioner**

**Mr. Kamau Karori instructed by the firm of Iseme, Kamau & Maema & Co. Advocates for the
Respondent**