REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 50 OF 2010

MEYA AGRI TRADERS LTD.....PLAINTIFF

VERSUS

SARKISH FLORA LTD.....DEFENDANT

RULING

1. This Ruling applies to two applications -

1. *A Notice of Motion dated 11.05.2010 in which the Plaintiff sought orders of summary judgment against Sarkish Flora Ltd in terms prayed in the Plaint dated and filed on 1.03.2010, or in the alternative the admitted sum of Kshs. 2,933,465.00. That application is hereinafter referred to as "the Plaintiff's application."*

2. *A Notice of Motion dated 28.03.2013 and filed on 16.04.2013 (hereinafter called "the Receivers' Application"). In it, the Receivers, Samuel Onyango and Harveen Gadhoke, seek to be struck out of the suit herein. They also seek costs.*

2. Before determining those applications, it is necessary to give some background to the suit.

3. The suit herein was filed on 1.03.2010 against the Defendant Company. Unknown to the Plaintiff, the Defendant Company was put under Receivership by I & M Bank pursuant to a Debenture dated 29.04.2008 securing advances to the Company in the sum of Ksh 123 million together with interest thereon. Upon learning that the company had been put in receivership the Plaintiff sought and was granted leave to amend its Plaint by including the two Receivers.

4. The Receivers, upon being served with the Amended Plaint, filed on 11.05.2011, a Defence dated 10.05.2011. At paragraph 6 of the said Defence, the Receivers averred that the suit was filed before their appointment by I & M Bank, and that by virtue of the Debenture the I & M's Bank's claim against SARKISH FLOWERS LTD *(the Company)* had priority over all unsecured claims, and that the Plaintiff's claim would only be recoverable after the I & M Bank had recovered its loan.

5. Following that Defence, the Plaintiff filed on 18.05.2011 a Reply to Defence dated 14.05.2011 and challenged the Receivers to strict proof of I & M Bank's loan, and validity of the Debenture.

6. The Receivers did however complete their assignment and filed with the Registrar of Companies a Notice of Cessation to act as Receiver or Manager dated 20.12.2012, the day they ceased being such Receivers and Managers of the Defendant Company.

7. The Receivers Application dated 28.03.2012 and filed on 16.04.2013 consequently seeks the

order that Samuel Onyango and Haveen Gadhoke be struck out from the suit with costs against the Plaintiff.

8. There is no Replying Affidavit by the Plaintiff Company against the Receivers Application. However in their counsel's submissions, dated 19.06.2013 and filed on 20.06.2013, the Plaintiff does not oppose the Receivers' Application to be struck out of the suit. The Plaintiff does however oppose the award of the costs to the Receivers. The Plaintiff says that it ought not to be punished for the fact that the Receivers have completed their mandate and ceased acting as such for the Defendant during the pendency of the suit.

9. In the absence of any opposition thereto, I allow the first leg of the Receivers' Application, and hereby strike out the Receivers from the suit by the Plaintiff Company against the Receivers. The only question is whether the Receivers are entitled to costs.

10. I think, the Receivers are entitled to their costs against the Plaintiff. Under the proviso to Section 27(1) of the Civil Procedure Act, *(Cap. 21, Laws of Kenya)* costs follow the event. Secondly, having been warned by the Receivers that their mandate was limited under the Debenture to recover for the Bank the moneys outstanding, under that security, the Plaintiff had an opportunity to review its claim, and withdraw its claim against the Receivers. In default the Plaintiff was liable to the Receivers on costs on a full indemnity basis.

11. Thirdly, the court takes judicial notice of the fact that the plaintiff having joined the Receivers in the suit,;caused them to instruct counsel to represent them. They paid legal fees. The Advocates drew the Defence to the suit, and the Application the subject of this Ruling. In the circumstances it would be both unfair and unreasonable to make them shoulder their own costs upon instructing counsel who kept appearing for them, **PARTY OF INDEPENDENT CANDIDATE & ANOTHER VS. HON. MUTULA KILONZO & 3 OTHERS (EP NO. 2013).**

12. The reason why costs should be awarded even where action is discontinued was explained in the Canadian case of **NEWEL POST DEVELOPMENTS LTD VS. 14022801 Alberta Ltd 2012, ABOB 422** -

> ***"This was an attempt by a Plaintiff to discontinuance after the trial had commenced. The principle of the rule is plain. It is that after the proceedings have reached a certain stage, the Plaintiff who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then not to be dominus litis (the master of the action).***

13. Similarly in the Canadian case of **PAUL HENRY ZELENY VS. DEANE THERESA ZELENY [2004]** Can Lii, the Superior Court of Ontario made the following observation on the question of costs -

> ***"In exercising that discretion court must consider the three fundamental purposes of costs as confirmed by the Ontario Court of Appeal at paragraph 22 of the FONG decision -***

i. ***to indemnify successful litigants for the costs of litigation,***

ii. ***to encourage settlement, and***

iii. ***to discourage and sanction inappropriate behaviour by litigants.***

> ***From this analysis it is clear that indemnification is simply one factor to consider in determining the costs payable by the unsuccessful party. Whether or not the successful party is fully indemnified for the amount of fees paid to his or her solicitor is only one consideration."***

14. In the instant case therefore, the Plaintiff or its Advisors would have done a search in the

Companies' Registry, or sought particulars of the Debenture before filing a Reply to Defence to the Receivers Defence, and being satisfied with the validity of the debenture would swiftly have moved to amend their claim against the Defendant and remove the names of the Receivers. Having failed to do so, it is only but proper the court's discretion be exercised by allowing costs to the Receivers. It is so ordered.

15.0 <u>THE PLAINTIFF'S CLAIM FOR SUMMARY JUDGMENT</u>

15.01 The procedure and conditions for seeking summary judgment are set out in Order 36 rule 1(1) of the Civil Procedure Rules which says -

1(1) In all suits where a Plaintiff seeks judgment for -

(a) a liquidated demand with or without interest, or

(b) the recovery of land with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired, or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser where the Defendant has appeared but not filed a defence, the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of land or <u>mesne</u> <u>profits.</u>

2. ***The application shall be supported by an affidavit either of the Plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.***

3. ***Sufficient notice of the Application shall be given to the Defendant which notice shall not be less than seven days.***

4. ***The Defendant may show either by Affidavit or by oral evidence or otherwise that he should have leave to defend.***

15.02 It was held in the case of **COMMERICAL ADVERTISING & GENERAL AGENCIES LTD VS. QUREISHI [1985] 458,** that -

1. ***the court has power under Order XXXV (now Order 36) of the Civil Procedure Rules to enter summary judgment for the claim of a Plaintiff with a view to eliminating delays in the administration of justice.***

2. ***Summary judgment is granted subject to there being no bona fide triable issue entitling a defendant to leave to defend. If a bona fide triable issue is raised, the Defendant must be given unconditional leave to defend, but not so in a case in which the court feels justified in thinking that the defences raised are a sham.***

3. ***On an application for summary judgment the Plaint, the Defence, the counter-claims and reply to defence, if any, and affidavits in support of and in reply as well as all relevant issues and circumstances are all proper material for consideration. Nothing is immaterial which helps justice to be done.***

15.03 Similarly in **SUNDERJI VS. CLYDE HOUSE COMPANY LTD [1984] KLR 499**, the Court held -

1. ***An application for summary judgment under Order XXXV (now 36) of the Civil Procedure Rules should not be allowed where pleadings and affidavits disclose bona fide triable issues of fact and law,***

2. ***where an issue is raised which requires reference to case law in order to reach a decision such an issue should be tried with full argument on the law and should not be dealt with***

summarily,

3. ***Potter JA (in obiter) said:-***

Summary power should be used sparingly even where its use can be justified as being economically prudent because excessive use of such power can lead only to multiplication of the expenditure of time and money."

16.0 The above is the procedural as well as the case law. The situation in this case is this -

1. *The Plaintiff sued the Defendant for the sum of Ksh 4,439,622.80, costs and interest @2% per month or otherwise at court rates.*

2. *Out of the said sum the Defendant issued cheques for sh 2,933,965.00 which cheques were dishonoured.*

3. *In a defence dated and filed on 19.03.2010 the Defendant denied the claim.*

4. *In light of that defence, the Plaintiff filed on 12.05.2010 a Notice of Motion dated 11.05.2010, and sought summary judgment against the Defendant in terms of the Plaint aforesaid, or in the alternative judgment on the admission of Ksh 2,933,465.00.*

5. *The Notice of Motion was served upon the firm of Musembi Mongeri & Co. Advocates and an Affidavit of Service sworn on 16.07.2010 was filed on 19.07.2010.*

6. *The Plaintiff's application dated 6.01.2011 filed on 17.01.2011 to enjoin the Receivers, Harveen Gathoka and Samuel Onyango was allowed by order of court made on 16.03.2011.*

7. *Following service of the Amended Plaint – M/s Iseme, Kamau and Maina entered a Memorandum of Appearance dated 13.04.2011, and filed 20.04.2011.*

8. *The firm of Iseme, Kamau and Maina filed on 11.05.2011 a defence dated 10.05.2011 for the Defendant – SARKISH FLORA LTD.*

9. *The Plaintiff filed on 18.05.2011 a Reply to Defence dated 14.05.2011 and stated that the Defendant's statement of Defence did not disclose any reasonable defence to the Plaintiff's claim, and was filed as a ploy to avert responsibility to deny the Plaintiff justice.*

10. *The firm of Iseme, Kamau and Maina filed on 13.06.2012 grounds of opposition dated 8.06.2012 to the Plaintiff's Application for summary judgment and stated that the Plaintiff being a judgment creditor cannot claim priority over a debenture holder.*

16.01 From the record of pleadings it is clear to me, that firm of Iseme Kamau and Maina came on record only for the purpose of defending the Receivers, and interest of I & M Bank as the Debenture holder. The Receivers sole purpose was to collect the secured creditor's debt, and once having done so, they filed the statutory notice of cessation of acting as Receivers and left the Company *(the Defendant)* to its own designs. There is no record that the firm of Musembi Mongeri & Co. Advocates ceased to act for the Defendant as such. It also appears to me that no process was served upon the said firm by either the Receivers Advocates, or his Plaintiff's Advocates. It is thus clear to me that after cessation of the Receivership, no counsel looked after the interests of the Defendant. The submissions by counsel for the Receivers only covered the Receivers position and made no reference to the application for summary judgment. The question then becomes does the Defendant know of the Application for summary judgment? Order 36, rule 1(3) requires notice of at least seven days to be served upon the Defendant, or *(where the Defendant has Advocates)* his Advocates, Musembi Mongeri & Co. Advocates.

16.02 It is clear that neither the Defendants nor its Advocates were served with the application

for summary judgment. However from the Application itself, and attachments thereto, the Defendant admitted by issuing cheques for sh 2,933,465/= that it had received goods worth the said sum of money. I think no prejudice can therefore be suffered by the Defendant if judgment is entered in the said sum.

16.03 In the premises therefore judgment is hereby entered for the Plaintiff in the sum of Shs 2,933,465.00/= with interest thereon. The balance of the claim will go to trial by way of formal proof. The Plaintiff will also have the costs of the Application.

16.04 In summary therefore, the Receivers shall have costs against the Plaintiff. The Plaintiff shall have judgment against the Defendant in the said sum of Ksh 2,933,465.00/= with interest at court rates, as well as costs of the application for summary judgment.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 28th day of February, 2014

M.**J. ANYARA EMUKULE**

JUDGE