



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 497 OF 2013

KAJULU HOLDINGS LIMITED.....1st PLAINTIFF

COMMERCIAL BANK OF AFRICA LIMITED.....2ND PLAINTIFF

- VERSUS -

DIAMOND TRUST BANK KENYA LIMITED.....DEFENDANT

RULING

1. The defendant's application seeks the striking out of the Plaint and the dismissal of the suit for being frivolous, vexatious and abuse of the process of the court.
2. The background to the application and to the suit is common ground to the parties.
3. On 22nd November 2010, **KAJULU HOLDINGS LIMITED** was placed under Receivership on the grounds that it had defaulted in servicing the financial facilities which had been extended to it by **COMMERCIAL BANK of AFRICA LIMITED**.
4. **KAJULU HOLDINGS LIMITED** rushed to court, in an endeavour to stop the Receivers and Managers from interfering with the company's business. The case in which **KAJULU HOLDINGS** sued the **COMMERCIAL BANK of AFRICA** is HCCC No. 732 of 2010.
5. On 7th December 2010 the court commenced the inter-partes hearing of the plaintiff's application for an interlocutory injunction. Prior to that date, the court had, on 24th November 2010, issued an ex-parte injunction.
6. During the inter-partes hearing, the court ran out of time, and was thus unable to conclude the hearing of the application. The matter had to be adjourned to another date.
7. Whereas it was obvious that the application had to be adjourned, the parties were sharply divided on the question whether or not the interim injunction would be extended. Therefore, the parties made their respective submissions on that issue.
8. On 9th December 2010 the court gave its Ruling on the question regarding the extension of the orders which had been first granted on 24th November 2010. The court extended the said orders until the application was heard and determined.

9. Following the extension of the said orders, the **COMMERCIAL BANK OF AFRICA** felt so aggrieved that it lodged an appeal before the Court of Appeal.
10. On 19th May 2011 the Court of Appeal gave its Ruling on the bank's interlocutory application. By their Ruling, the Judges of Appeal ordered that the orders which had extended the initial injunctive reliefs be stayed until the substantive appeal was heard and determined.
11. By the time the parties before me were arguing the current application, the appeal was still pending at the Court of Appeal.
12. The bank had allowed the Directors of Kajulu Holdings Limited to operate the company's bank accounts after the High Court had restrained the Receivers from interfering with the business of the company.
13. According to the defendant herein, the Receivers willingly moved away from the company's premises, paving way for the Directors to take control of the company.
14. By handing over the control of the company at the time when the court had restrained the Receivers, the said Receivers are said to have been acting in compliance with the orders of this court.
15. And because the absence of the Receivers implied that there was no other person(s) with the authority to run the affairs of the company, the Directors submitted that they then had the requisite mandate and obligation to step in and run the company.
16. In the process of running the affairs of the company, the Directors operated the bank accounts of the company so as to be able to meet the company's contractual obligations.
17. It is the understanding of the defendant herein that when the court stopped the Receivers, that was tantamount to a reinstatement of the Directors. Therefore, before the Court of Appeal put on hold the orders through which the Receiver had been restrained, the Directors believe that they had the authority and mandate of the court to operate the affairs of the company.
18. For that reason, they believe that the Directors of the company should not be required to answer for the actions which they took at a time when the Receiver had been "*frozen*". In fact, according to the company, the Receivers were not just "*frozen*", they were actually ordered to vacate the company premises.
19. It was thus deemed preposterous for the plaintiff to now attempt to hold the bankers of the company liable for the debits which were made to the account of Kajulu Holdings. Those debits were made at the instance of the Directors, who believe that the court had reinstated them to their positions as directors of Kajulu Holdings.
20. That belief on the part of the directors stems from their reasoning that if the ex-parte orders dated 24th November 2010, (and which were thereafter extended) did not have the effect of stopping the Receivers, there would have been no need for the Commercial Bank of Africa Limited to appeal to the Court of Appeal.
21. The Defendant faults the plaintiffs for laying a claim against the Bank when the said Bank was only following the valid orders of the court.
22. The plaintiff is said to have made claims which it was not entitled to make.
23. The claim, as put together is said to raise absolutely no reasonable cause of action or

any triable issues. Therefore, the plaint was described as beyond redemption.

24. In answer to the application, the plaintiffs submitted that they have a genuine and arguable case, which has good prospects of success.

25. The first point made by the plaintiffs was that on the appointment of the Receivers on 22nd November 2010, all the floating charges over the assets of Kajulu Holdings Limited became fixed charges in favour of the Commercial Bank of Africa.

26. If that be correct, as submitted by the plaintiffs, the orders made by Apondi J. did not have the effect of re-floating the charges over the assets of Kajulu Holdings.

27. It was the contention of the plaintiffs that whereas the orders in issue stopped the Receivers from interfering with the business of Kajulu Holdings, the assets of that company remained subject to the fixed charge.

28. The bank accounts of Kajulu Holdings were a part of the assets of that company. Therefore, it would follow that if the floating charge crystallised over the assets of Kajulu Holdings, the bank accounts would have been directly affected.

29. The plaintiffs have pointed out that the court did not, at any time, set aside the appointment of the Receivers. That is an accurate statement of fact.

30. The Court of Appeal made the following point;

“... it is not in dispute that the receivers and managers had been removed pursuant to the aforesaid order”.

31. That portion of the Ruling by the Court of Appeal may appear to suggest that the receivers were removed from their role qua receivers. However, the very next sentence in the said Ruling lays to rest any such notion. This is what the court said;

“Since there is no challenge touching on their appointment, we order that they be reinstated forthwith”.

32. That implies that it was only the physical presence of the receivers at the premises of Kajulu Holdings that had been barred.

33. However, there arises the question as to the roles, if any, and the inter-relationship between the receivers whose appointment had not been challenged and the directors who had obtained an order to have the receivers leave the premises.

34. Did the fact that the receivers moved away from the premises, and did not thus interfere with the running of Kajulu Holdings also imply that the Directors had been mandated to take over from the Receiver?

35. Of course, I appreciate the argument that when the receivers were restrained from interfering with the operations of Kajulu Holdings business, there would have been a vacuum in the management of the company if the directors had not moved in.

36. In practical terms, it appears to have made sense for the directors to step into the management at that time, but that, of itself, may not necessarily have meant that the actions of the directors had the backing of the law.

37. But the directors are not the defendant in this case. The defendant is **DIAMOND TRUST BANK KENYA LIMITED**.

38. On a *prima facie* basis, it would appear that they had acted on the instructions of the directors of the company, and that therefore, the bank should not be accountable to the plaintiffs.

39. But the matter is much more complex. I say so because it is possible that the directors may have given instructions to the bank at a time when the directors lacked legal mandate to run the affairs of the company.

40. In the event that the court should conclude that the directors did not have the requisite legal authority to give instructions to the bank after the floating charge had crystallised over the assets of the company, consequences would follow. And whether or not one of those consequences might be to hold the bank liable for the funds which were debited against the account of Kajulu Holdings, it is only a full trial which can determine.

41. In the result, the plaintiff's suit appears to raise a reasonable cause of action. The case raises serious issues of law that need to be determined on merit. It would therefore be wrong to strike out the suit, summarily.

42. Accordingly, the defendant's application is dismissed, with costs to the plaintiffs.

DATED, SIGNED and DELIVERED at NAIROBI this 26th day of November 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the 1st Plaintiff

.....for the 2nd Plaintiff

.....for the Defendant

Collins Odhiambo – Court clerk.