REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 991 of 1999

THE RECEIVER GRAND REGENCY HOTEL…….....…….…….....PLAINTIFF

VERSUS

EMMS ARCHITECTS LIMITED .....……..... DEFENDANT

RULING

1. On 29th July, 1999, this suit was filed in the name of **The Receiver Grand Regency Hotel** against the Defendants claiming Kshs.1,416,523/25 together with interest. The said claim was in respect of accommodation services rendered to certain businessmen from Australia in or about October, 1996. The Defendant filed its Defence on 1st September, 1999 disputing the claim. In or about 31st November, 2007, on the Plaintiff's application, the Plaint was amended and the Plaintiffs were made parties suing as joint Receivers of the Grand Regency Hotel.

2. On 17th January, 2005, 9th February, 2005, 15th June, 2001, 15th June, 2007 and 13th May, 2008, the Defendant applied for the dismissal of the suit for want of prosecution. However, those applications were either withdrawn or were unsuccessful. It would seem that pursuant to an order recorded in another suit between the **Kenya Anti-corruption Commission and Kamlesh MB Pattni & 16 others, i.e. HCCC NO.1111 of 2003**, the Joint Receiver Managers were discharged from the management of the assets of a company known as Uhuru Highway Development and the same was transferred to the Central Bank of Kenya. That seems to have terminated the Plaintiff's services or role as Receiver Managers of the Grand Regency Hotel. That order does not seem however to have been recorded in these proceedings.

3. The suit herein continued to remain unprosecuted and on 24th February, 2012, the court on its own motion dismissed the suit with costs for want of prosecution Pursuant thereto, the Defendant had his costs of the suit taxed at Kshs.130,496/80 on 20th June, 2012. On 13th July, 2012 the Defendant proclaimed the Plaintiff's items for Kshs.132,946/80 plus auctioneer's costs of Kshs.18,500/-

4. Upon such proclamation on 19th July, 2012, the Plaintiffs took out a motion on notice under Order 22 Rule 22 (1) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and sought two substantive prayers. That the execution of the decree be stayed and that the proclamation and attachment of 13th July, 2012 be lifted. The grounds upon which the application was made was set out in the body of the motion and in the Affidavit of H.W Gichohi sworn on 19th July, 2012.

5. It was contended by the Plaintiffs that they applied to be substituted as Plaintiffs in this case in their capacity as joint receivers in 2007, that they merely continued this suit in that capacity and not in their private capacities, that no liability touched on their persons but the office of the Official Receivers, that they were removed as joint receiver on 9th April, 2008, that therefore the attachment of their goods on

13th July, 2012 was ill advised and unlawful.

6. Mr. Mutuli learned Counsel for the Applicant in his submissions dated 24/12/12 submitted that the applicants were appointed pursuant to a court order in HC Misc suit No.1111 of 2003 (OS), that they acted for a disclosed principal against whom execution should have been levied. That Order XL of the Civil Procedure Act was clear as to the appointment of a receiver. That a receiver maintains a suit in the name of the person entitled to sue and that it is against such a person execution should be levied. Counsel relied on the cases of **Lochab Brothers –vs- Kenya Furfugal Co. Ltd 91983) 1 KLR 257, Githungo –vs- Fidelity Shield Insurance Co. Ltd (2004) 1 EA 45** and **Davis & Shirtliff Ltd –vs- Attorney General (1976-1980) 1 KLR 1061**. Counsel urged that the application be allowed.

7. The Defendant opposed the application through a Replying Affidavit sworn by Guandaru Thuita on 18th September, 2012. It was contended for the Defendant that the firm of Mutuli & Associates could not properly bring the present application without leave of court as there was hitherto the firm of Mutuli & Apopo Advocates which was on record and the suit had been concluded, no leave had been obtained for the firm of Mutuli & Associates to take over the conduct of the matter, that the Plaintiffs are liable on the basis of being parties to the suit, that the Defendant was not privy to the internal arrangements between the Plaintiffs and the appointing authority, that the Plaintiffs recourse lies in obtaining indemnity against the appointing authority, that the Plaintiffs had not sought to set aside the decree and to grant the orders as sought would leave the decree "hanging". The Defendant therefore urged that the application be dismissed.

8. Having considered the Affidavits on record, submissions of Counsel and authorities relied on, it is true that the firm previously on record was that of Mutuli & Apopo Advocates. That firm had filed a Notice of Change on 8th February, 2005 to act for the Plaintiffs in the place of the firm of P.L. Mutuli & Company Advocates. This suit was determined on 24th February, 2012 and a decree issued on 28th June, 2012. The present application was filed on 19th July, 2012 by the firm of Mutuli and Associates. That firm filed a Notice of Appointment on behalf of the 2nd Plaintiff on 19th July, 2012. The suit having been determined on 24th February, 2012 as aforesaid, I do not think that any firm of Advocates would take over the conduct of the matter for any of the parties without leave of court. The rule as to seeking leave before coming on record of a law firm has sound foundation. In my view, even if the firm of Mutuli & Apopo Advocates had disintegrated, it was imperative that Mr. Mutuli should have first sought leave of court to act before filing or prosecuting the present motion. On that ground alone, the motion would fail.

9. Coming to the merit of the application, it is clear that originally the suit was filed in the name of the Receiver, Grand Regency Hotel. The previous receiver did not name himself as a party. It was his office that had brought the suit. Come 2007, on being appointed to the office of the Receiver Manager of Grand Regency Hotel, the Plaintiffs caused their personal names to be inserted, not substituted as parties to the suit. In having their personal names appear as parties to the suit instead of the former office, my view is that the Plaintiffs intended to put the human face onto the Plaintiffs prosecuting the suit. When they were discharged from their office, they never sought to have their names substituted or struck out of these proceedings. That is a duty they owed both to the court and the Defendant. Now that they never did so, I do not think they can turn around and argue that the court or the Defendant should pursue the appointing authority. Where and who is the appointing authority? Any dealings between the Plaintiffs and their appointing authority are matters between themselves and there is no evidence that they involved either the court or the Defendant in the same. I agree with the Defendant that the Plaintiff's remedy is in seeking indemnity from the appointing authority. Both the Court and the Defendant have throughout been dealing with the Plaintiffs.

10. For the foregoing reasons, this court holds the view that Order XL of the Civil Procedure Rules and Section 63 of the Civil Procedure Act do not apply to this case. The authorities also relied on are not applicable in this case. They relate to cases where the Receiver is appointed by court. In this case, the Plaintiffs applied to be replaced in the suit instead of the previous receiver.

11. Finally, on the efficacy of the orders sought, the 2nd Defendant has only sought the stay of

execution and discharge of the proclamation. That will leave the decree for costs in force against the Plaintiffs in limbo. What is it to be done to that decree? Against whom is it to be executed if not the Plaintiffs? I do not think that a stay and discharge can be granted as sought in the application. The Plaintiffs never sought for its setting aside. In any event, for reasons already given it could not be set aside. Having come to the conclusion that the Plaintiffs as parties bear liability for the costs of the suit, I do not think the orders sought can properly be granted.

12. In the premises, the application fails and the same is dismissed with costs to the Defendant.

DATED and **DELIVERED** at Nairobi this 19th day of April, 2013.

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A. MABEYA

JUDGE