



REPUBLIC OF KENYA

High Court at Malindi

Judicial Review 17 of 2011

FRED KARL KISEWETTERPLAINTIFF

=VERSUS=

PETER KOENECKDEFENDANT

R U L I N G

1. On 17th March, 2011 the applicant Fred Karl Kisewetter (Karl) filed an originating summons which primarily sought the dissolution of the partnership between him and the respondent Peter Koenecke (Peter) and distribution of the company assets. He cites various reasons including failed trust with his partner. On 4th May, 2011 Peter filed a replying affidavit confirming inter alia that Karl had been his business associate since 1983, in the joint venture known as P. K. Shopping Complex comprising of a beer garden and 12 shops for letting. He denied operating the business for his own benefit.

2. Before me now is a Notice of Motion filed by Karl on 17th March, 2011 and expressed to be brought primarily under Order 40 and 41 Civil Procedure Rules. The same seeks three key orders, namely:

“(b) That pending the hearing and final determination of the application herein the Honourable Court be pleased to appoint Nairobi Homes (Mombasa Ltd. (or any other manager as the Honourable Court may be pleased to direct) as the receiver manager of the firm of P. K. Shopping, the reasonable charges demanded by the receiver manager therefore be taken from the income of the business.

c) That pending the hearing and final determination of the suit herein the honourable court be pleased to appoint Nairobi Homes (Mombasa) Ltd (or any other manager as the honourable Court may be pleased to direct) as the receiver manager of the firm P. K. Shopping, the reasonable charges demanded by the receiver manager therefore be taken from the income of the business.

d) That such receiver manager as shall be appointed by the Honourable Court be directed to present quarterly accounts to the parties herein.”

3. It is premised on 9 grounds, *inter alia*:

“1. The Defendant invited the plaintiff to get together with him in the acquisition development and ownership of the business on land known as portion Number 782 (original No. 590/2). It was the intention of the parties that they build a shopping centre and related facilities and upon completion, lease out the premises for a profit. It was to be managed by the defendant and the profits of the business were to be shared equally.

2. The plaintiff paid to the defendant the sums demanded by the defendant as part of the plaintiff's contribution to the enterprise and in due course the premises are situated along Lamu Road, next to the Star Dust Discotheque and they are popularly known as "P.K. Shopping".

3. The defendant accounted to the plaintiff for the income and as well as the expenses incurred in the day today affairs of the "P.K. Shopping" until sometime in 1997 when the defendant was financially embarrassed when the Trust Bank went down and the defendant requested the plaintiff to allow the defendant to keep all the income of the business for a time as the defendant sorted out his finances. The plaintiff obliged the defendant. The defendant has continued to receive money from the business but he has failed and or otherwise neglected to supply the plaintiff with an account of the income.

4. The defendant has also in spite of repeated requests and demands, failed and or otherwise neglected to pay over to the plaintiff the sums due to the plaintiff on account of his share in the profits of their joined venture.

5. The defendant is running the partnership business as though it were his private personal undertaking. This is oppressive and unacceptable.

6. The plaintiff and the defendant do not speak and the plaintiff no longer trusts the defendant as a business partner."

4. In support of the Notice of Motion Karl swore an affidavit which, along with the annexures essentially seeks to give flesh to the grounds above. But when the Notice of Motion came for hearing before Omondi J. on 19th May, 2011, Peter raised a Preliminary Objection through his advocate. Ruling on the same was delivered on 18th April, 2012 on behalf of Omondi J. Thereafter Peter filed a Notice of Motion dated 12th June, 2012 seeking to strike out the entire suit for want of jurisdiction, or in the alternative seeking that "the Honourable court do strike out all or any claim based on Land Portion No. 782 (Original No. 590/2) Malindi set out in the originating summons" The main grounds being that the said property belongs to a third party one Hedwig Arina Hug and not to any of the parties herein and that the plaintiff's claims are untenable in law.

5. The respondent's Notice of Motion had been set for hearing on 22nd October, 2012, but before then, the applicant took an earlier date, 6th September, 2012 for the earlier Notice of Motion dated 17th November, 2012. The respondent had meanwhile instructed two advocates messers Mouko & Kibunja to act for him. It appeared that the Notice of Motion by the respondent had never been served on the applicant until the 5th September, 2012. Upon hearing the parties on the application to be given priority, the court directed that the two applications be heard together, the respondent's Notice of Motion being taken as a response to the applicant's Notice of Motion, to which no replying affidavit had ever been filed.

6. The oral arguments took cue from the depositions of the parties in the two applications. Briefly, Mr. Ole Kina argued on behalf of the applicant that there is a partnership subsisting between the parties which has become deadlocked as a result of disagreement between them; that the respondent is operating the business as personal property without rendering accounts; that the partners can no longer speak and the breakdown in trust has crippled the partnership. He referred to various annexures to demonstrate these points.

7. On the question of jurisdiction Mr. Ole Kina cited section 2 of the Partnerships Act as donating necessary jurisdiction to this court. He asserted that the land portion no. 782 Malindi is part of the partnership property and that if the respondent misrepresented the true facts of ownership to the applicant at the formation of the partnership he could not profit from the misrepresentation. He urged the court to note that the respondent had not tendered any accounts in the name of the partnership or schedule of profits paid to the applicant.

8. For his part, Mr. Kibunja for the respondent referred the court to the ruling on the Preliminary Objection directing that the substantive hearing of the matter be prioritized and observed that if the

applicant's Notice of Motion is allowed it will dispose of the entire Originating Summons prematurely. He said the applicant's affidavit contained highly contentious matters which require ventilation through a trial. Further, that the replying affidavit of the respondent gives an uncontroverted version of the conduct of the business, and transmission of rental income to applicant. This version he says is supported by other independent parties – Sammy Mweni, Herman Detering, Hilger Poehler, Patrick Becker – to the effect that the applicant received his share of rent proceeds but always complained about the amounts. He argued that the respondent had rendered accounts as required, which remained unchallenged.

9. He told the court that dissolution cannot be ordered on the basis of a business performing poorly as in this case. He clarified that the issue of jurisdiction raised in their Notice of Motion is this: the land cited in this dispute belongs to a third party, who is not a party to this suit and neither party herein has proprietary interest therein. Besides, the applicant as a foreigner cannot own freehold title to land in Kenya, hence the suit is unsustainable. That the question of dissolution must be tried by evidence.

10. The parties closed their arguments and ruling was thereafter set for 9th November, 2012. A day before the ruling, Mr. Kibunja appeared before me in another matter filed as Misc. HC Civil Case No. 29 of 2012 (OS) wherein the applicant is the respondent herein against one Hedwig Anna Hug, in a claim based on adverse possession. Although Mr. Kibunja had previously come before me on 30th July, 2012 in the same matter under certificate of urgency, it was not until 8th November, 2012 that I noted that the subject matter of the latest suit is the same land parcel cited in the dissolution application now before me.

11. The main prayers in the Misc. HCCC 29/12 OS are that:

“1. The freehold interest in land parcel No. 782 held by Anna Hug be and is hereby extinguished and be vested in the applicant.

2. The applicant is entitled by adverse possession to all that land known as parcel No. 782 Malindi (original number 590/2) and the Hon. Court do issue an order vesting the property in the applicant and that he be registered as the proprietor of all the freehold interest then” (sic).”

Two of the grounds therein state that:

a) the applicant took possession pursuant to a sale agreement between him, Fred Karl Kisewetter, a German citizen as purchasers and one Sadiq Ghalia (deceased) as vendors in 1982.

(b) The applicant has had exclusive, continuous and uninterrupted occupation of the said land parcel for thirty years paying all taxes, rates, utility bills etc.”

12. The the Originating Summons is supported by a twenty one paragraph affidavit sworn by Peter and affidavits sworn by Yolanda Mc Intnye, Godfrey Karume and Rubin Kioko all alleged past tenants at P.K. Shopping Center. Annexed thereto are a search certificate in respect of the land parcel in the name of Hedwig Anna Hug, a sale agreement, indenture and power of attorney dated 1982, 1983 respectively. All executed in respect of the suit land in favor of Peter and Karl by Sadiq Ghalia Advocate. The court has directed that Mr. Kibunja advertises the said suit. But on 9th November, 2012 when the ruling in HCCC 17/2011 came up for mention, Mr. Kibunja did confirm that the parties and the properties named in his latest suit are the same as in the present case. I will be returning to the MISC. HCCC No. 29 of 2012 (OS) presently.

13. For now, I need to answer the question whether, *prima facie*, a business partnership exists between the parties herein, and secondly, whether it is just and convenient in the circumstances of this case to appoint a receiver manager in respect of the said business property.

14. Although the applicant's Notice of Motion also cites Order 40 of the Civil Procedure Rules, it does appear from the prayers and material canvassed that the Notice of Motion is primarily brought under the provisions of Order 41. Order 41 rule 1(1) and (2) state as follows:

“1. (1) Where it appears to the court to be just and convenient, the court may by order —

(a) appoint a receiver of any property, whether before or after decree;

(b) remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver; and

(d) confer upon the receiver all such powers as to bringing and defending suits and for the realisation, management, protection, preservation, and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of such documents as the owner himself has, or such of those powers as the court thinks fit.

(2) Nothing in this rule shall authorise the court to remove from the possession or custody of any person property whom any party to the suit has not a present right so to remove.

[Order 41, rule 2.] Remuneration.

2. The court may, by general or special order, fix the amount to be paid as remuneration for the services of the receiver.”

15. With regard to the first question, the ruling on the Preliminary Objection by Omondi J. clearly stated that:

“There is a reasonable probabilitythat a partnership exists, and it would appear that what is now being contested is whether the partnership is valid due to the plaintiff's (Karl) immigration status.”

Earlier the judge observed as follows:

“The evidence on record prima facie shows that the defendant (Peter) is the manager of the business and is the one responsible for the day to day running of the affairs of the partnership.”

At this stage, I can add nothing more to the said observations save, having also perused the record to endorse them. Besides, Mr. Kibunja himself during the oral arguments did say this: *“Mr. ole Kina has answered questions about existence of partnership and income. He said yes. We too say Yes. But the mode of transmission of proceeds has been explained by the respondent....”*

16. Regarding the second question, the applicable principle is whether it is just and convenient in this case to appoint a receiver manager. It is not in dispute that the applicant has long complained about the amount of profits he derived from the business and that he did not trust his partner, or according to Mr. Kibunja, any one else. The respondent has sought to explain that the business has been doing poorly and that he furnished necessary accounts to the applicant, in addition to remitting to him his due portion of the profits. Annexed to the replying affidavit of Peter are returns for several years in respect of rentals for plot no. 782 Malindi, all in Peter's name.

17. The affidavits of Mweni Detering, Holger, and Becker while confirming that the business was not vibrant also confirm two other matters, firstly, that Karl expressed unhappiness over the 'envelopes' of hitherto undisclosed rentals he allegedly received and that as early as 1999, he informed Becker that

“he had fallen out with Mr. Koeneck who also refused to safe keep his share of the rent collection during his absence....asked me to speak to Mr. Koenecke to pay him Kshs. 500,000/- inclusive of interest accumulated over the past ten (10) years where he was short paid of his share.” (sic)

18. The applicant has annexed correspondence on this matter as Pexh.4. No record, besides the accounts in the name of Peter have been tendered in this application to show exactly how much was actually paid to each partner out of the rental proceeds, however minimal, over the years. It does appear

that the relationship between Peter and Karl continued to deteriorate and after a buy out proposal fell through in 1997, they only communicated through third parties (acquaintances and friends such as Becker and Wairimu and eventually advocates).

19. In one of Peter's letters marked P.Exh.5 dated 20th May, 2005 addressed to counsel to the applicant, it is stated:

“Your letter on the above refers. Ms. Wairimu has got my proxy to deal as necessary with any business related to property known as P. K. Shopping situated on Plot No. 782 Malindi. I do not wish to sit on the same table again with Mr. Kieswetter. Meanwhile we would like to offer Kshs. 6M for Mr. Kiesewetter's share, payable in 60 monthly installments at 100,000/=...(sic)”

The replying affidavit states that the proceeds were always shared but there is no evidence of the actual sharing and receipts. Besides the involvement of third parties even for purposes of discussing business matters was clearly necessitated by the breakdown of relationships between the partners. The respondent claims in his replying affidavit that the applicant does in fact owe him undisclosed sums of money even while denying that he owes the applicant over shs. 8M in unremitted rentals. The partners' relationship is clearly unhealthy.

20. According to an on-line extract of Law Book Company's **Nutshell: Corporate Insolvency Law by Richard Fisher (Sydney: LBC 2000 1st Ed.):**

“a receiver, who is an independent person appointed to take possession or assume control of a company's property, may take office as such in a number of different circumstances...the court's power to appoint a receiver) is more commonly used to preserve assets pending the resolution of a dispute; Re Newdi-Gate Colliery Ltd (1972)1 Ch. 468....the High Court and ... have jurisdiction to appoint a receiver. In any case in which it appears to the court to be just and convenient so to do...That jurisdiction, whilst it is statutory is equitable in origin; Re: Manchester and Milford Railway; exparte Cambrian Railway Co. (1880)14 Ch. D.645. Most often, that jurisdiction is exercise where there is a dispute between litigants with an interest in property or a business and where the dispute is such that, if some independent person is not appointed to assume control of that property or business, it will be at risk for want of proper maintenance and management. One common example of such a dispute is as between partners where their disagreement is so fundamental that the contained operation of the partnership is rendered impossible.”

21. Although this extract refers to Australian and UK jurisprudence, it is evident that the key consideration in those jurisdictions is in *pari materia* with our Order 41 rule 1(1) - “where it appears to the court to be just and convenient.” (see also **Anvarali Adamali & 2 others v Gulam Hussein Mulla Alibhai Civil Appeal No. 26 of 1974 (UR).**)

22. On the material before me, it is clear that the partners to the subject partnership are embroiled in a dispute over the business property of the partnership and there are such fundamental and long simmering disagreements between them that the continued operation of the business as a partnership seems impossible. The respondent reiterates that the business is doing badly.

23. In these circumstances both the business and its property appear at risk. This is where the suit Misc. HCCC 29 of 2012 (OS) has significant relevance. While that suit is yet to be heard, the material filed by Peter therein clearly evinces his desire to be the sole registered proprietor of the land parcel no. 782 Malindi which is in dispute in this case, notwithstanding the fact that the agreements he has annexed indicate that the land property was purchased jointly by himself and Karl.

24. Whether the entire property, namely the land and shops legally belongs to the business or to Peter alone or both or none of them is a different question that none of them must be resolved through evidence. So far no other contesting party has appeared to lay an adverse claim. On the face of it, the land was purchased from Sadique Ghalia by the two litigants herein while Karl admittedly constructed the shopping centre now standing thereon (see replying affidavit of Peter).

25. A perusal of Peter's pleadings in his latest suit in my view reinforces to the court the proposition that the both the business and its alleged property may be at risk. According to **Kerr on the Law and Practice as Receivers** London: Sweet & Maxwell, 1972 14th ed:-

“A receiver can only be properly appointed for the purpose of getting in and holding or securing funds or other property, which the court at the trial, or in the course of the action, will have the means of distributing amongst or making over to the persons or persons entitled thereto. The object sought by such appointment is therefore the safeguarding of property for the benefit of those entitled to it. There are two main classes of cases in which the appointment is made:

I) to enable the persons who possess rights over the property to obtain the benefits of those rights and to preserve the property pending realization where ordinary legal remedies are ineffective;

II) to preserve the property from some danger which threatens it.” (emphasis supplied)

Hence Mr. Kibunja's fear that the appointment of a receiver will determine the dissolution question may not be justified. The appointment is an interim measure intended for safeguarding the property.

In the circumstances of this case, I am satisfied that it is just and convenient to appoint a receiver manager if only to secure the property.

26. As regards the question of jurisdiction, I am not sure I understand the objection. The respondent cannot say in one breath that the property was purchased by the partners and also that it belongs to Hedwig Hug, unless he is saying that necessary transfers were never effected. In his own admission he has been in exclusive possession for 30 years, operating a business and is asserting title through adverse possession. The applicant is admittedly a joint purchaser and investor.

27. Besides, Hedwig Anna Hug, can if necessary be enjoined as a party. But if this objection is based on Order 40 rule 1(2) of the Civil Procedure Rules, the same contemplates a person in possession against another who is not entitled. Regarding the objection relating to Karl's inability to hold a freehold title in Kenya as a German citizen, I think it emanates from a misreading of Article 65 of the Constitution.

28. I do therefore grant prayer (b) of the Notice of Motion filed on 17th March, 2011, pending the hearing and determination of the Originating Summons. This order is subject to the appointed receiver furnishing written consent to act as receiver accompanied by a guarantee or bond from a reputable bank or insurance company in the sum of Kshs. 500,000/- within fourteen (14) days of today's date, as security.

29. The receiver managers will take possession of and or be responsible for: the management, protection, preservation, necessary improvement of the assets of the partnership namely P.K. Shopping (Centre), the collection of rents and profits and the deposit thereof into an interest earning account in a reputable bank, and the diligent application and disposal of such rents and profits as well as the execution of necessary documents.

30. They will prepare and file accounts in respect of all rents and profits received from the property into court and serve upon the litigants' advocates on a quarterly basis. For their services the receivers will be entitled to a reasonable remuneration out of profits collected, based on current rates for such services as approved by the relevant professional association or society such as Institute of Surveyors Kenya.

31. The costs of this application are awarded to the applicant. It goes without saying that the respondent's Notice of Motion dated 12th June, 2012 is both premature and lacking in legal merit. It appears to be a second preliminary objection to the Originating summons. It is dismissed.

Delivered and signed at Malindi this **12th** day of **November, 2012** in the presence of: Mr. Mouko for the defendant, Mr. Mwangi holding brief for Mr. ole Kina for the applicant.

Court clerk - Evans

C. W. Meoli
JUDGE

MR. MOUKO

I seek leave to appeal and certified copies of proceedings and ruling. We also seek a temporary stay for 30 days to enable intended appellant file formal application. No prejudice will be occasioned to the plaintiff. Thirty days' stay will not cause prejudice.

C. W. Meoli
JUDGE

MR. MWANGI

I am unfamiliar with the case, not sure of this matter but stay can always be granted subject to directions of the court.

C. W. Meoli
JUDGE

COURT

Let Mr. Ole Kina be present tomorrow 13th November, 2012 for arguing the oral application for stay.

C. W. Meoli
JUDGE

13th November, 2012

Before Hon. C W Meoli J.

Mr. Ole Kina for applicant

Mr. Mouko for respondent

court clerk - Evans

MR. MOUKO

We are seeking stay for 30 days to enable the respondent file a formal application. Court can also give any period. Reason is that the respondent intends to file an appeal and if execution is carried out, the appeal will be rendered nugatory. It will not be possible to reverse the position. Property has been in the hands of the respondent. Stay of thirty days will not make a big difference. Applicant will not be prejudiced; he has waited for many years. Respondent undertakes not to change status of the property until formal application heard and determined. No actual business going on – only tenants. Stay for two weeks or one month will be enough even on conditions.

C. W. Meoli

JUDGE

MR. OLE KINA

With the greatest respect I object to the application. The orders given by the court are to take effect within fourteen days, so effectively within the order itself there is a time within which the respondent can make his application. Then the same can be heard on its merits.

Other issues can....

The respondent cannot perpetuate a state where the applicant's rights continue to be infringed upon. Not true there will be no prejudice.

Exclusion from business itself is evidence of prejudice. I urge court to reject the application and the respondent to put in their application for hearing on merits.

C. W. Meoli
JUDGE

MR. MOUKO

Mr. Ole Kina says nothing will happen within fourteen days. If that is the case, then we can put in our application. Court should make it clear. If the applicant says no execution will take place within the fourteen days, we will be comfortable. Stay can be granted for fourteen days. The receiver can move immediately. We have shown intention to contest the ruling.

C. W. Meoli
JUDGE

ORDER

I have considered the matters canvassed before me and in the interest of justice will order that there be a stay of execution for five (5) days pending the filing of a formal application, BUT subject to the respondent depositing into court a sum of shs. 500,000/= by 5.00pm on 14th November, 2012.

C. W. Meoli
JUDGE