



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO.93 OF 2006
DALWANT SINGH MATHARU & NEETA MATHARU T/A BEES
ELECTRICAL CONTRACTORS & REWINDERS.....APPLICANTS/APPELLANTS
VERSUS
SHARKISH FLORA LIMITED.....RESPONDENT

RULING

The applicants being aggrieved by the judgment and decree of Hon. Gilbert Mutembei, Chief Magistrate in Nakuru CMCC No.1883 of 2004 filed this appeal challenging the decision to dismiss the applicants' claim against the respondent, Sharkish Flora Limited. The record of Appeal was filed on 5th September, 2007.

Four and a half (4½) years later, on 23rd March, 2011, the applicants have come back with the information that the respondent was placed under receivership on 4th October, 2010 and a receiver (Samuel O. Onyango) and a manager (Harveen Gadhoka) appointed.

Because the applicants are still desirous of prosecuting their appeal, they have brought the present chamber summons dated 17th March, 2011 for leave of the court to join the receiver and the manager as co-respondents in these proceedings. The application and hearing notice were served on the firm of Mong'eri and Company Advocates, advocates for the respondent, who did not respond to the application or attend court for the hearing of the application.

The application is expressed to be brought under **Order 1 Rules 10(2)** and **14** of the **Civil Procedure Rules** as well as the usual **Section 3A** of the **Civil Procedure Act**. Perhaps it is being suggested in this application that the presence of the receiver and the manager before the court is necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the appeal. See **rule 10(2)**. **Rule 14** cited here, however, has no relevance to the application.

Although it is settled that suits against the receivers and managers of a company under receivership can only be brought with the leave of the court, this, however, is not a suit against the receiver and the manager. See **The Code of Civil Procedure** by **Sir D. F. Mulla** at Pg. 972. The appointment of a receiver and a manager must not be confused with that of a liquidator. A company need not go into winding up in order for the receiver and manager to be appointed. The function of a receiver is merely to

get in the assets charged, to collect the rents and profits, to exercise the debenture-holders' powers of realization and to pay the net proceeds to holders in reduction of their charge.

The decisions, mainly, English cases cited in some local cases, are not unanimous as regards the role of the receiver *vis à vis* that of the directors with regard to suits. There are those decisions that maintain that the appointment of the receiver does not take away the company's capacity to sue or be sued; that it does not divest the directors of a company of their power to pursue a right of action that is not prejudicial to the company. See **Newhart Development Limited V. Cooperative Commercial Bank** (1978) 2 W.L.R 636.

On the other hand, **Palmer's Company Law** 25th Edition; Paragraph 14. 143, **Re: Foster Clark Ltd's Indenture Trusts** (1966) 1 W.L.R. 125, and **Tudor Grange Holdings Limited et al V. Citibank NA & Another** (1991) 3WLR 750 are categorical that it is untenable to have the directors and the receiver/manager in one company at the same time. That, in view of their different interests and views, chaos and conflicts would result.

But the point in the instant application is whether the receiver and the manager ought to be joined in these proceedings for the applicants to prosecute their appeal.

In my considered view, that is not necessary. The company, as a separate legal entity is in existence with all its structures. Although the appointment of the receiver/manager supercedes or puts in abeyance the power of the company in the conduct of its business, the company may still bring an action which is in the company's interest and benefit so long as the action does not interfere with the receiver's function of getting in the company's assets or affect adversely the debenture-holder's interests. Indeed the directors do still retain some residual powers or at least duties, such as the preparation of annual returns to the Registrar of Companies, preparation of the annual audit of the company's account.

For the reasons stated, the joining of the receiver and the manager in these proceedings will serve no purpose. The appeal against the company was not affected by the appointment of the receiver/manager.

For these reasons, the application is dismissed.

I make no orders as to costs.

Dated, Signed and Delivered at Nakuru this 30th day of November, 2011.

W. OUKO
JUDGE