

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS) Environmental & Land Case 75 of 2010

MANDEV LIMITED.....PLAINTIFF

V E R S U S

M. K. & SONS LIMITED (under receivership).....1ST DEFENDANT

AZIM VIRJEE (Receiver – Manager of M. K. & Sons Limited) ...2ND DEFENDANT

R U L I N G

The 1st Defendant is a company under receivership and has been sued jointly with the Receiver Manager (2nd Defendant) by the Plaintiff who seeks possession of godowns on LR. No.209/9724 which it contents in owns and which it had leased to the company on 1st March 2006 for five years and which lease is said to have expired on 31st July, 2010. Also sought are orders of mandatory injunction, *mesne* profits, interest and costs. With the suit was filed a notice of motion for a mandatory injunction. The Application was served on 2nd Defendant who instructed Kale Maina & Bundotich who filed a notice of appointment for the Defendants. The Defendants have not filed any papers and have indicated they do not wish to oppose the application.

However, Rachier & Amollo Advocates have filed a notice of appointment indicating they act for the 1st Defendant. This was opposed by both Mr. Muthui for the Plaintiff and Mr. Bundotich for the Defendants. Their position is that once Kale Maina & Bundotich Advocates are on record as acting for the Defendants, Rachier & Amollo Advocates cannot come into the matter for any of the Defendants unless they have filed a notice of change of advocates as required by **Order III rule 6** of the **Civil Procedure Rules**. Since there is no notice of change filed, counsel went on, the firm competently on record as representing the Defendants is Kale Maina & Bundotich Advocates. Mr. Arwa sought to wriggle out of that correct position of the law by stating that the 1st Defendant did not instruct Kale Maina & Bundotich Advocates but have instead instructed his firm; that the 1st Defendant was unaware of these proceedings until he saw them in the cause list on the morning of the hearing; and that the Plaintiff and the 2nd Defendant have conspired to wrestle the property from the 1st Defendant by now wanting to record a consent. It would be difficult to deal with these serious allegations unless they have been deponed to in an

affidavit. However, the parties appear to agree that there exists another suit, **No. HCCC No. 40 of 2010**, in which the 1st Defendant has sued the 2nd Defendant and the Plaintiff. This fact was disclosed in the plaint.

Rachier & Amollo Advocates were required to file notice of change of advocates if the intention of the 1st Defendant was to have them act on their behalf in place of the firm now on record. Even then, Mr. Bundotich and Mr. Muthui have submitted that once the 1st Defendant was placed under receivership it lost the capacity to sue or be sued in its name as a company. Mr. Muthui relied on the decision in **OMONDI & ANOTHER –VS- NATIONAL BANK OF KENYA LTD & 2 OTHERS [2001] KLR 579**. Mr. Arwa’s view was that receivership did not take away the company’s capacity to sue or be sued and placed reliance on **NEWHART DEVELOPMENTS LTD – VS- COOPERATIVE COMMERCIAL BANK LTD [1978] 2 ALL ER 896** and **TUDOR GRANGE HOLDINGS LTD AND OTHERS –VS- CITIBANK NA AND ANOTHER [1991] 4 ALL ER 1**. In the instant case, the 1st Defendant is not suing, but is being sued through the Receiver Manager. The general principle is that once a company has been placed under receivership it lacks the legal competence to institute a suit or be sued in its company name. It can only sue or be sued through the receiver. It is only in certain circumstances that the company directors have power to conduct legal proceedings even after the appointment of a receiver. This residual power cannot, however, be exercised where the proceedings could directly infringe on the property subject of the receiver’s powers or where the receiver’s position would be prejudiced by their decision to bring such proceedings. In **KISSI PETROLEUM PRODUCTS LTD –VS- KOBIL PETROLEUM, Civil Application No. 309 of 2003 at Nairobi**, the Court of Appeal observed thus:-

“It seems to us that the question whether it is the directors of a company or the receivers appointed under the debenture who have the capacity or legal right to institute proceedings will ultimately and invariably depend on the nature of the intended proceedings and the peculiar circumstances of each case.”

Rachier & Amollo Advocates want to come on record for the 1st Defendant who is under receivership. Such Defendant can only be sued through the receiver, and in this case the receiver has appointed advocates to act for it. Rachier & Amollo Advocates are not acting for the directors of the company, at least that is not borne out by the notice filed. The directors are not a party to the suit which the Plaintiff filed.

The result is that the notice by Rachier & Amollo Advocate seeking to act for the 1st Defendant is incompetent and is struck out with costs.

DATED, DELIVERED AND SIGNED AT NAIROBI

THIS 8TH DAY OF MARCH, 2010

A. O. MUCHELULE

JUDGE