REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 718 of 2008

§ ***Preliminary objection: order III rule 2(c) of Civil Procedure Rules***

§ ***Plaintiff company under Receiver's Manager appointed by Debenture holder/suit challenging decision of do-directors***

§ ***Whether resolution by Directors of Company or members needed before suit could be filed***

§ ***Whether S241 of Companies Act applies***

MULTI OPTIONS LIMITED ……..……PLAINTIFF/APPLICANT

(IN RECEIVERSHIP)

VERSUS

KALPANA S. JAI…….1ST DEFENDANT/RESPONDENT

SHAMIR K. DESAI……..……2ND DEFENDANT/RESPONDENT

BHANOO SHASHIKANT JAI……..3RD DEFENDANT/RESPONDENT

R U L I N G

This is a Preliminary Objection filed by the 3rd Defendant, who is one of the Respondents in the application dated 2nd December 2008. The Preliminary Objection is premised under order III rule 2(c) of Civil Procedure Rules. Four grounds are raised in the Preliminary Objection which are:

1. This suit was instituted without the express authority of the Plaintiff company as it was not sanctioned by any of its relevant organs.

2. Neither the Law firm of MURI MWANIKI & WAMITI ADVOCATES who filed this suit on 4th December, 2008, nor the law firm of MAJANJA LUSENO & COMPANY ADVOCATES who replaced them on 3rd February 2009 had the authority or instructions of the Plaintiff to represent or continue with these proceedings in its name or on its behalf

3. MR. DAVID KIBET CHEBII, who swore the verifying affidavit and the affidavit in support of the Chamber Summons dated 2nd December, 2008 did not have the authority or instructions of the Plaintiff to

do so.

4. The suit having been filed without the authority or sanction of the recognized organs of the Plaintiff is an abuse of the process of Court and should be struck out with costs.

In brief what the 3rd Respondent is saying is that this suit, which has been brought by a Receiver/Manager appointed by a Debenture holder, Akiba Bank currently known as Eco Bank, had no locus to file the suit because there is no proof that it obtained a resolution either by directors or shareholders of the company giving him the authority to file the suit and/or to appoint advocates to file the suit. Mr. Omuga for the 3rd Defendant relies on several authorities for the preposition that the suit was brought without authority of any organ of the Company and should be struck off and the Plaintiff's Advocate ordered to personally pay the costs of the suit and of the application.. In the case of Bugerere Coffee Growers Limited vs. Sebaduka & Another [1970] EA 147 it was held:

"(i) when companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Directors; meeting and recorded in the minutes; no such resolution had been passed authorizing these proceedings;

(ii) where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the Defendants for the costs of the action.

(iii) the advocates should be ordered to pay the costs."

He also relied on the case of Trust Finance Limited vs. Abrahim Kipsang Kiptanui HCCC No. 654 of 2002) where my brother Justice Ombija quoted with approval from the case of Trade Bank Limited (in liquidation) vs. Manmohan Singh Chawla T/A Gem Promotions Nairobi HCCC No. 1568 of 1995 (unreported). Pall J. at page 3 had this to say:

"However section 241(1) of the Companies Act is so clearly worded that there can be no doubt that the sanction of the court must be obtained either at the time or before the action has been brought. A sanction granted by the court under this section cannot have a retrospective effect which means that an action brought without the sanction of the court cannot be cured by an ex-post facto order of the court"

The learned judge Ombija himself had this to say;

"It follows therefore that the liquidator having failed to obtain the sanction of the court before purporting to appoint an advocate to act for the Plaintiff, the appointed advocate had no authority to act as such. He had no legal right to appear for the plaintiff in these proceedings."

Mr. Omuga also relies on the case of Ansapar Beverages Limited vs. Development Bank of Kenya Limited & 5 others (HCCC No. 1155 of 2000) thus:

"This point is a perfectly valid one in law. A company cannot institute a suit in its own name unless such action has been sanctioned by either the Board of Directors or the company in general or special meeting. Such sanction is to be evidenced by a resolution to that effect. In the instant matter, like I said earlier during the consideration of this point of objection, there is no traverse of the pleading that the suit was instituted without the authority of the company itself. That being so it must be taken that the suit was instituted by Mr. Tanna without the authority of the company through its Board of Directors or its shareholders in a general or special meeting. Such a suit is incompetent and must be struck out. In the premises, the first point of objection is upheld…

The upshot of this matter is that the first point of preliminary objection is upheld and the suit is accordingly struck out with costs to the defendants. In view of the fact that the suit was instituted by Mr. Arvind Tanna without the authority of the company through any of its organs. It is further ordered that the costs of both the suit and the application be paid by Mr. Arvind Tanna personally"

Mr. Omuga relied on the case of East African Safari Air Limited vs. Anthony Ambaka Kegode & Another, where my learned brother Justice Emukule had this to say:

"It is of course trite law that so far as a corporation is concerned, its agent for purposes of litigation is an officer authorized under its seal. That is the requirement of Order III rule 2(c) of the Civil Procedure rules. Where the authority of an agent is challenged like in this application, it behoves the corporation to show such authority; the mere fact of appointment as a director does not constitute one an agent for purposes of suit….

The proviso to the said section 27(1) enjoins that costs of any action cause or other matter or issue shall follow the event unless the court or judge shall for good reasons otherwise order. I have no good reason for ordering otherwise. The defendants shall have the costs of the suit, and the application.

In the matters where orders of costs are to be made against an Advocate or firm of Advocates personally, the court must be satisfied that indeed the Advocate or the Advocate's firm had no authority to institute suit against the Defendant or Defendants

…..when an advocate is however instructed of a client, and particularly against current or sitting directors or immediately former directors of a company, special care is required on the part of the Advocate or his firm that necessary authorizations by way of clear resolutions of the Board have been taken to institute suit.

In the matter at hand the Plaintiff's counsel ignored or misread those warning bells and thereby invited upon themselves the peril of incurring the costs of not only the application but also the suit itself."

Mr. Kibet represented the 1st and 2nd Defendants in this suit. Counsel concurred with the submission made by Mr. Omuga and supported the preliminary objection.

The Preliminary Objection has been opposed. Mr. Majanja for the Plaintiff argued that the grounds raised in the Preliminary Objection do not qualify to be raised as a PO. Mr. Majanja contended that no rule required a party to exhibit a resolution to prove authority to file a suit as demanded by the 3rd Defendant. Mr. Majanja submitted that the Plaintiff's company is under receivership and that it is the Receiver who swore the verifying affidavit. He urged further that the receivership arises out of a debenture over the Plaintiff company. Mr. Majanja relies on paragraph 5(c) of the plaint where it says that the Receivers are agents of the company, and that under the Debenture, the Receiver had the power to take over or to file a suit in the name of the company. Mr. Majanja referred the court to clause 17 of the Debenture where the role of the Receiver is outlined. That clause provides:

"Clause 17. Every Receiver shall be the agent of the Company and the Company shall alone be liable for his acts, defaults and remuneration and he shall have authority and be entitled to exercise the powers set out below in addition to and without limiting any powers conferred upon him by law:

a. to enter upon, take possession of, collect and get in any of the Charged Assets, to exercise in respect of the Securities all voting or other powers or rights and to take, defend or discontinue any proceedings or submit to arbitration in the name of the Company or otherwise as he shall think fit;

b. to carry on, manage, develop, reconstruct, amalgamate or diversify the business of the Company or concur in so doing and to lease or otherwise acquire and develop or improve properties or other assets without being responsible for loss or damage and to raise or borrow any money from or to incur any other liability to the Bank or others on such terms, with or without security, as he may think fit and so that any security may be or include a charge on any of the Charged Assets ranking in priority to this security or otherwise;

c. to sell by public auction or private contract, let or concur in selling or letting and to terminate or to accept surrenders of tenancies and leases of any of the Charged Assets in such manner and generally on such terms and conditions as he shall think fit and to carry any sale or letting into effect in the name and

on behalf of the Company;

d. to make any arrangement or compromise which the Bank or he shall think fit;

e. to promote the formation of companies with a view to their purchasing, leasing, licensing or otherwise acquiring interests in any of the Charged Assets or otherwise and to arrange for those companies to trade or cease to trade or to purchase, lease, licence or otherwise acquire any of the Charged Assets on such terms and conditions, whether or not including payment by installments and with or without security, as he may think fi

f. to appoint and to dismiss managers, agents, officers and employees upon such terms as to remuneration or otherwise as he may determine;

g. to call up all or any portion of the uncalled capital of the Company;

h. to sign any document, execute any deed and do all such other acts and things as may be considered to be incidental or conducive to any of these matters or powers or to the realisation of this security."

Mr. Majanja submitted that once the Debenture holders appointed a Receiver, the powers of the directors of the company ceased and there was therefore no need or legal requirement for a resolution by the company authorizing the suit to be filed. Mr. Majanja has relied on the Court of Appeal case of Lochab Brothers vs. Kenya Furfural Co. limited [1983] KLR where Madan, Kneller, JJA and Chesoni Ag. JA held:

"A receiver cannot sue in his own name as receiver since he has no property vested in him and so acquires no right of action by his appointment. Nor can the court give a receiver leave to sue as receiver. The receiver's duty is to take care of and receive the property which is put under his charge and he is not at liberty and is not entitled to bring an action in his own name. Thus the second respondents had no locus standi and they could bring the proceedings only in the name of the company whose agents they were."

Mr. Majanja also relied on the case of Moss Steamship Company Ltd. vs. Whinney thus:

"A great many joint stock companies obtain their capita, or a considerate part it, by the issue of debentures, and one form of securing debenture-holders in their rights is a well known form of application to the Court which practically removes the conduct and guidance of the undertaking from the directors appointed by the company and places it in the hands of a manager and receiver, who thereupon absolutely supersedes the company itself, which becomes incapable of making any contract on its own behalf or exercising any control over any part of its property or assets"

This appointment of a receiver and manger over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession of the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance."

Mr. Majanja has distinguished the cases cited by the 3rd Defendant as being irrelevant and made the following observations.

Regarding the Bugerere Case, Mr. Majanja urged that it is distinguishable on the grounds, that the dispute revolved around different factions of Directors and share holders of the Company and that the court had to satisfy itself which advocate had authority to sue. He urged that the issue was decided after a full hearing of the case.

Regarding the Anspar case counsel distinguished it and submitted that the issue was whether a director

can institute a suit through a company when receivers have been appointed. Counsel submitted that the Court stated that a company can file suit where there is a receiver but only after directors obtained authority from persons in control of the company. It had nothing to do with receivers' authority.

In regard to the case of Trust Company, Counsel urged that Section 240 of the Companies Act, was clear that a Liquidator once appointed needs leave of court to institute proceedings. Counsel submitted that there was no liquidator in the instant case.

In regard to the East African Safari case, counsel argued that the case involved shareholders and that the issue in the case was, who were the proper shareholders and whether the party suing had proper authority.

Counsel urged that the preliminary objection should not be upheld. Counsel urged the court to find that the Debenture have accrued. That even if suit were struck out the receivers will be compromised. Mr. Majanja submitted that the case involves serious fraud against the Defendants and that to rule in their favour will mean the Debenture holder will need leave from them to sue.

I have considered the submissions by all counsels in the Preliminary Objection. The cases that have been cited by Mr. Omuga for the 3rd Defendant do not apply to this case as the facts and circumstances of the instant suit are different from those in the cases cited. For instance in the Bugerere case, supra, the company was not under receivership as in the instant case. Since it was not under any receiverships it was therefore necessary that there should have been a resolution passed by either the Shareholders or members of the companies or board of directors authorizing the proceedings. Not so in the instant case.

In the Trust Finance Limited case, supra, the case involved a liquidator and under section 241 of the Companies Act, the sanction of the court is required to institute the proceedings, either before or at the time of bringing the action. No Liquidator is involved in the instant case and Section 241 of the Companies Act does not apply.

In Anspar case, supra, the company was under receivership and it purported to institute proceedings in its own name challenging the appointment of the Receiver/Manager without the consent of the Receiver/Manager and without the authority from the Directors or any organ of the Company. The court held that the company could not institute the case in its own name, but that since it was under receivership and it was challenging the appointment of the Receiver/Manager, it ought to have obtained the authority of the directors of the companies to bring the suit, which was not done.

In the case of East Safari Air Limited, supra, the company was not under receivership. The case is irrelevant.

Getting back to the matter in issue in this case, I chose not to address the issue whether the grounds raised in the notice of preliminary objection are pure points of law. I have decided to deal with the issues raised as they are of paramount importance to the case. I do find that the instant suit was brought by a Receiver Manager appointed by the Debenture holder in accordance to clauses 14 and 17 of the Debenture. I am satisfied that the Debenture had crystallized before the Debenture holder appointed the Receiver/Manager to take over the Company. Upon appointment the Receiver/Manager instituted the proceedings in the name of the Plaintiff Company. I am satisfied that the Receiver was authorised to take the proceedings in the name of the company, being an agent of the company. Under the Debenture the receiver has power to take care of and receiver the property of the Plaintiff Company under his charge. The Debenture, having crystallized, gave the Receiver Manager the necessary authority to bring these proceedings. The appointment of the Receiver Manager is governed by the Debenture and not the Companies Act per se. I am satisfied that the appointment of the Receiver Manager having been done by the Debenture are lawful and that therefore the Receiver Manager has the locus standi to bring these proceedings.

I can understand why the Defendants are challenging the locus of the Receiver Manager to institute these proceedings being directors of the Plaintiff Company. The suit has not been brought under the Companies Act. Secondly, the Receiver Manager is an agent of the Plaintiff company to take of the assets of the company. It was not necessary for the directors of the company who include the Defendants

sin this suit to give permission to the Receiver to institute the proceedings, neither was their permission required in order to validate the proceedings. The action that has been brought by the Receiver Manager is in the Plaintiff's company interest.

Given the circumstances of the case that the suit is being brought against the directors of the Plaintiff company, it is impossible to contemplate that the directors will give permission or consent to the Receiver Manager of the Company to bring the suit. The institution of the instant suit was not dependant on the authority of the directors or a resolution of the board or of the company, as to hold that way the possibility of injustice being done would be very real. The institution of the instant suit was dependent upon the Debenture and I find and hold the case has properly been instituted with authority derived from the said Debenture. The Preliminary Objection raised by the 3rd Defendant in this case, is accordingly dismissed for lack of merit with costs to the Plaintiff.

Dated at Nairobi this 29th day of May 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Majanja for the Applicant

Mr. Omuga holding brief Mr. Kibet for the 1st and 2nd Defendant

Mr. Omuga for the 3rd Defendant

LESIIT, J.

JUDGE