



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 260 of 2005

VINCENT O. KANYANGONDAPLAINTIFF

VERSUS

H. W. GICHUHI 1ST DEFENDANT

PETER NDAA.....2ND DEFENDANT

RULING

The plaintiff herein has moved the Court that judgment be entered for the admitted sum of Kshs.471,499/= together with interest thereon jointly and severally against the defendants. In the alternative, he applies that summary judgment and/or default judgment be entered against the first defendant who has no defence at all to the plaintiff's entire claim. The application is brought by way of a Notice of Motion dated 20th April, 2005, and made under O. XII rule 6, O.XXXV rule 5, O. L. rule 1 and O.IXA rules 3 and 4 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, Cap. 21 of the Laws of Kenya. It is supported by the plaintiff's affidavit sworn on 20th April, 2005.

The grounds upon which the application is premised are that the first defendant has not entered appearance or filed a defence despite service; that in his defence the second defendant has admitted the claim in the sum of Kshs.471,499/=; and that the defendants have no valid, proper, tangible or clear defence to the plaintiff's claim.

The application is totally opposed by the 1st defendant. On 10th May, 2005, the said defendant gave notice that at the hearing of the plaintiff's above application, the 1st defendant would contend that the entire suit is bad in law as the plaintiff has instituted the suit and application against the wrong parties and would further urge this Court to strike out both the suit and the application. In addition to the Notice of the Preliminary Objection, the first defendant also filed the following grounds of opposition-

1. *The application and suit are incompetent.*
2. *There is a dispute as to who is the competent defendant.*
3. *The defence of the first defendant raised triable issues.*
4. *The application is an abuse of the process of the Court.*
5. *The defence of the second defendant contradicts the letter of termination dated 13th August, 2004.*
6. *There is pending before this Honourable Court in HCCC NO.1111 of 2003 a dispute regarding the management of the Grand Regency Hotel and this suit and the application are therefore premature.*

Further to the Notice of Preliminary Objection and the grounds of opposition, the first defendant also filed a Replying Affidavit sworn on 11th May, 2005.

At the hearing of the application, Mr. Kopere appeared for the Plaintiff/Applicant. The 1st Defendant/Respondent was represented by Mr. Gacheru, and the 2nd Defendant/Respondent by Mr. Njihia all counsels agreed that the 1st Respondent's Preliminary Objection would be heard along the main application. After considering the pleadings, the submissions of Counsel and the authorities cited, it seems to me that the main issues to be determined are whether the Respondents are the rightful Defendants in this matter, and if so, whether judgment ought to be entered against them.

The applicant's case is that he was employed by the Grand Regency Hotel first as an Assistant Human Resources Manager with effect from 2nd June, 1999, and thereafter as the Public Relations Manager with effect from 1st September, 2000. By a letter dated 13th August, 2004 and signed by the Respondents as Joint Court Appointed Receivers/Managers, the applicant's services were terminated with effect from 13th September, 2004. According to paragraph 9 of his plaint, the applicant claims that his terminal dues were as follows-

- a) Two (2) months salary in lieu of notice Kshs.230,000/=
- b) 50 Leave days pending 191,666/=
- c) 13 days pay (September 2004) 49,833/=
- d) Gratuity at 15 days per year for 5 years 287,500/=

TOTAL Kshs.758,999/=

He therefore claims this sum, together with general and special damages, as well as the costs of the suit. The Respondents are sued as the Joint Court Appointed Receivers/Managers.

The 1st Respondent's preliminary objection, as articulated by Mr. Gacheru, is that the Receivers cannot be sued in their own names even when they are appointed by the Court. He further submitted that this principle applies not only where the Receiver is suing, but also where he is being sued. Secondly, Mr. Gacheru argued that the proceedings for leave to sue the Receiver were defective because the Plaintiff applied for leave in separate proceedings whereas such leave should have been sought in the action in which the Receiver was appointed. He contended that in this case there is no existing defendant and therefore the suit ought to be struck out.

The short background to this application is that by consent orders dated 31st May, 2004 and filed in Court on 7th June, 2004 in **KENYA ANTI-CORRUPTION COMMISSION v. KAMLESH M.D. PATTNI & 16 OTHERS, HC MISC. CIVIL SUIT NO. 1111 OF 2003 (OS)**, the two defendants were appointed as the Joint Receivers/Managers of the Grand Regency Hotel with effect from 7th June, 2004. After the Plaintiff/Applicant's services were terminated with effect from 13th September, 2004, he filed **HC MISC.Application No. 109 of 2005**, seeking leave to commence this suit and proceedings. Leave was duly granted on 26th January 2005, and the suit filed on 7th March, 2005. The defendants are sued as the Joint Court Appointed Receivers/Managers of the Hotel. Are they properly sued as the defendants herein? In the case of **SARTORIS v. SARTORIS** [1892] 1 Ch. II, Chitty J. set down the principle of law in the following words-

"...A Receiver appointed in an action, is to take care of, and receive the property which is put under his charge. He is not at liberty, and is not entitled, to bring an action in his own name; the reason being, that he has no property vested in him; and if a Receiver is appointed for the purpose of getting in outstanding estate, and those in whose hands the outstanding estate is, decline to pay him, it is generally that an action should be brought, and where the action has to be brought, it is not brought in the name of

the Receiver, but in the name of the party to the action who has the legal or equitable title on which the title is founded ...”

These words found favour with the Kenya Court of Appeal in **LOCHAB BROS v. FURFURAL CO. LTD & 2 OTHERS** [1982-88]1 KAR 335 in which Madan, J.A., as she then was summarized the basic principle at p.338 thus –

“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.”

On his part, in the same case, Kneller JA., also observed at p. 341-

“...a Receiver acquires no right of action because he has been appointed as such, so he cannot sue in his own name as Receiver, and the Court cannot authorize him to do so. He must maintain the action in the name of the person or persons entitled to sue, who would be the one who has the legal or equitable title on which the action is founded. The fact is, the property which is put under his care and the income which he is entitled to receive does not vest in him.”

The guideline embodied in the above statements is as clear as daylight. The import of those pronouncements is that a Receiver cannot sue in his own name, and the Court cannot authorize him to do so. It is notable, however, that these statements were made in the context of a Debenture. But in this matter, we are not dealing with a Receiver appointed by a Debenture holder. Rather, we are dealing with an action against Joint Court Appointed Receivers. This brings me to the second observation, which is that all the above statements refer to an action by a Receiver. In none of them is there any reference to an action against a Receiver – and a Court Appointed Receiver at that. Does one need leave of Court before one can sue a Receiver in the latter’s capacity as a Receiver?

Mr. Gacheru for the 1st Respondent submitted that the principle enunciated in the above excerpts applied not only where a Receiver is suing, but also where he is being sued. Although he did not cite any authority, his submission finds support in Kerr on the Law and Practice as to Receivers and Administrators where he says at p. 155 -

“Nobody can bring an action against a Receiver, in his capacity as such, without the leave of the Court, and if such an action is brought without leave, its further prosecution will be restrained.”

Where there is a provision for the appointment of a Receiver in a Debenture, it is the Debenture Deed which governs the propriety or otherwise of the appointment and the mode of operation of the Receiver.

But where a Receiver is appointed by the Court, then it is the terms of the Court order which determine how the Receiver is to discharge the functions of his office. The Court has a free hand in settling those terms. O.XL rule 1(1)(d) of the Civil Procedure Rules provides thus –

“Where it appears to the Court to be just and convenient, the Court may order –

...confer upon the Receiver all such powers as to bringing and defending suits ... as the Court thinks fit.”

In this matter, the Respondents who are the Joint Court Appointed Receivers, were appointed by a consent order.

Order 2(ii)(f) thereof states –

“The Joint Receivers/Managers shall have power to ... jointly take, defend, prosecute or become parties howsoever to any proceedings, suits and actions relevant to the affairs of the Grand Regency Hotel ...”

As the Grand Regency Hotel is under receivership, the Receivers are the right persons to be sued,

provided the leave of the Court to that effect is first had and obtained. In **HC MISC. Application No. 109 of 2005**, the plaintiff prayed that “leave be granted to him to commence proceedings against the respondents for recovery of his terminal benefits. “This prayer was granted as prayed by a Court order made by Ransley J. on 26th January, 2005. I therefore find that by reason of clause 2(ii)(f) of the consent order, the respondents herein were jointly empowered to become parties howsoever to any proceedings, suits and actions relevant to the affairs of the Grand Regency Hotel. No doubt this suit has a direct hearing on the hotel, and therefore the action is relevant to the affairs of that hotel. I also find that leave to file this action was duly granted by the Court. Therefore, the defendants are properly before the Court in their capacities as Court Appointed Joint Receivers.

Learned counsel for the 1st Respondent submitted that proceedings to sue the Receivers were defective because the plaintiff applied for leave in separate proceedings through or miscellaneous application. He argued that the correct procedure is that any application for leave to sue or receiver should be made in the action in which the receiver was appointed. He referred the court to Hubert Picaida, *The Law Relating to Receivers, Managers and Administrators*, 3rd edition at p. 419 wherein it is stated –

“An application to the Court for leave to enforce rights ... against the Court’s Receiver should be made in the action in which the Receiver was appointed and not as a rule by independent proceedings.”

If counsel had read on, he would have noticed that Sentences of that paragraph, provide as follows –

“In certain exceptional cases a fresh action may be appropriate ... Independent proceedings may also be allowed to continue if they do not prejudice the rights of the parties to the action in which the Receiver has been appointed.”

In the instant case, the Joint Receivers were appointed in **HC Misc. Civil Suit No. 1111 of 2003 (OS)**. It has not been demonstrated that the rights of the parties thereto will be prejudiced in any manner if this action is allowed to continue. I therefore find that it is prudent to allow these proceedings to continue.

As indicated earlier, the Plaintiff’s claim is for payment of his terminal dues. Paragraph 2 of the letter dated 13th August, 2004, terminating his services reads –

“As per the Termination Clause in your employment contract, you will be paid two months salary in lieu of notice, plus all your other terminal dues.”

In paragraph 4 of his statement of defence and partial admission of claim, the 2nd Defendant states –

“The 2nd Defendant thus admits that the Grand Regency Hotel is indebted to the Plaintiff in the sum of Kshs.471,499/= as pleaded in paragraph 9(a), (b) and (c) of the Plaint.”

The only claim that the 2nd Defendant does not admit is the one in respect of gratuity which he pleads was not payable.

On his part, the 1st Defendant denies liability to pay and contends that the Plaintiff’s claim is bad in law because it is based on an illegal contract. I find the position taken by this Defendant strange and untenable. In their joint letter dated 13th August, 2004 the Joint Receivers refer to the Plaintiff’s **“Employment Contract”** and assure the plaintiff that he **“will be paid two months salary in lieu of notice, plus all other terminal dues.”** When the Plaintiff files action to demand those same dues, the 1st Defendant turns around and begins questioning the veracity of the very contract under which the Receivers had jointly undertaken to pay. Yet that contract had been honoured to the letter by the previous Receiver and the Hotel Management. I do not think it is open to the 1st defendant to audit the validity of contracts entered into and observed before he was appointed a Joint Receiver; not especially after he has undertaken to pay the Plaintiff’s dues under that contract.

For the above reasons I find that on the basis of the letter signed by the Joint Receivers on 13th August, 20094, and the admission of the 2nd Defendant, the Plaintiff is entitled to judgment on admission under O.XII rule 6 of the Civil Procedure Rules. I accordingly make the following orders-

- 1. That judgment be and is hereby entered for the applicant against the respondents in their capacity as joint receivers for the admitted sum of Kshs.471,499/= together with interest at commercial rates with effect from 13th September, 2004 until payment in full.*
- 2. The defendants will pay the costs of this application as well as those of the suit.*

Dated and delivered at Nairobi this 26th day of January, 2007.

L. NJAGI

JUDGE

26.1.2006

Coram: Njagi, J

Maina Court Clerk

Mr. Kopere for the Applicant

Mr. Gacheru for the 1st Respondent

Mr Njihia for the 2nd Respondent

Court: Ruling read and delivered in the present of Mr. Kopere, Mr. Njihia and Mr. Gacheru.

L. NJAGI

JUDGE

26.1.07