



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 162 of 2006

JOHNSON M. KITHETE.....1ST PLAINTIFF

MUNGI FARMERS TOBACCO CO. LTD.....2ND PLAINTIFF

VERSUS

NAUSHAD TRADING CO.1ST DEFENDANT

MWARA INVESTMENT LTD.2ND DEFENDANT

R U L I N G

The main suit in this matter is expressed in the plaint dated 20th July 2006 in which John Muthengi Kithete and Mungi Farmers Tobacco Co. Ltd. being the 1st and 2nd plaintiffs herein sued Naushad Trading Co. and Mwara Investments Ltd, 1st and 2nd Defendants praying for:

(a) A permanent mandatory order of injunction to issue directing the defendants, their servants and or their agents to return motor vehicles registration numbers KAN 312H, KAD 366W, KAH 912B, KAC 356B, KAN 359H, ZB 9406, ZB 8874, ZC 0130, ZC 0129, KAN 074, KAK 067K, ZC 0131 plus their log books held by the 1st defendant.

(b) A permanent injunction to restrain the defendants, their servants and or agents from attaching, repossessing the plaintiffs' remaining motor vehicles. Selling by public auction or by private treaty or otherwise.

At the time of filing the plaint the plaintiffs took out a summons of the same date under Order XXXIX rules 1,2,3 and 9 of the Civil Procedure Rules in which they sought for temporary orders of mandatory injunction directing the defendants to return the motor vehicles earlier specified in the plaint pending the hearing and determination of this suit. The plaintiffs also sought for a temporary order of prohibitive injunction to stop the defendants from further repossessing the remaining motor vehicles. The plaintiffs further sought for orders seeking for a stay of the order giving the 2nd defendant police protection or assistance when carrying out repossession. The summons is supported by the affidavit of Johnson Muthengi Kithete sworn on 20th July 2006.

The summons was served upon the defendants who then mounted a serious objection to the summons by filing a replying and a further replying affidavits both sworn by Mehboob Virji. A defence has also been filed to challenge the plaintiffs' suit. The defendants have filed a notice of preliminary objection which is to the effect that the 1st plaintiff is not entitled to the orders prayed for in the summons because he cannot

sue on the assets of his estate and the entire suit. It is the submission of Mr. Mogaka advocate for the defendants that the application should be struck out because at the time of filing this suit the 1st plaintiff had obtained a receiving order meaning he lost the capacity to bring this application and the entire suit. This fact is contained in the further replying affidavit of Mehboob Virji sworn on 28th July 2006. Annexed to that affidavit is a copy of a letter from the official receiver addressed to the 1st and 2nd Defendants informing them of the issuance of a receiving order.

The 1st plaintiff's response to this averment is an admission that a receiving order was made on 12th September 2005. Now that it is admitted that a receiving order has been made against the 1st plaintiff, what is the effect? No doubt the law is very clear that the 1st plaintiff lost the capacity to bring these proceedings without leave of court. It suffices to refer to section 9 of the Bankruptcy Act which reads as follows:-

“9(1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor and thereafter except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings except with the leave of the court and on such terms as the court may impose.

(2) This section shall not affect the power of a second creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.”

The summons dated 20th July 2006 is an application jointly filed by the plaintiffs. It is supported by the affidavit of Johnson Muthengi Kithete. It is clear the 1st plaintiff did not seek leave of court before instituting these proceedings and in particular the summons. The plaintiff is verified by an affidavit he swore. In both the verifying affidavit and the affidavit in support of the summons at paragraphs Johnson Muthengi Kithete avers:

“1. That I am the 1st plaintiff/applicant herein and duly authorized/instructed to swear this affidavit on my own behalf and on behalf of the 2nd plaintiff/applicant therefore competent to swear this affidavit.”

It is clear that the 1st plaintiff is guilty of material non-disclosure. He failed to disclose his incapacity to sue and of course the existence of the receiving order in the entire plaint and in the summons.

In the end I find the preliminary point well founded. It is sustained with the result that the summons dated 20/7/2006 is ordered struck out for being incompetent with costs to the Respondent to be settled by the official receiver from the estate of the 1st plaintiff. The 2nd plaintiff's/applicant's summons cannot stand without a competent affidavit in support hence the entire summons must go. I have not made orders in respect of the suit because the matter that was before the court for hearing is the summons dated 20/7/2006.

Dated and delivered at Mombasa this 19th Day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Mogaka for the Defendants and Mr. Gitonga h/b Mrs. Kipsang for the plaintiff.