



REPUBLIC OF KENYA

ADRIAN SPENCER DEARING

JOHN STANLEY WARD (JOINT RECEIVERS

AND MANAGERS OF MUGOYA CONSTRUCTION

AND ENGINEERING LIMITED –

IN RECEIVERSHIP) APPLICANTS

VERSUS

JAMES ABIAM ISABIRYE MUGOYA

LIVINGSTONE ASSOCIATES DEFNDANTS

RULING

Before me is an application by way of Chamber Summons lodged by the Receivers/Managers of Mugoya Construction and Engineering Limited (In Receivership) (hereinafter called the applicants). The application is expressed to be brought under the provisions of Sections 348 (1) (b), 358 (1) and (2), 352 (1) and (2) of the Companies Act, Rules 3, 4 and 9 of the Companies Act and all other and further enabling powers and provisions of the law. The applicants seek *inter alia* the following principal orders of the court: (1) That the 1st respondent be compelled to submit and verify or concur in and verify a statement of the affairs of the Company; (2) that the respondents do attend on the applicants and give the applicants such information that they may require as to the affairs of the Company; (3) that the court do direct the 1st respondent to provide a concise account of all the missing plant machinery motor vehicles equipment, fittings and fixtures including stock in trade belonging to the Company; (4) that the 1st respondent be ordered to immediately restore to the Company all assets of the Company, removed from the Company's premises at the Embakasi Complex in Nairobi on diverse dates over the last 24 months; that the 1st respondent be ordered to immediately restore all books of accounts, minute books of the directors and Company bank statements, invoices, receipt books, wage books, inventories of assets, log books of all motor vehicles, computers and accessories, trading contracts and all other books belonging to the Company.

The application is made upon the following primary grounds:-

- (i) That despite service of a notice upon the 1st respondent he has neglected or refused to submit the statement of affairs.
- (ii) That upon inspection of the Company's premises it was discovered that virtually all the godowns were vandalized and all the plant machinery, motor vehicles, equipment and all other

moveable assets belonging to the Company were removed to undisclosed locations. And all statutory and other company assets have been removed from the premises.

(iii) That unless the orders for the restoration of the company assets are granted there is danger that the assets may be disposed off to 3rd parties leading to irreparable loss to the company running to about a billion shillings.

The application is supported by an affidavit sworn by Adrian Spencer Dearing, one of the joint receivers of the Company. The affidavit is an elaboration of the above grounds. The application is opposed and there are grounds of opposition filed by the advocates for the respondents. They are expressed as follows:-

- (1) That the application is incompetent.**
- (2) That the application is premature.**
- (3) That there is no jurisdiction to grant the orders sought.**
- (4) That the applicants have no locus standi to maintain this action or application.**
- (5) That the applicants have not demonstrated that they have been lawfully appointed as such receivers and managers of the Company.**

The application was canvassed before me on 8.5.2007 by Mr. Gichuhi, Learned counsel for the applicants and Mr. Ohaga, Learned counsel for the respondents. Both counsels highlighted the skeleton arguments which they had filed while canvassing preliminary objections to the application. I have considered the application, the said arguments, the oral submissions in court and the authorities cited. Having done so, I take the following view of the matter. The respondents have chosen to oppose this application on the basis of grounds of opposition only. There is no replying affidavit. The facts given in the supporting affidavit are therefore not contravened. Those facts show that Adrian Spencer Dearing and John Stanley Ward gave notice of their appointment as receivers of Mugoya Construction and Engineering Limited on 2.1.2007. In my view that notice cannot successfully be challenged in grounds of opposition lodged by the advocates for the respondents. Grounds of opposition alone cannot shift the burden to show the validity of the appointment to the applicants. If any further proof of their appointment was required the same was furnished in the applicant's skeleton arguments by way of pleadings in HCCC No.31 of 2007 which reveal that the Company acknowledged the applicants as duly appointed receivers and managers of the Company. It is illustrative that the plaint in that suit was filed by the present advocates of the respondents. I find and hold that the challenge made on the validity of the appointment of the applicants as receivers and managers of the Company has no merit and is rejected.

On the competence of the application, I have found that the objection raised is also without merit. The applicants are discharging their statutory duties under the Companies Act and in my view cannot be challenged for bringing this action in their names. They seek no personal reliefs.

On the objection made that the application is premature, I find that the same is too without merit. The notice served by the applicants exhibited as "AD2" to the supporting affidavit required the 1st respondent to prepare a statement of affairs as mandated by Sections 351 of the Companies Act. Indeed the prescribed form was supplied to the 1st respondent and compliance was expected within 14 days of the date of the letter i.e. 3.1.2007. The applicants lodged this application on 12.1.2007 which was only 9 days after the notice. Admittedly the application was lodged before the 14 days elapsed. However, the respondents have to-date not furnished the statement. The 1st respondent in my view is hanging on technicalities. He does not intend to voluntarily comply with the notice served by the applicants. In the premises, I will ignore the premature filing of this application.

On whether or not there is jurisdiction to entertain the application, I am of the view that there is

jurisdiction to grant the orders sought. The receivers and managers have statutory duties conferred upon them by the Companies Act. Those duties are not incompatible with seeking prohibitory and mandatory orders as long as the orders sought are limited to facilitating their compliance with statutory commands.

In the end, all the objections made by the respondents are rejected. The application dated 12.1.2006 is allowed in terms of prayer 3 pending further orders of this court. The respondents should within 14 days from the date hereof submit and verify or concur in and verify a statement of the affairs of Mugoya Construction and Engineering Limited (in Receivership) pursuant to the provisions of Sections 351 (1) and (2) and 352 (1) and (2) of the Companies Act.

The respondents are ordered to attend upon the applicants at their offices at such times as the applicants may appoint and give the applicants all information that they may require with regard to the affairs of the Company.

The 1st respondent is directed to provide a concise account of all the missing plant, machinery, motor vehicles, equipment, fittings and fixtures' including electrical and other cables and wiring and all other moveable assets including stock in trade belonging to the Company forming part of the security in favour of the debenture holders and more specifically described in the various debentures and the valuation report by Tyson's Limited dated 7/9/2004.

That the 1st respondent is ordered to immediately restore all the missing plant machinery, motor vehicles, equipment, fittings and fixtures including electrical and other cables and wiring and all other moveable assets including stock in trade belonging to the company that was removed on diverse dates over the last 24 months from the Company premises at Embakasi Complex in Nairobi comprised in L.R. Numbers 90 42/174, 9042/176 and 9042/218.

The 1st respondent is ordered to immediately restore all books of accounts including audited accounts, filed annual accounts, minute books of directors and Company bank statements, invoices, receipt books, wage books, inventories of assets, log books of all motor vehicles, computers, computer hard disks, trading contracts with 3rd parties and all other books of whatever nature belonging to the Company.

The applicants shall file separate undertakings under oath as to damages within the next 7 days.

Costs to be in cause.

Each party is granted liberty to apply.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 4th day of June 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Gichuki for the applicants and Ougo holding brief for Ohaga for the respondents.

F. AZANGALALA

JUDGE

4/6/07