



REPUBLIC OF KENYA

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

Misc Appli 207 o 2005

IN THE MATTER OF TARGET CARRIERS LIMITED (IN RECEIVERSHIP)

AND

IN THE MATTER OF THE COMPANIES ACT, CAP. 486

AKIBA BANK LTD (Through the Receivers/Managers of

TARGET CARRIERS LIMITED (In Receivership)
.....APPLICANT

VERSUS

SHAMMIT GHAI &

RAJAN GHAI (t/a UNIKEN ENTERPRISES).....
.....RESPONDENTS

LYNDON D'SOUZA (t/a ROADRUNNER CARRIERS).....
.....APPLICANT

VERSUS

AKIBA BANK LTD (Through the Receivers/Managers of

TARGET CARRIERS LIMITED (In Receivership)
.....RESPONDENT

1. RAPID RESPONSE TRANSPORT LTD

2. HASSAN SIDI

APPLICANTS

VERSUS

AKIBA BANK LTD (Through the Receivers/Managers of

TARGET CARRIERS LIMITED (In Receivership)

.....RESPONDENT

R U L I N G

On 12th April, 2005 this court ordered, pursuant to an application brought by the Receivers/Managers of TARGET CARRIERS LIMITED (in receivership) by chamber summons dated 16th March, 2005, that the Receivers/Managers do repossess, with the assistance of the police, various motor vehicles and trailers set out in the order that were said to belong to Target Carriers Ltd. There was liberty for any interested party to apply to court in regard to the order and any of the motor vehicles or trailers.

SHAMMIT GHAI and RAJAN GHAI so applied by notice of motion dated 9th May, 2005 in respect to motor vehicles registration numbers KAP 248Y, KAP 518V and KAP 519V. They sought the main order that the Receivers/Managers of Target Carriers Limited and their agent, TACT CONSULTANTS (Auctioneers), or other agents be ordered to restore to them the said motor vehicles. Upon hearing that application *inter partes*, the court conditionally allowed the application on 13th May, 2005 and reserved its reasons. In a ruling dated 13th but delivered on 15th July, 2005 the court gave its reasons.

The Receivers/Managers have now come to court by notice of motion dated 18th July, 2005 seeking the main order that the order of 13th May, 2005 be reviewed and set aside. This application was heard together with two other applications, both by notices of motion dated 5th July, 2005. One of those applications is by **LYNDON D'SOUZA** (t/a ROADRUNNER CARRIERS) in which he seeks the main order that the Receivers/Managers and their agent, Tact Consultants (Auctioneers), or other agents be ordered to restore to them motor vehicle registration number KAP 247Y, trailer registration number ZB 5665 and a steel tow bar.

The other application is jointly made by RAPID RESPONSE TRANSPORT LTD and HASSAN SIDI. They seek the following six orders:-

“1. That service of this application upon the Respondent be dispensed with and the application be heard ex parte in the first instance by reasons of the urgency and the same be heard inter-partes on such date as this Honourable Court may direct.

2. That the court be pleased to grant leave to the Applicants to file these proceedings against Target Carriers Limited (in receivership).

3. That this Honourable Court be pleased to order Target Carriers Limited (in receivership) to return and/or restore the following vehicles to Rapid Response Transport Limited pending the hearing and determination of this application:

(a) Truck Reg. No. H.Z. 0792C

(b) Trailer Reg. No. ZA 3437

(c) *Trailer Reg. No. 743 UBG*

(d) *Trailer Reg. No. 737 UBG*

4. *That this Honourable Court be pleased to order Target Carriers Limited (in receivership) to return and/or restore the following vehicles to Hassan Sidi pending the hearing and determination of this application:*

(a) *Truck Reg. No. KAP 517V*

(b) *Trailer Reg. No. ZA 8834*

(c) *Truck Reg. No. KAP 092X*

(d) *Trailer Reg. No. ZA 5597*

5. *That the Receivers/Managers be restrained whether by themselves, their servants or agents or any of them or however from disposing either through sale, auction or otherwise, alienating, wasting, damaging, converting to their own use, or interfering in any manner with the following vehicles and/or assets belonging to Rapid Response Transport Limited and Hassan Sidi pending the hearing and determination of this application:*

(a) *Truck Reg. No. H.Z 0792C*

(b) *Trailer Reg. No. ZA 3437*

(c) *Trailer Reg. No. 743 UBG*

(d) *Trailer Reg. No. 737 UBG*

(e) *Truck Reg. No. KAP 517V*

(f) *railer Reg. No. ZA 8834*

(g) *Truck Reg. No. KAP 092X*

(h) *Trailer Reg. No. ZA 5597*

6. *That the costs of this application be provided for”.*

There is a good reason for quoting these prayers in their entirety. It will be seen that the main prayers seek relief ***pending hearing and determination of the application***. There is no substantive prayer. Now that the application has been heard, what remains? Nothing! The application is spent! This is an example of bad drafting of pleadings which is all too common in this court. If it had been detected earlier, an appropriate amendment would have saved the application. But it is now too late. Without a substantive prayer there is nothing else to do as the application is spent. These applicants are bound by their own pleadings, just as any other litigant would be so bound. Regrettably, I need not consider the serious submissions made by learned counsels on this application as there is no prayer upon which I can make any substantive order. I must therefore, as I hereby do, strike out the application with costs to the Receivers/Managers. Order accordingly.

Two applications remain, the one by notice of motion dated 5th July, 2005 by Lyndon D’Souza (t/a RoadRunner Carriers), and the other for review by notice of motion dated 18th July, 2005 by the Receivers/Managers. I will deal with the earlier application first. As already

stated, it seeks the main order that the Receivers/Managers of Target Carriers Limited and their agent, Tact Consultants (Auctioneers), or other agents be ordered to restore to the applicant motor vehicle reg. No. KAP 427Y, trailer reg. No. ZB 5665 and a steel tow bar. The grounds for the application as stated on the face thereof are:-

“A. That the order dated 12th April, 2005 was obtained through deception using the false pretence that the vehicles were still under the ownership of Target Carriers Ltd. and were being hidden by the directors.

B. (That) the vehicles were being used in the normal course of business, and certainly not hidden when the Reclamation Officer of Tact Consultancy called at the yard.

C. That the motor vehicles and property were in the lawful possession of the Applicant when agents of the Respondent took possession.

D. That the said vehicles and property are the lawful property of the Applicant.

E. That the Respondent had no lawful claim to the said vehicles and property”.

There is an affidavit sworn by the applicant to which a number of documents are annexed. I have read the affidavit.

The application is opposed by the Receivers/Managers as set out in the affidavit of one PONANGIPALLI RAMANA RAO sworn on 22nd July, 2005, and which was marked by the court and referred to during arguments as the “1st Replying Affidavit” in order to distinguish it from two other affidavits sworn by the same person on the same date in respect to the other two applications, which affidavits were marked by the court and referred to during arguments as the 2nd and 3rd replying affidavits. I have read this 1st replying affidavit. Four main grounds for opposing the application are disclosed:-

(i) That there was a fixed charge over trailer registration No. ZB 5665 in favor of AKIBA BANK LTD in the debenture instrument under which the Receiver/Manager was appointed, which debenture had been duly registered at the Companies Registry. Further, that as the relevant register at the Companies Registry is a public document, certification of registration of the debenture was notice to the world that the trailer had been charged to Akiba Bank Ltd.

(ii) That a transfer form in respect of motor vehicle registration number KAP 247Y disclosing the joint ownership of the motor vehicle of Akiba Bank Ltd. and Target Carriers Limited had been lodged by Akiba Bank Ltd. at the Motor Vehicle Registry. Therefore, a search of the Motor Vehicle Registry would have revealed that transfer form, and by extension therefore, that the applicant had due notice of the interest of Akiba Bank Ltd. in the motor vehicle.

(iii) That Akiba Bank Ltd. had lodged a caution with the Registrar of Motor Vehicles against transfer of motor vehicle registration number KAP 247Y.

(iv) That the applicant is not a bona fide purchaser for value without notice.

I have given due consideration to the submissions of the learned counsels appearing, including the authorities cited. I have also carefully studied the various documents annexed to both the supporting and the replying affidavits. Annexed to the supporting affidavit is a transfer form in favor of RoadRunner Carriers from Target Carriers Limited dated 26th May, 2003 in respect of motor vehicle KAP 247Y. There is also annexed a copy of the registration (log) book which shows that the transfer was registered on 21st April, 2004. Likewise there is a transfer form in

respect of trailer registration number ZB 5665 by Target Carriers Limited to RoadRunner Carriers which appears undated. But there is a copy of the registration (log) book of the trailer which shows that the transfer to RoadRunner Carriers was registered on 18th May 2004. There is evidence on record that the Receivers/Managers of Target Carriers Limited (in receivership) were appointed by the Debenture Holder, Akiba Bank Limited, on 18th August, 2004.

I have looked at the debenture instrument dated 8th April, 2002 between Akiba Bank Limited and Target Carriers Limited. Trailer number ZB 5665 is specifically mentioned in the schedule to the debenture. There was therefore a fixed charge upon that particular property. There is no dispute that the debenture was duly registered. It is the Receivers/Managers' case that this fact of registration was due notice to the world of the interest of Akiba Bank Limited in the trailer, and that therefore Target Carriers Limited could not have lawfully sold it to the applicant. The applicant's stand is that he carried out a search at the Motor Vehicle Registry, and that the interest of Akiba Bank Limited in the trailer was not noted anywhere, and that therefore he could not have known of that interest. I do not think that the fact of registration alone can constitute sufficient notice to the world. It is not practical. Apart from carrying out a search at the registry of motor vehicles, what else could the applicant have done? Was he for instance expected to put out an advertisement in the press to enquire whether any person had a charge on or other interest in the motor vehicle and trailer in question before buying them? I do not think that he could have been reasonably expected to do that. The more reasonable thing to be done would have been for Akiba Bank Limited to ensure that its interest was noted in the registration books of those vehicles. The case of INDIGO GARMETS (E.P.Z.) LIMITED versus APEX APPARELS (E.P.Z) LIMITED was cited as persuasive authority for the proposition that registration of the debenture was sufficient constructive notice to the applicant of the interest of Akiba Bank Limited. But for the reasons given above I respectfully beg to differ. In my judgment it was incumbent upon Akiba Bank Limited to ensure that its interest was noted in the registration (log) book of the trailer so that a person carrying out a search of the same at the Motor Vehicle Registry, as the applicant did, would then become aware of such interest. Without registration of that interest in the registration book, how could anyone else, apart from the debenture holder and the borrower, know of the existence of such interest? A good parallel is charges and mortgages pertaining to immovable properties. The interest of the chargee or mortgagee is normally noted on the register of the property for the whole world to know of the existence of the same. In the present case the Receivers/Managers said that Akiba Bank Limited took steps to have the trailer and other motor vehicles transferred into its joint names with Target Carriers Limited. It is apparent that if such steps were taken there was no completion as the trailer and other motor vehicles were never transferred into the joint ownership. And this can only be blamed upon Akiba Bank Limited. It was incumbent upon it to ensure that the transfers were duly registered. Two years down the line it had not taken steps to ensure so. In the meantime the trailer and other motor vehicles and trailers had been sold and transferred to third parties by Target Carriers Limited. So, on this particular point, I hold that the applicant had no notice of the interest of Akiba Bank Limited in the trailer in question, ZB 5665. . The Receivers/Managers have also argued that Akiba Bank Limited had lodged a caution in respect to this trailer as well as other motor vehicles with the Registrar of Motor Vehicles. As pointed out during arguments there is no provision for lodgment of a caution in the Traffic Act, Cap. 403. I need not say any more on that point.

Regarding motor vehicle registration number KAP 247Y, the same does not appear in the schedule to the debenture. There can only have been a floating charge in respect to this motor vehicle in favor of Akiba Bank Limited. In the circumstances of this case that floating charge did not crystallize until the Receivers/Managers were appointed on 18th August, 2004. By this date the motor vehicle, along with trailer registration number ZB 5665, had already been transferred to the applicant. There was nothing to stop these transfers as the interest of Akiba Bank Limited was not noted in the registration books of these vehicles and the applicant did not otherwise have notice of the same.

It was also the case of the Receivers/Managers that the applicant was not a *bona fide*

purchaser for value without notice. I have already found that he had no notice. It is true that the applicant has not exhibited any evidence of payment for the motor vehicles. But it is also equally true that no **prima facie** basis has been laid by the Receivers/Managers to warrant a suspicion of any collusion between Target Carriers Limited and the applicant. It has not been alleged that there was any connection between them at all in terms of business operations or relationship between the applicant and the directors of Target Carriers Limited. The applicant has sworn that he purchased the motor vehicle and the trailer. Before he could be called upon to produce evidence of value payment it was incumbent upon the Receivers/Managers to place before court **prima facie** evidence of collusion between the applicant and Target Carriers Limited. As I have already stated there was no such **prima facie** evidence apart from the bare assertion that the applicant is not a purchaser for value.

Having considered all matters placed before the court in respect to the application by Lyndon D'Souza (t/a RoadRunner Carriers) by notice of motion dated 5th July, 2005, I find that the applicant had lawfully purchased motor vehicle registration number KAP 247Y and trailer registration number ZB 5665 and that good titles passed to him from Target Carriers Limited. The same must be restored to him. The application with respect to the steel tow bar was conceded. In the circumstances I will allow the application in its entirety with costs.

I will now consider the application by the Receivers/Managers for review by notice of motion dated 18th May, 2005. This application is brought under Order 44, rule 1 of the Civil Procedure Rules. As already stated its main prayer is an order to review and set aside the order of this court of 13th May, 2005. There are three grounds for the application stated on the face thereof:-

“(a). There has been discovery of new and important evidence which was not in the knowledge of the Receivers at the time the order dated 13th May, 2005 was made.

(b). The receivers have discovered that Shammit Ghai and Rajan Ghai (t/a Uniken Enterprises) were not purchasers for value without notice and were aware of the fraud carried out by the directors of Target Carriers Limited (in receivership).

(c) There is a real risk that the receivers will lose the vehicles”.

There is a supporting affidavit sworn by one of the Receivers/Managers, PONANGIPALLI RAMANA RAO, on 18th July, 2005. The formal order, review and setting aside of which is sought, is annexed to that supporting affidavit. There are also other documents annexed. I have read that affidavit. The order of 13th May, 2005 was made in favor of SHAMMIT GHAI and RAJAN GHAI (t/a Uniken Enterprises). They will hereinafter be referred to as the “respondents”. They had opposed the application upon the grounds set out in the replying affidavit sworn by Shammit Ghai on 26th July, 2005 and filed on the same date. I have also read that affidavit. Finally, I have given due consideration to the submissions of the learned counsels appearing.

Under the proviso to rule 3(2) of Order 44 of the Civil Procedure Rules, an application for review cannot be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation. So, the Receivers/Managers herein must strictly prove that the new matters or evidence which they now seek to place before the court were not within their knowledge, or could not be adduced by them when the order of 13th May, 2005 was passed or made.

What do they say in this regard? It is stated in the supporting affidavit that one of the Receivers/Managers, the deponent of the supporting affidavit, caused investigations to be carried out to locate some of the documents of Target Carriers Limited because he had not received any co-operation from the directors of that company who had refused to avail

documents and files to him; that he therefore hired the services of an investigator to trace files and documents; that the investigations revealed that there was a connection between Shammit Ghai and Target Carriers Limited; that Target Carriers Limited owed a large sum of money to Uniken Enterprises and had agreed with Shammit Ghai that he could keep the motor vehicles the subject matter of these applications in lieu of payment; that Shammit Ghai was aware of the interest of Akiba Bank Limited in these motor vehicles; that Shammit Ghai was also aware that KAREX CARRIERS LIMITED to which Target Carriers Limited had transferred the motor vehicles, and which in turn transferred the motor vehicles to the respondents, had been set up merely to facilitate that latter transfer; and that Shammit Ghai had full knowledge of the fraud carried out by Target Carriers Limited upon Akiba Bank Limited. It is further deponed that all the above information was not available when the application giving rise to the order sought to be reviewed and set aside was heard on 13th May, 2005 as the investigations were not yet complete, and that in any event the advocates then on record for the Receivers/Managers had been served with the application only three days before on the 10th May, 2005 and there was thus insufficient time to conduct and conclude investigations.

The court record does not show that there was any application for adjournment on the 13th May, 2005 by counsel for the Receivers/Managers, or that if there was such application it was refused. Had there been application to adjourn, especially upon the ground that the Receivers/Managers needed more time to carry out investigations in order to properly prepare for the application then at hand, it would no doubt have been readily allowed. Having made no application for adjournment, and having been apparently ready to proceed on 13th May, 2005, and having so proceeded, the Receivers/Managers cannot now be heard to complain that they proceeded with the application while not quite ready. Had they sought adjournment they would have been accorded all the reasonable time they would have required to properly prepare themselves, and they would have then laid before the court at the hearing of the application then at hand all the material that they now seek to place before the court in this application. So, I am not satisfied that the Receivers/Managers have strictly proved the allegation that these new matters and evidence could not be adduced by them when the order in question was passed. I must therefore refuse the application as advanced upon the ground of discovery of new matter or evidence.

The application is also laid upon the ground that there is sufficient reason to review and set aside the order. It is urged that the new matter and evidence discovered by the Receivers/Managers constitute a sufficient and compelling reason to review and set aside the order. What are these new matters and evidence? Among the documents annexed to the supporting affidavit are two letters. One is dated 6th February, 2004 and is addressed to Uniken Enterprises by Target Carriers Limited. It says:-

“As per your telephone conversation with Mr. Ghafur in London, concerning an outstanding balance of Kshs.2.1 million. We have now agreed you keep three Trucks until I come back to Kenya.

About the transfers, Akiba Bank is holding the original Log books, but we shall get them for you as soon as possible”.

The second letter is dated 10th March, 2004, again addressed to Uniken Enterprises by Target Carriers Limited. It says:-

“We have now registered a new company by the name Karex Carriers Ltd. We shall transfer the vehicles to the new company and then direct to your company”.

In his affidavit sworn on 9th May, 2005 in support of the application by notice of motion of the same date (which gave rise to the order of 13th May, 2005), Shammit Ghai stated at paragraph 9 that he and his partner Rajan Ghai had no connection at all with Target Carriers Limited. The

tenor of that affidavit is that he and Rajan Ghai were innocent purchasers for value, without notice, of the motor vehicles in question from Kerax Carriers Limited. But the two letters quoted above give the lie to this assertion. It is apparent from the letters that the three motor vehicles in question were not in fact purchased by Shammit Ghai and Rajan Ghai but were instead surrendered to them by Target Carriers Limited for a debt owed to them by Target Carriers Limited. And why could Target Carriers Limited not transfer the motor vehicles directly to Shammit Ghai and Rajan Ghai if indeed there was a genuine and innocent sale? Why through a company, Kerax Carriers Limited, apparently incorporated for that specific purpose? It appears to be plain that Shammit Ghai and Rajan Ghai knew of the interest of Akiba Bank Limited in these three motor vehicles, and that in transferring the motor vehicles to them Target Carriers Limited would defeat that interest of Akiba Bank Limited. They were not innocent or **bona fide** purchasers for value without notice. It was alleged during arguments that the letters appeared to be computer-generated and therefore not genuine. I find nothing computer-generated about those letters which are written on the letter-heads of Target Carriers Limited. Further, no reason was suggested as to why the Receivers/Managers would go to the extent of forging documents in support of their case. It is not their personal case. I therefore find that there was a conspiracy between Target Carriers Limited on one hand and Shammit Ghai and Rajan Ghai on the other hand to defeat the secured interest of Akiba Bank Limited in the three motor vehicles in question, KAP 247Y, KAP 518V and KAP 519V, which interest was secured in the debenture dated 8th April, 2002. This conspiracy was brought into effect by the circuitous transfer of the motor vehicles to them through a company, Karex Carriers Limited, apparently incorporated only for that purpose. This was a grave injustice to Akiba Bank Limited. It is a sufficient and compelling reason to review and set aside the order.

It has been argued that setting aside the order will be in vain because there is no prayer in the application for restoring the motor vehicles to the Receivers/Managers. That, with respect, is not correct. There is the order of court of 12th April, 2005 which had given possession of these motor vehicles to the Receivers/Managers. Once the order of 13th May, 2005 is set aside the Receivers/Managers will be entitled to possession of the motor vehicles by dint of the order of 12th April, 2005.

In summary therefore, the application by notice of motion dated 18th July, 2005 is hereby allowed as prayed with costs. The order of 13th May, 2005 is reviewed and set aside. The application by notice of motion dated 5th July, 2005 by Lyndon D'Souza (t/a RoadRunner Carriers) is also hereby allowed with costs. The joint application by notice of motion dated 5th July, 2005 by Rapid Response Transport Limited and Hassan Sidi has already been struck out with costs. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF MAY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 26TH DAY OF MAY, 2006.