



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

**Civil Suit 306 of 200**

**KIENZECO LIMITED.....**  
**...PLAINTIFF**

**VERSUS**

**KENATCO TAXIS LIMITED (UNDER RECEIVERSHIP).....**  
**.....DEFENDANT**

**RULING**

This is an application by the plaintiff, who is seeking interim injunctive reliefs. In particular, the plaintiff wishes to have the defendant restrained from further advertising for sale by public auction or private treaty; alienating; transferring or in anyway howsoever dealing with itself as a going concern, dealing with all its assets free of encumbrances or in any way howsoever, as to defeat the plaintiff's claim before this suit is heard and determined.

The plaintiff also wishes the court to restrain the defendant,

**"either through itself, servants or agents ... from further solely managing itself as a going concern, controlling its assets/funds, pending the hearing and determination of this suit."**

It is common ground that the defendant invited offers from the public for the sale of its assets. The said invitation to treat was in the form of an advertisement in the local daily newspapers dated 4<sup>th</sup> November, 2004.

The advertisement notified the public that a detailed information memorandum for the sale of assets and the terms of conditions of sale could be obtained from the Receiver and Manager of the Defendant.

According to the plaintiff, it did obtain the Memorandum, and thereafter engaged the defendant in an exchange of communication, which led to a firm offer being made by the defendant on 14<sup>th</sup> December, 2004.

However, although the plaintiff stated, in the affidavit of L.W. Mwangi, (**who is a director of the company**), that copies of the correspondence which led to the issuance of the firm offer were exhibited as a bundle marked "**LWM3**", the said bundle contained only two letters. The first in time, of the two letters was from the defendant, and is dated 22<sup>nd</sup> November, 2004. The gist of that letter is the request, by the defendant, that the plaintiff should enhance its bid. The plaintiff was also requested to indicate its source of funding.

The other letter, forming part of the bundle marked "*LWM3*", was dated 6<sup>th</sup> January, 2005. In effect, that letter was written after the defendant had, in the estimation of the plaintiff, already made a firm offer on 14<sup>th</sup> November, 2004. Therefore, that letter could not be described as one which played a role in the lead-up "*towards the crystallization of a suitable offer.*"

However, I do not think that the issue has any significant impact on the application before me. I say so because it is common ground between the parties herein that the defendant's letter of offer is the one dated 14<sup>th</sup> December, 2004.

Thereafter, the parties stopped reading from the same text. The plaintiff believes that it did accept the offer, and went further to pay the 10% deposit, amounting to KShs.4,020,000/-, pursuant to the terms of the agreement. Thereafter, as far as the plaintiff was concerned, the defendant was required to prepare a Sale Agreement which was to incorporate all the agreed terms. Notwithstanding that said understanding, the plaintiff blames the defendant for its failure to put together the Sale Agreement. Indeed, it is said that the plaintiff even went to the extent of preparing and sending to the defendant, a draft Sale Agreement.

Instead of the defendant executing the Sale Agreement, it is said to have introduced changes to the terms which had already been agreed upon. For instance, the defendant is accused of having reduced the scope of the assets being sold to the plaintiff, so that instead of the assets incorporating the entire assets of the defendant, the sale was then said to exclude debtor's liabilities and bank balances. In other words, the defendant was then saying that it had only offered to sell its vehicles.

It was the plaintiff's submission that as the invitation to treat had indicated that the defendant was selling "*the assets*" of the company, the defendant could not be permitted to turn around, to say that it was only selling its vehicles.

The plaintiff's contention is that if the defendant had intended to sell only its vehicles, there would have been nothing easier than for them to specifically say so.

It was further submitted by the plaintiff that the only reason why the defendant had made available to it, the statements of accounts was because the defendant appreciated the need for the plaintiff to know the defendant's financial status, as part of the assets which the defendant was selling.

For those reasons, the plaintiff submits that the defendant should not be permitted to renege on its obligations.

The plaintiff asked the court to bear in mind the fact that as from December 2004, the defendant has had the benefit of the deposit sum of KShs.4 million; yet they were now declining to sell their assets to the plaintiff. It was submitted that the defendant was estopped, by its conduct, from abdicating from the representations which it had given to the plaintiff. The said conduct was said to have led the plaintiff to believe that the defendant would sell all its assets to the plaintiff. Following the said representations, the plaintiff says that it changed its position; so that if the defendant were allowed to get out of the Agreement, the plaintiff would suffer irreparable loss.

Faced with those submissions, the defendant responded by saying that the plaintiff had failed to establish a prima facie case with a probability of success. The main reason for so saying was that there was no privity of contract between the parties herein.

Why does the defendant hold the view that there was no privity of contract between it and the plaintiff?

It is because, as far as the defendant was concerned, the plaintiff had only dealt with the Receiver/Manager. For instance, the advertisement in the newspaper, which constituted the invitation to treat, was by the said Receiver/Manager of the defendant. Therefore, the defendant believes that the suit ought to have been instituted as against the Receiver/Manager.

In support of its said submission, the defendant cited CHARLESWORTH & CAIN ON COMPANY LAW, 12<sup>th</sup> Edition at pages 588 to 591. The learned authors of that text make the point that when a floating debenture crystallizes, the company is prevented from dealing with the assets charged, without the receiver's consent. Secondly, they also make it clear, that when a receiver of the undertaking of a company is appointed, the directors' powers of controlling the company is suspended.

Would that imply that the receiver ought to be sued personally? At page 590 of that text, it is stated that

**"a receiver appointed by order of the court is personally liable on contracts made by him in the course of his receivership. (A liquidator is not personally liable on contracts which he enters into as liquidator)."**

First, I understand that the receiver/manager in this case was not appointed by order of the court. In the replying affidavit of Mr. Wilfred Wambua Ngoi he says that he was appointed the Receiver and Manager of the Defendant company by the Debenture Holders. Therefore, even assuming that the legal pronouncement in "*Charlesworth and Cain Company Law*" correctly reflects the law, it does not seem to be applicable to the facts of this case.

The defendant also cited KISII PETROLEUM PRODUCTS LTD –VS- KOBIL PETROLEUM, CIVIL APPLICATION NO.NAI 309 OF 203, to back its contention that it was the receiver/manager who ought to have been sued.

In that case, the **HON. E. O. OKUBASU J. A.** quoted with approval, the following words from **HALSBURY'S LAWS OF ENGLAND**:

**"The appointment of a receiver is one of the events which cause a floating charge to crystallize. As regards all the property comprised in the security over which the receiver is appointed, the directors' powers are of necessity paralysed. The powers exercisable by the receiver on the other hand depend entirely upon the combination of the precise terms of the debenture and his appointment as supplemented in the case of administration receiver by certain statutory powers if not inconsistent with the terms of the debenture."**

To my mind, nothing could have been clearer. In effect, although the appointment of the receiver in this case did serve to paralyse the powers of the company directors, the powers exercisable by the said receiver were entirely dependent on the precise terms of the debenture. Therefore, as the defendant has not demonstrated that the receiver herein was, by virtue of the terms of the debenture, empowered to contract personally with the plaintiff, I am unable to accept the contention that the suit should have been directed at him, instead of the company.

In HALSBURY'S LAWS OF ENGLAND, 4<sup>th</sup> Edition, Vol.39, at paragraph 805, the learned authors state as follows:

**"Prima facie a receiver appointed out of court, being an agent only, is not personally liable in respect of transactions properly entered into by him, as a receiver."**

In the light of the foregoing it appears to me that unless the defendant will later produce evidence that would render the receiver/manager to be personally liable, the first line of opposing the application must be deemed to have failed.

Moving on from that issue, the defendant submitted that if there was a contract between the parties herein, the same was breached by the plaintiff. It is said that the plaintiff was supposed to have paid the balance of the purchase price within 60 days.

It is common ground that the offer is contained in the defendant's letter dated 14<sup>th</sup> December, 2004. By that letter, the defendant set out the conditions, which included the following:

- (i) Purchase price KShs.40.2 million.
- (ii) Deposit, being 10% of the purchase price, was to be paid within 10 days of the date of the letter of offer.
- (iii) The balance of the purchase price was to be paid within 60 days of signing the letter of offer.
- (iv) If the conditions in the letter of offer were acceptable to the plaintiff, they were to sign and return the duplicate of the letter, to the Receiver and Manager.

At page two (2) of the letter of offer, there is endorsed the name of Mr. L. W. Mwangi, as well as his signature and Identity Card Number. Below the signature of Mr. L. W. Mwangi is the date 23<sup>rd</sup> December, 2004.

If matters stopped at that signature, it would be easy for the court to hold that there was an acceptance of the defendant's offer. But then, the plaintiff sent the duly executed letter of offer together with a separate covering letter dated 23<sup>rd</sup> December, 2004. By that letter, the plaintiff made it abundantly clear that its acceptance of the offer was subject to some seven specified conditions.

One of the conditions introduced by the plaintiff was that if the contract was not concluded for any reason, the deposit sum which had been paid by the plaintiff would be refunded. I highlight that particular condition for the reason that it was clearly a negation of the condition numbered

- (b) in the defendant's letter of offer, which stipulated that the 10% deposit was non-refundable.

In the light of the contents of the plaintiff's letter dated 23<sup>rd</sup> December, 2004, it is not clear to me whether or not a contract ever came into being, as between the parties hereto. On the face of the information now available to the court, it would appear that the parties were talking at cross-purposes.

But, at the same time, the defendant did state in its letter of 14<sup>th</sup> December 2004, as follows, in pertinent part;

**"OFFER TO PURCHASE ASSETS AND BUSINESS OF KENATCO TAXIS LIMITED**

***We refer to your letter dated 29<sup>th</sup> November, 2004 to purchase the assets and business of Kenatco Taxis Ltd as going concern ...."***

In my understanding, the tone of that letter suggests that the defendant was not only offering to sell its vehicles. If that were the case, it would have been easy enough to say so, instead of indicating (both in the heading and in the contents) that the offer was for the sale of **"assets and business."**

And, when the defendant added that Kenatco Taxis Limited was to be sold **"as going (Sic!) concern"**, they may be hard pressed to now insist that the sale was only supposed to be of vehicles.

Now, if it is true that the defendant caused the plaintiff to believe that it was selling the company as a going concern; and if the plaintiff paid the deposit of KShs.4,020,000/=, in that understanding, it may be inequitable to allow the defendant to benefit from the deposit, whilst giving nothing to the plaintiff.

Obviously, there are serious issues to be resolved in this case. Apart from those already highlighted above, there would arise the question whether the plaintiff's letter dated 23<sup>rd</sup> December, 2004 constituted a counter-offer. That question arises because the defendant now insists that the plaintiff did not accept the offer from the defendant. If that be the case, why should the defendant continue withholding the deposit sum?

But whichever way the case ultimately goes, I find that it is best that the subject-matter of the suit be

preserved. That is because if the defendant were to dispose of its assets before the disputes between the parties are resolved, the plaintiff may never be able to be compensated by an award of damages. Why do I say so?

The defendant is a company under receivership. Its own expressed wish was to dispose of its assets. If it were allowed to conclude the sale, whilst the case was still pending, the company would effectively cease to exist. That would imply that even if the plaintiff were to ultimately win the case, they would be unable to get compensation.

For those reasons, I find that it is in the interests of justice to issue, as I now hereby do, an interim injunction to restrain the defendant, whether by itself, its servants or agents, from further advertising its assets for sale, alienating, transferring or in any other way dealing with the said assets so as to defeat the plaintiff's claim herein. The said order will remain in force until the suit is heard and determined.

However, I am not satisfied that the plaintiff has made out a case to justify an order to compel the defendant to manage itself, alongside either the plaintiff or any other third party.

Finally, the parties herein are directed to take steps to ensure that all pre-trial procedures, such as discovery of documents and preparation of a list of the issues for determination at the trial, are completed within the next **THIRTY (30) DAYS**. The case is then to be set down for hearing on a priority basis, so as to safeguard the interests of both parties herein.

Meanwhile, the plaintiff is awarded the costs of the application dated 7<sup>th</sup> June, 2005.

**Dated and Delivered at Nairobi this 6<sup>th</sup> day of June, 2006**

**FRED A. OCHIENG**

**JUDGE**