



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT**  
**CIVIL CASE 506 OF 2004**

**PATRICK THUO GITANDU.....PLAINTIFF**

**VERSUS**

**ZAHIR SHEIKH.....1ST DEFENDANT**

**WILLIAM EGBE.....2ND DEFENDANT**

**COCA COLA EAST AFRICA LTD.....3RD DEFENDANT**

**RULING**

By their application of the 15/2/2005 the Applicants seek the following orders:

1. A Receiver be appointed of all that property known as Plot Number 253 within L.R Number 57/31 Kasarani, and all the developments thereon (hereinafter referred to as the property) to the exclusion of the Plaintiff, his servants and or agents pending the hearing and determination of the suit.
2. The property be committed to the possession, custody and management of the Receiver.
3. The Receiver be conferred with all such powers as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of rents and profits and investment of such rents and profits at interest pending the hearing of the suit to the extent that these are not required for the management of the property, and the execution of such documents as are necessary for the foregoing.

The 3rd Defendant claims that the Plaintiff in abuse of his terms of service with the 3rd Defendant by the device of using a business name transacted business with that business name which was in effect the Plaintiff himself and as a result took property belonging to the 3rd Defendant from the 3rd Defendant without any lawful reason or justification and as a result seeks restitution from the Plaintiff of the property so unlawfully acquired by the Plaintiff.

It is the Plaintiff's case that the three Defendants carried out assaults on the Plaintiff as a result of which he seeks the following relief in his Plaintiff:

- a) An order of injunction restraining the Defendants, their servants or agents from harassing, assaulting, calling, accosting or trespassing on the Plaintiff or any member of his immediate family.
- b) An order of injunction restraining the Defendants, their servants or agents from alienating, occupying, taking possession of, encumbering or in any way interfering with any assets or property or bank accounts of the Plaintiff or any member of his immediate family.

c) An order of injunction compelling the Defendants their servants or agents to restitute to the Plaintiff any assets, property, money, document, instrument, deed or any other chattel or immovable property belonging to the Plaintiff and possessed, alienated, occupied, encumbered or in any way interfered with by the Defendants or any of their servants or agents.

The Applicant asks for the orders sought for to preserve the property which the 3rd Defendant claims it is the owner of and which is in the possession of the Plaintiff pending the determination of this suit.

The particular property over which the receivership is sought is the property known as Plot Number 253 being part of LR No 57/31 Kasarani on which flats are erected.

In his affidavit in support of this application by Kendi Ogamba at paragraph 7 alleged the Plaintiff offered to transfer to the 3rd Defendant certain assets including the said property. Reference was made during the hearing of the Application to a consent order recorded herein on the 31/5/2005 in which certain of the property in dispute herein was provided for. It appears that the application for an injunction filed by the Plaintiff on the 18/5/2004 has not been finally disposed of and the consent orders made are of an interim nature. In his submission Mr. Kiragu relied on Mulla on the Code of Civil Procedure 13th Edition Volume II and the commentary on Order 40 of the Indian Civil Procedure Code which is in pari materia similar to our Order 40.

He referred to page 1535 where under the rubric “just and convenient”, the following appears:

“The order is discretionary and the discretion must be exercised in accordance with the principles on which judicial discretion is exercised. Hence, the Court should not appoint a receiver of property in the possession of the defendant who claims it by a legal title; unless the Plaintiff can show prima facie that he has a strong case and a good title to the property... The court must consider whether special interference with the possession of a Defendant is required, there being a well founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the court gives its protection.”

Also to a passage on page 1537 where it is stated:

“The appointment of a receiver is in the discretion of the Court. The power to appoint a receiver is not to be exercised as a matter of course or for the reason that it can do no harm to appoint one. A receiver should not be appointed in supersession of a bona fide possessor of the property in dispute unless there is some substantial ground for interference. The court has to consider whether special interference with the possession of the Defendant is required, there being a well founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the court gives its protection. The mere fact that the Plaintiff in his Complaint makes violent and wholesome charges is no ground for the appointment of a receiver... The removal, however, under suspicious circumstances of a large amount of property by the Defendant during the pendency of a suit in which the question of title to that property would be determined is a good ground for the appointment of a receiver.”

He also referred to a passage in Kerr on Receivers 14th Edition Page 3 where it is stated:

“A receiver in an action is an impartial person appointed by the court to collect and receive, pending the proceedings, the rents, issues and profits of land, or personal estate, which it does not seem reasonable to the court that either party should collect or receive, or for enabling the same to be distributed among the persons entitled.”

The appointment of a receiver is a discretionary equitable remedy and a court will only exercise its discretion to appoint a receiver where it is satisfied that there are grounds for thinking that some property in dispute will be dissipated if a Receiver is not appointed. The Applicant’s case is that the said property is the proceeds of what the 3rd Defendant alleges are ill gotten gains and that the Plaintiff will use the

rents arising from the property and be unable to refund them if it succeeds in its counterclaim.

In his Grounds of Opposition the Plaintiff states that the statement by the Plaintiff that he would return the said property to the 3rd Defendant was extracted by duress. That the Applicant does not have a right to remove from the possession or custody of property any person whom any party to the present suit has not a present right to remove. At present neither the allegations of the Plaintiff nor those of the Defendant have been proved and they remain mere allegations.

Mr. Mwangi relied on the case of Adamali & Others Vs Alibhai C.A No 26 of 1974 a case in which the High Court had in its discretion declined to appoint a Receiver of property. In that case the Learned Judge Mr. Justice Hancox (as he then was) declined to make an order despite the fact that the property was in the joint names of the parties on the grounds that:

1. It had not been shown that the property (in that) case would be dissipated or that there would be irreparable damage if a receiver was not appointed and
2. That being kept out of the rents was not sufficient in an interlocutory application to justify the grant of such relief and that to do so was tantamount to advancing the final relief sought.

At page 7 Wambuzi J.A in dismissing the appeal stated:

“In agreement with the trial judge I am unable to see that the justice and convenience of the case require the appointment of a receiver at this stage. The learned judge exercised his discretion judicially and I would not interfere with his decision.”

Each case must depend upon its own merits. There is no evidence that the Plaintiff will dispose of the said property or that he is incapable of refunding any rent which may become due to the 3rd Defendant in due course.

If the Plaintiff did what he is alleged to have done, he deserves no sympathy from a court. On the other hand there is an element of righteous indignation on the part of the Applicants in respect of this case. On the evidence before me I cannot say at this stage that the said property was acquired by the Plaintiff from ill gotten gains. If I was so satisfied I would make the order sought, however as there is no clear evidence for me to be so satisfied I decline to appoint a receiver.

The application is therefore dismissed with costs to the Respondent.

However I do think this is a case where I should order that pending the disposal of this suit the Plaintiff shall be restrained from disposing of the property or transfer it to anyone else. An order to this effect shall issue.

**DATED and DELIVERED at NAIROBI on 20th April 2005**

**P.J RANSLEY**

**JUDGE**