REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT N NAIROBI
MILIMANI COMMERCIAL COURTS

CIVIL CASE 2007 OF 2000

NATIONAL BANK OF KENYA LIMITED……PLAINTIFF

VERSUS

TOURSITS PRADISE INVESTMENTS LIMITED……DEFENDANT

R U L I N G

This is an application by an Objector, pursuant to the provisions of Order 21 rules 56 and 57 of the Civil Procedure Rules, as read together with Section 3A of the Civil Procedure Act. The Objector is asking the court to raise the proclamation dated 3rd December 2004.

The grounds set out on the face of the application pretty much summarise the objector's case. I therefore feel that it would be prudent to set out the said grounds, which are as follows:-

"**1. All the attached goods and property have been vested by this Honourable Court to the Objector as a Court appointed receiver of the 2nd Defendant's property assets and business operations.**

(2) The leave of this Honourable Court has not been first obtained as required by law before the attachment of the said property which is in custodia legis.

(3) The Decree sought to be satisfied and the judgement were issued over a year ago and as such the attaching creditor must first obtain and serve a Notice To Show Cause to the debtor, which was not done.

(4) By virtue of Sections 224 and 225 of the Companies Act, Cap 486, the said attachment is null and void ab initio since there is a Winding-Up Cause No. 3 of 2001 against the 1st Defendant, pending for determination

(5) The said attachment is a contempt of court as no leave of the court was sought before the attachment as the property is in custodia legis"

When elaborating on these grounds, Mr. Mugambi Imanyara, advocate for the Objector told the court that the Plaintiff had caused the proclamation of goods which were in the hands of the Objector. The said proclamation was carried out on 3rd December 2004. At the said date of proclamation, the Objector was the Receiver/Manager of the 1st Defendant.

There is no dispute about the appointment of the Objector, as Receiver Manager, on 12th

June 2001. But there are issues regarding the effect of the said appointment, which was made by the court.

The Objector contends that the effect of his appointment was to place all the property of the 1st Defendant in the hands of the court. The learned authors of HALSBURY'S LAWS OF ENGLAND, Vol. 32, have the following to say about the effect of the appointment of a receiver, by the court;

"**By the order for the appointment of a receiver the court assumes control of the property affected, and from that time the parties to the action retain possession only as custodians for the court."**

In my understanding, the legal position expounded in HALISBURY'S above, is also applicable with equal force, in Kenya.

That being the case, Order 21 rule 47 would then come into play, so that attachment of the 1st Defendant's property could then only be carried out by Notice to the court, requesting that the property be held subject to further orders of the court. In other words, there would be no issuance of warrants for attachment, which could then be executed by way of proclamation, and thereafter attachment of property, if such property was in the custody of the court. I therefore hold that the procedure employed by the Plaintiff/Decree-holder herein was irregular, in that regard.

The other issue raised by the Objector was to the effect that even if the procedure used were proper, the Plaintiff would have had to first take out a Notice to show cause against the 1st Defendant. The reason for that assertion is that the Decree which the Plaintiff was seeking to execute, by way of the proclamation which is now challenged, is more than one year old. A perusal of the record reveals that the Decree was issued on 5th July 2001. Therefore, pursuant to the provisions of Order 21 rule 18 of the Civil Procedure Rules, the Plaintiff ought to have applied to the court for a Notice to show cause to be issued to the 1st Defendant. Order 21 rule 18 reads as follows:-

"(**1) Where an application for execution is made** –

(a) more than one year after the date of the decree; or

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43,

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having lapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party whom execution is applied for, made on a previous application for execution, or in consequence of the application being made against the legal representative of the judgement-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him;

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgement-debtor having changed his employment since a previous order for attachment."

I have recited the above provisions extensively, as they not only indicate when a Notice to show cause should issue to a judgement-debtor, but the provisos also spell out the exceptions to the rule.

Clearly, the Plaintiff herein does not fall within the provisos to the rule. However, Mr. Wabuyabu, advocate for the Plaintiff made a valiant effort to justify his client's position.

He explained that the Decree herein was obtained by consent of the parties. The said consent incorporated an agreement that the decretal amount of Kshs. 6,039,905/25, together with interest thereon at 20% per annum from 20.10.2000, would be paid by monthly instalments of Kshs. 500,000/= from 1.7.2001. After the consent judgement was granted, the 1st Defendant defaulted in payment, prompting the Plaintiff to take out execution.

As soon as the 1st Defendant's assets were proclaimed, in 2001, the Objector filed an objection. However, the said objection proceedings were not prosecuted for a long period of time. Ultimately, on 22.10.2004, the objection was dismissed by the court, after the Objector failed to attend court, to prosecute it. In these circumstances, the Plaintiff submits that the proclamation being challenged was not anything new. It is contended that the Plaintiff had simply proceeded with the execution process which was commenced in 2001, and which had been temporarily placed on hold by the objection proceedings.

Indeed, the Plaintiff believes that the Objector should not even be permitted to prosecute this application, as he did not appeal against the dismissal of the earlier objection proceedings, or alternatively, set aside the said dismissal.

In the light of these interesting contentions, I must now decide whether or not the proclamation which is now being challenged was simply a continuation of the execution process which had been started in 2001. In my considered opinion, if the answer is in the affirmative, there may be a bar to the Objector carrying on with the present application.

A scrutiny of the material before the court reveals that the warrant of attachment dated 12th July 2001 was for a sum of Kshs. 7,326,917/65, whilst the warrant of attachment which was being executed in December 2004 is for Kshs. 12,636,847/20. Secondly, the goods proclaimed in 2001 were valued by the Court Broker at Kshs. 5,000,000/= whilst the goods proclaimed in 2004 are said, by the same Court Broker, to be valued at Kshs. 2,000,000/=.

To my mind, all those three facts indicate that the proclamation which is in issue now, is not simply a continuation of that which had been commenced in 2001. Accordingly, the Plaintiff Decree/Holder should have complied with the provisions of Order 21 of rule 18.

The other point taken by the Plaintiff was that the Receiver has no locus standi to agitate issues concerning the property of the company, in his own name. Instead, it is submitted by the Plaintiff, the said Receiver should be utilising his position to discharge the 1st Defendant's decretal debts, using the property in the Receiver's hands. As the decree herein was obtained with the 1st Defendant's consent, the Plaintiff believes that it is thus the obligation of the Receiver to pay off the decretal amounts, rather than obstructing it.

In the opinion of the Plaintiff, the Objector's authority to pay off the decretal sum emanates from the terms of the consent order, as well as by operation of the law.

Paragraph 707 of **HALISBURY'S** is cited as authority for the Receiver to pay the decretal amount. Whilst paragraph 720 is said to deprive the Receiver from bringing this application in his own name. And finally, the order numbered 5(v) in the consent judgement is said to have clothed the Receiver with express authority to pay the decretal amount. I will now look at each of these, in turn.

First, paragraph 5(v) of the consent judgement provides as follows:-

"**THAT Mr. Gitari T. Njeru be and is hereby appointed to be Receiver of the Fourth Defendant and of all its property, assets and business operations with power to collect in and hold any such property and assets, including but without limiting the generality of the foregoing:**

(i) the Receiver be and is hereby at liberty to give receipt or discharge of any of the assets which shall be made the subject of the said Order and management generally.

(ii) the Receiver shall have power to have delivered to him from any person or entity all such information and documentation as may be required to facilitate the purpose of the management including power to:-

(iii) Vest any and all assets of the Fourth Defendant insofar as may be appropriate in the name of the Receiver.

(iv) To take such steps in the management and administration of the Fourth Defendant and the Fourth Defendant's affairs and business operations as may be deemed proper by the Receiver.

(v) To sell, dispose or otherwise deal in any manner whatsoever with the assets of the Fourth Defendant for the purpose of the management and enter such deeds documents or instruments as may be appropriate for the purpose, and

(vi) To appoint advocates accountants or other legal or other advisors to act on his behalf in this jurisdiction or any other jurisdiction relevant to the appointment of the Receiver to the Fourth Defendant and the affairs of the Defendant."

In my understanding of the powers granted to the Receiver under Order 5 (v), above, the same were only to be utilised "**for the purposes of the management**," as expressly stipulated. Therefore, I hold that the said provision did not expressly or otherwise empower the Receiver to pay the decretal amount.

Paragraph 707 of HALSBURY'S reads as follows:-

"***Rent, rates, taxes and duties*. A receiver is also justified in paying head-rent, rates, taxes and other outgoings chargeable against him in respect of the property of which he is in occupation. He is entitled to deduct from the rent payable by him not only income tax thereon but also arrears of tax for previous years, though the rent for such years is unpaid. A receiver of licensed premises may, and should, pay, duties necessary to preserve the licences."**

I do not comprehend how the Plaintiff thought that the foregoing paragraph would have empowered the receiver to pay the decretal amount. At any rate, I hold that the said paragraph did not give to the receiver any such authority.

It is perhaps significant at this stage to recite here, the contents of paragraph 710 of HALSBURY's, which reads as follows:-

"***Leave as a rule necessary*. A receiver appointed by the court without express powers of management is not in general justified in incurring expenditure without the sanction of the court, though he may be allowed in his accounts any expenditure which is shown to have been beneficial to the parties interested."**

I appreciate that the Receiver herein was clothed with authority to manage the 1st

Defendant's property, assets and business. But that is as far as his authority went. By analogy therefore, the receiver's authority could not be extended beyond that which he had been expressly clothed with in the consent judgement.

And as regards paragraph 720 of HALSBURY's, I believe that the same speaks for itself. It says:-

"***Instances in which receiver may sue***. **Though a receiver cannot generally maintain an action in his own name, since no property is vested in him, yet if he has an independent cause of action, the fact that he is receiver does not disqualify him from suing. He may, for instance, sue as a holder of a bill of exchange or promissory note ……**

and a receiver and manager may sue in respect of his business transactions, as for the recovery of goods improperly detained."

In effect, the law expressly recognises the authority given to a receiver to sue for the recovery of goods improperly detained, And, as I understand it, that is exactly what the Objector was doing in this case. He cannot therefore be said not to have the locus standi to act in the manner he has done.

In the final analysis, I find that the Objector's application is well merited. Accordingly, I do hereby order that the proclamation dated 3rd December 2004 be and is hereby raised and vacated forthwith. Costs of this application are awarded to the Objector.

Darted and Delivered at Nairobi this 26th day of September 2005.

FRED A. OCHIENG

JUDGE