



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**Civil Case 306 of 2005**

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

**VERSUS**

**KENATCO TAXIS LIMITED .....DEFENDANT**

**(IN RECEIVERSHIP)**

**RULING**

On an application of the 7.6.2005 for orders seeking injunctive relief against the Respondent Company Mr. Njoroge took a preliminary point that the suit be struck out as the Plaintiff was non suited. He referred to sec. 348 (2) of the Companies Act which states that a Receiver appointed out of court be personally liable on any contract entered into by him.

The Plaintiff alleges that the Defendant entered into an agreement with the Plaintiff. It recognizes that the Defendant is in Receivership.

Mr. Njoroge relied on the case of *Kisii Petroleum Products Ltd. V Kobil Petroleum CA No. NAI 309 of 2003* in which O’Kubasu J. A. cited with approval a passage from *Halsbury’s Laws of England (4<sup>th</sup> Edition) at paragraph 1159* where it stated that “*the appointment of a Receiver is one of the events which causes a floating charge to crystallize. As regards all the property comprised in the security over which the Receiver is appointed, the director’s powers are of necessity paralysed*”.

Mr. Odera opposed the preliminary objection as not being a proper matter to be raised in a preliminary objection. He relied on the statement of *Newbold P in the case of Mukisa Biscuit Co. v West End Distributors (1969) E. A. page 696* in which he said;

*“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.*

He submitted whether a Receiver was personally liable in contract was a matter for consideration of the Deed of Appointment and Debenture.

He relied on the case of *Anspar Beverages Ltd v. Development Bank Ltd. cc. No.1155 of 2002*, which dealt with the rights of a Company in Receivership to all.

In this case the suit is against the Company. A Company in receivership still has its corporate status intact. There are many cases where a third party can sue a company in Receivership to establish liability against the company. The position is not analogous to a company being wound up where under Sec. 228 of the Companies Act no proceedings shall be proceeded with or commenced against the company except by leave of the court.

It is for the Applicant to establish that it has a right to sue the company for breach of contract and that the company is liable under the said Agreement and not the Receiver.

It must be borne in mind that the powers of the directors are paralysed only in respect of the property comprised in the security. If the agreement relates to property not included in the security then the company can be liable. Which is the correct position in this case is a matter for consideration and as such this suit cannot be struck out without an examination of the position on the facts.

In the result this is not a matter, which can be raised as a preliminary objection within the definition as stated by Newbold P above and the same is dismissed with costs. The substantive application can now proceed.

Dated and delivered in Nairobi this 25<sup>th</sup> day of October, 2005.

**P. J. RANSLEY**

JUDGE