



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 44 OF 2002**

RATILAL GOVA SUMARIA1ST PLAINTIFF

CAMPOS INDUSTRIES LIMITED.....2ND PLAINTIFF

VERSUS

FINA BANK LIMITED1ST DEFENDANT

CHETAN RATILAL SUMARIA2ND DEFENDANT

SHUSHRUT RATILAL SUMARIA3RD DEFENDANT

JIGNESH KUMAR NEMCHAND SHAH ...4TH DEFENDANT

RULING

The Plaintiff has come by way of Notice of Motion dated 4th August 2004. The same is brought under Section 3A of the Civil Procedure Act, Order 40 Rule 4, Order 39 Rule 7 and Order 50 Rule 1 of the Civil Procedure Rules and Sections 348 and 354 of the Companies Act.

The Plaintiff's counsel agitated prayers No 2, 3 and 4 of that Motion. The said prayers are: -

- That the defendant bank's Receiver Manager of the 2nd Plaintiff company Mr. Juma Namusasi Swaleh Abdallah do hereby within such time as the court may determine, provide a statement of Accounts and affairs of the 2nd Plaintiff Company from the date of his appointment on 17th December 2003 until the date of such Report to the court.
- That in default, the said Receiver manager be removed and his appointment by the defendant bank be terminated by this Honourable court.
- That pending determination of this application, all realization process of the suit property (L.R. No. 209/2151/2 and the assets of the 2nd Plaintiff company be stayed/preserved.

Mr. K'opere counsel for the plaintiff began his submission by informing the court that the sale the subject of last prayer, here above, is due on 11th November 2004, at 11.00 a.m. He submitted in favour of the application that the 2nd plaintiff company is in the business of production of polythene bags. That on 17th December 2003 the receiver manager was appointed by the 1st defendant bank as receiver manager of the 2nd plaintiff and he proceeded to close the 2nd plaintiff's doors by placing an extra lock.

The 3rd defendant who swore the supporting affidavit deponed that they did not know who had closed the 2nd plaintiffs doors and consequently they filed suit, namely HCCC 103 OF 2004 for the removal of the alleged trespasser and indeed obtain court order. On 19th December 2003 in the presence of OCS of Industrial area they found a person called Juma Namusasi Swaleh Abdallah. He informed them he was a receiver manager and he was taking over the running of the affairs of the company. He seized the books

of accounts, machinery, plant, office furniture, computers, raw material and finished products worth Kshs 11 million. The 3rd defendant then deponed that he and his co-directors stayed away from the company on the advise of their advocates and from that date the receiver manager has single handedly assumed the running of the company.

Plaintiff's counsel argued that what they require is an account of what has been sold, received or paid out and in that regard he said that the abstract forms filed by the receiver manager did not amount to an account. The receiver manager, he argued, was under an obligation at the expiry of the receivership to account what was there. In the absence of such account the plaintiff was seeking an injunction to preserve the subject matter of the dispute. Counsel said that prima facie the court had a basis to grant injunction pending the provision of those accounts.

Mr. Fraser, counsel for the 1st defendant opposed the application. He began by giving the background and previous applications made by the opposing parties hereof. He referred to the application amended on 5th February 2002 and which included a prayer to restrain the enforcement of the debenture as well as an injunction against the sale of the suit property. That application was dismissed by Justice Mwera on 24th December 2002. The other application dated 29th June was one seeking injunction to stop the sale of the suit property and among the grounds it was based on, was one which mentioned the appointment of the receiver as well as the exercise of statutory power of sale as grounds for the injunction being granted. There was another ground of that application which sought a declaration that the sale of the suit property whilst the receivership subsisted was null and void. This application was found to be res judicata by Justice Waweru and the same was dismissed.

1st defendant's counsel, quite rightly, pointed out that the reliance of Order 40 rule 4 was misconceived because that order related to an appointment of receiver by the court. In this present case he said the appointment was under the debenture.

He also argued that Sections 348 and 354 of the Companies Act had no relevance. Where else I agree with counsel in regard to Section 348, Section 354 does have relevance in that the parties wish to enforce the duty of the receiver manager.

The 1st defendant submitted, in regard to the second prayer of the application, which seeks the removal of the receiver, and, the also first prayer, which seeks accounts, and sought their dismissal on the ground that the said receiver manager to whom these prayers are directed is not a party to these proceedings.

The replying affidavit of the receiver manager deponed that the said receiver manager had not gained access to the 2nd plaintiff's premises since his appointment and never assumed management thereof because at the date of his appointment the 2nd plaintiff's premises were locked by an auctioneer under attachment as at 15th December 2003 in HCCC No. 1254 of 1999, where the plaintiff was sued by Reliance Bank Limited. For that reason the 1st defendant had terminated his appointment by a deed of discharge and he proceeded to file a notice of cessation to act as receiver together with receiver manager's abstract of Receipts and payment on 30th August 2004.

In considering my ruling I wish to start with the provisions of Section 251 of the Companies Act. This Act requires a receiver to give notice to the company of his appointment and on receipt of the statement provided in Section 352 to provide a copy of that statement to the registrar and every 12 months an abstract was required in prescribed form.

The pertinent section is Section 352, which requires that statement to be submitted to the receiver by the directors of the company giving amongst others particulars of the company's assets, debts and liabilities. The plaintiff and the 3rd defendant failed to prove that such a statement was provided to the receiver manager and it is clear then that Section 354, relied upon by the applicants, consequently does not raise a liability to the receiver. That as it may be the receiver did file an abstract of receipts and of payment as aforesaid.

The receiver deponed in the replying affidavit that he did not have access to the 2nd plaintiff's

premises and this evidence was not controverted and must therefore be accepted as correct.

Additionally I have perused the file of HCCC 1254 OF 1998 where the 2nd Plaintiff is the defendant. I noted that on the 19th December 2003 the counsel for the Plaintiff and the defendant entered into a consent whose content was that the 2nd plaintiff in this suit was to obtain possession of its premises from judgment creditor. That is clear evidence that the receiver was unable to gain access of those premises because auctioneers had locked up the premises.

Even though the applicant's counsel said what they sought was a preservation order what essentially they are looking for is an injunction and that is an equitable relief. The conduct of the plaintiffs and the 3rd defendant is pertinent in the consideration of that application and their failure to disclose the closure of the premises by auctioneers must be taken into account. My finding is that the present application is res judicata. The application of 4th February 2002 and of 29th June 2004 sought injunction against sale of the suit property and the enforcement of the debenture. Section 7 of the Civil Procedure Act prohibits litigation in instalment, which is what the applicants have been doing here.

Over and above the aforesaid finding I agree with the 1st defendant's counsel that the orders sought against the receiver manager cannot be granted when the said receiver manager is not a party in this suit. On this ground alone the application would fail.

The orders of this court are that the application dated 4th August 2004 is dismissed with costs to the 1st defendant.

Dated and delivered this 11th day of November 2004.

MARY KASANGO

AG JUDGE