REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL SUIT NO 600 OF 2004

KAMOTHO WAIGANJO

(Suing as the Liquidator/trustee of DAWA PHARMACEUTICALS STAFF

RETIREMENT BENEFITS SCHEME (in Liquidation
……...PLAINTIFF

VERSUS

DAWA PHARMACEUTICALS LIMITED

(In receivership)…….
……..DEFENDANT

AND

ENGINEER GAKURU KANYANJA

ENGINEER GEORGE NYAGISERE (both applying as joint Receivers – Managers of

DAWA PHARMACEUTICALS LIMITED (IN

RECEIVERSHIP…..INTERESTED PARTIES

RULING

The chamber summons dated 17th August 2004 is brought under order XXXIX Rule 1, and 2 of the Civil Procedure Rules and Sections 3A of the Civil Procedure Act.

It has 5 prayers but counsel for the applicant said that the applicant sought prayer Number 4 pending the hearing of the originating summons. Prayer number 4 is in following terms: -

> **"That this Honourable court be pleased to restrain the Respondent by itself, servants, agents or otherwise howsoever from remitting the sale proceeds of DAWA PHARMACEUTICALS LTD (IN RECEIVERSHIP) to any other person other than the applicant to the tune of kshs 22, 877, 000/- (or such less sum as may be realised) pending**

the hearing of this summons."

The applicant is the appointed liquidator of Dawa Pharmaceuticals Staff Retirement Scheme (in liquidation).

Mr Macharia for the applicant submitted that the said liquidator has been unable to compile a final report of the liquidation of the scheme because there are outstanding payments due to the scheme from amongst others, the Respondent in this matter.

The liquidator made demand to the Dawa Pharmaceuticals Ltd (in receivership) for the kshs 22, 877, 000/- to which the joint receiver/manger responded by their letter dated 29th April 2002 in the following terms: -

"We wish to advise you that the demanded payment has been noted and will be considered along with other creditors at the end of the receivership."

The applicant's counsel argued that this response was an admission of the debt since the joint receiver/manager did not deny the debt. The respondent's counsel did not accepts this argument and said that there is nothing in its content which shows that the joint receiver/manager was liable and added that the applicant needed to prove the debt.

Having in mind that what I am considering is an interim application I am of the view that the applicant need not at this stage make strict proof of the debt it suffices for this stage the respondent did not deny the debt.

Both counsel's argument was in regard to section 311 of the Companies Act and its role to the alleged amount owed to the scheme

Section 311 (1) state: *"In winding up of a company there shall be paid in priority to all other debts*

(a) ……

(b) ……

(c) ……

(CA) All retirement benefits contributions and vested benefits of any clerk or servant of the company."

This subsection (CA) came into operation on 19th December 2003 and the applicant's counsel argument was that its effect was to make retirement benefit a preferential debt. He said accordingly by virtue of section 95 of the Companies Act any asset coming into the hands of a receiver after the said amendment meant that the same was to be applied to the settlement of such preferential debts. The present application, counsel said, did not seek to make the aforesaid provision retrospective. Counsel argued that the provision of subsection (CA) related to when the debt was sought and not when it occurred.

The fact that the said subsection talked of benefit of any clerk or servant of the company meant, according to the applicant's counsel was that the benefits were in relation to when the claimants were workers and servants.

The respondent's counsel Mr. Nderitu argued in opposition that the debt had not been acknowledged by the joint receiver/manager; that the subsection (CA), related to Liabilities after the date when this subsection became operative because the Legislature did not state that it was to have retrospective effect. Counsel argued that by virtue of section 311 (2) the amount recoverable as a preferential debt cannot exceed kshs 20, 000/- per claimant; and going by the supporting affidavit and its annextures thereof the

contributors were said to be 103 in number. Counsel said that multiplication of 103 by Kshs 20, 000/- meant that the joint receiver/manager were liable for only ksh 2, 060, 000/-. Counsel however said that such liability was payable by former directors of the company that is, that the Liability of directors extinguished on appointment of receiver/manager. To support this proposition counsel relied on the case *NEWHART DEVELOPMENT LTD V CO-OPERATIVE COMMERCIAL BANK LTD (1978) ZALLER 896.*

I agree with the applicant's counsel that the aforesaid case does not assist the respondent because it relates to the director's right to take out an action on behalf of the company but did not deal with the director's Liability when a receiver had been appointed.

The Respondent drew the court's attention to HCCC NO. 667 OF 2001, which was filed by the company; seeking a declaration that their final dues be paid before the disposal of the company's assets; and also a declaration the final dues rank in priority to other debts. Counsel invoked Section 6 of the Civil Procedure Act but with the same breath said that the suit was dismissed for want of prosecution on 11th November 2004. That being the case Section 6 cannot apply because its application is to pending suits.

In my ruling I need to be guided by the holding of the case of *MBUTHIA V JIMBA CREDIT FINANCE CORPORATION & ANOTHER 1988 KLR* as follows: -

> **"The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each side's proposition. The lower court judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits."**

Having that holding in mind I believe the fundamental issue, which arose during argument, is whether the amendment of Section 311 ought to have retrospective effect. In deciding this issue I need to tread with care having in mind all that I am required to do is to weigh the evidence presented before me.

Section 46 (6) of the Constitution provides that Parliament, subject to Section 77 can make law with retrospective effect. Whether a law ought to specially state that its effect is retrospective or not has to be the subject of argument at the full hearing of the originating summons. Whether or not a debt, which is not time barred like in this instant case, can be brought under Section 311 (CA) I also believe should be canvassed at the full hearing, and similarly should also be the fate of the argument that the applicant's claim is limited by sections 95 (2) and 311 (7).

The relief sought by the applicant is an injunction. I am of the view that to order that the subject amount be remitted to the applicant as prayed in the application may be tantamount to granting final orders at an interlocutory stage. The question that needs to be satisfied is whether the applicant has brought himself within the ambits of *GIELLA V CASSMAN BROWN (1973) E.A. 358*. The first test is that the applicant has to show a prima facie case with a probability of success.

In weighing the evidence before me I do agree that the joint receiver/manager did not, when demand was directed to them, deny the applicant's debt; further more in their statement of affairs they reflected the said debt as owing. In view of that I am of the view that the applicant has shown a prima facie case with probability of success, and is therefore deserving restraining orders even though not in the specific terms prayed for.

In addition to the finding that a prima facie case has been established I am persuaded by the fact that the sums of money the subject of this litigation relate to contributions towards pension fund of employees. The pension fund relates to contributions, which the employees contributed, for much of their working life, which is supposed to ensure regular payments during their years of retirement, which will be a period when they will not be working. On a balance of convenience, this alone, would sway me to grant stay orders.

The orders of this court are as follows: -

1. That the joint receiver/manager of Dawa Pharmaceuticals (in receivership) be and are hereby restrained by themselves, their servants and agents or otherwise howsoever from remitting in priority to other debts the sale proceeds to the tune of kshs 22, 877, 000 or sum that may be realized of Dawa Pharmaceuticals (in receivership) to any person and to retain the said sum pending final determination of this suit.

2. The costs of the application dated 17th August 2004 shall be in the cause.

Dated and delivered this 14th day of December 2004.

MARY KASANGO

JUDGE