



UNION LIMITEDAPPELLANT

VERSUS

KIRINYAGA DISTRICT FARMERS

FARMERS SACCO SOCIETY LTD.1ST RESPONDENT

REGISTRAR OF CO-OPERATIVES

SOCIETIES2ND RESPONDENT

RULING

This application dated 16th July, 2002 and filed in court on 18th July, 2002 seeks three (3) prayers; namely:

(2) That Mr. H.W. Gichohi be appointed receiver and manager of the respondent's business with power to take immediate possession, custody and control of the respondents business, assets, funds, books of account, minutes books and all other related records until this appeal is heard and determined or until further orders of this honourable court. (3) That further hearing of and proceedings in Co-operative Tribunal case number 5 of 2001 be stayed until this appeal is heard and determined or until further orders of this honourable court. (4) That costs of this application be costs in the cause.

The application is supported or based by/or on the ground set out on the application and also on the supporting affidavit. The applicant herein is the claimant in the Co-operative Tribunal No.5 of 2001 in which the defendant is the respondent herein.

During the hearing of the Tribunal case, the applicant had filed an application on 26th April, 2002 for appointment of one H.W. Gichohi as receiver and manager of the respondents business A ruling delivered by the Tribunal on this application on 21st June, 2002 declined to grant that prayer on grounds that the issues raised in the application and the submissions made by counsel went into the substance of the claim and that it would be prejudicial to a fair disposal of the claim to make a finding on any of the issues at that stage.

Arising from that refusal the applicant filed an appeal to this court on 28th June, 2002 to contest that refusal. And on the heels of the appeal followed this application as stipulated in the first paragraph of this ruling. The grounds upon which the application is based are that if the receiver and manager is not appointed during the pendency of the appeal which has great probability of success the applicant will suffer substantially.

The grounds talk of the unlimited jurisdiction vested in this court in commercial disputes where parties are cooperative members or its power to preserve the subject matter by the appointment of receiver and

manager.

Further grounds are that there is a dispute between the parties to this appeal over the ownership of banking business worth more than Kshs.600 million which the appellant transferred to the respondent to run on its own behalf in the late 1998.

That during the pendency of the suit events had occurred which had made the appellant apprehensive that unless it is stopped the respondent would so deal with the appellants business and assets that any decree passed in its favour would be worthless as the respondent might have put the assets beyond its reach.

The grounds state further that though there was an application for the appointment of receiver and manager on 26th April, 2002, to take immediate control of the respondents' assets initially pending the interparties hearing of that application and thereafter until the determination of the suit, the Co-operative Tribunal totally ignored the commercial urgency in the matter which would give the respondent a chance to destroy the documents or put the assets beyond the reach of the Tribunal.

That the Tribunal had ignored the applicable principles governing the appointment of receivers and managers. That the applicant fears that because of the Tribunals refusal to act, on its application of 26th April, 2002 the respondent has destroyed and/or will continue to destroy important documents pertaining to the subject matter of the appeal.

That because of the way the Tribunal has handled the applicants' application of 26th April, 2002, it is not known when that application will be disposed of.

The grounds further state that the respondent had nothing to lose as it has invested nothing while the applicant has everything to lose from the respondents breach of trust as the former holds and runs the banking business upon trust for the latter since 1998. That the assets being held in trusts by the respondent are worth Kshs.682,276,079/= but that the respondent is in breach of its obligation by disowning the trust.

That the respondent is using the veil of formation of the respondent under the Co-operative Societies Act by the applicant in May 1998 to perpetuate a gigantic fraud on the latter. That using the applicants monies/assets, the respondent is making investments without prior approval of and/or consultation with the applicant.

That one of such investments without approval of the applicant is the purchase of plot No. INOI/KERUGOYA/250/139 and constructing a huge building thereon valued at Kshs.15 to 25 million to house the applicants business.

That also without approval of the applicant the respondent has purchased plot numbers 37 Kianyaga and 47 Kiamusugu on which it is constructing buildings in which to carry on/out the applicants business.

That the respondent has no basis for claiming the assets and business which the applicant transferred to the former after the latter formed it and assets and/business in preposterous, and ridiculous to the extreme.

That if the order sought is not granted and the tribunal case progresses, the respondent will have a chance to destroy vital documents relating to the assets and business entered in favour of the applicant, it will be worth very little.

That the applicant, its officers and investments are under pressure which is traceable to this suit or that the Tribunal was not composed of the same members throughout the period of the hearing of the applicant's application dated 26th April, 2002. A number of affidavits were sworn to by different deponents and filed in support of the application. One such affidavit was deposed to by one Samuel Kamau Keregeni the chairman of the management committee of the applicant which gave the origin and formation of the respondent and/or what assets were transferred to it by the applicant.

This affidavit also deposes to why the application was filed in this court and what its objects are. The rest

of this affidavit was nearly a repeat of the grounds set out on the body of the application. Another affidavit was that of Johana Gicheru sworn on 26th July, 2002. He is the chief accountant of the applicant. His affidavit was actually in opposition to an application filed in this court on 30th July, 2002 for setting aside the court's order of 19th July, 2002. There were other affidavits of one Gichohi dated 26.7.2002 and 1st August, 2002 and also a further affidavit of Yohana Gicheru of 1.8.2002.

There was also a further affidavit by Keregeni dated 9th August, 2002 and another by one Richard Mwai dated 19.8.2002. Gichohi was the receiver manager appointed by the court order of 19th July, 2002 and his affidavits were mainly on the status of the receivership. www.kenyalawreports.or.ke 6 Mwai's affidavit reiterated the contents of Keregeni's affidavit and those of the affidavit of Johana Gicheru and re-enforces a consent order entered into by the parties on 1st August, 2002 as regards prayer (d) of the 1st respondents notice of motion dated 24th July, 2002.

The intention of Mwai's affidavit so far as I can see was to bar this application being heard on priority basis or as a matter of urgency.

A replying affidavit to this application was deposed to by out Nahashon Gutu Manda the General Manager of the 1st Applicant and filed in court on 25th July, 2002.

In this affidavit Mr. Manda disputed that Kenegani was a member of the management committee which dealt with the transformation of the union Banking section of the applicant into Sacco hence did not participate in the transaction, which was as result of the government policy advising unions to transfer their union banking section into independent savings and credit societies, which is how the respondent was born in 1998. That since the formation of the respondent was formed it had developed into a giant savings and credit society for the whole of Kirinyanga District having deposits in excess of Shs.500 Million, 110,000 depositors and 170 employees.

That out of shareholder capitals, the sacco has acquired land on which it is constructing premises for its use and for letting. In further elaboration of the transformation and present status of the sacco, the deponent adopted other documents, affidavits and www.kenyalawreports.or.ke 7 grounds of opposition produced at the cooperative Tribunal and attached to the replying affidavit. According to the affidavit, the business and assets taken from the union belong to the depositors in the sacco and not to the union. The deponent denied paragraphs 4, 10, 11 14, 15,16,18,19, 20 22, 24, 25 26, and 27 of the supporting affidavit and that the appellant's application was made in bad faith.

The deponent stated that the appellant had already established a parallel savings and credit section, which operates as it banking section and that the appointment of the receiver to run the 1st respondent was meant to kill it and thereby create business for the new banking section. Otherwise the appointment of the receiver is a remedy which should be resorted to in very exceptional circumstances. That the application is made to discredit and destabilize the respondent.

That the assets of the Union Banking Section were transferred to the respondent which had duly been registered as a separate entity and that the question of the respondent such assets in trust for the applicant does not arise.

That the deponent of the supporting affidavit is trying to undo what his predecessors did willingly after realizing that the applicant is in financial problems. That the transformation was duly performed with the appellant paying to the respondent Kshs.20 million out of Kshs.39 million outstanding as per the agreement and arrangements made for the applicant to pay the balance.

That apart from the assets, the Union Banking Section transferred to the 1st respondent liabilities. According to the replying affidavit, the assets transferred to the 1st respondent were those of the Union Banking Section and not of the Union as such.

That the 1st respondent is a legal entity independent of the Union having its own separate shareholders assets and liabilities and is not answerable to the Union which is not a shareholder. The deponents states

that there is nothing wrong in investing the shareholders capital in projects which have been approved by the said shareholders in an annual general meeting and that such investments cannot be termed wasteful.

Paragraph 21 of the replying affidavit gives the devastating effect of the order appointing a receiver and manager made on 19th July 2002 without the applicant disclosing to the court that a similar application made at the Tribunal was dismissed on 17th July 2002. Paragraph 23 of the affidavit states that unless the orders made by this court on 19th June 2002 are set aside, and in the meantime stayed, the business of the respondent will soon collapse to the great detriment of the shareholders, the employees, the co-operative movement and the country in general.

Counsel for the parties appeared in this court on 8th October, 2002, 23rd October 2002, 12th November 2002, 19th November 2002 and 14th February 2003 when they submitted on this application. Counsel for the applicant outlined the Tribunal case No. 5 of 2001 in which an application for interim appointment of Receiver and manager on 26th April 2002 was refused on 21st June 2002 giving rise to an appeal filed herein on 28.6.2002 and this application dated 16th July 2002.

Counsel said the purpose of the application was for the preservation of the subject matter of the appeal; namely the banking business and the assets worth Kshs.680 million. That the appeal would be rendered nugatory if the 1st respondent were to have power to deal with the assets and put them out of reach of the applicant firstly by the time the appeal is heard and also by the time the Tribunal determines the case before it. That another reason for the application was that the Tribunal had been differently constituted on the days for the hearing of the application for the appointment of the receiver and manager. That different members of the Tribunal had different understanding of the application.

That justice cannot manifestly be seen to be done where different members hear the same dispute at different times. According to counsel the appointment of the receiver is pegged on the main suit and because different members heard it, even if justice was done it would not be seen to be done because a reasonable person observing proceedings where some members did not participate would not appreciate the justice of the matter. Counsel stated that the case at the Tribunal is part-heard – to resume probably after the decision in this application or appeal and this application was intended to connect the appointment of receiver and manager and the continuation of the Tribunal case. Counsel explained how the respondent was formed, why, what assets were transferred to it and who or the body formed to run it. But he added this created problems because of being physically passed to the respondent including Kshs.628 million worth of assets without any assignment or any written agreements. So that there are now two rival contentions regarding the transformation. He submitted that the applicants case is that the 1st respondent was to hold all the assets upon trust for the applicant and to account profits to it.

He stated further that a receiver and manager can be appointed where there is imminent danger of assets of the society adding that the respondent may make unauthorized investments using funds now in dispute.

That appointment of a receiver and manager is intended to safeguard the assets for those entitled. Counsel urged the court to find that there is a lot of money which can be dealt with during the pendency of the appeal which has raised serious issues.

That no harm will be done to either party if receiver – manager is appointed. That the transfer of assets took place through transformation which was not described which gave the respondent the ownership of Kshs.600 million worth, though the latter put in nothing.

Counsel for the respondent opposed the application for stay and appointment of receiver manager as it was devoid of merit. He submitted that the reason given that members of the Tribunal have sat intermittently does not make sense given that no objections were ever raised over this and that the chairlady sat throughout all such sittings. www.kenyalawreports.or.ke 11 That if an issue has never been canvassed in the lower court, it cannot be an issue in the appellate court.

According to counsel, the application for stay of the Tribunal proceedings cannot be sustained because if the said Tribunal has been given some jurisdiction to deal with some matters such jurisdiction should not

be unduly interfered with. Counsel submitted that the High Court cannot direct how the Tribunal should do its work and that the High Court should be slow to intervene in the Tribunal proceedings which are half way through unless it is extremely necessary.

That nothing has been demonstrated to warrant this court to interfere with the Tribunal proceedings which are proceeding as it the applicant who took the respondent there.

That the applicant has not shown it will suffer grave injustice to entitle it to a stay of Tribunal proceedings.

Counsel submitted that before 1998, the 1st respondent was a department of the applicant – known as Union Banking Section. Then he explained how the ministry of Co-operative Development recommended the transformation of this banking section into an independent legal entity in the nature of a co-operative Society. That it was registered in the name of the 1st respondent to take over the functions of Union Banking Section in 1998 after initial resistance by the applicant; but with concurrence of depositors. According to counsel, a new management of the Society was appointed which discussed with the applicant as to the assets to be transferred to the Society.

With concurrence of the applicant and the respondent, a group of consultants was appointed to make an inquiry and make recommendation as to which assets and liabilities were to be taken over by the respondent.

This was done and a report was prepared which was fully accepted and adopted by the applicant's Annual General Meeting. That by this recommendation, the applicant was to pay the respondent Kshs.39 million, and also transfer to it certain motor vehicle.

That a letter was written to the bank to transfer Kshs.39 million to the 1st respondent but that this was changed later and only Kshs.20 million was transferred with a proposal as to how the balance would be paid.

According to counsel this problem came up when a new Chairman was elected by the appellant and he wanted to go back on the agreement of 1998 and this is why a suit was filed at the Tribunal in the year 2000. That the applicant even refused to pay to the 1st respondent the balance of Kshs.19 million. That by then the 1st respondent had grown with 100,000 depositors and over half a billion shilling in operating capital. That an application for the appointment of receiver and manager made 1½ years after filing the case was dismissed by the Tribunal.

Even after such dismissal an application was once more made for an interim appointment of such receiver and manager and/or stay of proceedings which was again dismissed on 17th July 2002, but then this application was filed in this court on 18th July 2002 without disclosing the Tribunal order of 17th July 2002. According to counsel, the appointment of receiver and manager is a very serious matter recourse to which is taken as a last resort. That this is the harshest remedy which the law provides for agreements of rights.

That a receiver should be appointed to protect rights or for prevention of injury according to legal principles. Counsel submitted the appointment of receiver in this matter was done when legal title of the property in issue is in the name of the 1st respondent and not in that of the applicant.

That the claim the appellant is making against the 1st respondent is not legitimate because money raised belong to the depositors of the 1st respondent and not the applicant – hence no justification for the appointment of the receiver and manager. That the 1st respondent was not formed as a subsidiary of the appellant; nor does it hold the cash or assets in trust. Counsel stated that the reason why the applicant is attempting to negate the agreement on transformation is because it has no money to comply with what was agreed; or that its financial position has worsened; but that a party who freely entered into an agreement cannot be allowed by the court to come out of it.

That the applicant has not made out a strong prima facie case to warrant the appointment of a receiver and manager. That in this case a receiver and manager was appointed *ex parte* when no strong prima facie had been established. That no evidence has been adduced to show that the applicants own the assets in dispute and/or that such assets are being put at peril by the respondent.

Counsel for the respondent submitted that this application has been made in utter bad faith as it thought the first respondent was an easy target where to find (get) money to run its affairs. Otherwise without special circumstances being shown to exist a receiver – manager cannot be appointed. That since the transformation took place in 1999 there is an inordinate delay for an application for the appointment of receiver to be made in 2002.

And this appointment of receiver is intended to suppress and harm the business of the 1st respondent and give business advantage to the appellant. That the receiver appointed has not given an undertaking as to make good any damage that may be suffered by the 1st respondent by virtue his appointment.

That the court should find that the receiver order has been used for an improper advantage and must not be let to continue since he is not acting as an officer of the court acting independently but working in cohort with the applicant. Counsel for the respondent stated that appointment of receivers does not often improve the business. That this application should not be granted unless the court is satisfied that it is worth it. That the application should be dismissed.

Mr. Gicheru for the second respondent stated that the Tribunal was seized of jurisdiction to determine this matter and that the appellant's complaint does not lie by way of appeal but that it should have come to court by way of review.

That as regards appointment of receiver manager, Section 54(1) of the Co-operative Society's Act has not been complied with and that in this case the receiver manager is not neutral as required by law.

That the application for appointment of receiver manager should be refused. In reply counsel for the applicant reiterated that the assets in dispute should be preserved by the appointment of the receiver and manager. These are submissions made in this matter on both sides for consideration and decision. If a person is daring enough to disturb a swarm of bees in their hive then he/she should not be heard to complain and/or blame anyone when severally stung.

From the submissions made herein, the creation of the first respondent was initiated by the guidelines on the transformation of Union Banking Sections into Independent Producer Based Sacco Societies; by a circular dated May 1991 issued by the Commissioner of Co-operatives.

The circular to all Provincial and District Co-operative Officers gave the steps to be taken in implementing the transformation and the parties to be involved; the dissemination of information through meetings both Committee as well as special general meeting. The participants of these meetings were supposed to pass and ratify any necessary resolutions pertaining to the intended transformation.

The special general meetings were expected to elect implementation committees to oversee the transformation of Union Banking Section into Independent Sacco Societies.

The circular even suggested names of those to form and become members of the implementation committee. They included the Union General Manager, Banking Co-operative Officer, Banking Specialist from the Co-operative Rural Banking Component and an officer from the Co-operative Bank of Kenya.

After this circular was issued the applicant held various meetings to deliberate on it. But one of the most important of them was the one held on 9th April 1999 which said in part:- 1. "Transformation of the Union Banking Section into A Rural Sacco Society.

The Kirinyaga District Farmers Sacco Society Ltd. was duly Registered by the Commissioner for Co-operative Development on May 5, 1998 as CS/No.8379 and the same was officially launched on June 18,

1998. The cut off date to disengage the union and Sacco Society affairs was fixed to October 1998. The intention was that from the cut off date each of the two organizations would be autonomous. Since the cut off date the Union Management took the bold and positive step of transferring all depositors funds to the Sacco Society intact. It was anticipated issues between the Union and the Sacco Society were to be concluded amicably and expeditiously. A number of joint meetings designed to resolve the problems have been held between the Management of the Union and the Sacco Society and the latest having been held on April 1999. Emerging from this latest meeting there are now high hopes that some pending matters could be resolved". To resolve these outstanding issues, the applicant and the 1st respondent held a meeting at Grand Oak Hotel on 23rd June 1999 and which mandated external auditors for the two Institutions – Mike Kiswili (for the Sacco) and Mr. B. Obungu (for this Union) to work under the Chairmanship of the Provincial Co-operative Auditor Central Province, and come up with a report in settlement of the differences arising on the transformation process.

This Committee met and made recommendations on various items where difference had arisen between the two parties. This report is dated 10th August 1999.

The recommendations of this select Committee were adopted in a meeting jointly attended by the applicant and the respondent about 18.9.1999.

The select committee was paid Kshs.2.5 million and the two parties thanked the Committee for assisting them together with the District Co-operative office to arrive at the conclusion of those matter. It would appear there after parties parted and continued to carry out their respective duties forgetting their past for the benefit of Kirinyaga Farmers.

Though there were indication that there was initial resistance to the transformation by the applicant, it nonetheless took place and was implemented.

Infact the implementation committee included the applicant's general manager and its accountant. No where in all these documents is it shown that the cash Kshs.39,759,303 was transferred to the 1st respondent together with motor vehicles and other assets to hold in trust for the applicant. During the submissions herein the applicant does not show the basis of claiming ownership of the said cash, motor vehicles and other assets to warrant this application for the appointment of the Receiver and Manager for such property.

Under Order XL Rule 1(a) of the Civil Procedure Rules the court may appoint a receiver of any property where it appears just and convenient to it. This is the same case with order XL Section 503(1) of Mulla on Civil Procedure. The court should appoint a receiver for the protection of rights or for the prevention of injury according to legal principles.

But the court cannot appoint a receiver of property in possession of the defendant who claims it by legal title unless the plaintiff call show prima facie that he has a strong case and a good title to the property.

The applicant in this application claims title to the property or assets transferred to the 1st respondent on the basis of trust but gives absolutely no evidence to establish it.

The transformation under which the 1st respondent was created was intended to make and did make it an independent entity from the applicant. It has operated as such since 1999 only for the application to come up with this weird notion of trust which this court does not find at all in the submissions made herein.

By filing the proceedings at the Tribunal, it is the applicant who has created confusion and panic amongst depositors and the management of the 1st respondent otherwise there was no fear of imminent danger or waste of the assets and cash transferred to the respondent by the applicant.

The applicant even compounded the situation by making an application to this court for the appointment of a receiver on interim basis without making full disclosure of the full fact and in particular that a similar application had been made to the Tribunal and refused. In the case of Nassir Ibrahim Ali and 3 Others Vs

Kamlesh Mansukhlal Damji Pattni (Civil Number Appeal No. 72 of 1998, Omolo J.A. said:

“--- where a receiver is to be appointed *ex parte* a court must exercise great care and caution and I would myself add that such a step should be taken only in exceptional circumstances.” The applicant’s counsel submitted before this court about the need to preserve or protect the property from investing mainly the cash in unnecessary and wasteful projects.

What interest had the appellant in the assets, including cash transferred to the 1st respondent in 1999 to allege they are being invested in wasteful projects?

It is not a shareholder or depositor therein. Its general manager was only a member in the Committee implementing the transformation and once this ended with the adoption of the external auditors report dated 10th August 1999 in a joint meeting between the parties held on 15th September 1999, the applicant’s role in the Sacco ended. From thereon the applicant has no business poking its nose in the affairs of the respondent. It cannot tell this court, through counsel that it has any interest in the assets of the 1st respondent more so when it only transferred to the former Kshs.20 million which has now grown to over Shs.600 million it now talks of; knowing well that this has been due to aggressive recruitment of depositors who have injected their own capital into the Sacco.

Receivers have never been known to build any institution and the plea by the applicant to get one here is meant to simply run it down and to give the applicant an advantage to come out of the problems it faces. This is utter bad faith on the part of the applicant and this court cannot sanction such prayer.

You cannot just come from the blue to start interfering with other peoples affairs and expect this court to take you seriously. There are proceedings on this file where the so called receiver has even applied to be paid Kshs.4 million per month. What for?

These are depositors funds and must be used properly. Shareholders and depositors have not complained of their society or its management and a stranger in the form of the applicant should not be allowed to do so on their behalf because they have not sent him to do so.

No basis has been laid for either staying the proceedings before the Tribunal or the appointment of a receiver. I can only term the applicant a busy body in this matter and this court cannot allow him to interfere with the assets of the 1st respondent. This court dismisses this application with costs for two counsel. The *ex parte* appointment of receiver is hereby set aside.

Delivered this 24th day of March 2003.

D.K.S. AGANYANYA

PRINCIPAL JUDGE