

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 1001 OF 2001

NITA GANATRA SUING AS THE

RECEIVER MANAGER OF DAWAT

RESTAURANT LIMITED.....PLAINTIFF

V E R S U S

SHIMMERS PLAZA LIMITED.....1ST DEFENDANT

AUCKLAND AGENCIES.....2ND DEFENDANT

R U L I N G

Mr. Wahome, the learned Counsel for the Defendants raised a preliminary objection to the Plaintiff's suit and application filed in this Court on 20th June, 2001. That objection was argued on 28th June, 2001 and the Defendants' contention is that the Plaintiff as the Receiver Manager has no locus standi to institute and continue the suit in her own name. The Receiver Manager was appointed pursuant to a debenture dated 3rd November, 1993 by Trust Finance Limited and Trust Bank Limited on 14th June, 2001. By this time the premises of Dawat Restaurant Limited had already been distrained for non payment of rent by the Defendants. The charge was over the property known as L.R. No. 1870/IX/128/NAIROBI owned by the 1st Defendant. Mr. Wahome referred to the case of **Lochab Brothers v. Kenya Furfural Co. Ltd. and Two others [1982 – 88] 1 KAR 335** which held that receivers are not entitled to bring proceedings in their own names. The late Madan J.A., as he then was, stated at p. 338;

“A receiver cannot sue in his own name as receiver since he has no property vested in him, and so acquires no right of action by his appointment. Nor can the Court give a receiver leave to sue as a receiver. Accordi ng to practice, a receiver was never allowed to originate any proceedings. Parker v. Dunn 50 FR 195, 196.”

The proper Plaintiff would, therefore, be the Company under receivership and the Receiver Manager is merely its agent. However, in order to do justice to the parties herein, this Court will decline to strike out the plaint and instead invoke its powers under Order VIA Rule 5 and direct that the plaint and the Chamber Summons application dated 20th June, 2001 be amended by the removal of “Nita Ganatra” and in her place be put the name of the Company under Receivership, that is, Dawat Restaurant Limited. I believe that the non-joinder of the Company was a bona fide mistake deserving to be corrected under Order 1 Rule 10. Striking out a plaint is a drastic remedy and “the Courts,” said Sir Udo Udoma, C.J.:-

“have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is a n abuse of legal procedure.”

Those very appropriate words of Sir Udo Udoma C.J. were uttered in the case of **Musa Misango v. Eria Musigira and Others [1966] E.A. 390 at p. 395.** The suit should not therefore be defeated for non-joinder or misjoinder of parties (Order 1 Rule 9), and this Court takes this early opportunity to correct the error. The amendments shall be within the next fourteen days and the Defendants be served accordingly.

The preliminary objection is consequently dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 18th day of July, 2001.

ALNASHIR VISRAM

JUDGE