



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL SUIT NO. 758 OF 2000 (O.S.)

CHARLES KARIUKI GITHUNGO suing as the
RECEIVER OF WORLD DUTY FREE COMPANY LIMITED

T/A KENYA DUTY FREE COMPLEX.....PLAINTIFF/APPLICANT

-VERSUS-

AFRICAN BANKING CORPORATION LIMITED.....1ST DEFENDANT/RESPONDENT

FORE-FRONT AGENCIES.....2ND DEFENDANT/RESPONDENT

JUDGMENT

The applicant is asking for several Orders in the Chamber Summons dated the 17th May, 2000.

The application is supported by the Grounds filed together with the application and by an affidavit sworn by Mr. Charles Kariuki Githungo (The Receiver). Among the prayers in the Chamber Summons is prayer No. 8 which seeks a Temporary Injunction to stop the defendants from selling the parcels of Land L.R. No. 209/10882/15 and L.R. No. 209/10882/16.

The background to this application is that the defendants advanced some money to the World Duty Free Company Limited (The Company) which was secured by a debenture dated 13th September, 1996 and a Charge over the Properties LR. No. 209/10882/15 and LR No. 209/10882/16 in the name of Nassir Ibrahim. Having defaulted in payments the Bank advertised the properties to be sold by public auction on 31.5.2000. It is the applicants' case that the company being under receivership the applicants needed leave of the court to advertise and sell the property and since the applicant has not obtained such leave the sale cannot take place. The Respondents countered this argument by saying that the properties in question belong to Nassir Ibrahim and do not belong to the company and therefore are not subject to the Receivership.

The applicant is not the mortgagor but Nassir Ibrahim and therefore does not fall under the Provisions of Order 36 (3) (a) of the Civil Procedure Rules.

The applicant has no locus standi to make the application. It is true that the properties charged are in the name of Nassir Ibrahim but it is also true that there is a dispute as to how the properties came to be in the name of Nassir Ibrahim. The applicant (Receiver) maintains that the properties in question belonged to Kenya Duty Free Complex and did not belong to Nassir Ibrahim. This dispute is the subject of the HCCC No. 418 of 1998 between Kamlesh Mansukhal Danji Pattni V. Nassir Ibrahim Ali, Dinkey International S.A. and World duty Free Company Limited. In a ruling in that case dated 24.2.1997 by Lady Justice Effie Owuor J. (as she then was) it was observed that:

“the most disturbing aspect of this transaction as far as the applicant is concerned is the discovery that the two properties warehouse LR No. 209/10882/15 and LR No. 209/10882/16 which there is prima facie evidence that belonged to the company have ended up being registered in the names of the 1st defendant/respondent and indeed charged for a whopping sum of money Shs.35 million without the applicants knowledge. The affidavit filed herein by one Llonel J. Smith supports the applicant’s story as far as the ownership of these properties by the company are concerned”.

These properties referred to in this ruling are the same properties the subject of the present application. One of the parties in HCCC No. 418 of 1998 is the World Duty Free Company Ltd. which is the applicant in the present case. There is no dispute that the company is under Receivership under Mr. Githungo as the present court appointed Receiver. From this ruling and from the plaint in HCCC No. 418, it is quite clear that there is a dispute as to the ownership of these two properties and in particular as to how the properties ownership moved from the company to Nassir Ibrahim. The interests of the company are taken care of by the Receiver, in both HCCC case No. 418/98 and in the present application. So long as this dispute is not resolved, it is not possible to take the charge in isolation of the claim lodged in HCCC No. 418/98, when the claim is based on how the properties became owned by Nassir Ibrahim. This claim gives legitimacy to the Receiver and the company in questioning any dealing with the properties before the issue is resolved and therefore the Receiver has loci standi.

In addition to this, the order by Lady Justice Owuor prohibits the respondents in that application from selling or allineating these properties “until further orders of this court”. The respondents in that application included Nassir Ibrahim as the 1st defendant. The court was not shown any further orders of the court enabling Nassir Ibrahim to sell the properties.

The claim that the properties belonged to the company which company is under receivership brings into play the law of Receivership. Having found that the Receiver has a Loci Standi it becomes necessary that any intended sale can only be carried out with the leave of the court. The respondents do not have that leave, their stand being that they are dealing with the Nassir Ibrahim as the Mortgagor and not the applicant. To proceed with the sale in the name of Nassir Ibrahim will be a clear contravention of the court order of 25.2.1998 because it specifically prohibits what the respondents are attempting to do.

Order 36A of the Civil Procedure Rules, the relevant parts provides:

“..... or any person entitled to or having property subject to a legal or equitable charge or any person having the right to fore close or redeem any mortgage, whether legal or equitable may take out as of course an originating summons....”

The company is claiming ownership of the two properties and if it succeeds in showing that it is the owner instead of Nassir Ibrahim, it would be a person entitled to or having property subject to a legal or equitable charge. To that extend the company has loci standi to make the present application.

The observations in the Ruling of 25.8.1998 by stating that “ there is a prima facie evidence, that belonged to the company have ended up being registered in the names of the 1st defendant.....” makes the claims of ownership by the applicants real and makes it impossible to wish it a way to the extend that the property could be sold before determining that claim.

The issue as to who is in possession was argued during the hearing of this application. The applicant contended that the receiver has the possession while for the respondent it was said that the Receiver is not in possession.

In the Civil Suit No. 1455 of 1999 filed by the bank against the Receivers and the company the plaintiff in paragraph 7 states:

“The 1st defendant who was the Court Appointed Receiver and Manager of the 3rd defendant then refused to allow the plaintiff receivers access into the company thereby rendering it impossible for the plaintiff to realise its security under that debenture”.

This assertion seems but to confirm what the applicant is saying that it has had the possession of the properties all along. KERR on the Law and Practice as to Receivers 16th Edition on 123 says:

“ Since the Receiver is an officer of the court any property of which he is in possession is strictly in the possession of the court. In appointing a receiver the court deals with the possession only until the right is determined, if the right be in dispute.....”

I read this to mean that the Receiver being in possession and there being a dispute as to the ownership of this property as between the company and Nassir Ibrahim, he the receiver will continue being in possession until the dispute is resolved.

What the applicants should have done was first to seek the court's leave to assert their rights over the properties before embarking to sell the properties.

“A man who thinks he has a right paramount to that of the Receiver must before he presumes to take any step of his own motion apply to the court for leave to assert his right. If the receiver has done anything wrong the party who has suffered the wrong must apply to the court which appointed the receiver and he will get full justice done”

See Kerr on the law and Practices as to Receivers page 136.

For these reasons, I find and hold that the applicants have loci standi to bring these proceedings and that the respondents intended sale is challengable on the ground that the respondents had not obtained the courts leave to interfere with the properties in question. Since the Respondent's action are against the law an injunction would appropriately issue to restrain them from proceeding with their illegal action.

The application is therefore allowed in terms of prayers 8 and 9 of the Chamber Summons.

I have noted that the applicants do admit that they owe the Respondent some monies only that there seems to be a dispute over the amount. In paragraph 11 of the Supporting Affidavit, the receiver acknowledges the sum of Shs.11,812,811.30.

The receiver will pay this amount by monthly installments Ksh.200,000 per month until the whole amount is paid. In case the respondents are willing to sell the properties together with the Receiver as it is suggested in the Replying Affidavit, the Receiver is hereby authorised to enter into such arrangement.

The cost of this application shall be in course.

Dated and delivered at Nairobi this 30th day of May, 2000.

KASANGA MULWA

JUDGE