



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1535 OF 1999

RIFT VALLEY AGRICULTURAL

CONTRACTORS LTD &
ANOTHER.....PLAINTIFF

VERSUS

MAHESHKUMAR MANIBHAI
PATEL.....DEFENDANT

RULING

By the Notice of motion dated 30.7.99 applicants pray for an order that Joseph Githinji Chege be appointed receiver of the first plaintiff with powers to do the acts specified in para 2(a), (b) (c) (d) (e) (f) of the application.

The application was first heard exparte by Mitey J. who on 30.7.99 appointed Joseph Githinji Chege as interim receiver of the first plaintiff (company) pending the hearing of the application interpartes. The interim Receiver has, since date of his appointment, filed three reports in court.

As the pleadings disclose the first plaintiff in a private company with two shareholders who are also the only directors. The second plaintiff owns 102 shares and the defendant 98 shares. First plaintiff grows wheat in Narok on leased lands and at the time of filing the suit it had about 7000 acres under wheat. The amended plaint does not disclose the assets of the company. The defendant in his amended defence does not also disclose the assets of the company. But avers in para 25 of the defence that the farming land is leased from Maasai community on annual leases. He discloses in para 27 that the company owns among other things a three seater single engine aeroplane. The amended defence also discloses that the company has been farming for 35 years and is one of the leading wheat farmers in the country. The interim Receiver has not established the assets of the company. He states so clearly in his third report dated 14.4.2000. The Agricultural Finance Corporation (AFC) through an application dated 9.8.99 (already determined) disclosed that it is owed shs 131,830,640/90 by the company as at 30.6.99 and that two plots, L.R. No. 451/1540; Nakuru Block 6/25 and a piece of land Narok Kis - Mara/Ewaso Nyiro/1 are charged to it to secure advance. AFC has further disclosed that the company has executed chattel transfer assigning and transferring to AFC by way of mortgage all moveable properties of the first plaintiff. It has annexed a list of 29 motor vehicles whose logbooks are in its possession. There are other creditors of the company as contained in the interim Receiver's first report dated 25.10.99.

Looking at the Amended plaint generally, plaintiffs complain that defendant has between 1989 to date stolen money and wheat of great value belong to the company. Plaintiffs also complain that defendant has disposed of motor vehicles and machinery and has also hired out to third parties machinery belonging to the company. Paragraph 11 of the plaint shows why this matter was filed under certificate of urgency. There was a crop of wheat growing planted on 7000 acres which was due for harvesting from 2.8.99. Plaintiffs feared that defendant would convert the proceeds of wheat to his own use. Plaintiffs by

paragraph 11 of the plaint pray that a receiver manager of the company's wheat, machinery, plant, vehicles and moveable and immovable assets be appointed.

The relief sought in the plaint is recovery of shs 240,737,236/50, general damages and appointment of Receiver manager to manage, protect preserve and improve the moveable and immovable assets.

Defendant, in a detailed defence, denies any wrong doing. He avers that both he and 2nd plaintiff were signatories to the company's bank account. He avers that 2nd plaintiff through his son was running the operations of the company in Nakuru. He alleges that during 1994 to 1999 2nd plaintiff and his son have not accounted for proceeds of sale of wheat. Defendant alleges that the appointment of a receiver is within view to not paying debts to AFC and other Creditors and to make profit for second plaintiff.

The application is brought under order XL Rules 1, 2 and 3 of Civil procedure rules. The court has power under order XL Rule 1(1) (a) to appoint a Receiver of any property if it appears to the court to be just and convenient. Section 63(d) of Civil Procedure Act gives court power to appoint a receiver of any property in order to prevent the ends of justice from being defeated. The application of order XL is discussed in detail in Mulla Code of Civil Procedure Vol. III 15th edition. It is recognized that the appointment of a receiver is one of the harshest remedies for enforcement of rights and that appointment of the receiver should be made in open court and not in a summary way. The court has absolute discretion but should not exercise its discretion in favour of a plaintiff unless he shows prima facie that he has a strong case and also a good title to the property. The receiver so appointed is an officer of the court and possession of property by the receiver is possession by court, the receiver being an officer or agent of the court. Property in the hands of a receiver cannot be attached without leave of the court, and as a general rule of equity, a receiver cannot be sued without leave of the court.

According to KERROM THE LAW OF RECEIVERS - 16th Edition page 5- 6 the main object for appointment of a receiver is to safeguard property for the benefit of those entitled to it.

Two classes of cases are discussed in that treatise. The first one is where the appointment is made as a matter of course eg where the appointment is made under a mortgage or under a statutory provision. The second class is where the appointment is made to preserve property and where required, ensure its proper management pending litigation to decide the rights of parties.

Is it just and convenient to appoint a receiver for the company in the circumstances of this case?

It is apparent from the plaint and the application that the application for appointment of a receiver was made for two main reasons namely,

(a) There are irreconcilable differences between the 2nd plaintiff and defendant over the management of first plaintiff company

(b) The wheat crop on about 7000 acres which was to be harvested in the month of August 1999 would waste and defendant would misappropriate the proceeds thereof.

The application was first brought exparte under a certificate of urgency. The urgency of the matter was because plaintiff wanted to protect the proceeds of sale of wheat crop valued about 100 million which was due for harvest in the month of August 1999. A receiver was appointed on 30.7.99. The receiver harvested the crop and sold it for about shs 29 million. He filed his first report dated 25.10.99. Thereafter the receiver was preoccupied with preparation of the lands for planting for the year 2000 crop. This is clear from the second and third reports. I am informed by the advocates involved in this case that the crop was indeed planted and harvested in the month of July 2000 and that next crop will be planted in the month of February 2001. It is clear that after the first crop was sold there is no question of safe guarding the assets of the company. The Receivers main activity being doing farming business.

Firstly, it is apparent from the Amended plaint that the suit does not concern property rights of either the second plaintiff or the defendant. The two are shareholders of the company. All the assets belong to

the company. It is true that 2nd plaintiff and defendant have irreconcilable differences over the management of the company. Each accuses the other of mismanagement of the company and misappropriation of company assets. The suit is not intended to resolve those disputes. Indeed, the suit is for a pecuniary claim which claim will not be prejudiced by failure to appoint a receiver. As the law stands the main object of appointing a receiver is to safe guard property, pending litigation, for the benefit of those eventually entitled to it. Applicant's have not shown that there is any property to be safeguarded pending suit.

Secondly, the assets of the company have not been ascertained. I referred to the pleadings to show that the pleadings do not sufficiently disclose the assets of the company. The pleadings do not show what assets are in possession of each director. Paragraph 7 of the third report by the receiver dated 14.4.2000 shows that the receiver has not yet ascertained the assets or taken possession of the assets. In any case, there is no dispute that most of the assets of the company are charged to AFC to secure the loan. AfC has custody of logbooks and has not complained that defendant is wasting any of the assets.

In the above circumstances, it cannot be said that any assets of the company are in danger of being wasted or alienated so as to justify the appointment of a receiver pending suit.

Thirdly, the appointment of a receiver will have far reaching consequences on the company's creditors particularly the AFC AFC and other creditors will legally be inhibited in realizing the securities. The appointment of a receiver will in effect interfere with the contractual rights of the creditors and give the company unwarranted protection from its creditors. From the reports filed by the receiver, I do not see any genuine effort of paying the major creditors like AFC.

Lastly, by appointing a receiver, the court will in effect be doing farming business on behalf of the shareholders of the company. Large scale farming is a complex and risky business., It is affected by vagaries of the weather and market forces among other forces. It is a business that the court cannot supervise effectively. The directors of the company have the experience of 35 years and have built a name for the company. They should be left to run the business of the company. It is not the proper business of the court to do farming through the receiver on behalf of the directors.

For above reasons, It is my view that it is not just and convenient to appoint a receiver of the company pending litigation in the circumstances of this case.

The receiver is not at the moment doing any farming business. I am informed that the receiver is in the process of renewing leases for the farming land and that thereafter he will prepare land for planting in the month of February 2000. It is a convenient stage for the receiver to hand over to the directors.

Consequently, I dismiss the application with costs in the cause. I order that the receiver do file his final account in court and hand over the company to the 2nd plaintiff and the defendant on or before 31.10.2000.

E. M. Githinji

Judge

6.10.2000

Mr. Kuhonge holding brief for Muturi Kigano present

Mr. Bowry present

Mr. Kihonge

I apply for leave to appeal if necessary I also apply for typed copy of the proceedings and ruling

Order:

Leave to appeal if required granted. Ruling to be
typed and copies supplied as prayed.

E. M. Githinji

Judge

6.10.2000