



Specialised Engineering Limited (In Receivership) v Gautama (As legal representative and executor of the Estate of Satish Gautama (Deceased); Patel (Interested Party) (Commercial Case 497 of 2011) [2023] KEHC 20582 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20582 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 497 OF 2011
DAS MAJANJA, J
JULY 21, 2023**

BETWEEN

SPECIALISED ENGINEERING LIMITED (IN RECEIVERSHIP) PLAINTIFF

AND

**ASHOK KUMAR GAUTAMA (AS LEGAL REPRESENTATIVE
AND EXECUTOR OF THE ESTATE OF SATISH GAUTAMA
(DECEASED) DEFENDANT**

AND

DEVESH A PATEL INTERESTED PARTY

RULING

1. What is before the court for consideration is an Originating Summons dated 28.11.2022 made, inter alia, under Order 52 rule 4 of the *Civil Procedure Rules*. It has been brought by Devesh A. Patel, the Interested Party. He is a director of Specialised Engineering Limited (“the Company”) and has authority from his co-director Dilip Patel to file the application. The Summons seeks to compel two firms; Kimamo Kuria Advocates and Kinoti Kibe and Company Advocates to furnish accounts and deliver up to the court the balance of the monies together with interest thereon held in an account at Credit Bank Limited after setting off the gross settlement sum inclusive of advocates’ costs amounting to Kshs. 12,500,000.00 being the agreed all-inclusive award in NRB Industrial Court Cause No. 1571 of 2011, the called-up money being preserved pursuant to the order of this court dated 07.06.2019 issued by Tuiyott J. He also seeks an order that Kimamo Kuria Advocates be directed to file its bill of costs on account of legal fees as may be due to Satish Gautama (deceased).



2. The application is supported by the Interested Party's affidavit sworn on 28th November 2022. It is opposed by the Defendant through the replying affidavits sworn on 13th March 2023 by Kuria Kimano and Andrew Mmbogori both advocates acting on the Defendant's behalf. Ashok Kumar Gautama has also sworn an affidavit in opposition to the application. The Plaintiff relies on the Grounds of Opposition dated 16th May 2023. The parties filed written submissions supplemented by oral arguments made by their respective counsel.
3. Before I deal with the application, it is important to outline the facts giving rise to these proceedings. This matter was commenced by an Originating Summons dated 11.11.2011. The Company sought an order for accounts and delivery up of monies paid by Kenya Commercial Bank to its advocate, Satish Gautama on account of a decree issued in its favour in NRB HCCC No. 1728 of 1979, Kenya Commercial Bank Limited v Specialised Engineering Limited. In his response through the affidavit sworn on 23.11.2011, Satish Gautama confirmed that he was paid Kshs. 23,212,242.25 being the decretal amount inclusive of interest and costs by Kenya Commercial Bank Limited and that he is exercising his lien over the amount as he had not been paid any fees in the matter and other matters in which he represented the Company.
4. In the meantime, Satish Gautama's employees filed a suit against him for terminal dues being NRB ELRC Cause No. 1571 of 2011 seeking judgment for Kshs. 27,454,000.00. On 21.02.2011, Rika J., granted preservatory orders in respect of the account holding the money at Oriental Bank. In the same vein, Mabeya J., issued an order against Shushila Gautama, the executor of Satish Gautama's estate directing her to deposit Kshs. 23,165,065.00 held in an account at Diamond Trust Bank which account did not have the money anticipated. In due course, the monies preserved by the order of Rika J., in NRB ELRC Cause No. 1571 of 2011 were deposited in the joint account held by Kimamo Kuria Advocates and Kinoti Kibe and Company Advocates at Credit Bank Limited.
5. The parties resolved NRB ELRC Cause No. 1571 of 2011 and as a result recorded a consent agreeing that Kshs. 12,500,000.00 be paid over to settle the claim inclusive of the advocates' costs. On 13.09.2019, Sushila Gautama was paid Kshs. 3,565,000.00 while the Company through the firm of Kale Maina and Bundotich Advocates was paid Kshs. 11,480,000.00.
6. The gravamen of the Interested Party's application is that the substratum of the suit, which is the money belonging to the Company, has been paid out to third parties despite the sums being preserved by the orders issued by Tuiyott J., dated 07.06.2019 and Mabeya J., on 03.12.2012. The Interested Party contends that it is the substantive disputant in the disputes that led to payment of the sums to the Company and the advocate who represented the Company cannot enter into a consent and attempt to distribute the monies to their exclusion. He points out the Plaintiff in the main suit only sought delivery up of monies held by Satish Gautama and not distribution, apportionment or handover to the Plaintiff. He further states that Satish Gautama opposed the suit filed by the Plaintiff and stated that the money belonged to the Company.
7. The Plaintiff and Defendant oppose the application on procedural as well as substantive grounds. Since the principal objection raised by them concerns the standing of the Interested Party to file and prosecute the application, I hold that it is in the nature of a preliminary objection which must be determined first as it may dispose of the application (see *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others* SCK Petition No. 10 of 2013 [2014] eKLR and *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696).
8. It is not in dispute that the Interested Party is a director of the Company. It is also not in dispute that the Company is in receivership and was placed in receivership by Ecobank Kenya Limited being the successor of Akiba Bank Limited and EABS Bank Limited in 2006. This begs the question, what



is the position of a company in receivership? The Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR cited *Hawkesbury Development Co. Limited v Land Mark Finance Pty Ltd* [1969] 2 NSW 782 and stated, in part, as follows, “While it remains the position that a receiver and manager supplant the board of directors in the control, management and disposition of assets over which security rests, it also acknowledged that the receiver and manager does not usurp all the functions of the company’s board of directors. The extent to which the powers of directors are supplanted will vary with the scope of the receivership and management vested in the appointee.”

9. Other decisions cited by the Defendant make underline the same principle. In *Mandev Limited v M. K. & Sons Limited (Under Receivership)* NRB ELC No. 750 of 2010 [2010]eKLR, the court observed that, “The general principle is that once a company has been placed under receivership it lacks the legal competence to institute a suit or be sued in its company name. It can only sue or be sued through the receiver.” Likewise, in *Cyperr Enterprises Ltd v Metipso Services Ltd & 2 Others* NRB ELC No. 250 of 2009[2011] eKLR where the court, in striking out the suit, observed as follows, “Therefore prima facie the position appears to be that the Plaintiff Company is still under Receivership. If that be the case, then the suit ought to have been instituted through the authority of the Receiver manager and not the Directors of the company. This is because the Directors of the company have been temporarily put on the back seat so far as the management of the company is concerned. There being no evidence of any authority from the Receiver manager to file the suit, the suit is incompetent”
10. These authorities show that generally, the directors of a company in receivership are divested of their managerial authority which includes authority to prosecute any suit or proceedings on the company’s behalf without the permission of the receiver. The receivers remain in control of the company to the exclusion of the directors and it is only the receiver who can compromise the suit or proceedings.
11. The courts have recognised that there may be circumstances where the directors are entitled to exercise certain functions depending on the security or instrument under which the receiver is appointed. The Interested Party has not shown that it is entitled to exercise such authority on behalf of the Company. Instead, he moves the court as a director of the Company. The corporate rule that a company is a legal person enunciated in *Salomon v Salomon* [1896] UKHL1 is still good law which means directors, qua directors, cannot institute proceedings on behalf of a company as the Interested Party has done. Even if the Company was not under receivership, the Interested Party, as a director, would lack the standing to prosecute the application.
12. Ultimately, this is a suit between the Company and its advocate. The receivers of the Company having taken over the management of the company are entitled to compromise the suit with the Defendant in any manner they deem fit. The directors cannot intervene in the regular and lawful exercise of the receiver’s power.
13. Without belabouring the point, I also agree with the Plaintiff and the Defendant that an originating summons cannot be filed within another originating summons. An originating summons is a suit filed for a specific purpose under Order 37 of the Civil Procedure Rules. The Rules do not provide for or contemplate the filing of a suit within a suit.
14. In view of the conclusions I have reached, it is not necessary to deal with the other objections raised by the parties. It must be abundantly clear that the Interested Party’s Originating Summons dated 28.11.2022 must be struck out. It is struck out with costs to the Plaintiff and the Defendant.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JULY 2023.

D. S. MAJANJA



JUDGE

