



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL DIVISION**  
**HIGH COURT CIVIL APPEAL NO. 157 OF 2017**

**H.W. GICHOHI.....APPELLANT**

**VERSUS**

**PETER NDA.....RESPONDENT**

**(Being an appeal from the Judgment delivered on 23<sup>rd</sup> March, 2017 by Hon. E. Wanjala (Miss) (Principal Magistrate) at Chief Magistrate Court's Milimani Commercial Courts in CMC Case No. 6359 of 2014)**

**JUDGMENT**

1. The Appellant sued the Respondent in the lower court seeking to be indemnified by the Respondent of Ksh.109,223/= arising from a decree in HCCC 991 of 1999 when both of them were Joint Receivers and Managers of the former Grand Regency Hotel.
2. The Respondent filed a Statement of Defence and denied the claim.
3. Following a full hearing, the trial magistrate dismissed the Appellant's case with each party to bear own costs.
4. The Appellant was dissatisfied with the said judgment and appealed to this court on the following grounds:

**1. That the learned trial magistrate erred in facts and law in finding that the Appellant ought to have been indemnified by the appointing authority.**

**2. That the learned trial magistrate erred in law and in facts in failing to consider that in HCCC Suit No. 991 of 1999 Peter Ndaa & H.W. Gichohi (as joint receivers of Grand Regency Hotel) vs EMMS Architect Limited's decretal sum was to be borne by the Plaintiff's as parties.**

**3. That the learned trial magistrate erred in law and in facts in misapprehending the facts of the case in HCCC Suit No. 991 of 1999 Peter Ndaa & H.W. Gichohi (as joint receivers of Grand Regency Hotel) v EMMs Architect Limited which lead to a wrong conclusion in the judgment.**

5. The Appeal was canvassed by way of written submissions. The Appellant's counsel relied on the exposition of the law by the Court of Appeal in the case of **Top Time Enterprises Ltd v P.V.R. Rao as Receiver/Manager appointed by Kenya Commercial Bank Limited to run Nyali Beach Hotel Limited in Receivership & another** [2014]eKLR while referring to **Halsbury's Laws of England third Edition volume 6** at paragraph 975, which states as follows in respect of the liability of a receiver:

**“A receiver or manager of the property of a company appointed under the powers contained in any instrument (a), is, notwithstanding that he may be an agent of the company and able to bind it by his contracts, to the same extent as if he had been appointed by order of the Court (b), personally liable on any contract entered into by him in the performance of his functions except in so far as the contract otherwise provides and is entitled in respect of that liability to indemnity out of the assets; but nothing in this provisions is to be taken as limiting any right to indemnity which he would have apart therefrom, or as limiting his liability on contracts entered into without authority or as conferring any right to indemnity in respect of that liability.”**

The Court of Appeal further referred to the principal captured in **“The Law and Practice as Receivers appointed by the High Court of Justice or Out of Court”** by William Williamson Kerr 9<sup>th</sup> Edition page 298-351 which states as follows:

**“Persons contracting with a receiver and manager who is carrying on the business of a company and are cognizant of his appointment, must be taken to know that he is contracting as principal, not as agent for the company, whose powers are paralyzed;...**

**Receivers and managers appointed by the court (except the so called receivers appointed in lunacy (c), and probably receivers and managers of statutory undertakings (d), are personally liable to persons dealing with them in respect of liabilities incurred, or contracts entered into by them in carrying on the business (e), unless the express terms of the contract exclude as they may do, any personal liability (f); but subject to a correlative right to be indemnified out of the assets in respect of liabilities property incurred, (g) for receivers are not agents of any person but principals (h) and are therefore assumed to pledge their personal credit...**

**Similarly, receivers and managers appointed by debenture holders or mortgagees under the powers of an instrument are personally liable to persons dealing with them with knowledge of their position; for they are agents for the mortgagor according to circumstances...”**

6. The Respondent's counsel in his submissions relied on the terms of the consent order that appointed the parties herein as Joint Receivers and Managers.

7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others** [1968] E.A. 123 where it was stated as follows:-

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

8. During the trial before the lower court, the Appellant testified and adopted his witness statement dated 18<sup>th</sup> August, 2014. The Appellant also produced his bundle of documents dated 18<sup>th</sup> February, 2014 as exhibits. The Appellant's evidence was that as per the terms of a consent dated 31<sup>st</sup> May, 2004, together

with the Respondent they were appointed as Joint Receivers and Managers of the former Grand Regency Hotel. That in a suit filed against them in HCCC 991 of 1999, a decree was issued against them for the sum of Ksh.132,946.80. That the Decree Holder instructed Auctioneers to recover the decretal sum together with Ksh.18,500/= Auctioneers charges.

9. The Appellant further testified that he instructed a firm of advocates to make an application to vary the award of costs made against the Appellant and the Respondent in the said case on the grounds that they were no longer acting as the Joint Receivers and Managers of the former Grand Regency Hotels as at the said judgment date but the application was dismissed. That in total the Appellant ended up paying the sum of Ksh.218,446.80 in settling the decretal sum, the Auctioneers charges and the advocates' fees. The Appellant's contention was that both the Appellant and the Respondent were equally liable to pay the said sum of money on *prorata* basis but the Respondent has failed to indemnify him.

10. The Respondent testified and adopted his witness statement filed on 30<sup>th</sup> October, 2015 and produced his bundle of documents dated 12<sup>th</sup> February, 2015 as exhibited. The Respondent's evidence was that in accordance with the court orders dated 31<sup>st</sup> May, 2004, as the Joint Receivers and Managers of the former Grand Regency Hotel, both himself and the Appellant were to be indemnified by their respective appointing authorities against any judgment or decree passed against them while carrying out their functions as Joint Receivers and Managers. His position was that the Appellant unilaterally instituted HCCC 991/99 and subsequently filed the application challenging the award of costs therein.

11. The Respondent further stated that his properties were also attached by the Auctioneers in a bid to recover the decretal sum. He stated that he incurred Ksh.62,080/= as payment of legal fees to file Objection Proceedings and a further Ksh.42,500/= Auctioneers charges. The Respondent's contention was that if there was any money due to the Appellant, the same ought to be reimbursed by the appointing authority.

12. The undisputed facts are that both the Appellant and the Respondent were appointed Joint Receivers and Managers by consent. It is also not in dispute that the suit in question was dismissed for want of prosecution. The Appellant admitted in cross-examination that he did not obtain the Respondent's consent before the filing of the application to set aside the dismissal order. It is however apparent from the number of the case in question that it was filed in the year 1999. That was before the appointment of the parties herein as Joint Receivers and Managers.

13. From the consent that appointed both parties herein as Joint Receivers and Managers, it is clear that their mandate was to be exercised jointly including to jointly appoint advocates and to become parties to court proceedings. The Appellant therefore acted in contravention of the said consent when he unilaterally instructed advocates to contest the dismissal orders in HCCC 991 of 1999. This adds credence to the Respondent's position that he was not aware of the said suit and that the Appellant did not involve him in the said litigation. Having acted contrary to their terms of engagement, the Appellant cannot turn around and demand any reimbursement from the Respondent's side.

14. With the foregoing, I find no merits in the Appeal. Consequently, I dismiss the Appeal with costs to the Respondent.

**Dated, signed and delivered at Nairobi this 16<sup>th</sup> day of July, 2020**

**B.THURANIRA JADEN**

**JUDGE**