



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.90 OF 2018

(FORMERLY MOMBASA ELC CIVIL CASE NO. 71 OF 2018)

SULEIMAN ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

1. KENSALT LIMITED.....1ST DEFENDANT

2. KEMU SALT PACKERS PRODUCTION LIMITED(UNDER RECEIVERSHIP).....2ND DEFENDANT

3. HANSHEWER TRANSPORTERS LIMITED.....3RD DEFENDANT

4. SHREEJI EXPRESS.....4TH DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated 4th February 2019. The Motion filed herein on the same day by Rachier & Amollo, LLP styling themselves as the Intended Advocates for the 2nd Defendant/Applicant prays for orders:-

2. That the Honourable Court be pleased to allow the firm of Messrs Rachier and Amollo LLP Advocates of P.O. Box 5564-00400, Mayfair Centre Ralph Buche Road to come on record for the 2nd Defendant Company.

3. That the Replying Affidavit sworn by Hussein Saleh Mohamed Ishmael on 1st February 2019 be deemed as duly filed.

4.

5. That during the inter partes hearing, the Honourable Court be pleased to review/vary/set aside the orders issued on 4th February 2019 allowing the 1st Defendant's application dated 17th December 2018.

6. That the Costs of this application be awarded to the 2nd Defendant/Applicant.

2. The said application which is supported by an affidavit sworn by Hussein Saleh Mohamed Ishmael is based on the grounds listed thereunder as follows:-

i. The 2nd Defendant was put under receivership on 6th September 2016. That the Companies Act Cap 486(now repealed) allowed for the appointment of a receiver by a debenture holder. However with the promulgation of the new Insolvency Act, the provisions of the Companies Act were repealed. Section 520 of the Insolvency Act 2015 defines an administrator to mean a person appointed under this part to manage the affairs of and property (sic) and includes a former administrator. That further Section 521 (c) further provides that a Company ceases to be under administration when the appointment of an administrator of the company ends in accordance with the Insolvency Act.

ii. That pursuant to Section 593 of the Insolvency Act 2015, the term of receivership/administration is fixed at 12 months unless extended by the Court under Sections 594 thereof.

iii. That Section 594 of the Insolvency Act explicitly provides that the term of an administrator can only be extended before

expiry. That despite the foregoing provisions of the law, the receivers appointed to administrate the 2nd Defendant did not seek an extension of the receivership from Court with the consequence that the same expired on 7th September 2018.

iv. That despite the foregoing, the said receivers have been illegally/unlawfully carrying interfering (sic) with the assets of the company and are therefore trespassers on the property and business of Kemu Salt Packers Production Ltd and are accordingly committing acts of theft and plunder of the assets and properties of Kemu Salt Packers Production Ltd to the detriment of the company.

v. That after the lapse of the receivership/administration by operation of law, the directors of the 2nd Defendant company have appointed Messrs Rachier and Amollo LLP to protect their interests since the erstwhile receivers are bent on dissipating and mismanaging the 2nd Defendant's assets.

3. The application is opposed. In a Replying Affidavit sworn by its General Manager Finance Wilfred Kibiti Mbogori Kimiriri and filed herein on 26th March 2019, Kensalt Ltd (the 1st Defendant) avers that this application is an abuse of the process of this Court as it is not made by a person who is a party to this suit and who has *locus standi* before this Court.

4. The 1st Defendant further avers that this application is seeking orders in respect of the receivership of the 2nd Defendant which are not within the jurisdiction of this Court by virtue of the law. The 1st Defendant asserts that even if this Court had jurisdiction to determine the matter, this application is misconceived in so far as it includes prayers for stay, review, variation or setting aside as those orders can only be sought after the question of the 2nd Defendant's receivership is declared to have come to an end, the pleadings are accordingly amended and the 2nd Defendant by a valid resolution appoints Messrs Rachier & Amollo LLP as its advocates.

5. Similarly, the Joint-Receivers of the 2nd Defendant are opposed to the application. In a Replying Affidavit sworn on their behalf by Anthony Muthusi and filed herein on 12th March 2019, the Joint Receiver avers that on 6th September 2016, he was appointed together with Peter Obondo Kahi as Receivers and not Administrators over the 2nd Defendant by Dubai Bank Kenya Ltd (In Liquidation).

6. The Joint-Receivers further aver that shortly after their appointment, they commissioned a Valuation of the 2nd Defendant's salt plant and assets in 2016. The Valuation had a schedule of all the assets and machinery which were on site at the time. That thereafter on 8th November 2016, the directors of the 2nd Defendant obtained Court orders barring the Joint-Receivers from discharging their duties and it was not until 25th January 2017 that the Receivers were able to regain full control of the 2nd Defendant's Plant in Malindi.

7. The Joint-Receiver assert that to their shock and horror they noted that some of the machines that had been there when the valuation was done were no longer in the Plant and they came to the conclusion that they must have been carted away by the directors of the 2nd Defendant. The said directors including the deponent of the Supporting Affidavit to this application were on 28th September 2017 found to be in contempt of orders issued by the High Court in Malindi HCCC No. 28 of 2016.

8. The Joint-Receivers state that given the removal of the said vital machines and the level of indebtedness of the 2nd Defendant when they took over the Plant, they decided to give the 1st Defendant a Licence over the Salt Plant and land owned by the 2nd Defendant. The Joint-Receivers accordingly accuse the Applicant herein of failing to disclose that the assets whose return the 1st Defendant has sought do not belong to the 2nd Defendant.

9. The Joint-Receivers further state that by a Notice of Motion application dated 20th July 2018 filed in the said Malindi HCCC No. 28 of 2016, the Applicants herein sought the removal of the Receivers but the said application was suspended indefinitely by Hon. Justice Weldon Korir who directed that the matter do proceed to hearing on merit.

10. The Receivers further state that on the instructions of the same directors, Messrs Rachier & Amollo LLP filed yet another application on 22nd October 2018 in **Mombasa High Court Miscellaneous Application No. 266 of 2018** seeking similar orders as those they had sought before the High Court at Malindi. That matter was subsequently on 3rd December 2018 transferred to the High Court at Malindi for hearing and disposal.

11. I have perused and considered the application and the response thereto. I have equally perused and considered the voluminous and detailed written and oral submissions as placed before me and canvassed by the Learned Advocates for the parties.

12. The application before me was precipitated by the proceedings that took place in this Court on 4th February 2019. On that day, this matter had come up for hearing of the 1st Defendant's application dated 17th December 2018. As it turned out, two Advocates appeared before me both purporting to represent the 2nd Defendant. While one of the Advocates opposed the application, the other supported it.

13. Upon interrogation of the Learned Counsels, it became apparent that Mr. Okoth Advocate represented Oraro & Company Advocates for the Joint-Receiver managers of the 2nd Defendant while Mr. Munyua Advocate represented Messr Rachier & Amollo Advocates for the Directors of the 2nd Defendant which he submitted was no longer under receivership. Having considered the record herein, this Court did rule that the firm of Rachier & Amollo LLP Advocates did not act for any party in these proceedings and ordered that any document purportedly filed on their behalf were of no consequence.

14. By their application now before me, the said Law Firm urges this Court to be pleased to review the said orders and allow Messrs Rachier & Amollo LLP Advocates to come on record for the 2nd Defendant company and further, to admit a Replying Affidavit sworn by the 2nd

Defendant's director one Hussein Saleh Mohamed Ishmael and filed herein on 1st February 2019 as having been duly filed in opposition to the 1st Defendant's said application.

15. The application is premised on the contention that the 2nd Defendant was put under receivership on 6th September 2016 and that under Section 593 of the Insolvency Act, 2015, the term of receivership or administration is fixed at 12 months unless extended by the Court under Section 594 of the Act. The Applicant asserts that since the Receivers appointed to administrate the 2nd Defendant did not seek an extension as provided under Section 594 of the said Act, their term expired by effluxion of time on 7th September 2017.

16. Arising from that conclusion, the Applicants aver that the Directors of the 2nd Defendant Company have since duly appointed Messrs Rachier & Amollo LLP to protect their interests since the erstwhile Receivers are bent on dissipating and mismanaging the 2nd Defendant's assets.

17. While the Plaintiff did not oppose the application, both the 1st Defendant and the Joint-Receivers of the 2nd Defendant are opposed thereto.

18. The application before me is expressed to be brought pursuant to Sections 520, 521, 593 and 594 of the Insolvency Act 2015. Section 2(1) of the said Act defines the word Court thus:-

“The Court” means the High Court, and if there is an insolvency division of that Court, means that division.”

19. As it were, this Court is not the High Court and assumption of jurisdiction by the Courts is a subject regulated by the Constitution, by Statute law and by principles laid down in judicial precedent. Where the Court has no jurisdiction, it must down its tools and decline to take any further steps in the matter. As was stated by the Court of Appeal in *Karisa Chengo & 2 Others –vs- Republic (Criminal Appeal Nos. 44, 45 and 76 of 2014 (2015) eKLR:-*

“...jurisdiction flows from the law, and the recipient Court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity...”

20. In the matter before me, the Statute invoked by the Applicant clearly and unambiguously provides the Court that has the mandate to deal with the matter. Indeed from a perusal of the record, the Applicant is aware of that fact and has already filed not one but two applications before the High Court. The Applicant initially filed *Malindi HCCC No. 28 of 2016; Kemu Salt Packers Production Ltd –vs- Dubai Bank Kenya Ltd*(In Liquidation). Subsequently, the Applicant filed *Mombasa High Court Miscellaneous Cause No. 226 of 2018* which was later transferred to the High Court at Malindi.

21. A perusal of the pleadings in those two matters as annexed in the Replying Affidavit of the Joint-Receiver Anthony Muthusi reveals that the subject matter thereof is the same argument herein that the term of the Receivers expired upon the lapse of 12 months and that they should now cease the administration and hand over the 2nd Defendant company to its directors. Those two matters remain in the right Court for determination and this Court declines the invitation by the Applicant to delve there into.

22. Besides, the 2nd Defendant herein is described as Kemu Salt Packers Production Ltd (In Receivership). That *ipso facto* means that the 2nd Defendant is a company in receivership. In their application before the Court, Messrs Rachier & Amollo LLP have asserted that they have been appointed by the Directors of the 2nd Defendant. Having considered the circumstances before me, it is clear to me that the party instructing the Law Firm is not the 2nd Defendant sued herein. As was stated by the Honourable Justice G.V. Odunga in *Republic –vs- Kenya Revenue Authority ex-parte KSC International Ltd (In Receivership) (2016) eKLR:-*

“Once the receiver was appointed, the floating charges crystallised with a result that the directors no longer had a free hand in deciding on the manner in which the applicant's assets could be disposed of. In *Flagship Carriers Ltd –vs- Imperial Bank Ltd & 2 Others Nairobi (Milimani) HCCC No. 1643 of 1999, Hewett, J expressed himself as follows:-*

“The effect of appointment of a receiver on the powers of the directors is to remove from their control all of the assets covered by the Charge under which he has been appointed, other than any which may have been excluded by the instrument appointing him. In case of the normal floating Charge debenture this will mean all the assets of the company. The corollary of this is that once the assets have been removed from the control of the directors, they have no access thereto and may only enter the company's premises with permission of the receiver. They may take action in relation to the business of the company, which could be construed by third parties as indicating control or ownership of that business....”

23. Accordingly, and unless and until the matters pending in the High Court are determined, the directors have no right to make decisions on behalf of the 2nd Defendant with respect to the assets under receivership nor are they a proper party to this suit entitling them to make the application before me or otherwise participate, whether by themselves or through an agent.

24. In the premises, I did not find any merit in the Motion dated 4th February 2019. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 13th day of March, 2020.

J.O. OLOLA

JUDGE