



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 497 OF 2013

KAJULU HOLDINGS LIMITED (*In Receivership*).....1ST PLAINTIFF

COMMERCIAL BANK OF AFRICA LIMITED.....2ND PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITEDDEFENDANT

JUDGMENT

1. The Plaintiffs, **KAJULU HOLDINGS LIMITED (*In Receivership*)** and **COMMERCIAL BANK OF AFRICA LIMITED** have sued the **DIAMOND TRUST BANK KENYA LIMITED** for the sum of Kshs.89,502,424/=.

2. Further, or in the alternative the Plaintiffs sued the defendant for an Account of all moneys received by the Defendant, to which the Plaintiffs or either of them are entitled.

3. The claim arises out of a claim for money had and received to the use of or in trust for the 1st Plaintiff, **KAJULU HOLDINGS LIMITED (*In Receivership*)**.

4. In the alternative, it was asserted by the Plaintiffs that the claim was for money had and received to the use of or in trust for the 2nd Plaintiff, **COMMERCIAL BANK OF AFRICA LIMITED**.

5. The money was said to have been held in the bank accounts of the 1st Plaintiff as follows;

a) Account Number 0400517001 Shs.50,144,641

b) Account Number 0201550001 Shs.39,357,783

TOTAL

Shs.89,502,424

6. The Plaintiffs' case was that when Receivers were appointed over the 1st Plaintiff, the Debentures crystallized over all the moveable assets of the 1st Plaintiff.

7. The said assets were inclusive of the money which was in bank accounts of the 1st Plaintiff. Those are the two accounts whose particulars are given above.

8. The Plaintiffs' further case was that they drew the attention of the Defendant to the fact that receivers had been appointed over the 1st Plaintiff.
9. In their response to the claim, the Defendant confirmed that on 23rd November 2010, **MR. KARETA MARIMA** and **MR. IAN SMALL** had been appointed by the **COMMERCIAL BANK OF AFRICA LIMITED**, as Receiver/Managers of **KAJULU HOLDINGS LIMITED**.
10. According to the Defendant, they were requested to suspend the operations of any accounts which the 1st Plaintiff held at any of the Defendant's branches.
11. However, on 25th November 2010, the Defendant was served with a Court Order which was issued by Justice **MUGA APONDI** in the case of **KAJULU HOLDINGS LIMITED V. COMMERCIAL BANK OF AFRICA LIMITED HCCC NO. 732 OF 2010**; the said Order restrained the bank from interfering with the operations of **KAJULU HOLDINGS LIMITED**.
12. That initial order was to remain in force for a period of fourteen (14) days.
13. It was the Defendant's case that the directors of the company notified them in writing; that the operations of the company had reverted to the company.
14. It is the understanding of the Defendant that pursuant to the Court Order which was served upon it on 25th November 2010, coupled with the letter dated 25th November 2010, the Directors of **KAJULU HOLDINGS LIMITED** took control of the company and the management of its assets and affairs.
15. The Defendant insists that it granted access to the Directors of **KAJULU HOLDINGS LIMITED**, in good faith, owing to the Court Orders. Therefore, the Defendant believes that the directors of the company were lawfully entitled to manage the bank accounts of the said company.
16. The question that arises for determination is whether or not the Defendant erred by granting the directors of the 1st Plaintiff, access to the company's accounts.
17. The Defendant holds the view that it acted in accordance with the law and with the Orders made by the courts.
18. On the other hand, the Plaintiffs' view was that once the receivers were appointed, and the debenture had crystalized over the assets of the company, the bank was wrong to have allowed the directors of the company to access the accounts, and to remove therefrom, the funds which were in the said accounts.
19. The first point to be noted is that the defendant made the following submission;
 - “15. Your Lordship, it is the Plaintiff's submission that on 22nd November 2010, due to the appointment of receiver managers, the Debentures crystallized, making them a fixed charge over all the moveable assets belonging to Kajulu.*
 - 16. Although this is the correct position in law, it is now also clear that De-crystallization or Re-flotation can also occur.”*
20. The defendant reasoned that Justice **Apondi** did not want **KAJULU HOLDINGS LIMITED** to be under receivership as at 9th December 2010, when the Learned Judge delivered his Ruling.
21. As far as the Defendant was concerned, the Judge was very clear, that he could not permit the receivership, as the said receivership could “finish” the company.
22. The submission by the Defendant is that the Learned Judge wanted to give the company a second chance, so that the company could continue to run for as long as possible.

23. Therefore, it was the Defendant's contention that;

“.....if the Learned Judge only removed the receivers from the premises but left the receivership intact, the company could not have been able to run and such an order would have placed Kajulu in a suicidal position, which the Judge was avoiding in the first place.”

24. What the Defendant has said constitutes its understanding of the consequences of the orders made by Justice **Apondi**. Nowhere did the Defendant draw this court's attention to any specific order which either revoked the receivership or removed the receivers from the position to which their appointment placed them.

25. As the Defendant said, in its submissions;

“Out of the witnesses that testified, it is clear that none of them is the Learned Judge Muga Apondi, the issuer of the Orders.

The witnesses could only testify on what they perceived the Order to mean.”

26. In seeking to justify its perception of the Orders, the Defendant went about looking at the reasoning of the Learned Judge. In other words the Defendant was providing this court with its own interpretation of the Court Orders.

27. In my humble opinion, Orders made by a Court of Law must be clear, precise and unambiguous. If any order did not have clarity, it could be difficult, if not impossible to enforce.

28. When an Order was capable of interpretation in more than one way, and when each person who was giving his interpretation was convinced about the correctness of the position he has taken, then there is a serious problem.

29. That appears to be precisely the situation prevailing in this case.

30. I say so because the company informed the Defendant about its understanding of the order made by the Learned Judge.

31. The Defendant now says that that interpretation was the correct one.

32. The Defendant further finds fault with the **Commercial Bank of Africa (“CBA”)** for not having written to the Defendant, with a view to informing the Defendant about the interpretation by **“CBA”**.

33. The fact that the Defendant accepted the interpretation given by one of the two parties to the case in which the Order being interpreted was made, implies that the Defendant did not necessarily apply its own mind in ascertaining, (at the material time), whether or not the said interpretation was accurate.

34. If the said interpretation was accurate, because it was an objective one (as opposed to a subjective interpretation), it would not have made a difference whether or not the **“CBA”** also provided the Defendant with another (different) interpretation.

35. In my understanding, when **Apondi J.** granted Prayer 4 of the Application which was in the following terms, he cannot be said to have been adamant in halting the receivership;

“THAT pending the hearing and determination of the plaintiff's suit, the Receivers appointed by the defendant in purported enforcement of securities given by the plaintiff to the defendant to secure various banking facilities be restrained from interfering with the plaintiff's business.”

36. If anything, that prayer contains an express acknowledgement that Receivers had been appointed. Their said appointment was described by the company herein, as have been done in the purported

enforcement of securities.

37. I understand that to mean that the “CBA” had appointed Receivers without having had recourse to court; they did so when enforcing the securities.

38. And the company did not seek the removal of the Receivers. They sought an Order to restrain the Receivers from interfering with the Plaintiff’s business.

39. By granting an injunction to restrain the Receivers, there was an acknowledgement that the persons being restrained were Receivers; and that that status had not changed.

40. The only thing which the court restrained them from doing was the interference with the company’s business.

41. If the Learned Judge had intended to halt the receivership, he could have easily said so expressly.

42. He did not do so; nor had he been asked to so.

43. The Learned Judge observed the lack of evidence on the receiver/managers competence to conduct the business of **KAJULU HOLDINGS LIMITED**. Therefore, he expressed the view that if the receiver/managers took over the business, that would be a sure way of killing the business.

44. Once again, the Learned Judge may have had an intention of halting the receivership; but he did not grant orders to that effect.

45. The Defendant appears to have appreciated the fact that the Judge had an intention, (“**in his mind**”) that the receivership must be suspended – see Paragraph 36 of the Defendant’s written submissions.

46. However, an Order only becomes an Order when the Judge grants it. The fact that the Judge may have had the intention of granting an Order, cannot convert such an intention into an Order.

47. The Judge rendered himself thus, at Page 22 of the Ruling which he delivered on 10th June 2011;

“Having considered the case law carefully together with the explicit position of the law, it is crystal clear that a debenture holder has a right to appoint a receiver and that it was under no duty to refrain from doing so if it might cause a loss to the company. However, it has also been held that those powers must be exercised reasonably and without any oppression.”

48. The Learned Judge was of the view that the debenture holder in this case had acted in an unreasonable, high handed manner, and without any justification. That evaluation was in relation to the fact that the company was required to pay a colossal amount of money within **10** days.

49. It does appear that the Learned Judge had spelt out sufficient reasons that could justify the cessation of the receivership. However, he was neither asked to bring the receivership to an end, nor did he order that it would end.

50. Of course, when receivers are appointed by a debenture holder, the floating charge crystallizes over the assets of the company. Crystallization is not to be confused with the steps which a receiver/manager takes after he had been appointed, and he then quickly moves in to take physical control over the assets.

51. Crystallization takes effect automatically. It does not require the receiver to take any physical steps.

52. In comparison, a receiver takes control over the assets by practically moving to the place where the assets such as vehicles are situated.

53. But whether or not a receiver takes over the physical control of tangible assets, crystallization would

have taken effect.

54. That is why the order for the physical removal of the receiver from the premises of the company, did not have any effect on the crystallization.

55. An order restraining a receiver from accessing the premises of the company cannot therefore constitute de-crystallization or the suspension of the receivership.

56. It is true that when the receivers were restrained from interfering with the operations of the company, and when the receivers were ordered to vacate the company's premises, the said receivers could not operation the company's bank accounts.

57. In those circumstances, if the directors were not operating the company's business, the said company would be at a standstill.

58. The company did not seek an order from the court to enable its directors to take over the operations of the business.

59. The court did not grant an order that would reinstate the directors who had been automatically sidelined by the appointment of the receivers.

60. Therefore, when the company told the Defendant that its directors were lawfully entitled to manage the company's bank accounts, that information was not founded upon an order granted by the court.

61. The Defendant was aware that the company (**KAJULU HOLDINGS LIMITED**) had been placed under receivership.

62. By virtue of the said receivership, the powers vested in the directors of the company were ousted. Therefore, if the said directors told the Defendant something which appeared inconsistent with the effect of the appointment of receivers, the Defendant ought to have taken appropriate action to verify whether or not what was being said by the directors was accurate.

63. If the Defendant had asked the debenture-holder, and if the debenture-holder had failed to respond to such inquiry, the said debenture-holder could not be heard to later complain.

64. De-crystallization or Re-floatation of a charge which had crystallized might, in law, be possible. However, as the Learned authors of

“The Law of Administrators and Receivers of Companies”

said at Paragraph 3-105;

“Careful consideration should also be given to the terms of any guarantees and the prior consent obtained (if possible) of any guarantors, for there may be a substantial risk that the release of the fixed charge over assets (involved in the replacement of the fixed by the floating charge) may prejudice the rights of the debenture-holder against guarantors.”

65. These are matters about which active consideration must be given by the court, because of the potential prejudice which might arise when a fixed charge is re-floated.

66. In this case, there was never a request by the company for an order that the fixed charge be de-crystallized or be re-floated.

67. And unlike the crystallization of a floating charge, which occurs automatically upon the appointment of the receiver, I find that de-crystallization or re-floatation of a fixed charge does not occur automatically, upon the removal of receivers from the premises of the company.

68. In this case, I find that there was neither de-crystallization nor the re-floatation of the charge over the company's assets.

69. DTB submitted that it was merely complying, in good faith, with the court order, when the bank granted access to the company's accounts, by the company's directors.

70. Even though the Defendant may have giving effect to the instructions of its customer, such instructions cannot have been lawful if the same were not consistent with the law. Therefore, as receivers had been appointed, and because the receivership had not been revoked by a Court of Law, the directors of the company did not have lawful authority to give those instructions.

71. In the final analysis, the Defences which had been pleaded by the Defendant are lacking in merit.

72. Meanwhile, as regards the lines of defences which were being raised for the first time during the final submissions, I hold the view that the same cannot be the basis upon which the case can be determined. I so hold because the court can only be called upon to make a determination on Issues which arose from the pleadings and the evidence tendered by the parties.

73. Submissions are neither pleadings nor evidence.

74. In the final result, the Plaintiffs have proved their case on a balance of probabilities. Accordingly, I enter judgment in favour of the Plaintiffs for Kshs.89,502,424/= plus interest thereon at Court rates from the date when the suit was filed in Court.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of June 2018.

FRED A. OCHIENG

JUDGE