



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL SUIT NO. 266 OF 2018

KEMUSALT PACKERS PRODUCTION LIMITED.....APPLICANT

VERSUS

1. PETER KAHI

2. ANTHONY MUTHUSI.....RESPONDENTS

R U L I N G

1. The court is called upon to determine an application by Notice of Motion dated 23/10/2018 seeking orders that:-

i. THAT the application is certified as urgent and service thereof be dispensed with in the first instance.

ii. THAT a mandatory injunction be issued restraining the Respondents from purporting as receivers, administrators and/or managers of the Applicant pending the hearing and determination of this suit.

iii. THAT a prohibitory injunction be issued restraining the Respondents from trespassing onto the applicant's business and/or interfering with any and all properties of the Applicant pending the hearing and determination of this suit.

iv. THAT this honorable court be pleased to remove the Respondents from being administrators of the Applicant.

v. THAT this honorable court be pleased to direct the Respondents to give a true and fair account to this court of all monies they have receive and/or handled as Administrators from 7th September 2017 to date and all fees that they have received during that period of time.

vi. THAT the Respondents be directed to refund all the fees collected by them from 7th September 2017 to date.

vii. THAT the OCS Marereni Police Station be directed to assist in the enforcement of all orders of this court.

viii. THAT costs of this application be provided for.

2. The application is grounded on the fact that under the Insolvency Act, 2015, there is no office of a receiver manager but only that of an administrator and that once an administrator is appointed the appointment lapses at the expiry of 12 months unless extended by the court of the appointing authority. The application was supported by the Affidavit of Hussein Sale Muhammed Ismail essentially reiterating that the appointment having been done in September 2016, after the Insolvency Act came into operation and the 2nd and 3rd Respondents having been appointed as receivers under the repealed statute that appointment was void and additionally even if not void the appointment came to an automatic and at the end of the twelve months after the appointment in terms of Section 593 of the Act.

3. The application was opposed by the defendants by way of the Replying Anthony Muthusi, the 2nd Respondent, whose gist was that there was a previous suit no. 28 of 2016, Malindi which had not been revealed to the court at the time this matter was filed and in which the orders sought herein had been sought by an application filed on the 20/7/2018 and therefore the current matter was *sub-judice* the Malindi matter and should not be entertained.

4. It was additionally added that by such concealment, the applicant led the court to grant the orders granted herein *ex-parte* which have the potential of contradicting those issued by, Korir J in Malindi HCC No. 28 of 2018 and thereby creating a fertile ground for two courts giving two different orders on the same subject matter. The Respondent then went into the merits of the application and contended that they were

appointed as receivers not administrators under section 690 (4) of the Act and therefore being not administrators section 593 did not apply to them.

5. Those facts in the affidavits were reiterated by counsel in the oral submission made before court in which a number of sections of the the insolvency act were cited to court with great emphasis being laid on Section 593 by the Applicant while the Respondents stressed the application of Section 690(4) of the Act, Section 6 and 7 of the Civil Procedure Act and a decision of the Court of Appeal in **Bellevue Development Co. Ltd vs Hon. Justice Francis Gikonyo & Another** as well as a book by **Prof. Harry Rajak, Company Liquidators**.

6. From the submissions offered, the first question this court must confront and answer is whether or not this matter is properly before it on account of the locus of the cause of action, situation of the company being litigated over, and the existence of an earlier suit file at the Malindi High Court.

7. I have heard the benefit of reading the pleadings and decisions handed out in the Malindi suit and I am convinced that even though there are prayers that attack the appointment of the Respondents to manage the affairs of the Applicant here, that attack is largely on the basis that there was no right to appoint them unlike here where the contention seen to be that the appointment was irregular or just null and has come to an end by the operation of law. However as structured, crafted and filed this application could conveniently and properly be pleaded in the Malindi matter so that prospects of two different courts rendering themselves on one matter of appointment and continued stay in office by the Respondents may be dealt with by one court rather than two. That is what I understand to be the dictate of Section 6 of the Civil Procedure Act which prohibits a court from proceeding with a suit in which the dispute is a matter directly or substantially in issue of a previously instituted suit.

8. While the Respondents submit that the suit ought to be dismissed on that account I hold the view that in the circumstances prevailing here the matters in issue are not exactly the same and it shall not be just to dismiss or strike out the suit. It is however just that the matter be taken before the judge previously seized of a dispute between the parties for him to consider whether the matter could be dealt with separately or consolidated with the previously filed matter.

9. The other reason that I find compelling to have the matter directed to be heard in Malindi is the fact that the dispute here concerns the receivership or administration of the company with its Salt extraction and production site situate at Marereni, within Kilifi County. There is a High Court Registry which is the convenient station for the matter to be litigated. That is not to say that the court lacks jurisdiction to entertain the matter. No. It simply means that court disputes should be handled in consonance with the judiciary's obligation to take its services closest to the litigants by establishing High Court Registries as near as possible to the people seeking services of the courts. Having established a registry in Malindi, where the plaintiff herein is demonstrated to have filed previous suits, it is only just that even this matter be heard and determined there.

10. I direct now direct, with the consent of the parties, that this file be transmitted to Malindi forthwith for the parties to appear before the judge for mention on 21st January 2019. In the meantime I direct that the status quo currently prevailing be maintained

11. Having so said, I refrain to delve into the merits of the application which I leave to be determined by the Malindi Court. I must however reiterate and say that I do not consider filing this matter in Mombasa as *sub-judice* or abusive of the court process.

Dated and delivered at Mombasa on this 3rd day of December 2018.

P.J.O. OTIENO

JUDGE