



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 174 OF 2003

SAM-CON LIMITED.....PLAINTIFF

-VERSUS -

NATIONAL BANK OF KENYA LIMITED.....1ST DEFENDANT

ANDREW DOUGLAS GREGORY.....2ND DEFENDANT

ABDUL ZAHIR SHEIKH.....3RD DEFENDANT

RULING

1. The defendant has asked the court to strike out the suit because it had been filed without leave of the High Court, yet the plaintiff was a company under receivership at the time when the suit was instituted.
2. The Plaintiff was filed in court on 31st March 2003.
3. Meanwhile, on 16th January 2003, the 1st Defendant, **NATIONAL BANK OF KENYA LIMITED** had appointed 2 Receiver Managers, namely **ANDREW DOUGLAS GREGORY** (*the 2nd defendant*) and **ABDUL ZAHIR SHEIKH** (*the 3rd defendant*).
4. It is the defendants contention that, pursuant to the provisions of Section 228 of the Companies Act, when a company had been placed under receivership, then no action can be commenced by that company or against the said company without first obtaining the leave of the court before the proceedings were started.
5. The defendant acknowledges that Section 228 of the Companies Act deals with Receivers or Liquidators who had been appointed by the court, in the course of proceedings for the winding up of the company, by the court.
6. However, the defendant submits that the effect of the appointment of a Receiver, by the court was usually the same as the effect of the appointment of a Receiver under an instrument such as a debenture.
7. That submission is premised on paragraph 20 – 24 of **KERR AND HUNTER ON RECIEVERS AND ADMINISTRATORS 19th Edition, at page 520**, wherein the learned authors said;

“The effect of the appointment out of court is, as regards the crystallization of the floating

charge into a fixed charge, and as to the consequences as regards judgement creditors, the same as in the case of an appointment by the court?.

8. My understanding is that the said learned authors were making reference to two (2) specific situations, namely;

a. The crystallization of the floating charge into a fixed charge; and

b. The consequences as regards judgement creditors.

9. Therefore, that text cannot be deemed to be an authority for the proposition that in all circumstances, the effect of an appointment of a Receiver by the court was similar to that of an appointment under an instrument such as a debenture.

10. The second authority cited by the defendant was the case of **JOSEPH KAARA MWETHAGA Vs THABITI FINANCE COMPANY LIMITED (IN LIQUIDATION) & 4 OTHERS, CIVIL APPLICATION No. NAI.120 of 1998**. In that case, the Court of Appeal said;

“As stated earlier, the first defendant is described by the plaintiff in his plaint as being a limited company registered under the Companies Act and is currently undergoing involuntary liquidation. This is not disputed. In such a case the plaintiff required leave of the court to proceed with the suit against the first defendant?.

11. As the plaintiff in that case had not obtained the leave of the court to proceed with the suit against the first defendant, the Court of Appeal held that the suit was incurably defective and incompetent in law.

12. The significant aspect of that case was that the plaintiff was undergoing involuntary liquidation.

13. In contrast, the plaintiff was under receivership; and the Receiver had been appointed under a debenture.

14. At this point, I find it prudent to set out the provisions of Section 228 of the Companies Act, which reads as follows;

“When a winding up order has been made or an interim liquidator has been appointed under section 235, no action or proceedings shall be proceeded with or commence against the company except by leave of the court and subject to such terms as the court may impose?.

15. In my understanding of that statutory provision, leave of the court is mandatory when;

i. a winding up order has been made; or

ii. an interim liquidator has been appointed under section 235 of the Companies Act.

16. That section does not say that when circumstances had arisen which were comparable to those 2, then it was also mandatory to first obtain leave of the court before commencing or proceeding with proceedings.

17. It is perhaps necessary to emphasize that pursuant to Section 235 (1) of the Companies Act;

“The court may appoint the official receiver to be the liquidator provisionally at any time after the presentation of a winding up petition and before the making of a winding-up order?.

18. Clearly, therefore, Section 228 of the Companies Act contemplates two (2) scenarios in which the court had intervened, either by appointing an interim liquidators or by making a winding-up order.

19. In **RUTH WANJIKU KAGIRI Vs RELIANCE BANK LIMITED (IN LIQUIDATION) & 2 OTHERS**, Hccc No. 130 of 2010, Odunga J. said;

“My understanding of section 228 aforesaid as well as the authorities above, is that where a winding up order is made against a company, all pending proceedings against the company are stayed until leave to continue therewith is granted. On the other hand, fresh proceedings are expressly barred unless leave is granted and conditions attached thereto are complied with?.

20. The learned authors of **“CHARLESWORTH AND CAIN COMPANY LAW?, 12th Edition** made the following distinction between receivers and liquidators at pages 585 to 586, when they said;

“A receiver takes possession of the property of the company over which he is appointed and realizes it for the benefit of the debenture holder(s). He should not be confused with a liquidator. A liquidator is appointed with the object of winding up the company and terminating its existence whereas the receiver may be paid out, whereupon the company will resume business as before?.

21. Therefore, as the roles of receivers are different from those of liquidators; and because the receivers herein were appointed by the debenture – holders, I find that Section 228 of the Companies Act does not apply to the plaintiff. In other words, the plaintiff did not require the leave of the court before instituting these proceedings.

22. The defendants request that the suit be struck out for want of leave from the court, to have it instituted by the plaintiff, is rejected.

23. I award to the plaintiff costs relating to the Case Management Request dated 7th September 2016.

DATED, SIGNED and DELIVERED at NAIROBI this 25 day of January 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

S.T. Wanjohi for the Plaintiff

Isaac Wanjohi for the 1st Defendant

Isaac Wanjohi for the 2nd Defendant

Isaac Wanjohi for the 3rd Defendant

Collins Odhiambo – Court clerk.