



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 71 OF 2015

KUNDAN SINGH CONSTRUCTION
INTERNATIONAL LIMITEDPLAINTIFF/PLAINTIFF

-VERSUS-

BANK OF AFRICA KENYA LTD.DEFENDANT/DEFENDANT

-AND-

KENYA COMMERCIAL BANK..... INTERESTED PARTY

R U L I N G

INTRODUCTION

1. The Application before this Court is the Notice of Motion dated **20th February 2015** and filed in Court on the same day. It is expressed to be brought under **Sections 3 and 3A** of the **Civil Procedure Act** as well as **Order 40 Rule 2, 3, 4** and **Order 51 Rule 1** of the **Civil Procedure Rules**.

2. The Application is based on the grounds stated in the application and is supported by the Affidavit of RIPHUMAN SINGH UBHI, a director of the Plaintiff Company and sworn on **20th February 2015**.

3. The Plaintiff is seeking the following orders:-

1) ...

2) ...

3) ...

4) ***THAT pending the hearing and final determination of this suit, an injunction do issue restraining the Defendant/Respondent by itself, its servants or agents, or advocates, or any of them or otherwise from interfering with the Plaintiff/Applicant's business operations in its head***

office and any of its offices within the Republic of Kenya and particularly in its road construction sites and projects in Kenya and further from appointing a receiver manager, liquidator, or any other person whatsoever pursuant to the Debenture dated 5th August 2011 and not to interfere with the status, management and/or operations of the Plaintiff/Applicant in any manner whatsoever.

5) THAT the Plaintiff/Applicant be and is hereby granted a period of nine (9) months to liquidate the un-disputed sum of USD 3,301,874.49 owed to the Defendant/Respondent or any such other period of time as this Honourable Court may deem just to grant in the circumstances of this case.

6) THAT pending the hearing and determination of this suit, the court be pleased to lift the receivership placed on the Plaintiff/Applicant by the Defendant/Respondent.

7) THAT the costs of this application be provided.

4. The background of the application is as follows. By way of a Debenture dated 5th August 2011 and a Charge over Land Reference Number 336/108 Ruaraka, Nairobi, the Defendant advanced to the Plaintiff certain banking facilities including a term loan and overdraft facilities in the aggregate sum of **Kshs. 300,000,000.00/=**.

5. The facilities were extended to the Plaintiff for purposes of road construction projects pursuant to contracts between the Government of the Republic of Kenya and the Plaintiff which projects are yet to be completed. The Plaintiff avers that the Government of Kenya and particularly the Ministry of Roads, Public Works & Transport has not paid them for the issued certificates for completed works citing lack of funds. However, recently the Government started making sporadic payments on the same and as a result, the Plaintiff's efforts to liquidate the undisputed debt has been frustrated to some extent since the various payments made so far from the said small payments and the Plaintiff's other sources are not able to drastically reduce the debt.

6. The Plaintiff avers that as a result of the staggered and delayed payments on the part of the Ministry, they engaged the Defendant on a structured plan that will ensure the outstanding debt is liquidated whenever payments are received either from the Government of Kenya on the on-going various projects or from other projects outside the Country that the Plaintiff is engaged in. The Plaintiff further avers that they have been making re-payments from time to time and are committed to liquidate the entire outstanding amount immediately substantial payment is received in respect of the on-going road construction projects both in Kenya and outside jurisdiction which fact the Defendant is well aware of.

7. Further to the foregoing, it is the Plaintiff's assertion that the securities taken up by the Defendant are also being held at Kenya Commercial Bank Limited and I & M Bank Limited on *pari passu* basis with the Defendant, to secure a sum of **KShs. 2,555,000,000.00** and **KShs. 1,000,000,000.00** respectively. The said securities are held under a Securities Sharing Agreement between the Defendant and the aforementioned Banks. It is the Plaintiff's case that the Defendant is aware of this arrangement. The Agreement has been referred to as the Inter-Lenders Agreement in this ruling.

8. On 18th February 2015 the Defendant issued a notice demanding payment of **Kshs. 476,429,887.95** and on the same day and time appointed Kolluri Venkata Subbaraya Kamasastri to be Receiver and Manager over the affairs and operations of the Plaintiff. According to the Plaintiff, the Defendant had never issued any prior notice to that effect. It is the Plaintiff's case that in view of the negotiations that had been taking place between the Plaintiff and the Defendant regarding liquidation of the outstanding debt and in light of the payments made so far, the Defendant's actions are unwarranted, malicious and tainted with bad faith and ill motives as opposed to debt recovery.

THE PLAINTIFF'S CASE

9. It is the Plaintiff's case that the Defendant has un-procedurally and unlawfully placed in Receivership

the Plaintiff and purported to appoint Receivers to manage the affairs of the Plaintiff when the Defendant has no such right and none has accrued so far on its behalf or at all. Therefore, according to the Plaintiff, the Defendant's conduct is illegal *ab initio* and in bad faith in all respects.

10. It is averred for the Plaintiff that the Receiver and Manager has taken over their principal and operational offices and forcefully ejected all the employees of the Plaintiff. In the process, their operations have been interrupted and totally paralyzed. It is the Plaintiff's position that as a result they have been exposed to substantial and enormous financial loss and suffering.

11. In addition, it is averred for the Plaintiff that the Defendant has taken over all their road construction and other civil engineering sites all over the Republic of Kenya and ejected all the employees and other workers from the construction sites. The Plaintiff's contention is that the Receiver has no knowledge and/or skill whatsoever on road construction matters and particularly the skills to operate the massive construction machinery and equipment in each site. This has exposed them to enormous financial loss and damage to its business, massive machinery and equipment on all sites valued at about **KShs. 2,000,000,000.00**. Further, it is the Plaintiff's contention that the Receiver and Manager will not be capable and will not be accepted by the various Government Agencies to carry out very critical and sensitive infrastructure projects. This, according to the Plaintiff, will put into jeopardy and frustrate all the on-going projects in various parts of the country and therefore will be against public interest since these are projects for public use.

12. The Plaintiff has further averred that in any event, the Defendant is under obligation to Kenya Commercial Bank Limited and I & M Bank Limited to issue notice to the said financial institutions on the strength of the Lenders Agreement dated 17th June 2011 and executed by the three parties aforesaid which notice has not been issued at all.

13. It is the Plaintiff's case that the conduct of the Defendant and its agents, especially the ejecting of the Plaintiff's employees from their offices and its construction sites and locking up the said offices is a calculated move on the part of the Defendant to completely cripple the operations of the Plaintiff which are huge by any standards and with a view to dispose off its assets at throw away prices as is always the case with Receivers and Managers in this country.

14. The Plaintiff is apprehensive that unless the orders sought herein are granted as prayed, they will suffer irreparable harm and injury that cannot be compensated by damages as the entire business will be crippled through no fault of its own.

THE DEFENDANT'S CASE

15. The Application is opposed. The Defendant opposed the application vide the Replying affidavit of its Manager Debt Recoveries, BEN MWAURA, sworn on **23rd February 2015**. There is also a list of authorities filed on the same day.

16. The deponent avers that the orders of injunction restraining the appointment of a receiver manager pursuant to the Debenture dated 5th August 2011 is not available to the Plaintiff because the Defendant on 18th February 2015 appointed Kolluri Venkata Subbaraya Kamasastri, as Receiver and Manager over all the property and assets of the Plaintiff. Accordingly, there are no grounds for prohibiting the Receiver appointed by the Defendant from entering the premises and from carrying out his duties.

17. The deponent further avers that the Receiver duly appointed by the Defendant Bank is a respected auditor of long standing, and has informed him that he has handled many receiverships including Rolmil Kenya Limited, Afrolite Industries Limited, Rising Sun Apparels EPZ Ltd, Kwality Candies & Sweets Ltd, Nyali Beach Hotels Ltd, Spraymaster Ltd in which the debts owing to the Banks were recovered and the Receiverships lifted.

18. It is the deponent's assertion that the Receiver has advised him that he does not intend to terminate

the works of the Plaintiff, but will work with the requirements the business shall dictate. The Receiver has further advised that he shall engage any skilled persons as necessary to assist him in his duties pertaining to the Plaintiff Company. On that basis, it is the deponent's assertion that there are no grounds for the Court to lift the Receivership that is already in place. Furthermore, it is the deponent's assertion that the Plaintiff has clearly admitted to owing the Defendant an undisputed sum of USD 3,301,874.49/=.

19. It is the Defendant's case that Courts do not re-write contracts entered into by parties. The deponent avers that Paragraph 13 of the Debenture entitled "**Appointment of Receiver**" dated 5th August 2011 executed by both parties, provides for the Appointment of Receiver at any time after the principal monies thereby secured become payable as a result of a demand made by the Bank. Such demand was made on the Plaintiff by the Defendant for the payment of the outstanding sum of KES 476,429,887 Cents 95 on 18th February 2015, and was received by Mr. Kundan Singh Ubi at about 12:30pm. The deponent further avers that payment of the said amount has not been received to date.

20. It is also averred by the Defendant that in any event, Paragraph 11 of the same Debenture entitled "**Events of Default**" provides that the principal moneys, interest and other moneys secured thereby, shall immediately become payable without any demand, protest or other notice of any kind if any amount due by the Company is not paid when demanded or on the due date for payment (whether or not demanded).

21. The Defendant's contention is that there have been a plethora of demands for payment by them to the Plaintiff which have not been honoured such as those issued on 11th September 2014, 26th August 2014, 12th August 2014, all of which expressed the Defendant's disappointment with the Plaintiff's failure to meet its repayment obligations and gave notice of the intention to appoint a Receiver.

22. It is the Defendant's case that the Plaintiff has been making numerous promises to pay the Defendant, all of which have been empty. *(copies of emails and letters promising payment by the Plaintiff dated 5th September 2014, 8th August 2014, 8th July 2014, 11th April 2014 are to be found at pages 42 to 45 of the Defendant's Exhibit.*

23. The deponent notes that the Plaintiff has not exhibited a shred of evidence confirming a firm date when it "is expecting huge payments from the Governments of Kenya, Tanzania and Zambia in respect of ongoing projects in those countries" as pleaded at Paragraph 16(c) of the Supporting Affidavit of **Ripthuman Singh Ubi**. He avers that the fact that the Plaintiff is relying on proceeds of trade generated from outside of Kenya using the Defendant's funds, presents the clear risk that the Plaintiff may be beyond the jurisdiction of this Court on those areas. As such, it is the Defendant's case that this is a compelling reason for the Court not to lift the Receivership that is already in place with regard to the assets in Kenya and within its jurisdiction.

24. With regard to the Inter-Lenders Agreement, it is the Defendant's case that it has informed the other Lenders of its intention to proceed to appoint a Receiver in respect of the Plaintiff. *A copy of the said Notification is to be found at page 46 of the Exhibit.*

25. It is the deponent's assertion that there has been non-disclosure of material facts by the Plaintiff as follows. On 18th February 2015, the Plaintiff improperly used the offices of the OCS Ruaraka Police Station to interfere with the work of the Receiver. The Defendant did a written complaint on 19th February 2015 to the Director, Internal Affairs Unit, Office of the Inspector General, National Police Service. Further, the Plaintiff owes various other Banks colossal amounts of money running into billions, including Kenya Commercial Bank Limited and I&M Bank Limited and they are also considering appointing Receivers over the assets of the Plaintiff.

26. It is averred by the deponent that the Plaintiff's application and entire suit is incompetent, frivolous and an abuse of the Court process and ought to be struck out. This is on the basis that the Plaintiff has commenced this suit in the name of Kundan Singh Construction International Limited, when such Company does not exist whatsoever in the Companies Registry, as the name was changed to KSC International Limited on 18th January 2013. *A copy of the Certificate of Change of Name is to be found at*

27. Further, the Plaintiff has commenced this suit in the name of Kundan Singh Construction International Limited without acknowledging that it is in Receivership in breach of **Section 349** of the **Companies Act**.

28. It is the Defendant's case that it is trite law that it *is not appropriate to interfere in the passage of receivership unless it could be shown that the conduct of the receiver was seriously oppressive or not in accordance with recognized principles of law and commercial practice, or that there were clear and compelling reasons to do so*. It is further the Defendant's case that it is not the function of the Courts to modify a party's contractual obligations by ordering repayment of the loan in a manner different from the one covenanted in the Charge.

29. KCB was joined as an interested party in this matter by virtue of being a party to the Inter-Lenders Agreement which gave rise to the receivership in this matter. In opposition to the current application, there is a Replied affidavit sworn on 23rd February 2015 by Bonnie Okumu, an Advocate of the High Court of Kenya on behalf of the Interested Party. There is also a list of authorities dated 23rd February 2015.

30. It is essentially the interested party's case that the appointment of the receiver in this matter is regular and in line with the Debenture document. The deponent also clarified that they were given adequate notice as provided for under the Inter-Lenders Agreement with regard to the appointment of the receiver. It is also the Interested Party's case that the Plaintiff has been granted numerous opportunities to regularise the amount of debt owing and despite indulgence by the lenders the Plaintiff has perennially failed to settle the debts.

THE HEARING OF THE APPLICATION AND ORAL SUBMISSIONS

31. On 25th February 2015, the parties appeared before me to argue the current application. Mr. Nyachoti, for the Plaintiff, indicated that he would restrict himself to submission for a temporary stay of Receivership for a period of 14 days only, pending the *inter-partes* hearing of the other prayers sought in the application in the event that the matter was not resolved within 14 days.

32. Counsel submitted that the Plaintiff was asking for 14 days to enable them look for funds, and demand outstanding debts. According to the Plaintiff's Counsel, this cannot be done by the Receiver Manager who does not know the debtors. It is the directors who can be able to do that. It is Counsel's submission that most importantly, there are heavy equipment and machinery in many parts of Kenya and their movement require expertise. The said equipment is valued at over kshs.2.0 billion.

33. Mr. Nyachoti submitted that this is a case where the courts intervention is needed. He further submitted that the Plaintiff undertakes not to interfere with the properties of the company. In addition the Plaintiff undertakes to pay any costs incidental to appointment of the Receiver from the day he was appointed.

34. The Defendant opposed the stay of appointment of Receiver. Mr. Karungo for the Defendant submitted that in the cause of negotiations, they had proposed a consent in the following terms. The Receiver Manager would have unfettered access to the documents, bank statements, books of account, etc. The parties had also proposed that the Receiver would not dispose off the assets for a period of 10 days to enable the Plaintiff settle the debts within 14 days in default of which the Receiver would be at liberty to execute his duties in full. Further, the Receiver in consultation with directors would prepare a statement of affairs of the company within 7 days. Finally, the Defendant proposed that the company operations would continue under the approval and overall supervision and management of the Receiver.

35. However, it is Counsel's submission that the above offer was refused and that is why they have to oppose the application. He submitted that as a matter of law once the Receiver has been appointed, the management of the company is under the Receiver. He further submitted that on 18th January 2013 the Plaintiff Company ceased to exist and is now called KSC International Limited. For that reason, it was his

submission that the suit before the court is incompetent. He added that the Plaintiff Company is actually in receivership yet this fact was not disclosed to the Court.

36. Mr. Karungo submitted that it was clear from the Defendant's Replying affidavit that the Receiver would not terminate any works or sack any employees. It was his submission that negotiations for payment started two years ago and the Defendant had severally told the Plaintiff that they would place the company under receivership but nothing has been paid to date. Counsel informed the Court that the Plaintiff had also frustrated the Receiver by arresting him and the Defendant had to negotiate his release. It was Counsel's submission that this being a court of equity, the Plaintiff's hands are not clean.

37. It was submitted for the Defendant that the fact that the Government had not paid the Plaintiff was not relevant. It was further submitted that it is not the function of the court to modify agreements. It was Counsel's position that interfering with a receivership was actually a mandatory injunction granted only in exceptional circumstances. According to Counsel, there were no such exceptional circumstances in the matter.

38. Mr. Mungai for the interested party in his submissions associated himself with Mr. Karungo's submissions. He relied on the authorities filed on behalf of the interested party in opposing the current application.

39. Before I could render a Ruling on the current application, the Plaintiff/Applicant by a Notice of Motion dated 2nd March 2015 sought to bring before this Court two documents;

I. A Notice of Termination of Contract dated 24th February 2015 by the Kenya National Highways Authority.

II. A letter dated 26th February 2015 by Road Development Agency of Zambia making inquiries about the fact of the Plaintiff being put in receivership.

40. By these documents the Plaintiff intended to convince the Court that third parties with whom the Plaintiff is engaged in various contractual relationships being cognisant of the fact of receivership, are either terminating those contracts, or will soon be doing so. Mr. Nyachoti for the Plaintiff submitted that if that happens then the already dire situation in which the Plaintiff finds itself will be made worse and that these are additional grounds for this court to exercise its discretion to grant temporary relief orders sought herein.

41. On their part, Mr. Karungo for the Defendant and Mr. Mungai for the interested party both dismissed those 'new' evidence stating that there was nothing new in the circumstances and that in any event such letters of inquiry about the receivership and threats to cancel contracts due to the same are expected and will continue.

ANALYSIS

42. The Plaintiff is seeking for a temporary stay of Receivership for a period of 14 days only pending the *inter-partes* hearing of the other prayers sought in the application in the event that the matter is not resolved within 14 days. The Plaintiff is asking for 14 days to enable them look for funds, and demand outstanding debts.

43. The Defendant and the interested Party are opposed to the same. It is not in dispute that a Receiver has already been appointed in this matter. The receivership is regular and legal in accordance with the Debenture and the Inter-Lenders Agreement between the parties. It is the Plaintiff's case that they are frustrated by lack of payment by the Government and this is a compelling reason to grant them the interim relief for stay of receivership. According to the Plaintiff, the Receiver will actually take over the running of the company and this will affect the productivity of the company.

44. The Defendant's case on the other hand is that the Receiver would not terminate any works or sack

any employees. It is also the Defendant's case that negotiations for payment started two years ago and the Defendant had severally told the Plaintiff that they would place the company under receivership but nothing has been paid to date.

45. It is trite law that a Receivership would not be stopped by the Court except where it is oppressive in nature and where there are compelling reasons to require the intervention of the court. See **Kenya United Steel Company Limited vs. Kenya Commercial Bank Ltd & Another [2005] eKLR** where the Court of Appeal referred to the case of **Hastings Irrigation Ltd Vs The Standard Chartered Bank (K) Ltd & Others [1987] KLR 280** in which it was held that courts will not interfere with receivership unless it could be shown that the conduct of receivers and managers was seriously oppressive, or not in accordance with the recognised principles of law and of commercial practice, or clear and compelling reasons to do so are shown.

46. The Plaintiff's case does not show any compelling reasons. In addition the Plaintiff has not demonstrated any oppressive conduct on the part of the Defendant. I have struggled to understand the Plaintiff's request for 14 days. I have patiently waited for the Plaintiff to state that on the 14th day, if such stay were to be granted, the Plaintiff would pay a particular part of the debt. I have asked the Plaintiff's Counsel what the Plaintiff intended to do after the 14 days. No tangible answer has come from the Plaintiff except that after the said period the Plaintiff will give a road map to the recovery of the debt. To my mind, I do not believe that given 14 days the Plaintiff will make any payment of the debt or a good part thereof. Those will be 14 wasted days. While the receiver will have lost the said 14 days in terms of performing his duties under the Receivership, there is no knowing what the Plaintiff will do with its properties. It is known that rogue companies under receivership take any available opportunity to conceal or even waste the Receivership property in order to frustrate the Receiver. Where a receivership has crystallised, courts will very seldom stay the same except under exceptional circumstances, none of which has been demonstrated by the Plaintiff.

47. The Plaintiff's apprehension is that the Receiver will run down the company. The Defendant on the other hand has stated that the Receiver will continue with the contract and will not sack any employees. There is no evidence to the contrary. The Plaintiff's allegation that the Defendant has ejected the Applicant's employees has not been substantiated. In any case, fourteen (14) days is relatively a short period for the Receiver to alter the operations of a company whether in the negative or otherwise. The Receiver has not yet been given a chance or time to demonstrate that he can recover the debt on behalf of the Respondents and at the same time sustain the business of the Plaintiff Company. Therefore, the allegations raised by the Plaintiff that the Receiver has no knowledge or skill to operate the Plaintiff Company is merely apprehensive and premature.

48. The Plaintiff has admitted to owing the Defendant money. The Plaintiff had obtained the said monies by way of the Debenture dated 5th August 2011 which provided for the appointment of a Receiver at any time after the principal monies thereby secured become payable. The Debenture document is not in dispute. Therefore, the Defendant's right to appoint a receiver to manage the Company's affairs has arisen. This was an agreement entered into by the parties and indeed it is commonplace that this Court cannot rewrite or alter the same. The responsibility of the Courts is limited to only enforcing contracts within the law. In **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & another Civil Appeal No. 95 of 1999**, the Court of Appeal held that a court of law cannot rewrite a contract between the parties as the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

49. From the foregoing pleadings and submissions of the Defendant, it is clear that the Defendant, pursuant to the proposed consent which never materialised, has shown a great deal of goodwill to the Plaintiff. The Defendant was prepared to give the Plaintiff some 10 days during which the powers of the Receiver would be limited or circumscribed at least in relation to termination of employees, termination of work or disposal of Plaintiff's assets. It is upon this gesture of goodwill by the Defendant that I make the following orders in relation to the Plaintiff's application:-

a) ***The Plaintiff's application for a stay of Receivership for a period of 14 (fourteen) days is***

dismissed for want of merit except that for a period of 10 days from the date of this ruling;

i. The Receiver/Manager shall, while exercising the full mandate of his office nonetheless:-

a. not terminate any ongoing works or contracts,

b. not sack any employees,

c. not dispose off any assets.

ii. Upon the expiration of the said 10 days, the Receiver/Manager will exercise his full mandate as he deems fit and without any restraint whatsoever.

(b) The costs of the application shall be for the Respondents.

(c) The parties are at liberty to list the application dated 20th February 2015 for the hearing and determination of the other prayers.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 5TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Nyachoti for the Plaintiffs

Mr. Karungo for the Defendant Defendant

Mr. Aisi for the Interested Party

Teresia – Court Clerk