



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 559 OF 2005**

**KENYA SUGAR BOARD.....PLAINTIFF**

**• VERSUS -**

**NDUNGU GATHINJI.....DEFENDANT**

**JUDGEMENT**

1. The plaintiff, **KENYA SUGAR BOARD** sued the defendant, **NDUNGU GATHINJI** in relation to services which the defendant had rendered as one of the 2 Joint Receiver/Managers of **MIWANI SUGAR COMPANY**.
2. It was the contention of the plaintiff that **JACKTON RANGUMA**, who had been the defendant's colleague, had relinquished his position when he was appointed as a Commissioner at the Kenya Revenue Authority.
3. The plaintiff's claim was that the defendant had failed to exercise his contractual duties. The plaintiff's further claim was that the defendant had breached his legal and statutory duties.
4. Finally, the plaintiff had claimed that the defendant had been grossly negligent.
5. All the shortcomings on the part of the defendant were said to have caused the plaintiff to suffer great loss and damage. Therefore, the plaintiff sought to have the defendant barred from trespassing upon the premises of **MIWANI SUGAR COMPANY**. The plaintiff also proposed to have the defendant ordered to provide a detailed statement of account, as well as compensation for the losses suffered by the plaintiff.
6. In answer to the Plaintiff, the defendant lodged a Defence and Counter-claim.
7. By the said Defence, the defendant asserted that he did not have any contractual relationship with the plaintiff. He pointed out that it was **ORIENTAL COMMERCIAL BANK LIMITED** that had appointed the plaintiff and **JACKTON RANGUMA** as the Receiver/Managers at **MIWANI SUGAR COMPANY**.
8. The defendant also contended that the appointment of the Joint Receiver/Managers had never been terminated. Therefore, the plaintiff was accused of being discriminatory and selective by suing only the defendant.
9. It was the defendant's contention that the Joint/Receiver Managers conducted their work ethically, honestly and professionally. Therefore, they denied all the claims of breach of contract; breach of legal and statutory duties, and the claims of negligence.
10. The defendant lodged a Counter-claim against the plaintiff, asserting that the plaintiff's purported termination of the Receivership was irregular, wrong and unlawful.
11. As the termination was a nullity, the defendant's position was that he continued in his role of a Receiver/Manager until his appointment was lawfully terminated.
12. The defendant claimed a fee of Kshs. 750,000/- per month from 7<sup>th</sup> September 2005 until his appointment was lawfully terminated. Indeed, the claim for Kshs. 750,000/- monthly was said to

- be valid until the suit was heard and determined.
13. The defendant further claimed the sum of Kshs. 8,000,000/- on account of outstanding arrears of the Receiver/Management fees.
  14. According to the defendant, the purported unlawful termination of his services had subjected him to mental agony, embarrassment, financial loss and suffering. Therefore, the defendant lodged a claim for General Damages to compensate him.
  15. On 20<sup>th</sup> December 2011 the plaintiff's suit was dismissed by Kimondo J. The learned Judge dismissed the suit because the plaintiff and its advocate failed to attend court to prosecute the suit.
  16. Following the dismissal of the suit pursuant to the provisions of Order 12 Rule 3 of the Civil Procedure Rules, the plaintiff filed an application to reinstate the suit.
  17. After giving due consideration to the application, the court dismissed it on 19<sup>th</sup> April 2012. In effect, the court sustained the dismissal of the plaintiff's claim.
  18. Eventually, the Counter-claim came up for trial on 10<sup>th</sup> June 2014.
  19. The defendant was the only witness who testified in support of his case.
  20. His testimony was that he was operating as a Stock Broker. He was no longer practicing as an accountant.
  21. The defendant testified that he was appointed as a Receiver/Manager at **MIWANI SUGAR COMPANY** on 31<sup>st</sup> July 2001. The person who appointed him was **DELPHIS BANK**.
  22. Following the appointment of the defendant and **JACKTON RANGUMA** as the Joint Receiver/Managers, they wrote to the Statutory Manager on 9<sup>th</sup> August 2001, setting out their fees.
  23. The reason for communicating with the Statutory Manager was that the company was already under receivership.
  24. The defendant testified that the fee they quoted was Kshs. 500,000/- per month, plus disbursements.
  25. At the material time, the defendant and Jackton Ranguma were also the Receiver/Managers at **MUHORONI SUGAR COMPANY**. According to the defendant, the debenture – holder over the assets of **MUHORONI SUGAR COMPANY** was the plaintiff, **KENYA SUGAR BOARD**.
  26. On 10<sup>th</sup> August 2005 the plaintiff wrote to the Receiver/Managers, telling them that they were required to cease acting as Receivers at the **MIWANI SUGAR COMPANY**.
  27. The plaintiff had disagreed with the Receiver/Managers at **MUHORONI SUGAR COMPANY**.
  28. However, instead of taking action only in relation to **MUHORONI SUGAR COMPANY**, the plaintiff also purported to terminate the appointment of the Receiver/Managers at **MIWANI SUGAR COMPANY**.
  29. It was the testimony of the defendant that their appointing authority, (**DELPHIS BANK**) asked the Receiver/Managers to continue performing their duties at **MIWANI SUGAR COMPANY**.
  30. However, when the plaintiff purported to terminate the Receiver/Managers at **MIWANI SUGAR COMPANY**, the plaintiff physically barred the Receiver/Managers from gaining access to the company.
  31. As a result of being barred from entering **MIWANI SUGAR COMPANY**'s premises, the defendant says that he was unable to get all their documents which had remained at the company.
  32. The defendant pointed out that the plaintiff sought the legal opinion of the Solicitor General, in relation to the termination of the Receivership at **MIWANI SUGAR COMPANY**.
  33. In response to that request, the Solicitor General wrote to the plaintiff on 22<sup>nd</sup> August 2005, telling it that it had no legal basis for removing the Receiver/Managers from **MIWANI SUGAR COMPANY**.
  34. The defendant testified that **DELPHIS BANK** requested the Receiver/Managers to continue with their work. Therefore, the defendant did continue with their work, even though they were denied entry into the company's premises.
  35. The defendant said that the Receiver/Managers continued with their work elsewhere.
  36. In the circumstances, the defendant claimed Kshs. 8,000,000/- being the Fees and Expenses for the Receiver/Managers until June 2008 when they ceased to be the Receiver/Managers.
  37. He explained that the Receiver/Managers were supposed to have been paid from the proceeds realized from the sale of sugar-cane from **MIWANI ESTATES**. The said sugar-cane was being

- processed at Muhoroni.
38. The defendant further said that Delphis Bank did not provide the Receiver/Managers with money to develop or to maintain sugar-cane. It was the function of the Receiver/Managers to harvest the sugar-cane and to thereafter pay both the guards at **MIWANI SUGAR COMPANY** and also the Receiver/Managers.
  39. However, as there were months when insufficient funds were generated, the defendant said that it was not always possible for them to pay themselves. In the circumstances, when there were insufficient funds, the Receiver/Managers would pay themselves when funds became available.
  40. When the Receiver/Managers were removed, the defendant said that the funds from the **MIWANI SUGAR COMPANY** became un-available. Therefore, the Receiver/Managers were unable to pay themselves.
  41. The defendant explained that it is because of those reasons that the arrears claimed arose. And he added that the arrears were for the period between 2001 and 2005.
  42. The next bit of the defendant's evidence was that he was supposed to have been paid Kshs. 250,000/-, plus expenses for travelling monthly.
  43. By September 2005, the accrued arrears of the unpaid fees and expenses had accumulated to Kshs. 8,000,000/-.
  44. Out of the said sums, the defendant said that his travelling expenses for every month was Kshs. 20,000/-.
  45. The defendant said that from July 2001, he had been paid intermittently. However, the defendant did not have the actual calculations or workings to demonstrate how the claim was derived.
  46. The defendant blamed his inability to make available documents to the fact that the documents were left behind at **MIWANI SUGAR COMPANY**, at the time when the Receiver/Managers were removed unceremoniously.
  47. He said that the lives of the Receiver/Managers were at risk in Miwani, if they had returned to that place. Therefore, the defendant's claim was pegged on the Returns which the Receiver/Managers had filed.
  48. It was from the said Returns that the defendant calculated the outstanding sum as being Kshs. 8,000,000/-.
  49. Secondly, the defendant said that his claim for monthly fees was Kshs. 250,000/-, down from Kshs. 750,000/- which is cited in the Counter-claim.
  50. And he lay claim to his fees between September 2005 and June 2008 when Delphis Bank and Kenya Sugar Board settled the issues between them. According to the defendant, he formally ceased to be a receiver in June 2008.
  51. Finally, the defendant claimed General Damages on account of the fact that the irregular termination of his job had tarnished his name. The said irregular termination was also said to have had repercussions on the defendant's other appointments. He explained that after the irregular termination, he never got any other job as a Receiver. Therefore, he had to stop practicing as a Receiver.
  52. During cross-examination, the defendant said that between 2001 and 2005, the Receivers/Managers used to first pay expenses and salaries, before giving the balance of the money to Delphis Bank.
  53. The defendant also reiterated that the claim in the Plaintiff, for Kshs. 750,000/- per month was erroneous.
  54. The defendant emphasized that until the plaintiff interrupted their role, business was going on as usual.
  55. Meanwhile, as regards the arrears of Kshs. 8,000,000/-, the defendant said that that sum ought to have been claimed from Delphis Bank. However, because it is the plaintiff who terminated the defendant's appointment, the arrears remained unpaid. It was for that reason that the defendant felt that the plaintiff must be held responsible for paying that sum.
  56. However, when the defendant was asked to make available the records from which that claim could be verified, he told the court that he did not have any records. He explained that the plaintiff had deprived them of an opportunity to get the documents from **MIWANI SUGAR COMPANY**.
  57. But even without the records, the defendant insisted that the sum being claimed was calculated after Delphis Bank terminated the receivership, in 2008.
  58. When the defendant was asked if there was proof to demonstrate that his failure to get other

- receiverships was attributable to the manner in which the plaintiff had terminated his services, the defendant said that he did not have any such proof.
- 59.As regards the travelling expenses, the defendant confirmed that those could have been quantified. In effect, actual expenses were special damages. Therefore, they should have been specifically pleaded, and thereafter the defendant should have provided evidence to prove them.
  - 60.The defendant did not put down a specific claim for travelling expenses. Therefore, as that claim was in respect of special damages, it cannot be granted.
  - 61.On its part, the plaintiff called **THOMAS NDUBI MAKENI** as its only witness. Thomas was the Head of Finance at the plaintiff. He had worked with the Sugar Board since 2003, and was familiar with the case.
  - 62.Thomas testified that the appointment of the Receiver/Managers was terminated by the plaintiff because they had failed to comply with the deliverables on their mandate.
  - 63.According to Thomas, it was unlikely that there were any arrears in respect to the fees payable to the Receivers as they used to pay themselves before remitting any balance to Delphis Bank.
  - 64.Thomas confirmed that it was Delphis Bank which had appointed the Receiver/Managers. But he added that both the bank and the Sugar Board were debenture holders over the assets of **MIWANI SUGAR COMPANY**. For that reason, Thomas opined that Delphis Bank could only terminate the receivership with the concurrence of the Sugar Board. In his view, that would be in line with best practice.

*So why is that it was the Sugar Board that terminated the receivers?*

- 65.Thomas said that the Sugar Board had paid – off Delphis Bank.
- 66.When Thomas was confronted with the letter from the Solicitor General, advising the Sugar Board that it was only the bank which could lawfully terminate the receivership, he conceded that when the Sugar Board terminated the receivers, it had disregarded the legal opinion.
- 67.Finally, the plaintiff said that the defendant had never provided the Board with any document to prove his claim for Kshs. 750,000/-.
- 68.Having given due consideration to all the evidence adduced, I now make the following findings:
- 69.The Kenya Sugar Board did not appoint the Receiver/Managers. It was Delphis Bank which had appointed the Receiver/Managers.
- 70.There is no evidence of any involvement of the Board at the stage of the appointment.
- 71.The plaintiff has failed to demonstrate any lawful authority which could have clothed it with the mandate to terminate the Receiver/Managers. I therefore find that the plaintiff's action of terminating the appointment of the defendant was a nullity.
- 72.The defendant's claim for Receiver/Management fees of Kshs. 750,000/- was not supported by any evidence. Indeed the defendant admitted that that sum was claimed in error.
- 73.The letter dated 9<sup>th</sup> August 2001 indicated that the Receivership Fees was Kshs. 500,000/- per month.
- 74.Considering that that fees was payable to the joint Receiver/Managers, it would imply that the defendant's share of that sum was Kshs. 250,000/-.
- 75.Although the defendant claimed Kshs. 8,000,000/- on account of Unpaid outstanding arrears, he did not produce any evidence to prove that claim.
- 76.It was not good enough for the defendant to blame the plaintiff for barring him for **MIWANI SUGAR COMPANY**. He must have had a basis upon which he pegged his calculations which led him to claim that sum. But he failed to make available any such foundation upon which the court could ascertain whether or not he was entitled to that sum or to any other sum, in respect to the alleged arrears.
- 77.In law, the onus is upon the person who makes a claim to prove it.
- 78.Where necessary, the person could seek the orders of the court, to compel the other party to produce documents.
- 79.The defendant failed to produce any evidence to support its claim for Kshs. 8,000,000/-. Accordingly, that claim is rejected.
- 80.In relation to the claim that the manner in which the receivership was terminated caused the defendant's reputation to suffer, so that he, thereafter failed to get appointments as a receiver, I find that the defendant did not prove the nexus.

- 81.The defendant asserted that he continued working as the Receiver/Manager for **MIWANI SUGAR COMPANY** even after the plaintiff’s attempt to terminate the receivership.
- 82.If that be the case, and because the defendant was working with the blessings of Delphis Bank until June 2008, it would have been expected that Delphis Bank would have been paying him.
- 83.I must say that it remained unclear, from the evidence tendered, whether or not the defendant continued to work after the plaintiff purported to terminate his appointment as a Receiver/Manager.
- 84.If he continued working, he should have been able to pay himself as he had been doing prior to the intervention by the plaintiff.
- 85.But if the defendant stopped working, he would not have been earning his fees.
- 86.It is possible that the defendant continued to hold the position of a Receiver/Manager between August 2005 and June 2008, but without actually working. I say so because the defendant had made it clear that his life would have been in danger if he had visited **MIWANI SUGAR COMPANY**.
- 87.As the defendant deemed as a nullity, the attempt by the plaintiff to remove him, that implied that the defendant was only removed in 2008.
- 88.In the circumstances, he cannot seek compensation for wrongful termination as he continued working until 2008.
- 89.The defendant asserted that he was exposed to professional disrepute. This is how he put it in his submissions:

**“The word was out among his colleagues, clients, I.C.P.A.K, relatives and friends that he had been forcefully chased away from Miwani like a thief or robber. Apart from increasing his distress this damaged him as a professional”.**

- 90.Whereas the said submission is powerful, it was not founded on evidence. None of the defendant’s colleagues, clients, relatives or friends came to testify. **ICPAK** did not testify.
- 91.Therefore, although it is possible that the defendant’s submission was founded upon reality, he forgot to bring evidence to court, to enable the court make a finding in his favour.
- 92.In respect to the assertion that he suffered mental agony, that would be a fact about which the defendant had personal knowledge. He testified about that fact.
- 93.Of course, it would have been even better had there been some medical evidence to back the evidence of the defendant. But the lack of medical evidence cannot obliterate the defendant’s own evidence.
- 94.I therefore find that the unwarranted actions of the plaintiff did cause mental anguish to the defendant.
- 95.The plaintiff must compensate the defendant for the mental agony it caused him. I award the defendant the sum of Kshs. 1,000,000/- as compensation.
- 96.The defendant is also awarded the costs of the Counter – claim.
- 97.The award of Kshs. 1,000,000/- will attract interest at Court rates, from the date of Judgement.

**DATED, SIGNED and DELIVERED at NAIROBI this 4<sup>th</sup> day of November 2015.**

**FRED A. OCHIENG**

**JUDGE**

***Judgement read in open court in the presence of***

No appearance for the Plaintiff

Nzamba Kitonga for the Defendant

Collins Odhiambo – Court clerk.