



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

WINDING CAUSE NO.1 OF 2014

IN THE MATTER OF KAPCHEBET TEA FACTORY LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT (CAP.486 LAWS OF KENYA)

AND

IN THE MATTER OF SECTION 189, 191, 219, 22, 224, 234, 235,239, 240, 241, 242, 243, 252, AND
253 OF THE COMPANIES ACT, CAP 486 LAWS OF KENYA.

AND

IN THE MATTER OF THE INHERENT POWERS OF THE COURT

BETWEEN

DAVID BETT LANGAT.....1ST PETITIONER/APPLICANT

ISMAIL GULAMALI.....2ND PETITIONER/APPLICANT

VERSUS

STEPHEN KIPKATAM KENDUIYWA.....1ST RESPONDENT

JOEL KIMUTAI SANG.....2ND RESPONDENT

JOSEPH KIPKURUI NGETICH.....3RD RESPONDENT

RODERICK MITEI KENDUIYWA.....4TH RESPONDENT

JONAH KIPKEMOI KETER.....5TH RESPONDENT

KAPCHEBET TEA FACTORY LIMITED.....6TH RESPONDENT

KOLLURI VENKATA SUBBARAYA KAMA

SASTRY (JOINT RECEIVERS & MANAGERS).....1ST INTERESTED PARTY

RULING

On 2nd July 2014, Miss Muthee, learned advocate for the Petitioners, appeared before this court and argued exparte the Motion dated 30th June 2014. Pursuant to aforesaid exparte proceedings, this court granted the following orders:

- i. That pending the hearing and determination of this application all income/proceeds from Kapchebet Tea Factory Limited (company) in respect of the assets of the company to be deposited in the Company's Bank Account Number 01010020001460 at Messrs. K-Rep Bank, Kericho Branch and any transactions therefrom notwithstanding the mandate given to be forthwith sanctioned by the signature of the Petitioners/Applicants as directors/shareholders and/or members of the Company;
- ii. That pending the hearing and determination of this application all decisions and more particularly with regard to the financial affairs of Kapchebet Tea Factory Limited (6th Respondent) in respect of the assets of the Company and any transactions therefrom notwithstanding the mandate given to be forthwith sanctioned by the signature of the Petitioners/Applicants as directors/shareholders and/or members of the Company;
- iii. That a grant of temporary injunction do issue prohibiting the 1st – 5th Respondents and K-Rep Bank Limited (Interested Party) by themselves, their agents, assignees, employees and/or servants from transacting in the affairs of the Kapchebet Tea Factory Limited without the knowledge/consent and/or sanction by way of the signature of the Petitioners/Applicants as directors/shareholders and/or members of the Company.
- iv. That a grant of temporary injunction do further issue prohibiting the 1st – 5th Respondents as well as K-Rep Bank Limited (the Interested Party) by themselves, their agents, assignees, employees and/or servants from selling, transferring, charging, assigning, leasing, Renting, hiring out, dealing or in any way disposing of the assets of Kapchebet Tea Factory Limited pending the hearing determination of this application and Petition.
- v. That the Officer Commanding Sisiot Police Division do provide security in the execution of the orders and to facilitate access of the premises.
- vi. The Motion is fixed for interpartes hearing on 16th July 2014.

K-Rep Bank Ltd, the 2nd Interested Party herein, filed the Motion dated 7th July 2014 to have the aforesaid orders set aside and or varied. On 8th July 2014, Mr. Muthama learned advocate for the 2nd Interested Party appeared exparte and sought for following orders:

THAT pending the inter partes hearing and determination of the Petition, or until further orders of the court, this Court be and is hereby pleased to vary the ex parte orders issued on the 3rd of July 2014 to the extent that:

- a. The Receivers and Managers be liberty to continue discharging their executive mandate over the assets of the Company which are subject to the Debentures issued by the company and therefore subject to the fixed and floating charges created there under, including but not limited to operating and running the designated Company Bank Accounts, collecting any receivables, dealing in any stocks in trade and incurring any expenditure necessary to meet the day to day operational requirements and expenses of the company without having to first seek and obtain the sanction of the Petitioners.
- b. K-Rep Bank Limited be at liberty to act on the written instructions received from the Receivers and Managers in respect of the company's Bank Accounts held with the Bank without having to

- first seek and obtain the sanction of the Petitioners.
- c. The Receivers and Managers do make available to the Court and to the Petitioners and to the Respondents quarterly or other periodic accounts of all of the company receivables and all expenditure.
 - d. Based on the said accounts, there be liberty to the Petitioners and Respondents to apply for further orders if necessary.

I have considered the grounds set out on the face of the Motion and the facts deponed in the supporting affidavit of Daisy Ajima together with the oral submissions of Mr. Muthama. It is the submission of Mr. Muthama that the *ex parte* orders given on 3rd July 2014 have had a devastating, draconian effect on Kapchebet Tea Factory Ltd, the 6th Respondent, hereinafter referred to as the company. It is argued that the operations of the company have been totally paralyzed in that the Receivers and Managers are not able to pay staff salaries nor pay farmers and suppliers for deliveries made nor pay for utility bills. This court was informed that unless the aforesaid orders are varied at this *ex parte* stage the Receivers and Managers who are currently managing the assets of the company will simply have to shut down the operations of the company. Mr. Muthama further submitted that the pendency of the orders has the effect of pushing the company's debt from a performing debt to a non-performing or distressed debt, thus, exposing the 2nd Interested Party to loss of its securities and the financial advances amounting to Ksh.224,000,000/=. The learned advocate further argued that it cannot have been the intention of the court to visit greater hardship on the 2nd Interested Party and on the company than the mischief the *ex parte* orders sought to prevent. In the Motion dated 30th June 2014, the Petitioners alleged that the 1st – 5th Respondents in collusion with the managers and or officers of the 2nd Interested Party misappropriated the company's funds and or incomes. It was further argued that the Respondents and the 2nd Interested Party have withheld from the Petitioners the company's financial affairs thus running the company in an oppressive manner. This court appreciated the fact that the allegations were made *ex parte* hence it did not make conclusive findings. The court issued the *ex parte* orders with the firm belief that it would protect the subject matter of the suit pending the interpartes hearing of the Motion. Mr. Muthama correctly argued that when this court granted the *ex parte* orders of 3rd July 2014 it did not intend to paralyze the operations of the company. It has now been stated that the *ex parte* orders have had the effect of shutting down the operations of the company. Mr. Koko, learned advocate who held brief for Miss. Muthee for the Petitioners, beseeched this court not to grant *ex parte* orders but instead fix the Motion dated 7th July 2014 for interpartes hearing on 16th July 2014 together with the Motion dated 30th June 2014. I have taken into account those views. It is now quite clear that on 25th June 2014, the 2nd Interested Party being the holder of debentures appointed Receivers and Managers, 1st Interested Party over the assets of the company which were subject to debentures. It has been argued that the *ex parte* orders issued on 3rd July 2014 amounted to the court rewriting the debentures between the company and the 2nd Interested Party, a jurisdiction the court does not have. It would appear the court still retains the power to interfere with the appointment of receivers and Managers by a debenture holder if the same is not validly done. I refer to Halsbury's Laws of England, 4th Edition at page 520 in which it is stated in part as follows:

“A debenture or trust deed often gives power to appoint a receiver and manager in specified events. Such a power given in debentures of a series is a fiduciary power, and if an appointment is made which is not for the benefit of the debenture holders, but with a view to the benefit of the company or third parties, the court will interfere and appoint its own receiver.

.....where such a receiver has been validly appointed, the court will not displace him by appointing the liquidator in his place.”

It is trite law that the appointment of receivers and managers has the effect of diluting or taking away the powers of the directors of the company. The receivers and managers appointed under such instruments have the discretion to apply to court for directions in relation to any particular matter arising in connection with the performance of their functions. Those receivers and managers are also enjoined by law to provide information and accounts on regular basis.

The question posed to this court to decide is whether the orders given on 3rd July 2014 should be varied and if so to what extent? I have already stated that when receivers and managers are appointed, the powers of directors of the company take a back seat. The 2nd Interested Party is basically saying that the Receivers and Managers it had appointed should be given a free hand to perform their duties to keep the company running. Of course the Petitioners had earlier alleged in the Notice of Motion dated 30th June 2014 that the 2nd Interested Party had colluded with the 1st to 5th Respondents to misappropriate the company proceeds to their utter detriment. It would appear from the material placed before this court that at the opportune time the validity of the appointment of the Receivers and Managers may be challenged. The orders issued on 3rd July 2014 appear to have tied the hands of the receivers and managers in that those orders required them to seek the approval of the Petitioners in exercising their powers donated to them by the debenture instrument. There is no doubt that the Petitioners and the 1st to 5th Respondents have a serious dispute over the management of the 6th Respondent. The Petitioners have on their part alluded that the receivers and managers appointed by the 2nd Interested Party are partisan. The 2nd Interested Party has stated that its main interest is to protect and preserve its securities. Mr. Koko made a passionate submission by urging this court not to make any *ex parte* orders to enable all parties involved make submissions. I am persuaded by the submissions of Mr. Koko that there is need to hear all the parties involved in this saga to enable the court make an informed decision. Consequently I decline to make *ex parte* orders and direct that the Motion dated 7th July 2014 is fixed for *inter partes* hearing together with the Motion dated 30th June 2014 on 16th July 2014.

Dated, signed and delivered in open court this 9th day of July 2014.

J. K. SERGON

JUDGE

In the presence of:

- Mr. Muthama for 1st and 2nd Interested Party.
- Miss. Muthee for Petitioners.
- Mr. Miruka for 1st and 4th Respondents
- N/A for 2nd, 3rd, 5th and 6th Respondents