



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 29 OF 1995

UHURU HIGHWAY DEVELOPMENT LIMITED.....PLAINTIFF

-versus-

CENTRAL BANK OF KENYA.....1ST DEFENDANT

EXCHANGE BANK LTD(IN VOLUNTARY LIQUIDATION.....2ND DEFENDANT

KAMLESH MANSUKHLAL PATTNI.....3RD DEFENDANT

PANSLA INVESTMENTS LTD.....4TH DEFENDANT

RULING

There is before me an application by the plaintiff brought under Order 39 rules 1, 2, 3 and 9 and Order 40 Rule 1 of the Civil Procedure Rules and sections 3A and 63 of the Civil Procedure Act for several orders the basic of which asks the court to appoint an interim Receiver/manager to take possession, custody and management of all the movable and immovable property of the Grand Regency hotel and the plaintiff or its duly appointed agent Grand Hotel Management Limited.

The application is grounded on two affidavits annexed thereto sworn by Mukesh Vaya and Kamlesh Mansukhlal Pattni.

Before I allowed counsel to prosecute the application Ex-parte I had to be satisfied that the same was urgent and that service in the first instance should be dispensed with. Going by the Certificate of Urgency annexed to the application I was satisfied that the same was urgent. The learned counsel also pleaded that the application be heard Ex-parte as the relevant data held on computers shall undoubtedly be deleted with the click of a delete instruction and all relevant documents may disappear from the computer or may be tampered with, hidden away or destroyed.

More instructive however is the averment of Mr Pattni at paragraph 48 of his affidavit aforesaid where he depones thus:

“ 48 THAT I pray this Honourable Court to hear this application Ex-parte for the following reasons:

(I) That because of the allegations of fraud, deceit and mismanagement contained herein and because all the documents including such as may be incriminating are in the possession, power and control of Kittony and the Hotel Management, there is a real and present danger that once the 1st defendant or Kittony have knowledge of this application, the same will be destroyed, altered or defaced to avoid discovery.

(ii) That much of the information relating to the Hotel in particular all occupancy data and accounts are held on computers and there is a danger that any information sensitive or otherwise will be erased, deleted or otherwise destroyed at the throw of a switch”

The allegations levelled against Mr Joseph Kittony and the management of the hotel center on incompetence, mismanagement, theft and fraud which are eroding the business and assets of the plaintiff.

On the foregoing, I found the fears expressed on behalf of the plaintiff to be well founded and decided to dispense with service in the first instance and hear the application Ex-parte.

I believe I have the jurisdiction to address the application and make orders thereunder under the provisions of section 63 of the Civil Procedure Act and Orders 39 and 40 of the Civil Procedure Rules. The orders to be made under Orders 39 and 40 of the Civil Procedure Rules aforesaid are covered by section 63 (c) (d) and (e). The key words in section 63 aforesaid I believe are that the court in a given situation may act “In order to prevent the ends of justice from being defeated.” (Emphasis added)

Bearing the foregoing in mind, I consider it important to mention a few facts. Mr Joseph Kittony was appointed by the first defendant as the receiver of the Grand Regency Hotel by a letter dated 15th April, 1994. On the same day he moved into the hotel and suspended Mr A Furrer the Managing Director until further notice. This evidence is contained in annexure “M.V. 1A”.

Mr Kittony’s appointment is in dispute both under the charge that the first defendant holds on the property and also under the Registration of Titles Act. The charge does not provide for the appointment of a receiver and a receiver appointed under the Registration of Titles Act, Cap 281 Laws of Kenya does not take possession of the property but stands at the gate, so to say, and collect rent etc.

Be that as it may, the grounds upon which the application is made are:

(I) THAT the first defendant/respondent has failed to properly furnish any or all accounts since the 15th March, 1994 to date.

(ii) THAT the first defendant/Respondent acting by itself and/or by its agent or employee Joseph Kittony has failed to administer the hotel in a sound and competent manner appropriate to the standard of a preferred hotel.

(iii) THAT Joseph Kittony is eroding the assets afore stated to such an extent and at such a speed that only a mere shell shall be left unless action is taken to stem the damage presently being done.

Mr Rebelo the learned counsel for the plaintiff/applicant has taken the court through the two affidavits together with the annexures thereto. Saying that this is a classic case of a game keeper turned poacher, he submitted that, the Chief Executive of the hotel who should be Mr Kittony, the General Manager and Financial Controller whether by indolence, negligence or sheer disregard are causing serious losses running into millions of shillings. There is evidence of fraud and thefts. It is his submission that had the hotel been properly managed from 15th April, 1998 when Mr Kittony took possession, control and management, without thefts and frauds over the last four years, the hotel would have earned sufficient monies to have paid off the alleged debt under the charge.

In Civil Appeal No. 36 of 1996 Uhuru Highway Development Limited - v- Central Bank of Kenya, and others, the court of appeal directed that the parties conclude their preliminaries as regards issues within 60 days from 12th November, 1996 and that the case thereafter be heard on a day to day priority basis. That order has not been complied with and the delay has been attributed to the first defendant. The plaintiff’s case is that the Central Bank of Kenya is not interested in proceeding with the he case because it is in possession of the hotel.

Mr Rebelo has pointed out the failures of Mr Kittony as stated in the affidavit of Mr Pattni. Such failures include the Golden Beach Hotel in Mombasa which is said to have never recovered from Mr Kittony's mismanagement. The other is the hotel group known as African Tours and Hotels Limited which is said to be insolvent and suspended by the Nairobi Stock Exchange. "See KMP7". He is said to have been or still is its managing director.

Some reports in respect of the mismanagement of the Grand Regency Hotel have been annexed to Mr Pattni affidavit as "KMP9". Notes and recommendations made by auditors have not been addressed. Mr Kittony has allowed and or permitted a large number of persons to stay at the hotel and enjoy its facilities at complementary basis. This has been annexed as "KMP10".

Substantial luxury items have been removed from the hotel to furnish the residence of the General Manager at Muthaiga. A manager was also arrested for theft from the hotel. See annexures "KMP11" and "KMP12". A private restaurant by the name of After Hours Restaurant at Village Market, Gigiri has benefited from the transfer of movables, food and other items from the hotel. The said restaurant is not and has never been an asset of the plaintiff and is said to be an instrument or device for syphoning materials out of the hotel for the benefit of the Financial Controller and the General Manager. See "KMP16".

Annexed to Mr Pattni's affidavit as "KMP14" is a bundle of letters of complaints showing that some valued clients made of Embassy and Diplomatic personnel, and Canadian Armed Forces have stopped using the hotel due to embarrassment and mismanagement. Above all a sum of Ksh. 44 million owed to the hotel has not been collected from debtors for unknown reasons. The list is not exhaustive. At the end of it all, the picture that comes out is that of a profile of mismanagement, incompetence and sheer plunder. If that is not arrested, irreparable loss shall surely result.

In view of the foregoing, I consider it my duty to appoint a receiver/ manager to save the situation. This can be done ex-parte; and in this instance I am guided by the Court of appeal decision in **C.A No. 10 of 1997- Leisure Lodges Limited -v- Yashivin A. Shretta.**

In C.A No. 71 of 1998 Nasir Ibrahim Ali & Others -v- Kamlesh Mansukhlal Danji pattni & Michael Scanlon, the Court of Appeal citing Mulla on Civil Procedure said, the receiver is appointed for the benefit of all concerned. He is a representative of the court and of all parties interested in the litigation wherein he is appointed. The appointment of a receiver is the act of the Court and made in the interest of justice. The receiver is subject to the orders of the court. Such a receiver is not the assignee or representative of any of the litigating parties and must be clothed with some measure of accountability.

I have been provided with copies of Curricula Vitae of nine persons of whom I may consider for the appointment of the Receiver/ Manager. I have very carefully gone through each one of them. They are all in respect of persons of integrity and old hands in the Hotel Industry and management. After that exercise, I have settled for PERRIE HENNESSY. His is a household name in Hotel Management. With over 28 years experience in Hotel Management he headed the Lonhro Hotels in Kenya as Managing Director in charge of Norfolk Hotel, Nairobi, Aberdare County Club, Mount Kenya Safari Club, Ark, Sweetwaters, Mara Safari Club etc. He is an exposed person going by the other jurisdictions he has served. He is currently the Managing Director of Halcyon Days Management Co. Ltd/Management Company. Accordingly I appoint PERRIE HENNESSY to be the Receiver/Manager of Grand Regency Hotel, Nairobi.

Having done so, the law requires that I impose safeguards as to his accountability. Order 40 Rules 3 and 4 of the Civil procedure Rules provide that:

"3 Every receiver so appointed shall-

(a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;

(b) submit his accounts at such periods and in such form as the court directs;

(c) pay the amount due from him as the court directs; and

(d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.”

Rule 4 provides for the penalty that may befall a receiver who does not comply with the requirements of Rule 3 above. This entails attachment of his property to sell the same and make good any losses. As regards security, the plaintiff is the owner of the land and buildings, the subject matter of these proceedings. Above all, the plaintiff is the owner of all the movables in the hotel as correctly found by the Court of Appeal in **C.A. NO. 36 OF 1996 Uhuru Highway Development Limited -v-s Central Bank of Kenya and others.** The movables alone have been estimated to be of the value as about Kshs. 2 Billion. I find the security as required by Rule 3 has been sufficiently pledged by the plaintiff.

As far as the accounts are concerned, the receiver now appointed shall provide to the Registrar of this Court with a certified copy of the accounts within six(6) months from the date hereof and thereafter, after every three months. The parties herein shall be entitled to certified copies thereof and shall be at liberty to apply to this court in connection therewith.

The receiver shall have the power to do all thing regarding the Hotel as if he were himself the General Manager for the preservation of the Hotel, its financial integrity and to retain its reputation as a preferred Hotel.

The consequence of the foregoing orders is that orders sought in prayers 3 to 8 of the Chamber Summons are also granted. The orders herein take effect forthwith and shall be enforced with the assistance of the Court Bailiff. In the event of any resistance the OCS Central Police Station is hereby mandated to assist.

Finally, this application shall be served upon all the defendants. The matter shall be mentioned before the Duty Judge, Githinji J. on 20th May, 1998 for directions as to hearing Inter Partes.

The costs shall be in the cause.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of April, 1998.

A. MBOGHOLI MSAGHA

JUDGE