



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: GICHERU, OMOLO & SHAH, JJ.A.)**  
**CIVIL APPLICATION NO. NAI. 71 OF 1998 (UR.25/98)**  
**BETWEEN**

NASIR IBRAHIM ALI ..... 1ST APPLICANT

DINKY INTERNATIONAL S.A. .... 2ND APPLICANT

WORLD DUTY FREE COMPANY LIMITED

T/A KENYA DUTY FREE COMPLEX ..... 3RD APPLICANT

AND

KAMLESH MANSUKHLAL DAMJI PATTNI ..... 1ST RESPONDENT

MICHAEL SCANLON ..... 2ND RESPONDENT

**(Application for stay of all proceedings and orders  
pending an intended Appeal from the Ruling and Order of the  
High Court of Kenya at Nairobi (Kuloba, J.) dated 24th March,  
1998**

**in**

**H.C.C.C. NO. 418 OF 1998)**

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**RULING OF THE COURT:**

By a plaint dated and filed on 24th February, 1998 in the superior court, the first respondent herein averred that on 27th March, 1992 the first applicant herein on his own behalf and on behalf of the second applicant herein executed a Memorandum of Understanding with him wherein it was agreed inter alia that the first respondent was to purchase 100% shares owned by the first and second applicants in the third applicant herein, a limited liability company incorporated in the Isle of Man in the United Kingdom on 5th December, 1989 with its Head Office at Al Qooz, P.O. Box 8222, Dubai, United Arab Emirates and carries on business in Kenya in the name and style of Kenya Duty Free Complex at the Jomo Kenyatta International Airport, Nairobi and at the Moi International Airport, Mombasa and owns Warehouses in Nairobi, at the price of U.S. Dollars 13,750,000. This Memorandum of Understanding was to be followed by a formal execution of Sale and Purchase Agreement.

According to the first respondent's averment, the agreed purchase price of U.S. Dollars 13,750,000 reflected inter alia those assets of the third applicant which were referred to in a letter of confirmation of the said assets dated 27th March, 1992 and addressed to the first respondent by the first applicant. According to the first respondent, pursuant to the Memorandum of Understanding and as a token of his

commitment to fulfilling his obligation, he on the execution of the said Memorandum paid to the first applicant K.Shs. 90,000,000/- which at the agreed rate of K.Shs. 30/- to a U.S. Dollar was an equivalent of U.S. Dollars 3,000,000. On 3rd April, 1992 the first respondent made a further payment of K.Shs. 63,750,000/- which was an equivalent of U.S. Dollars 2,125,000 in pursuance of the same Memorandum of Understanding.

Thereafter, according to the first respondent, on 10th April, 1992 he and the first and second applicants executed the Sale and Purchase Agreement of the 100% shares in the third applicant as is earlier mentioned in this ruling and in that Agreement, the first respondent was to complete the payment of the purchase price of the said shares on or before 10th April, 1993 and the first and second applicants were thereafter to transfer their respective shares in the third applicant to the first respondent on or before 31st December, 1993. Subsequent thereto, the Board of Directors of the third applicant was to resign and the management of the third applicant was to be transferred to the first respondent.

The latter, according to him, complied with his obligation under the Sale and Purchase Agreement by paying in full the purchase price of the 100% shares of the first and second applicants in the third applicant but the first and second applicants have refused and/or neglected to transfer the said shares to him and persists in such refusal and/or neglect in flagrant breach of the Sale and Purchase Agreement referred to above. Subsequent thereto, according to the first respondent, the first applicant has committed fraud on him in that on 27th January, 1994 he fraudulently caused the transfer to himself of the two Warehouses standing and forming part of Unit NO. 2 Portion of L.R. 209/108820 situated along Mombasa Road in Nairobi which Inter alia were part of the assets of the third applicant for which he had purchased the 100% shares of the first and second applicants as is set out in this ruling.

Besides, according to the first respondent, the first and second applicants were negotiating the sale and disposal of their shares in the third applicant and if they were not restrained, he stood to suffer irreparable loss and damage. The first respondent therefore, in addition to seeking an order of the superior court directing the first and second applicants to transfer to him all the 100% Shares in the third applicant in terms of the Sale and Purchase Agreement also sought inter alia an injunction restraining the first and second applicants from selling, transferring and/or disposing any of their shares in the third applicant, except to him, until the final determination of his suit against the applicants in the superior court.

Likewise, he sought an injunction against the first applicant restraining him in whichever manner from interfering with the third applicant's peaceful occupation of the two Warehouses referred to earlier in this ruling until his suit against the applicants was heard and finally determined. The first respondent also sought from the superior court an order appointing an interim Receiver/Manager to manage, control and administer the day to day operations of the third applicant including the Kenya Duty Free Complex's Shops at the Jomo Kenyatta and Moi International Airports in Nairobi and Mombasa respectively and the two Warehouses referred to above pending hearing and final adjudication of his suit in the said court.

Concurrent with the filing of his plaint in the superior court on 24th February, 1998, the first respondent took out a Chamber Summons expressed to be made under Order XXXIX rules 1, 2 and 3; Order XL rule 1; and Order V rules 21 and 27 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In that Summons, the first respondent sought orders of the superior court that the said Summons be certified urgent and that its service be dispensed with in the first instance. He also inter alia sought temporary injunctions against the first and second applicants together with the appointment of a Receiver/Manager in the terms set out in his plaint as is indicated above until further orders of the superior court. The first respondent also undertook to abide by any order the superior court may make as to damages if it was of the view that the applicants may sustain any loss and damage by reason of the orders of temporary injunctions and the appointment of a Receiver/Manager.

His affidavit in support of the aforesaid Chamber Summons reiterated in a detailed form the averments in his plaint but further alleged that the first applicant through the third applicant had transferred to Zanzibar Duty Free Operations without any reference to him a considerable quantity of furniture, equipment, large sums of money as well as substantial quantities of stock from the Kenya Duty Free Complex Shops and Warehouses and that the same applicant was by courier on Emirate Airlines making weekly cash transfers

of a minimum of U.S. Dollars 100,000 from the Kenya Duty Free Complex Shops. According to the first respondent, these factors together with the first and second applicants being foreigners terrified him of the ease with which the assets of the third applicant could be dissipated outside the jurisdiction of the superior court leading to the third applicant being reduced to an empty shell. To avoid such an eventuality and to safeguard the financial integrity of the third applicant, the appointment of an interim Receiver/Manager to take over the management and the finances of the third applicant's duty free shops at Nairobi and Mombasa International Airports together with the two Warehouses situated along Mombasa Road in Nairobi was, according to the first respondent, the only just course in the circumstances of the matter before the superior court.

Annexed to the first respondent's affidavit were inter alia photostat copies of the alleged Memorandum of Understanding purportedly made and executed in Dubai, United Arab Emirates on 27th March, 1992; a letter of the same date confirming to the first respondent the main assets owned by the third applicant which were included in the agreed purchase price of the first and second applicants' 100% shares in the third applicant; the Sale and Purchase Agreement allegedly made and executed on 10th April, 1992; and nine Bankers Cheques the first four of which were drawn in favour of Trade Bank Limited with a total value of K.Shs.153,750,000/= while the next two were drawn in favour of Inter Marketing & Trade Africa Limited with a total value of K.Shs.78,000,000/= and the last three were drawn in favour of Consultants & Marketing Services (Africa) Limited with a total value of K.Shs.181,000,000/= receipts of which appears to have been acknowledged by or on behalf of the first and second applicants. Also annexed to the said affidavit were six curricula vitae of purported competent persons suitable for appointment as Receiver/Manager of the third applicant as the superior court deemed fit.

The only other material affidavit in support of the first respondent's Chamber Summons was that of one Lionel John Smith who described himself as a Project Manager with the third applicant from October, 1989 until 1992 when he was promoted to the post of Director, projects. According to him, on the authority of the first applicant, save for the first two Bankers Cheques issued by the first respondent at the execution of the Memorandum of Understanding on 27th March, 1992, all the other seven Bankers Cheques issued by the first respondent were collected, banked and acknowledged by him. Indeed, according to him, the two and the three Bankers Cheques drawn in favour of Inter Marketing & Trade Africa Limited and Consultants & Marketing Services (Africa) Limited respectively were so drawn on the instructions of the first applicant who had directed him to incorporate the two companies in this country and open Bank Accounts in respect of each of them purely for the purpose of facilitating the receipt of the payments of the sale of the shares in the third applicant and he had complied. Annexed to his affidavit were inter alia photostat copies of some correspondences intimating a possible sale of the Kenya Duty Free Complex operations to Kenya Wines Agency Limited which he brought to the attention of the first respondent in January, 1998.

With the foregoing allegations laid before the superior court on 24th February, 1998, Owuor J. (Mrs.) certified the first respondent's Chamber Summons urgent and proceeded with its hearing ex parte apparently having, but without putting it on record, dispensed with service of the same in the first instance. After submissions of counsel for the first respondent, the learned judge gave her ruling on the same day and in that ruling she was of the view that the material then before her did not inspire any confidence that the property of the third applicant would not be dissipated before the hearing and final determination of the first respondent's suit against the applicants if his prayers as are set out in this ruling were not granted considering that the first applicant was a foreigner and the second and third applicants were companies incorporated outside this country. Believing that the only way to avert such a situation while the parties litigated their disputes in the superior court was by having the property and business of the third applicant in Kenya being managed by a third uninterested party, the learned judge, besides granting the temporary injunctions sought by the first respondent, proceeded under Order XL rule 1 of the Civil Procedure Rules to appoint a Mr. Michael Scanlon of P.O. Box 49794, Nairobi, the second respondent herein, as an interim Receiver/Manager of the third applicant. His appointment, according to the learned judge was on the basis of his past experience and performance as indicated in his curriculum vitae which was amongst those of the six people suggested by the first respondent for appointment as suitable Receiver/Manager of the third applicant. The appointed Receiver/Manager was to take over forthwith the management and control of the third applicant's operations in the Kenya Duty Free Complex

inclusive of its two Warehouses situated along Mombasa Road in Nairobi until further orders of the superior court. The learned judge then ordered that the matter before her be mentioned before Kuloba, J. on 10th March, 1998.

By a Notice of Motion dated and filed in the superior court on 9th March, 1998, the applicants sought the discharge of the orders of Owour, J. (Mrs.) made on 24th February, 1998 and in particular they sought the removal of the Receiver/Manager of the third applicant appointed on the same day. In the alternative, the applicants sought orders of the said court requiring the first respondent to provide security on such terms as may be determined by the superior court and that likewise the Receiver/Manager of the third applicant be required to provide security for the management and operations of the Kenya Duty Free Complex on such terms as the same court may determine. The basis of this motion was principally that the first respondent had obtained the orders sought to be discharged on the strength of forged documents and the superior court could not assist him in the commission of fraud which in effect would amount to giving approval to such fraud. Besides, the applicants alleged that the Receiver/Manager appointed by the superior court had engaged the first respondent's relatives in the management of the Kenya Duty Free Complex which may result in their collecting substantial sums of money belonging to the third applicant with a likelihood of interfering with the latter's records. These grounds were articulated in the affidavit of the first applicant in support of the applicants' Notice of Motion.

According to the first applicant, he did not meet the first respondent on 27th March, 1992, to negotiate the sale of his shares and those of the second applicant in the third applicant nor did he agree to sell the same to the first respondent at a price of U.S. Dollars 13,750,000 and the Memorandum of Understanding allegedly made on the said date was a forgery and so was the letter of the same date allegedly addressed by him to the first respondent purporting to confirm the main assets of the third applicant which were included in the alleged purchase price. In any event, as a prudent businessman he could not have sold the third applicant whose initial capital investment was over the sum of U.S. Dollars 25,000,000 for a less amount of U.S. Dollars 13,750,000.

Likewise, the first applicant denied being a party to the Sale and Purchase Agreement purported to have been executed on 10th April, 1992, and like the other two documents, this too was a forgery. He also denied having received the proceeds of the Bankers Cheques referred to earlier in this ruling nor having acknowledged receipt of the same. Indeed, except for the letter Reference Number KDF/091/92 dated 9th September, 1992, and addressed by him to the Permanent Secretary, Office of the President and copied to the Permanent Secretary, Office of the Vice-President and Ministry of Finance and to the Managing Director, Kenya Airports Authority, and which letter, according to him, was never dispatched to the addressees and the original thereof was still in his possession, all the other correspondences annexed to the affidavit of the first respondent in support of his Chamber Summons in the superior court purportedly written and signed by him (first applicant) were not genuine.

To that end, the first applicant has since learning of the forged documents annexed to the first respondent's affidavit in support of his Chamber Summons in the superior court complained to the Kenya Criminal Investigation Department and to the Central Bank Fraud Investigation Department for criminal investigation. He has also complained to the drawer banks and recipient banks of the Bankers Cheques referred to earlier in this ruling seeking clarifications and particulars of the payments reflected in those cheques. The relevant letters of complaint in connexion therewith all dated 7th March, 1998 were annexed to his affidavit in support of the applicants' Notice of Motion to discharge the ex-parte orders of the superior court made on 24th February, 1998.

In response to the affidavit of Lionel John Smith in support of the first respondent's Chamber Summons in the superior court, the first applicant deposed that the said Lionel Smith had no authority to negotiate and/or execute any agreement on behalf of any of the applicants. Indeed, he had no authority to open Bank Accounts on behalf of the first applicant or be a signatory to the Bank Accounts of the third applicant. Above all, according to the first applicant, he did not instruct him to incorporate any company in this country, open Bank Accounts and receive any funds on his behalf. On account of this therefore, none of the proceeds of the Bankers Cheques referred to above were received by any of the applicants.

By a Chamber Summons made under Order VI rule 13 (1) (a) of the Civil Procedure Rules , dated and filed in the superior court on 10th March, 1998, the applicants sought inter alia to have the first respondent's plaint and Chamber Summons both dated and filed in the said court on 24th February, 1998 struck out principally as relates to the third applicant for not disclosing any reasonable cause of action as the third applicant was a separate and distinct entity from the first and second applicants and was therefore not a party to the alleged Sale and Purchase Agreement of shares in it between the latter two applicants and the first respondent with the result that the said Agreement was not enforceable against the third applicant. Hence, when the matter out of which the orders made by Owuor, J. (Mrs.) on 24th February, 1998 was mentioned before Kuloba, J. on 10th March, 1998 in the superior court, counsel appearing in that court for the applicants herein sought to proceed with the latter's applications for orders to discharge the ex-parte orders made by Owuor, J. (Mrs.) for the alleged reason that the third applicant was by fraudulent pretences kept out of its investment which was in excess of K.Shs. 2.8 billion and that neither the first respondent's plaint nor his Chamber Summons disclosed any reasonable cause of action against the third applicant. Consequently, as there was no opposition to these matters being gotten out of the way, the same were set down for hearing on 13th March, 1998 with the interim orders of Owuor, J. (Mrs.) being extended to that date. At the hearing of the applicants' applications on 13th and 16th March, 1998 their thrust in connexion therewith was the non-disclosure of any reasonable cause of action against the third applicant by the first respondent's plaint and Chamber Summons both dated 24th February, 1998 on account of which they sought the same to be struck out at least as against the third applicant. The ruling of Kuloba, J. given on 24th March, 1998 was to the effect that the issues in matter urged before him would better be gone into at the inter partes hearing of the first respondent's application for the appointment of an interim Receiver/Manager of the third applicant as the allegations of fraud, concealment of material facts among others may probably require a trial on viva voce evidence. The learned judge then concluded:

***"It appears to me from the anxiety expressed on both sides to get to the truth at once that all these questions and allegations be dealt with without further delay, and the court call upon each side to give the whole case extreme urgency and priority to decide the controversial questions within the shortest possible time."***

Although this ruling appears to have been silent as to the extension of the orders of Owuor, J. (Mrs.) made on 24th February, 1998, the implication seems to be that those orders were extended until the inter partes hearing and disposal of the first respondent's application in the superior court for the appointment of a Receiver/Manager of the third applicant. Consequently, the applicants have evinced their intention to appeal against the decision of the superior court in that ruling by lodging a notice of appeal in connection therewith under rule 74 of the Court of Appeal Rules and now comes to this Court under rule 5(2)(b) of the said Rules seeking a stay of all proceedings and orders in the Nairobi High Court Civil Case NO. 418 of 1998 pending the hearing and final determination of their intended appeal. The grounds for their application for stay are that they have an arguable appeal and are likely to suffer serious and irreparable loss and damage and their intended appeal rendered nugatory unless they are granted the stay they are seeking.

At the hearing of their application before us on 6th and 7th April, 1998, Mr. Oraro who appeared with Mr. Ochieng Oduol for the applicants submitted that the issue before the superior court concerning the first respondent's plaint and Chamber Summons disclosing no reasonable cause of action against the third applicant was not adjudicated upon by that court and the applicants cannot go back for inter partes hearing of the first respondent's application for the appointment of an interim Receiver/Manager of the third applicant in the same court. According to Mr. Oraro, the first respondent's plaint concerned the enforcement of a contract of sale and purchase of shares in the third applicant between the first and second applicants and the first respondent and until that contract is performed the third applicant has no role in the sale and purchase of those shares for as a corporation it is distinct from its shareholders.

As regards the appointment of a Receiver/Manager of the third applicant, Mr. Oraro submitted that the orders made in respect thereof were to last until further orders of the superior court. Silence in the ruling of the subject-matter of the applicants' intended appeal as to whether or not those orders were extended implied that the Receiver/Manager appointed by that court on 24th February, 1998 was to stay put

notwithstanding that such appointment gave the first respondent a right to the third applicant which he did have for even if Order XL rule 1(1) of the Civil Procedure Rules was applicable in that regard, he did not bring himself under the provisions of sub-rule 2 of the said rule. In any event, no regard was given to the provisions or rule 3 of the aforesaid Order when the Receiver/Manager of the third applicant was appointed by the superior court and his continuation as such without the accountability envisaged by rules 3 and 4 of the Order aforementioned may lead to a total ruin of the third applicant with the result that the applicants' intended appeal, if successful, would be rendered nugatory, Mr. Oraro concluded.

Mr. Patel who appeared with Mr. Kalove for the first respondent was, however, of the view that the third applicant was not a stranger to the Sale and Purchase Agreement relating to the sale of shares by the first and second applicants to the first respondent. According to Mr. Patel, the first respondent having purchased and paid for the 100% shareholding in the third applicant, notwithstanding the non-transfer of the said shares to him by the first and second applicants, he nonetheless was the equitable owner of the third applicant's assets and in that regard the third applicant was properly joined as a party to the proceedings commenced in the superior court by him. If therefore the stay sought by the applicants is granted and their intended appeal eventually fails, in the circumstances of the said proceedings as are outlined in this ruling, the first respondent may end up having bought an empty shell in the third applicant. To Mr. Patel therefore, the circumstances of those proceedings screamed against the grant of the stay sought by the applicants.

From what has fallen from our lips, it seems to us that in as much as it concerns the third applicant, there are substantial issues for discussion in the applicants' intended appeal which latter we think is not therefore frivolous. It is, however, patently clear that the anxiety expressed by the parties to the present application both in the superior court and before us is evidence of the enormity of the subjectmatter of their litigation in the superior court. Whereas therefore it is not at this stage open to us to adjudicate on the validity or otherwise of the appointment of the Receiver/Manager of the third applicant under Order XL rule 1 of the Civil Procedure Rules , it is nevertheless plainly obvious that both parties herein are anxious to preserve the third applicant particularly as concerns its operational viability in the Kenya Duty Free Complex pending the hearing and final determination of the applicants' intended appeal.

The appointment of the Receiver/Manager of the third applicant by the superior court on 24th February, 1998 under Order XL rule 1 of the Civil Procedure Rules was without the necessary safeguards as to his accountability as envisaged by rules 3 and 4 of the said Order. This is the source of serious concern to the applicants in regard to the preservation of the third applicant in the circumstances of litigation before the superior court as we have attempted to outline in this ruling. Order XL 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***

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

***4.Where a receiver -***

***(a)fails to submit his accounts at such periods and in such form as the court directs;***  
***or***

***(b)fails to pay the amount due from him as the court directs; or***

***(c)occasions loss to the property by his wilful default or gross negligence, the court may***

***direct his property to be attached, and may sell such property, and may apply the proceeds to make good any amount found to be due from him, or any loss occasioned by him, and shall pay the balance (if any) to the receiver."***

Mulla on Civil Procedure, 12th Edition at page 1165 when dealing with the Appointment of Receivers under Order 40 of the Indian Code of Civil Procedure, Act V of 1908 which is similar to our Order XL of the Civil Procedure Rules observes that:

***"The object and purpose of the appointment of a receiver may generally be stated to be the preservation of the subject-matter of the litigation pending a judicial determination of the rights of the parties thereto". "The receiver is appointed for the benefit of all concerned: he is the 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. A receiver is an officer or representative of the Court, and is subject to its orders. His possession is the possession of the Court by its receiver ..... His possession is the possession of all the parties to the proceedings according to their titles. The moneys in his hands are in custodia legis for the person who can make a title to them."***

Indeed such a receiver is not the assignee or representative of any of the litigating parties and in the instant application, in order to remove the possibility of any such notion in the Receiver/Manager appointed by the superior court on 24th February, 1998, and with a view to effectively preserve the subject-matter of the intended appeal for the benefit of all the parties concerned, the said Receiver/manager must be clothed with some measure of accountability. Accordingly, the said Receiver/manager, Mr. Michael Scanlon of P. O. Box 49794, Nairobi, the second respondent herein, is forthwith ordered in terms of Order XL rule 3(a) and (b) of the Civil Procedure Rules duly to account for the management, control and operations of the third applicant in the Kenya Duty Free Complex by submitting to the Registrar of the superior court his accounts in regard to the said management, control and operations on or before the 24th day of every third month with effect from the date of this ruling until the hearing and determination of the applicants' intended appeal with certified copies of the said accounts being furnished to the applicants and to the first respondent each of whom shall have the liberty to examine the accounts submitted to the Registrar of the superior court and to apply in the said court in connection therewith. To the extent set out above, the applicants' application succeeds with the costs occasioned by the same being in the intended appeal.

**Dated and delivered at Nairobi this 24th day of April,1998.**

**J. E. GICHERU**

**JUDGE OF APPEAL**

**R. S. C. OMOLO**

**JUDGE OF APPEAL**

**A. B. SHAH**

**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**

