REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1728 OF 1979

KENYA COMMERCIAL BANK LTD .....APPELLANT

VERSUS

SPECIALISED ENGINEERING COMPANY LTD.....RESPONDENT

ORDER

In this case an unfortunate misunderstanding has arisen between counsel and it has fallen to the court to deal with the issue involved.

In its plaint, which was filed on May 31, 1979, the Kenya Commercial Bank Limited claims an injunction restraining Specialised Engineering Company Limited, the defendant, from severing or removing any fixtures from certain premises erected on a plot of land in Nairobi known as LR 209/8201 ("the lands") which are the property of a third company, Morris and Company Limited, ("the debtor") and also claims damages in respect of such fixtures as have already been removed from the premises and in respect of damage done to the premises.

In paragraphs 3, 4, and 5 of the plaint it is pleaded that the plaintiff is owed money by the debtor, that the debtor charged the lands to the plaintiff by a charge dated May 13, 1977, and charged its assets to the plaintiff by a debenture dated February 13, 1977. This debenture crystallised over all the moveable assets of the debtor by the appointment by the plaintiff of a receiver on January 18, 1978.

In paragraph 6 of the plaint, it is alleged that after the buildings on the lands had been erected, the debtor leased part of them to the defendant, and in paragraph 7, it is stated that the defendant is in the process of moving out of the premises and has started to remove from the premises fixtures charged to the plaintiff.

The plaintiff immediately after filing the plaint obtained, *ex parte*, a temporary injunction ("the injunction order") pending order restraining the defendant from severing or removing from the portion of the lands leased to it by the debtor, any fixtures so charged to the plaintiff.

The defendant in its defence, filed on July 20, 1979, does not admit the contents of paragraph 3, 4 and 5 of the plaint and states in paragraph 3 of the defence that until May 31, 1979, it occupied certain workshops and office premises on the lands as a monthly tenant of the debtor and that during its tenancy, it had, at its own cost, and with the knowledge and consent of the debtor, erected certain temporary structures and affixed certain fixtures and fittings ("the said fixtures and fittings") in the workshop and offices.

In paragraph 3 of the defence, the defendant also asserts that it was entitled, at any time, to remove the

said fixtures and fittings and certain other chattels ("the other chattels"), all of which (as regards the debtor and the plaintiff) were and are the absolute property of the defendant, and the said fittings and fixtures never having been charged to the plaintiff or comprised in the charge mentioned in the plaint.

In paragraph 4 of the defence, the defendant denies that it has removed or intends to remove or was removing any fixtures belonging to the debtor or charged to the plaintiff, and it also denies that the plaintiff is entitled to any of the relief claimed in the plaint. The defendant in its defence also pleads that, the plaintiff has wrongfully and contrary to the order of May 31, 1979, prevented the defendant from removing the said fixtures, fittings and other chattels the property of the defendant by locking the premises, whereby the defendant has suffered loss and damage, and the defendant counterclaims for an injunction restraining the plaintiff, preventing it from removing the said fixtures, fittings and other chattels and for damages, together with an order vacating the injunction and dismissing the suit.

In its reply and defence to the counterclaim, filed out of time on November 15, 1979, after the making of the consent order hereinafter referred to, the plaintiff states that, on or about June 20, 1979, the defendant had been invited to collect "all the items which were not in dispute" which, however, the defendant had declined to do. In the meantime, the defendant, upon a notice of motion filed on August 6, 1979, applied to the court to have the injunction order discharged or set aside.

This application, in support of which and in opposition to which a number of affidavits were filed, came before Platt J on October 9, 1979 when, at the request of both Mr JJ Patel ("Mr Patel") who appeared for the defendant and Mr Nyamu who appeared for the plaintiff, the matter was adjourned for hearing before me on November 1, 1979. On this date Mr Nyamu, applied for a week's adjournment to enable him to take instructions and to enable Mr Le Pelley, the partner in his firm who had been handling the matter, to appear. The application was opposed by Mr Patel but, having regard to the circumstances, I granted an adjournment until November 9, 1979.

On the latter date, Mr Nyamu and Mr Patel again appeared and, following a short discussion between them outside court, I was informed by them that an agreement had been reached which they wished me to record. They then handed me the draft of a consent order in manuscript in the handwriting of Mr Patel and signed by each of them setting out the terms of the order which I was being requested to make. I recorded these terms on the file in the following words and signed them - ("Order by consent:

> "(1) the defendant (applicant) to have released to it forthwith the fittings, fixtures and chattels as per particulars given in Exhibit "A" attached to the affidavit of JAP Morris dated August 3, 1979 and for this purpose the defendant (applicant) to have free access to premises LR 209/8201, Mogadishu Road, Nairobi, to remove the said fittings, fixtures and chattels without any interference by the plaintiff and/or its agents.
> (2) Order dated May 31, 1979 varied to the said extent.
> (3) Costs of this motion on notice to the defendant (applicant)."

In addition to so recording the order, I placed on the file the said draft order in manuscript which had been handed in by counsel and the terms of which are the same as those recorded by me. It is contended by the plaintiff, however, that in requesting me to record this order, Mr Nyamu was acting under a misapprehension as to the relative positions of the parties, and the plaintiff, for which Mr Le Pelley appears, having declined to approve the draft order, which accordingly has not been perfected, now applies by motion to have the consent order reviewed, discharged, set aside or varied. The application is opposed by Mr Patel, who again appears for the defendant, and I am indebted to both counsel for their assistance. Some aspersions directed to the conduct of the proceedings by Mr Patel were entirely without foundation and should not have been made.

In support of this motion, affidavits by Mr Nyamu and by Mr Patel Sinclair, one of the joint receivers of the debtor, have been filed by the plaintiff, and the defendant has filed affidavits by Mr AJ Patel and Mr Morris, two of its directors. From these, it is clear that on October 18, 1979, the defendant's advocates wrote a letter to the plaintiff's advocates enclosing photocopies of a letter dated June 11, 1979 addressed by the defendant to a firm of accountants named Coopers & Lybrand, together with a letter dated August

21, 1979, from the defendant's advocates to the receiver and manager of the debtor, and a letter dated August 30, 1979 addressed to a Mr MM Patel. In this letter of October 18, 1979, the defendant's advocates pointed out that it would be observed from the enclosures that the plaintiff had agreed to release the moveable belonging to the defendant and requested that, effect should be given to this immediately.

Notwithstanding that this letter was apparently received by the plaintiff's advocates on October 19, 1979, and initialled by a partner, it seems that no reply to it was ever sent. In view of this, both Mr Nyamu and Mr Patel were, in my opinion, justified at the hearing on November 9, 1979 in assuming, as apparently they did that an agreement to release the movables as indicated in the letter of October 18, 1979, had in fact been reached, and Mr Patel was justified in so informing Mr Nyamu immediately prior to the hearing.

Although he represented the plaintiff before Platt J on October 9, 1979 and before me three weeks later, Mr Nyamu in his affidavit in support of the present motion states that he was not personally handling the file in this suit, that he had not had an opportunity to study the file properly before agreeing to the terms of the consent order of November 9, 1979 and that he had consented to the order through a mistake. It would appear that the mistake was adduced partly by his perusal on his firm's file of the letter of October 18, 1979 and presumably by the fact that this letter had remained uncontradicted. In addition, he also attributes his mistake to what must have been a careless reading by him of the affidavit of Mr Morris dated August 3, 1979 for in paragraph 4(d) of this affidavit it is stated that "a list of the tenants fixtures and fittings and the said chattels wrongfully detained is attached hereto and marked "A". This list, although containing items such as a complete main switch-board, a distribution box, a number of switches and steel windows, is inaccurately headed with the words "moveable items." This in turn let Mr Nyamu in his affidavit to say that, having perused the order of May 31, 1979, he noticed that it only covered fixtures and, having perused annexure "A" noticed that "all the items were described as moveable."

Mr Le Pelley concedes that Mr Nyamu must be taken to have been empowered at the hearing on October 9, 1979 to agree to the setting aside of the injunction over the fixtures, but contends that he had no power to go further than that or to bind the debtor, and he suggests that the consent order should be replaced by an order merely discharging the injunction. He refers in particular to the defendant's notice of motion dated August 6, 1979 which seeks nothing more than to have the injunction discharged or set aside and the costs provided for. It is not suggested that so much of the consent order as awards costs to the defendant should be interfered with.

Although not named as a party to the suit, the debtor is directly involved in the litigation by reason of the fact that by May 13, 1977 the lands, which are its property, was charged to the plaintiff, and that plaintiff on February 18, 1978, in exercise of its powers under the debenture dated February 15, 1977, put the debtor into receivership, thereby crystallising the plaintiff's charge over the debtor's chattels. Furthermore, the only evidence furnished by the plaintiff in support of its original application for the injunction order, was an affidavit dated May 31, 1979 of Mr Sinclair, one of the joint receivers of the debtor.

In the present application Mr Sinclair again comes to the assistance of the plaintiff and asserts in paragraph 6 of his affidavit of November 16, 1979 (his second affidavit) that considerable damage will be done to the premises if the fixtures referred to in the injunction are removed. He admits, however, that, with the exception of some articles which he is unable to find, all the movables referred to in the affidavit of Mr Morris dated August 3, 1979, are in his possession as receiver of the debtor. These are substantially the articles referred to in both the defence and the consent order. Furthermore, in paragraph 7 of his second affidavit, Mr Sinclair states that two of the items mentioned in the annexure, which were in his possession as receiver of the debtor, are the subject of a claim by the debtor against the defendant pending in this court in Civil Case No 717 of 1978, and it is to be observed that, the parties in that suit are represented respectively by the same firms of advocates as are the plaintiff and the defendant in the present suit.

The position, accordingly, is that, by its plaint the plaintiff has brought within the jurisdiction of the court in this suit, what it has described as "fixtures charged to the plaintiff", and the defendant by its

counterclaim has brought within the suit what it has described as “the tenants” fittings and fixtures” and also the tenants’ “other chattels.” It is clear, therefore, that all the items comprised in the consent order are, quite apart from the order, within the ambit of the suit.

The only items comprised in the injunction are such of the fixtures as are charged to the plaintiff, the discharge of which by the consent order, the plaintiff now suggests should be left undisturbed. The issue therefore, is as to whether there exists any reason for interfering with so much of that order as relates either to fixtures which are not so charged to the plaintiff or to fittings and chattels which are not fixtures. A question of law arises as to the extent to which an advocate can effectively bind his client in litigious proceedings. Mr Le Pelley contends that the chattels were never in the possession of the plaintiff, that Mr Nyamu had no authority to bind the receiver and that he had been inadvertently misled by Mr Patel as to the plaintiff having already agreed to release the movables to the defendant.

Reliance was placed by Mr Le Pelley upon *Khushaldas & Son Ltd v Weinstein* [1964] EA 734, which gives some specific illustrations of circumstances under which a compromise can be said to “relate to the suit” within the meaning of the former Order XXIV rule 6 of the Civil Procedure (Revised) Rules, 1948, but although not falling within any of those illustrations, I have no doubt that the terms of the consent order fall within that rule as amended in 1975.

Mr Le Pelley also submitted that the receiver, and not the plaintiff, is in possession of the chattels but the correctness of the position must depend on the terms of the instrument under which the receiver was appointed. I accept as correct the statement in Kerr on Receivers (15th Ed) at page 321 - 322 that “debentures and debenture trust deeds usually provide, in express terms, that the receiver is to be agent for the company, as in the case of the statutory power. Sometimes this provision is omitted and in such cases it may be inferred from the terms of the instrument that the receiver is agent for the debenture holders, as for instance, where he is given power to carry on the business or other powers largely in excess of those conferred on receivers by statute.” The terms of the present debenture under which the appointment was made, have not been disclosed to the court and I am unable to make any finding as to whether or not the receiver is lawfully in possession of the chattels. It must also be remembered that the agency of a receiver for the company, where it exists, is of a special nature for, as Kerr on Receivers points out (15th Ed at page 322), “the receiver’s agency for the company is, of course, one with very peculiar incidents. Thus the principal may not dismiss the agent, and his possession of the principal’s assets is really that of the mortgager who appointed him.”

Both counsel relied, for different purposes, upon the decision of the former Court of Appeal for East African in *Brook Bond Liebig (T) Ltd v Mallya* [1975] EA 266, where, in declining to set aside a consent judgment, the court cited with approval a passage from volume 1 of the 7th Edition of Seton on Judgments and Orders page 124 to the effect that, *prima facie* any order made in the presence and with the consent of counsel is binding on all parties to the proceedings and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient materials or in misapprehension or ignorance of material facts in general for a reason which would enable the court to set aside an agreement.

The 7th Edition of Seton was published in the year 1912, that is, more than sixty five years ago. It does not take into account the decision of McCardie J in *Welsh v Roe* (1918), 87 LJ KB 520, where the earlier authorities were carefully considered and it was held that after the commencement of an action, the solicitor for a party has an implied general authority to compromise and settle the action and the party cannot avail himself of any limitation by him of the implied general authority to his solicitor, unless the limitation has been brought to the notice of the other side. This decision is accepted as authoritative by the editors of the Supreme Court Practice (1979), vol 2 para 2013, where it is stated that a solicitor has a general authority to compromise on behalf of his client, if he acts *bona fide* and not contrary to express negative direction.

There is no suggestion in the present case that Mr Nyamu acted contrary to any express negative direction or that any limitation placed by the plaintiff upon his implied general authority over the conduct of the litigation either existed or was brought to the notice of the defendant. The most that can be said, would

seem to be, that Mr Nyamu committed a perfectly understandable error resulting from an insufficient acquaintanceship with the matter in the granting of several adjournments for his convenience. The marking by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and, when made, such an order is not lightly to be set aside or varied save by consent or on one or other of the recognized grounds.

It is to be observed from *Welsh v Roe* (Supra) and other decision mentioned in the Supreme Court Practice that, in England the power of a solicitor to bind his client in effecting a compromise may possibly be even more extensive than that of a member of the Bar acting as counsel. If there be such a distinction it would seem that the position of an advocate in Kenya, where the two branches of the legal profession as known in England are fused, approximates more closely to that of a solicitor in England by reason of the very close professional relationship which normally exists there between a solicitor and his client without the intervention, as in the case of a barrister, of an instructing solicitor. The relative position of counsel and solicitor vis a vis the client was considered in *Re Wedge* (1908), 98 LT 436, where it was held, by Warrington J, that the circumstance that a material fact within the knowledge of the client and his solicitor had not been communicated to counsel at the time when he gives his consent to an order in court, is not a sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if counsel states that he would not have given his consent if he had known of the fact. This decision is accepted as correct in the Supreme Court Practice (Supra) at paragraph 2112.

I am not without sympathy for Mr Nyamu but, having carefully considered the matter in the light of the representations made and of the authorities, I am not satisfied that the consent order should be discharged, set aside or varied, and accordingly in the exercise of my discretion, I direct that the motion be dismissed with costs.

Dated and delivered at Nairobi this 6th day of January, 1980.

L.G.E HARRIS

JUDGE