



**Ng'ang'a v NCBA Bank of Kenya PLC & another (Civil Application
176 of 2021) [2024] KECA 428 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 428 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 176 OF 2021
AK MURGOR, MSA MAKHANDIA & M NGUGI, JJA
APRIL 26, 2024**

BETWEEN

DAVID MUIGAI NG'ANG'A APPLICANT

AND

NCBA BANK OF KENYA PLC 1ST RESPONDENT

KERETO MARIMA 2ND RESPONDENT

(An Application for an interim injunction of the Ruling and order of the High Court of Kenya at Machakos (D.K. Kemei, J.) delivered on 21st May 2021 in HCCC No. E006 of 2021)

RULING

1. By a notice of motion dated 2nd June 2021 brought pursuant to rule 5 (2) of the *Court of Appeal Rules*, the applicant, David Muigai Ng'ang'a seeks for orders that (i) pending the hearing and determination of the intended appeal, this Court be pleased to issue an interim injunction restraining the 2nd respondent Kereto Marima by himself, his agents, employees and/or servants from acting as a Receiver and Manager of Sheng Shuang Quarry Limited (In Receivership) (the company); (ii) that in the alternative this Court be pleased to suspend the appointment of the 2nd respondent as a Receiver and Manager of the company pending the hearing and determination of the intended appeal and (iii) that the costs be provided for.
2. The Notice is brought pursuant to the grounds on its face and an affidavit in support thereof sworn by the applicant in which he reiterates the grounds of the application and further contends that; the company owns Land Reference Number 28617 IR I295L9 (the charged property) measuring 20.24 hectares situate within Machakos County; that by a valuation report dated 24th September 2014, the 1st respondent valued the charged property at Kshs. 3,143,000,000; that on or about 24th September 2014, the 1st respondent offered the company banking facilities for commercial exploitation of the land for quarry business; that the land was charged and a debenture as additional security was executed



- on 3rd September 2014 for the entire amount of Kshs. 241,400,000; that on diverse dates in the years 2014-2017, the company paid a total of Kshs. 326,509,228 as principal, interest and penalties towards liquidation of the loan advanced by the 1st respondent; that this notwithstanding, in June 2018, the 1st respondent forcefully entered into and took possession of the company's quarry business, chased away the workers and subsequently repossessed machineries, equipment vehicles and materials on site; that the forceful entry was illegal and unlawful as no prior notice had been issued as required by section 94 of the Land Act 2012; that the 1st respondent sold all the materials on site, together with the equipment, machineries and vehicles, and thereafter abandoned the site.
3. The applicant further contends that, after entering the company's quarry business as aforesaid, the 1st respondent issued a Notice of intention to exercise its Statutory Power of Sale over the charged property, prompting the company to file Machakos High Court Civil Suit No. 25 of 2019 Sheng Shuang Quarry Limited vs NCBA Bank Kenya Limited, against the 1st respondent, and simultaneously filed an interlocutory application seeking interim conservatory orders; that on 30th September 2019, although the High Court declined to issue the reliefs sought, the court issued a *status quo order* pending the hearing and determination of the suit; that the 1st respondent filed an application to set aside the orders for *status quo* that was dismissed on 30th June 2020; that on 14th November 2019, the 1st respondent filed in the High Court Nairobi Civil Suit No. E407 of 2019 against, the company, the applicant and his wife as guarantors of the loan seeking recovery of Kshs. 234,932,714.76; that in response, the applicant filed a defence to the suit, and the two suits are pending determination before the High Court.
 4. It was further contended that on 21st April 2021, the 1st respondent purported to appoint the 2nd respondent as a Receiver and Manager of all the assets and affairs of the company, and that by 30th April 2021, neither the company nor the applicant had been formally notified of the appointment of the 2nd respondent and placement of the company under receivership; that arising therefrom, the company on 4th May 2021 filed Machakos HCCC No. E006 of 2021 Sheng Shuang Quarry Limited (in receivership) vs NCBA Bank Kenya Limited and Kereto Marima seeking various reliefs; that upon hearing the parties, the court dismissed the suit on 21st May 2021 which ruling is the subject of the Notice of Appeal dated 26th May 2021 lodged in this Court.
 5. In a draft memorandum of appeal also annexed to the application, the applicant contends that the learned Judge wrongly dismissed the company's application yet the materials placed before him were overwhelming and supported the issuance of interim orders; that the Judge failed to hold that the *status quo order* in force in Machakos High Court Civil Suit No. 25 of 2019 Sheng Shuang Quarry Limited vs NCBA Bank Kenya Limited prevented the 1st respondent from appointing the 2nd respondent as Receiver and Manager of the company; that the 1st respondent did not have powers to appoint the 2nd respondent as a Receiver and Manager; and that by making such appointment, the 1st respondent was in contempt of the court order of *status quo* of 30th September 2019 in Machakos High Court Civil Suit No. 25 of 2019 Sheng Shuang Quarry Limited vs NCBA Bank Kenya Limited; that the learned Judge also failed to hold that by filing recovery proceedings in Nairobi HCCC No. E407 of 2019, the 1st respondent had compromised its options as provided for in section 90 (3) of the Land Act 2012.
 6. In a replying affidavit sworn by Stephen Atinya, the 1st respondent's legal counsel, it was deposed that the applicant does not have an arguable appeal, and that neither would such appeal be rendered nugatory if the orders sought in the application are not granted. On whether the intended appeal was arguable, it was deposed that the applicant does not have the *locus standi* to bring the application in his personal name since the 2nd respondent was appointed as Receiver and Manager over the company (In Receivership); that further, the issues raised in the application are either *res judicata*, or are caught



by the doctrine of estoppel considering that the decisions issued in Machakos High Court Civil Suit No. 25 of 2019 *Sheng Shuang Quarry Limited vs. NCBA Bank Kenya Limited* related specifically to the charged property and not the company's other assets; that the appointment of the 2nd respondent as Receiver over the company fully complied with the requirements of the law and the terms of the Debenture dated 3rd September 2014, and by appointing the 2nd respondent as Receiver of the company, the 1st respondent was exercising its contractual rights under the Debenture, which powers at all times remained unfettered by any court order; that the 1st respondent's exercise of power to appoint the Receiver was based on the Debenture rather than under the *Land Act*, 2012. Consequently, it was deposed that the notices under the *Land Act*, 2012 were inapplicable to the 2nd respondent's appointment, and therefore the High Court's jurisdiction to consider an application for contempt of court was wrongly invoked.

6. On the nugatory aspect, the deponent averred that any claim of abuse of process in the appointment of the 2nd respondent as Receiver can be compensated in damages if, after the full hearing, the appointment of the 2nd respondent was found to be unlawful; that the 2nd respondent's appointment does not extend to the charged property over which the company enjoys the *status quo orders* issued in Machakos High Court Civil Suit No. 25 of 2019 *Sheng Shuang Quarry Limited vs. NCBA Bank Kenya Limited*, which suit is yet to be prosecuted; and that the appointment of the 2nd respondent was for the purposes of realizing company assets.
7. In the submissions filed on behalf of the applicant, learned counsel for the applicant, submitted that the applicant stands to suffer irreparable loss as, following the appointment and gazettement of the 2nd respondent, he was removed from the control and management of the company; that the applicant is apprehensive that the placing of the company into receivership and appointment of the 2nd respondent is intended to destroy the company as there are no other remaining assets of the company to receive and manage after they were seized and sold in June 2018 by the 1st respondent. The only remaining asset is the charged property and that the company is currently not in a position to prosecute and defend the pending suits and in particular Machakos High Court Civil Suit No. 25 of 2019 *Sheng Shuang Quarry Limited vs NCBA Bank Kenya Limited*, which suit disputes the outstanding loan, interest and penalties.
8. We have considered the application, the supporting and replying affidavits, the grounds of appeal and the written submissions. At the outset, we observe that the manner in which the applicant has brought this application has given rise to certain fundamental jurisdictional questions.
9. Firstly, the application has been brought in the applicant's personal capacity for the first time in this Court, and not in the name of the company as was the case in the High Court. It can be discerned from the application that, whereas the suit in the High Court (the subject of this application), that is, Machakos HCCC No. E006 of 2021 *Sheng Shuang Quarry Limited (in receivership) vs NCBA Bank Kenya Limited and Kereto Marima* was brought in the company's name, the application before us has been brought in the applicant's personal capacity, and therefore bears no resemblance to the suit that was before the High Court. It would mean that it no longer concerns an appeal against the decision of the High Court, but relates to a fresh matter that the applicant seeks to have this Court determine. Article 163 (4) of the *Constitution* mandates this Court to hear appeals from the superior courts. This Court has no jurisdiction to hear and determine such an application which does not arise from a decision of the High court, and for this reason, we find it to be incompetent.
10. Secondly, there is the question of whether the applicant could lodge this application in his personal capacity following the appointment of a Receiver Manager. Learned counsel for the respondent has



argued that he has no such *locus standi* to bring it in his personal name since, the 2nd respondent had already been appointed as Receiver over the company's assets.

11. In the case of *Alfred Njau & Others vs City Council of Nairobi* [1982-88] 1 KAR 229, this Court defined the term *locus standi* to mean the right to appear or be heard, in court or other proceedings. According to the Court, to say that one has no *locus standi* means that one cannot be heard, even on whether or not he has a case worth listening to.
12. In a case such as this, it is trite law that pursuant to the appointment of a Receiver, the company's directors have no power to sue on behalf of the company after such appointment, especially where the proceedings could directly infringe on the property subject of the Receiver's powers. See *Tudor Grange Holdings Ltd. & others vs. Citi Bank N.A.* [1991] All ER.
13. However, there are instances where, directors and shareholders of a company under receivership can be permitted to maintain an action in the name of the company to question the validity of the instrument that provides for the appointment of the Receiver or the circumstances or Deed appointing the Receiver.
14. In the case of *Kissi Petroleum Products Ltd vs Kobil Petroleum*, Civil Application No. 309 of 2003 at Nairobi, this Court observed that:

“It seems to us that the question whether it is the directors of a company or the receivers appointed under the debenture who have the capacity or legal right to institute proceedings will ultimately and invariably depend on the nature of the intended proceedings and the peculiar circumstances of each case.”
15. From what we are able to discern from the pleadings, the applicant has challenged the appointment of the 2nd respondent, while the 1st respondent contends that the 2nd respondent was lawfully appointed. However, according to the record, the respondents have produced a *Gazette Notice No. 4166* dated 21st April 2021, entitled, “...In the Matter of Sheng Shuang Quarry Limited (in Receivership)” which shows that the 2nd respondent was indeed appointed as Receiver of the company. So that, in view of this appointment, which the applicant acknowledges, albeit that he challenges the manner of appointment, and this application having been brought in the applicant's personal capacity, notwithstanding the appointment of the Receiver, we agree with the respondents that the applicant does not have *locus standi* to bring this application.
16. Finally, the applicant seeks an interim injunction to restrain the 2nd respondent from acting as a Receiver and Manager of the company, or in the alternative, seeks orders suspending the appointment of the 2nd respondent as a Receiver and Manager. But, as indicated above, the 2nd respondent has already been appointed as Receiver and Manager. Such appointment having already taken effect, there is nothing for us to restrain or suspend. It therefore becomes clear that the orders sought have been overtaken by events, and are therefore incapable of being granted.
17. Consequently, the applicant has failed to satisfy the requirements necessary for a rule 5 (2) (b) application, with the result that the Notice of Motion dated 2nd June 2021 is unmerited and is dismissed. Costs in the intended appeal.
18. This ruling has regrettably been delayed. This is for the reason that the date scheduled for its delivery was erroneously omitted from the record of judgments and rulings scheduled for delivery. It was only recently discovered that it was pending delivery after a reconciliation of court records identified it as still pending. Any inconvenience caused to the parties herein is regretted.



It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

