REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CAUSE NO. 2 OF 2019

FORMERLY MOMBASA MISC. NO. 266 OF 2018

IN THE MATTER OF THE INSOLVENCY ACT 2015

AND

IN THE MATTER OF KEMUSALT PARKERS PRODUCTIONS LIMITED

(In Receivership)

KEMUSALT PARKERS PRODUCTION LIMITED.....APPLICANT

VERSUS

PETER KAHI.....1ST RESPONDENT

ANTHONY MUTHIANI.....2ND RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Rachier & Amollo for the Appellant

Oraro for the 1st and 2nd Respondent

RULING

The application was filed by **Kemu Salt Parkers Ltd** on 22.10.2018 pursuant to Section 1A, 1B, 3A of the Civil Procedure Act and Sections 522, 563, 568, 593, 594 and 604 of the Insolvency Act, Regulation 10 of the Insolvency Regulations 2016.

1. ***The motion calls for a mandatory injunction be issued restraining the respondents from purporting as receivers, administrators and or managers of the applicant pending the hearing and determination of the suit.***

2. ***That a prohibiting injunction be issued restraining the respondents from trespassing into the premises and or interfering with any all the property of the applicant pending the hearing and determination of suit.***

3. ***That the honourable court be pleased to direct the respondents to give a fair account to this court of the records they have received and handled as administrations from 7.9.2017 to date and all fees they have received during that period of time.***

In support of the application are the many grounds stated in the body of the motion and an affidavit by **Hussein Saleh Muhamed Ismail** dated 22.10.2018. The rejoinder by the respondents is contained in a replying affidavit by **Anthony Muthusi** dated 30.10.2018 with attachments and annexures.

In the replying affidavit the respondent depones that by virtue a deed of appointment dated 6.9.2016 they took over the administration of the applicant company (under receivership) by the debenture holders that as agreed a valuation of the company's salt plant and assets was undertaken by **Tysons Limited** as indicated in the report **exhibit AM1.**

That on 6.11.2016 a court orders by **Chitembwe J** in **HCCC NO. 28 OF 2016** prohibited the duo from discharging their duties as receivers of the applicant. That the after attempt to regain access of the applicant company premises has not been realized notwithstanding existence of court orders.

That as private security were stationed within the entrance of the applicant's company, it has not been possible to execute the proper performance of the borrower's obligations under the facility agreement, and its debenture and securities including but not limited to the repayment of the loan amount.

That in any event the applicants directors **Hussein Zubeidi** testified in the court of action filed in **ELC NO. 172 OF 2014** with regard to acquisition of the aforesaid applicant company.

That if anything analogous to any of the orders sought in this motion there are other subsisting suits namely HCCC NO. 265 OF 2016 and 28 OF 2016, 529 OF 2009 on the debt, incriminated debt and other syndicated facilities touching on the applicant's company, its directors and debenture holders which are similar to those in the current motion. It also came to the court's attention that from both the affidavit in support and replying affidavit. There exist apparent on the face of the record correspondence in respect of the outstanding debt and multiplicity of suits filed at Milimani Commercial Court Nairobi, ELC Court at Malindi and the defendants claims in the two suits filed at Malindi High Court.

The applicants case as submitted by Learned counsel **Mr. Munyua** was to the effect that the prayers sought in the motion ate demanding and in compliance with the Insolvency Law.

Further, Learned counsel contended in the ordinary course of business the effect of the respondents appointment has substantially resulted in the dissipation of the company operations.

That the respondents purported management agreement is in breach of several of the clauses that would trigger an automatic collapse of the applicant company.

In the defence and opposition to the motion Learned counsel **Mr. Muchiri** for the respondents asserted that the particulars of the claim is an abuse of the court process and specifically its tantamount to forum shopping.

Further Learned counsel contends that the applicant herein cannot be heard in view of the order made by **Hon. Justice Korir** that on account of the pending suit **HCCC NO. 28 OF 2016**, which is admitted to be in existence would most likely occasion a mistrial. On this legal proposition, Learned counsel relied and cited the principles in **Nisairh Yongendra Patel v Pascale Mirandile {2017} eKLR.**

Learned counsel further argued and submitted that even assuring for purposes of argument only that there is a competent application, he was of the view that there had been no credible evidence to grant injunctive relief under Order 40 of the Civil Procedure Rules.

The question from the stand point of the parties themselves is whether this court can exercise discretion to grant or refuse the orders sought in the motion dated 22.10.2018.

Determination

As was said by the **Privy Council in NCB v Olinit {2009} UKPC Lord Hoffman** gave the following guidance:

> ***"16. …… The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to achieve a just result. As the House of Lords has pointed out in American Cynamid Co. v Ethicon {1975} A. C. 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that this freedom of action should not have been restrained, then an injunction should ordinarily be granted.***
>
> ***17. …... The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other……***
>
> ***18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.***
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> ***19. There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases the underlying principle is the same, namely, that the court should take the course which seems likely to cause the least irremediable prejudice to one party or the other ……. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J. said in Shephard Homes Ltd v Sandham {1971} Ch 340, 351, "a***

high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted. "

According to the purpose of Order 40 of the Civil Procedure Rules, the court may in its discretion grant the breach complained of and also to compel performance of the requisite acts. The relief sought by the applicants is to resolve the company to the states which preceded the pending legal controversy. The court interference under Order 40 Rule 2 is necessary to protect the party from the species of injury. I would also add, that its generally accepted that an injunction being an equitable remedy *"he who seeks equity must come with clean hands."*

The importance question to be answered is whether the applicant's property in dispute is in danger, it is being wasted, or is damaged or it is being alienated or threatened to be sold or disposed of by the respondents. That in the interest of justice a mandatory injunction should be granted all this stage? It is well settled in **Giella v Cassmann Brown {1973} EA** that:

"the applicants motion though premised on mandatory and procubitory injunction."

Three traditional factors have to be satisfied nevertheless before grant of such a relief: ***(a). Prima facie case, (b). Irreparable loss (c).Balance of convenience.***

According to the principles in **Kenya Breweries Ltd & Another v Washington O. Okeya {2002} eKLR.** The Court of Appeal on the requirement of a mandatory injunction held:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence or existence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a sample and summary all which could be easily remedied or where the defendant had attempted to state a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that on the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

Further still in **Nation Media Group & 2 Others v John Harun Mwau {2014} eKLR** a decision of the Court of Appeal held:

"It is trite Law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional had in the clearest of cases."

Bearing these principles in mind, the issue inevitably raised by the applicants is whether the case moved by the applicants has satisfied the criteria for a mandatory or prohibitory injunction.

According to the affidavit evidence and pleadings before court there are several issues raised between the applicant and the respondents in this case. I take cognizance that the benchmark on equitable remedy of injunction is to do justice to the parties. Daniel Webster, in life and letters of Joseph story **(William W. Story Boston C Littee and James Brown 1851 (Vol 4 P 624)** said:

"Justice Sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever, her sample stands, and so long as it is duly honored, there is foundation for social security, general happiness, and the improvement, and progress of our race. Whoever labours on this edifice, with usefulness and distractions, whoever clear its, foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its anguise dome, still higher in the skies, connects himself in name, and fame, and character, with that which is and must be as durable as the frame of human society."

I also adopt the formulation that the grant of mandatory injunction stated advance the cause of justice (See **Suryanath Singh v Khedu Singh {1994} SCC 561**). The points that needs to be underlined is the existence of a bonafide dispute between the applicant and debenture holders who in effect appointed the respondents as receiver managers. In that case referring to the appointment deed comprising the general power of the respondents there may be complexity of issues that cannot be settled by grant of an interlocutory mandatory injunction. This is by virtue of the principles in the case of **Smiths Ltd v Middleton {1979} 3 ALL ER 842 and in RE B Frenson & Co. (Builders Ltd) 1955 2 ALL ER** the courts held as under:

"Whereas a receiver and manager for debenture – holders is a person appointed by the debenture holders, to whom, the company has given powers of management pursuant to the contract of loan constituted by the debenture and as a condition of obtaining the loan, to enable him to preserve and realize the assets comprised in the security for the benefit of the debenture holders. The company gets, the loan, on terms that the lender shall be entitled, for the purpose of making their security effective, to appoint a receiver with powers of sale and management pending sale, and with full discretion as the exercise and made of exercising third powers the primary duty of the matter is to the debenture holders and not to the company. He is receiver and manager of the property of the company for the debenture holders, not manager for the company."

The key validity of the motion by the applicant is whether the respondents appointment as receiver managers are in breach of the contract to re-direct a mandatory injunction for them to vacate the premises or their jurisdiction is an error in the eyes of the Law. It would appear from the affidavit deponed by **Hussein Zubedi,** the appointment and extension of tenure of the respondents in those aspects has not been for the best interest of the 'company'. Further, according to the applicant while they are obligated to account pursuant to the instrument of appointment there has been a default making the company remain in paralysis and literally there is need to redeem it from further collapse.

Regarding to this question Counsel for the respondent observed that the same question being placed before court has been litigated in other

courts of concurrent and equal status jurisdiction. Therefore, the legal and equitable relief being pursued by the applicant is an abuse of the court process.

On the burden of proof that there is a case of dissipation of assets subject to both mandatory and prohibitory injunction is by and large the duty of the applicant. This is as of necessity in proving a fact in dispute in issue raised between parties in a cause as expressly provided in Section 107 (1) of the Evidence Act.

I note that in this case there are two elements viz the discretion of the court is being sought to be exercised without considering that there is still a pending suit namely **HCCC NO. 28 OF 2016** set to be determined by the court. Secondly, the qualification and appointment of receivers was undertaken by the lenders Dubai Bank Ltd (under receivership) pursuant to Section 690 (4) of the Insolvency Act 2015. It is quite apparent that the existence of a prima facie as pleaded with a permissible special circumstances necessitating protection of the applicant's rights by issuance of a mandatory injunction has not ripened.

Importantly, the appointment of a receiver does not create a right against the applicant's property over which enforcement is sought, instead it creates a right against the defaulting party. In particular Banks face borrowers with complex asset holdings involving multiple litigations opaque dealings especially in claims involving fraud and failure to satisfy the repayment of the loan under the agreement. In the circumstances the exercise of discretion calls for the need to protect the respondents' rights compared or when weighed against the needs of the applicant company under receivership.

In my view, as I have indicated the equitable remedy of mandatory or prohibitory injunction against the receiver managers appointed by the debenture-holders would not be just or convenient that such an order be issued as prayed by the applicant.

This question, lies at the heart of this matter as to whether or not the motion has satisfied the criteria for this court to reach a conclusion with regard to the grant of equitable remedy. Given the nature of the case, the following passage from **Learned author Spry**, in his invaluable work **Equitable Remedies, 8th Edition pages 466 -467 states, under the sub-heading "Interlocutory Injunctions**." Reflects this position:

> ***"……. where there is not a conflict on the evidence as to matters of fact, but rather a dispute as to questions of law, the preparedness of the court to determine those questions depends on their difficulty and on the balance of convenience, regard being had both to the consequences of granting or refusing relief and also to the other relevant circumstances. Even where in a particular case the court is not disposed to decide a difficult question of law on an interlocutory application, it is often found that the risk of injury to the plaintiff is such that interlocutory relief should be granted. But usually the court does to regard any matters of law in dispute as so difficult that it should decline to consider them if this may affect its decision, and hence it may be prepared to adopt a view, which is to be treated merely as provisional; and both that conclusion and the degree of confidence with which it has been reached may be duly taken into account in determining whether the balance of justice favours the grant of interlocutory relief. Indeed, in the case of disputes of law there is not so great a reluctance as in the case of disputes of fact for provisional determinations to be made, since disputes on questions of law do not depend on events which may be unknown to the court and which must be duly established on the adduction of appropriate evidence. Hence although in exceptional circumstances it may be found that a question of law is of such difficulty that, in all the circumstances, the court does not see fit to determine it although the consequent legal uncertainty is important, the court does not ordinarily refuse to consider a question of Law if substantial hardship to one of the parties may result from that refusal."***

As for nature of the application on reliefs sought to do with accounts and liabilities by the receiver managers grant as interlocutory orders would technically dog the substance of the pending suit on the merits.

Accordingly, apart from pleading an elaborate case, the conclusion is inescapable that the applicant has failed to present a reasonable case that in refusing to grant an injunction it would suffer greater hardship.

On the facts of the case, therefore equity will not stand aside and weep if I dismiss the notice of motion dated 22.10.2018 for want of merit with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF SEPTEMBER 2019

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Munyua for the applicant

2. Mr. Muchiri for the respondent