



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 12 OF 2015

BETWEEN

ODERA OBAR & CO. ADVOCATES.....APPELLANT

AND

CHARTER HOUSE BANK LIMITED.....RESPONDENT

(Being an appeal from the Ruling/Orders of the Commercial & Admiralty Division at Nairobi (Ochieng', J.) delivered on 8th December, 2014

in

H.C. Misc. Application No. 365 of 2014)

JUDGMENT OF THE COURT

[1] This is an appeal from the Ruling of the High Court (**Fred A. Ochieng', J**) striking out the appellant's bill of costs against Charter House, Bank Limited (CHB) on the ground that the bank had no authority to appoint the appellant to act for it.

[2] The bill of costs which was filed as miscellaneous application is an advocate/client bill of costs to recover costs incurred by the appellant firm of advocates in Milimani High Court Civil Suit No. 329 of 2006. The bill of costs was placed before the Deputy Registrar of the High Court for taxation. The Central Bank of Kenya (CBK) through its advocates requested that the issue whether or not the appellant was entitled to costs should be referred to a Judge for determination.

Consequently, the Deputy Registrar referred the issue to a Judge for determination. Although all counsel accepted that an objection to a bill should first be raised before the Taxing Officer, they nevertheless agreed that the objection should be determined by a judge and the learned judge dutifully agreed to determine the objection.

[3] On 23rd June, 2006, the Central Bank of Kenya (CBK) placed CHB under statutory management pursuant to **section 34(1)(d), 34(2)(9)** of the **Banking Act (Act)** and appointed **Rose Detho** as the Statutory Manager. The circumstances under which CHB was placed under statutory management (which are not directly relevant) are explained by **Kennedy Kaunda Abuga**, Director and Secretary of CBK. **Mr. Odera Opar** the advocate for the appellant advocates stated that following the action of CBK, he was instructed by CHB to institute civil proceedings for various reliefs including a declaration that the purported appointment of Rose Detho as statutory manager was illegal, null and void and for various injunctive orders. By an interlocutory injunction, CHB sought an order from the High Court to restrain the statutory manager from assuming or exercising powers of a statutory manager. That application was dismissed by the High Court. On appeal by CHB to the Court of Appeal against the dismissal of the application, the Court of Appeal summarily dismissed the appeal. Mr. Odera Opar revealed in the objection proceedings that despite the dismissal of the interlocutory injunction, the main suit was still pending for hearing.

[4] The objection by CBK to taxation of Bill of costs was based on the fact and effect of the appointment of a statutory manager of CHB. CBK contended that since by virtue of section 34(2)(a) of the Banking Act and by the letter of appointment the statutory manager, assumed the management control and conduct of the affairs and business of CHB to the exclusion of CHB Board of Directors, it is only CBK and the statutory manager who had power to appoint an advocate to represent CHB

It was further contended that since CBK and Statutory Manager did not appoint the appellant advocates to act for CHB, the appellant could only recover costs from the person or persons who instructed them. The appellant's response was that CHB through the directors had a right

to challenge the action of CBK for the benefit of CHB; the corporate nature of CHB still exists only that its directors are excluded from management; that the action of CBK could only be challenged by CHB in its corporate name and that the placement of a bank under statutory management is akin to receivership.

[5] The High Court while finding that the CHB had a right to challenge the appointment of the statutory manager and that the corporate entity and personality of CHB was still intact, nevertheless held that only the statutory manager could instruct an advocate to act for CHB and that since the statutory manager did not instruct the appellant's advocates, they could not tax the advocates client bill of costs against CHB.

[6] Although the appeal is based on ten grounds, ground 3 and 5 which we quote below for clarity of the legal issues raised, compendiously expound the appellant's grievance.

Appellant states in ground 3 thus:

“The learned Judge with respect, failed to appreciate sufficiently or at all, that although the directors of a company in receivership or a bank under statutory management are deprived of their powers to act as such directors, the residual powers of the directors to challenge the placement of a company in receivership or a bank under management in the name of the company is at any time never lost.”

and in ground 5:

“The learned Judge in the totality of the circumstances failed to appreciate or rather ignored the basic logic that a statutory manager could not challenge her own appointment in any event.”

Both the appellant and CBK have filed written submissions which were highlighted by Odera Obar and Geoffrey Muchiri, learned counsel for the appellant and CBK respectively.

[7] Section 34(2) (a) now S.34(2)(b) of the Act provides:

“In any case to which this section applies, the Central Bank may –

(a) Appoint any person (in this Act referred to as “a manager”) to assume the management, control and conduct of the affairs and business of an institution to exercise all the powers of the institution to the exclusion of its board of directors including the use of its corporate seal.”

[8] The letter appointing Rose Detho as a manager expressly authorized her to exercise those powers. The appellant contends that although the appointment of a statutory manager divests the Board of Directors of their powers to manage the affairs and business of the bank, the residual power of directors to instruct a counsel to challenge the appointment of the statutory managers for the benefit of the company is perfectly legal and that a bank placed under statutory management, just like a company under receivership, does not lose its corporate status.

[9] The appellant's counsel relied on Newhart Development Limited v Co-Operative commercial Bank Limited [1978] 2 All ER 896; Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others (2012) eKLR and Omondi & Another v National Bank of Kenya Limited & 2 Others [2001] KLR 579. In the Newhart Development Limited, the English Court of Appeal held in part:-

“A provision in a debenture empowering the receiver to bring an action in the name of the company whose assets were charged was merely an enabling provision, investing the receiver with capacity to bring such an action, and did not divest the company's directors of their power to institute proceedings on behalf of the company provided that the proceedings did not interfere with the receiver's function of setting in the company's assets or prejudicially affect the debenture holder by impelling the assets”

That holding was followed by the Kenya Supreme Court at para 40 in Samuel Kamau Macharia case (supra).

In Omondi & Another (supra) the High Court, (Ringera, J as he then was) said at page 587 at line 25;

“And although it is true that the appointment of a receiver manager has the effect of rendering the board of directors functus officio, it does not destroy the corporate existence and personality of the company. That appointment makes the directors unable to act in the name of the company but, as I understand the law, it does not make them in their capacity as members equally disabled”.

In Samuel Kamau Macharia & Another (supra), the Supreme Court at para 40 relying on Hawkesbury Development Co. Limited v Land Mark Finance Pty Ltd. [1969] 2 NSW 782 said in part:

“While it remains the position that a receiver and manager supplant the board of directors in the control, management and disposition of assets over which security rests, it also acknowledged that the receiver and manager does not usurp all the functions of the company's board of directors. The extent to which the powers of directors are supplanted will vary with the

scope of the receivership and management vested in the appointee.”

[10] The respondent’s counsel submitted that the **Newhart Development Limited** and **Samuel Kamau Macharia** case have no application in this dispute as they were dealing with a receiver appointed under a debenture and as the suit upon which the bill of costs is based was instituted by directors who no longer had power by dint of s.34 (2)(a) of the Act. The respondent’s counsel, on his part, relied on the ruling of **Waweru, J.** delivered on 19th January, 2007 and **Warsame, J.** (as he then was) delivered on 17th May, 2007 in **Kenya Commercial Bank Limited v Charterhouse Bank Limited, High Court Civil Case No. 626 of 2006 (O.S)**. In that case, the Kenya Commercial Bank sued the Charterhouse Bank Limited seeking to enjoin CHB to honour its undertaking to return title and security documents. The suit papers were served on the statutory manager appointed by CBK. However, CHB applied through the appellants advocates for leave for CHB to issue third party notices against CBK and the Statutory Manager. Waweru J. dismissed the application saying in part:

“I have already held that the management, control and conduct of the affairs and business and exercise of all powers of the defendant, to the exclusion of its board of directors, must include defending any court proceedings that may be brought against the Defendant including the present proceedings. In other words, the Statutory Manager is the proper person to defend the present proceedings, and not the directors of the Defendant.”

In the same case, the statutory manager appointed a firm of advocates to represent CHB while the latter appointed the appellant’s advocates and Warsame, J. was called upon to decide which firm of advocates had a right to represent CHB in the suit. By a ruling dated 17th May 2007, Warsame, J. following the ruling of Waweru, J., affirmed that the statutory manager had properly appointed the new firm and said in part;

“The powers of the board of directors of charterhouse ceased to exist on 23rd June 2006 when the central Bank of Kenya placed the bank under statutory management and appointed a statutory manager.”

The respondent’s counsel submitted that the respective decision of Waweru, J. and Warsame, J. were not appealed against.

[11] There is no difference in principle between the appointment of a receiver or manager of a company and the placement of a company under statutory management insofar as the general powers of the directors of a company are concerned. Although in case of receivership the receiver or manager protects the interest of the debenture holders, while statutory manager protects the interests of the company, its deposits and other creditors, in both cases, the powers of the directors of the company are paralyzed and vested in the receiver or statutory manager.

However, in both cases, the structure of the company remains intact until the winding up or liquidation as the case maybe. In **KERR On The Law And Practice as to Receivers and Administrators – 17th Ed.**, the authors state at p. 369, 2nd para:-

“Although as regards the outside world the receiver is the sole person in charge of the company’s operations, nevertheless, the corporate structure of the company still subsists. The directors are not thereby relieved of their normal statutory duties, although the discharge of those duties may well be rendered extremely difficult or even impossible without the co-operation of the receiver, which they are in no position to require, save in relation to accounts.”

The authors continue to say:

“However, the directors are entitled to use the name of the company for the purposes of litigating the validity of the security under which the appointment has taken place.”

Thus, the principle in **Newhart Development Limited** as affirmed by the Supreme Court in **Samuel Kama Macharia’s** case that the directors are not by the fact of receivership divested of their power to institute proceedings on behalf of the company which do not interfere with the functions of the receiver applies with equal force to statutory managements.

[12] The Ruling of Waweru J. and Warsame J. are distinguishable. There, CHB appointed advocate to defend a suit brought by a third party when statutory management was subsisting. As the learned judges correctly held, the statutory manager who had already assumed the management, control and conduct of the affairs and business of the company to the exclusion of its board of directors was the one legally entitled to instruct advocates to defend the suit on behalf of the company. In the suit upon which the advocate client bill of costs was based, CHB appointed the appellant to challenge the validity of the appointment of a statutory manager. It was a suit between the company against the appointing authority. As submitted by the appellant, CBK did not question the validity of the suit (HCC No. 392 of 2006) or the validity of the appointment of the appellants in those proceedings.

[13] The learned Judge recognised the right of CHB to challenge the appointment of a statutory manager and further stated that it was inconceivable that the statutory manager would have given instructions to an advocate to challenge her own appointment. In that scenario and in the circumstances of this case, CHB could only effectively have exercised its right through its own advocate. It is not disputed that CHB indeed instructed the appellant. CBK concedes in the affidavit of Kennedy Kaunda Abuga that the appointment of that statutory manager was challenged by instructions issued to the appellants advocates. In the circumstances, we find and hold that CHB had a legal right to file the suit for the revocation and appointment of a statutory manager and to instruct the appellants to conduct the proceedings notwithstanding the appointment of a statutory manager and that the learned Judge erred in law in striking out the bill of costs. The appellant is justly entitled to costs of the proceedings against CHB.

[14] Accordingly, the appeal is allowed, with costs. The ruling of the High Court is set aside and substituted it with an order that the bill of costs dated 11th August 2010 shall proceed to taxation in the normal manner.

Dated and Delivered at Nairobi this 9th day of February, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR