IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & KIAGE, JJ.A)

CIVIL APPEAL NO. 68 OF 2011

BETWEEN

KAMOTHO WAIGANJO

(Suing as the Liquidator/Trustee of

DAWA PHARMACEUTICALS STAFF

RETIREMENT BENEFITS SCHEME *(in liquidation)*.....APPELLANT

VERSUS

DAWA PHARMACEUTICALS

LTD *(in Receivership)*….....1ST RESPONDENT

AND

ENGINEER GAKURU KANYANJA

ENGINEER GEORGE NYAGISERE *(both applying as*

***joint Receiver–Managers of* DAWA**

PHARMACEUTICALS LTD (*in Receivership*)..…2nd RESPONDENT

(Being an appeal from the Judgment and Decree of the of the High Court of Kenya at Nairobi delivered on 21st September 2007 by Hon Mr. Justice H. P. G. Waweru

in

NAIROBI H.C.C.C. NO. 600 OF 2004)

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JUDGMENT OF THE COURT

By four debentures Dawa Pharmaceuticals Limited, the 1st respondent charged to Industrial and

Commercial Development Corporation Limited (ICDC), Industrial Development Bank Limited (IDBL) and National Bank of Kenya Limited (NBK), all its undertaking, goodwill, property and assets, both present and future, including its uncalled capital. Specifically the debenture dated 11th December, 1989 was expressly stated to be a first charge on all the property and assets of the 1st respondent and to constitute a fixed charge on all immovable property of the 1st respondent and a floating charge on all other property and assets. It was further stated that by that debenture the 1st respondent would have no power to dispose of any of its charged property or assets without first obtaining the consent of the ICDC. By two further supplemental debentures, the 1st respondent declared that its property and assets comprised in those debentures would be security for the payment of all monies advanced by NBK and that the supplemental debentures would rank *pari passu* with those of ICDC as first charge.

On 16th May, 2001 NBK and ICDC, in exercise of their power as debenture holders, appointed Eng. Gakuru Kanyanja and Eng. George Nyagisere as joint receiver/managers of Dawa Pharmaceuticals Limited (in receivership), the 2nd respondent. We clarify that the 1st respondent is Dawa Pharmaceuticals Limited, while the 2nd respondent is Dawa Pharmaceuticals Limited (in receivership), represented by the two receiver/managers.

Upon the appointment of the two receiver/managers, the 2nd respondent made a decision not to adopt the contracts of employment between the 1st respondent and the employees. Accordingly they sent out a notice to all employees informing them that their contracts of employment with the 1st respondent had been revoked from the date of receivership. Some 137 employees were affected by this notice. However 40 of those employees were re-engaged afresh on new terms and conditions by the receiver/managers. Those whose employment contracts were terminated were notified of their entitlement to severance pay. According to the 2nd respondent, only 96 of those employees collected their payment, amounting to Kshs 4,000 each. In addition and to preserve the 1st respondent's business the joint receiver/managers offered its assets for sale.

On the heels of these developments, in January 2001 the Retirement Benefits Authority approved the resolution to wind up Dawa Pharmaceuticals Limited Staff Retirement Benefits Scheme. The trustees of the scheme appointed Kamotho Waiganjo, the appellant therein as its liquidator.

These events prompted some 100 employees to institute an action in Nairobi, being HCC No.166 of 2001, in which they prayed for an order of injunction to restrain the 2nd respondent and the NBK from disposing of the 1st respondent's assets unless the employees' terminal dues were provided for in priority over any other debt.

Three years after the dissolution of the retirement scheme and the institution of HCC No.166 of 2001the employees, through the liquidator once more went to the High Court with an originating summons in H.C.C.C. NO. 600 OF 2004 for a declaration that the sum of Kshs. 22,877,000 payable to employees under the retirement scheme were preferred debts payable in priority to other debts including those of secured creditors; that the collected and unremitted contributions be paid to the liquidator out of the proceeds of sale of the 1strespondent's assets; and that the 2nd respondent be ordered to furnish full accounts of the management of the 1st respondent from the date it was placed under receivership. In respect of the claim for payment to the liquidator of Kshs. 22,877,000, the liquidator argued that under **sections 95(1)** and **311(7)** of the Companies Act as amended by Act No. 8 of 2003 the funds constituted preferred debts to be paid in priority to any other debts including those of secured creditors.

The 2nd respondent disagreed with that argument insisting that Act No. 8 of 2003 could not apply retrospectively, since its date of commencement was 19th December, 2003, approximately two years after the events leading to the placing of the 1st respondent in receivership. It, however, undertook to consider the issue of unremitted funds along with other claims at the end of receivership. But it insisted that that consideration would depend on the appellant proving that indeed the sum claimed was received but not remitted by the 1st respondent; that under the amendment introduced by Act No. 8 of 2003 only

retirement benefits contributions of ***"a clerk or servant of the company"*** were recognized and only in respect of sums payable during the period of 12 months immediately preceding the appointment of receivers; that the sum in question was a pre-receivership liability for which the directors who were in office at the time of that liability were responsible; that their liability was not extinguished by the placing of the 1st respondent in receivership; that the sum would be treated as ordinary debt and would only be paid upon proof. Finally the 2nd respondent argued that having filed HCC No. 1667 of 2001, which was still pending hearing and determination, the present suit, was *res judicata*.

Before the originating summons could be set down for hearing the 2nd respondent by a chamber summons dated 22nd February, 2005 applied that the appellant be ordered to provide security for costs to the 2nd respondent in the sum of Kshs. 600,000, failing which the suit would stand dismissed. That application was compromised by a consent order recorded in court on 26th April 2004 in which the parties agreed that;

> **"1. <u>THAT</u> the application by chamber summons dated 22/2/2005 be and is hereby marked withdrawn with no order as to costs.**
>
> **2. <u>THAT</u> the receivers liability as against the liquidator and those claiming under him be and is hereby limited to the total sum of Kshs. 2,060,000.**
>
> **3. <u>THAT</u> upon payment of the said um of Kshs. 2,060,000 by the receivers to the liquidator, the receivers and the debenture holders be discharged from any further liability and those claiming under him.**
>
> **4. <u>THAT</u> subject to 2 and 3 above, the order of injunction made on 16th September, 2004 be and is hereby vacated, and the receivers be at liberty to remit the sale proceeds of Dawa Pharmaceuticals Limited (in receivership), less the amount payable in 2 above, to the debenture holder.**
>
> **5. No further order as to costs as between the liquidator and the joint receivers.**
>
> **WAWERU**
>
> **<u>JUDGE</u>**
>
> **Further Order; The suit as against Dawa Pharmaceuticals Limited (in receivership) may be set down for hearing.**
>
> **WAWERU**
>
> **<u>JUDGE."</u>**

With that consent order the originating summons was set down for hearing between the appellant and the 1st respondent as ordered while the claim against the 2nd respondent was compromised. On the day of hearing, Waweru, J rejected an attempt by Mr. Ngoge to represent the 1st respondent because he "*had not filed his papers"*. The hearing therefore went on *ex parte.*

The learned judge after observing that the originating summons was technically unopposed, expressed the view that, since the 1st respondent was in receivership, the reliefs sought in the originating summons were essentially against the 2nd respondents who were the receiver/managers of the 1st respondent; and that since the suit against the 2nd respondents had been compromised by consent,

> "…..**the reliefs sought in the originating summons cannot now be properly made as it would behove the interested parties** (the 2nd respondent) **to effectuate them**."

That conclusion has been challenged in this appeal because the appellant believes that the learned Judge, having agreed with the appellant that the 1st respondent had failed to remit Kshs. 22,877,000 towards the staff retirement scheme, erred in turning around and holding that, on account of the post-receivership debt and pendency of High Court Civil Case Number 1667 of 2011, the suit would fail; that he failed to appreciate that H.C.C. Case No. 1667 of 2001 and H.C.C. Case No. 600 of 2004 were distinct and relating to different entities; that while the former was a claim for employees' terminal dues, the latter dealt with employees' claim to their contributions to a pension scheme; that he ignored the fact that the consent order was specifically directed to the 2nd respondent to pay the post-receivership contributions that were not remitted; and finally that the learned Judge failed to consider the fact that the 2nd respondent had admitted owing Kshs. 22, 887,000.

By the provisions of **Rule 29(1)** of the Court's Rules, on a first appeal we are enjoined to re-evaluate the record before drawing inferences of fact. This principle was succinctly summarized in the East Africa Court of Appeal case of **Selle V Associated Motor Boat Company Ltd.** (1968) EA 123, 126 as follows:-

> "**Briefly put they (the principles) are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."**

As explained earlier no oral evidence was called as no directions were given as required by **order XXXVI rule 8A** of the repealed Civil Procedure Rules. And therefore what we shall be evaluating are the pleadings and submissions made before the learned Judge.

What is at stake is some Kshs. 22, 887,000 which was said to be staff pensions contributions allegedly received by the 1st respondent but not remitted on behalf of the employees to the retirement scheme by the time the 1st respondent was placed under receivership. The related issue is whether the amounts were a preferred debt under **sections 95(1)** and **311(7)** of the Companies Act as amended by Act No. 8 of 2003. By a consent order, which we have set out earlier, the 2nd respondent undertook to pay to the appellant Kshs. 2,060,000 in full and final settlement of the claim against the latter and the debenture holders. Even though the learned Judge found as a fact that the 1st respondent failed to remit employees' pensions contributions amounting to Kshs. 22,877,000, he nonetheless, for two reasons found no substance in the originating summons. First, in his view the consent compromised the whole action and; second, that directing the 1st respondent to pay to the appellant Kshs. 22,877,000 would in essence mean that the payment be made by the 2nd respondent as it was the 2nd respondent that was running the affairs of the 1st respondent.

We intend to dispose of this appeal by considering the status of a company in liquidation as regards its obligations and liabilities, the role of receiver/managers with regard to liabilities incurred by the company before their appointment and, finally whether the sum of Kshs. 22,877,000, if proved constituted a preferred debt.

The receiver/managers were appointed under the debenture by NBK and ICDC, we believe pursuant to **section 348(1)** of the repealed Companies Act. The duties and obligations of such receivers are defined by the instruments appointing them. It is trite that receivers are agents of the companies in respect of which they are appointed. In this case the joint receivers were agents of the two financial institutions that appointed them. See **Lochab Brothers vs. Kenya Furfural Company Limited & Others** [1983] KLR 257 and **Lubega v Barclays Bank (U) Limited** [1990-1994] EA 294 (SCU).

The words of Jenkins LJ in **Re B Johnson & Co (Builders) Ltd,** [1955] 2 All ER 775 at page 790 are instructive:

"…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

primary duty of the receiver 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 of the company. The company is entitled to any surplus assets remaining after the debenture debt has been discharged, and is entitled to proper accounts."

As soon as the receivers complete their assignment, which may invariably include gathering in, managing and realizing the assets charged with a view to liquidating the secured creditors' debt, their involvement in the management of the company comes to an end and the control reverts to the directors of the company.

In the matter before us the learned Judge erred in assuming that the receiver/managers were bound to settle pre-receivership debts. The consent was unambiguous as regards the limits of their liability. Upon settling Kshs. 2,060,000, which had accrued during receivership, they were to be completely absolved and discharged from further liabilities arising from past non- remittances. Further the consent order was equally explicit that the claim against the 1st respondent was not compromised and would be determined at hearing. Therefore all that the learned Judge was expected to determine was whether the sum of Kshs. 22,877,000 was due to the appellant from the 1st respondent.

The joint receiver/managers prepared a statement of affairs immediately upon their appointment in which they noted that the 1st respondent's debts as at 30th June, 2004 stood at Kshs. 101,801,000 out of which they acknowledged that Kshs. 22,877,000 was a claim by the appellant as unremitted staff pensions contributions. Later in reply to the appellant's demand to remit the amount owed, the 2nd respondent maintained that the claim would be considered along with claims of other creditors at the end of the receivership.

Next we consider whether the sums claimed were preferential debts to be paid in priority to all other debts. We reiterate that the 1st respondent was placed under receivership in 2001. Prior to the enactment of Act No. 8 of 2003, under **section 311 (1)** the only recognized debts that would be paid in priority of other debts in the case of a company being wound up were;–

"(a) all taxes and local rates due from the company at the relevant date and having become due and payable within twelve months next before that date not exceeding in the whole one year's assessment;

(b) all Government rents not more than one year in arrear;

(c) all wages or salary (whether or not earned wholly or in part by way of commission of any clerk or servant (not being a director) in respect of services rendered to the company during four months next before the relevant date and all wages (whether payable for time or for piece work) of any workman or labourer in respect of services so rendered."

By Act No. 8 of 2003, **section 311(1)** was amended by adding a new **sub-section (cA)** extending those limits to included;

"(cA) all retirement benefits contributions and vested benefits of any clerk or servant of the Company;

(2) Notwithstanding anything in paragraph (c) or (cA) of subsection (1), the sum to which priority is to be given under these paragraphs shall not, in the case of any one claimant, exceed twenty thousand shillings".

Regarding the application of the amendment of 2003 to events of 2001 we are guided by the decision of the Supreme Court in **Samwel Kamau Macharia & Another V Kenya Commercial Bank Ltd. & Another,** Supreme Court at Nairobi, Appeal No. 2 of 2011 where it was observed that;

> **"As for non criminal legislation, the general rule is than all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are *prima facie* prospective and retrospective effect is not to be given to them unless by express word and necessary implication, it appears that this was the intention of the legislative.''**

This dictum applies to a newly enacted statute as it applies to an amendment to a statute.

With respect, we agree with the argument of the 1st respondent in the court below that from its clear language, the amendment introduced by Act No. 8 of 2003 did not have retrospective application; that it was not known how many of the employees were clerks or servants of the 1st respondent and whether their claims were within the twenty thousand shillings limit. Those claims did not meet the requirements of the law as it then stood. The learned Judge completely failed to consider this question.

The final matter that we turn to relates to the pendency of H.C.C. Case No.1667 of 2001 at the time the originating summons was brought. According to the learned Judge both suits sought the same reliefs; terminal dues *vis a vis* retirement benefits. Since the learned Judge did not make a determination one way or another because there was no evidence whether or not it was pending at the time the originating summons was being heard, we are not obliged to consider the question for the same reason.

Likewise the learned Judge made no determination with regard to the prayer for the furnishing of accounts. As we explained earlier, and as a general rule, apart from their primary duty to manage the property of the 1st appellant with due diligence, the receiver/managers were only answerable to the two financial institutions that appointed them and to the 1st respondent.

In the end and for totally different reasons we come to the same conclusion as the learned Judge and find no substance in the appeal which we hereby dismiss with no orders as to costs.

Dated and delivered at Nairobi this 23rd Day of June, 2017.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR