



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU, MURGOR JJ,A)

CIVIL APPEAL NO. 227 OF 2012

BETWEEN

NATHAN CHESANG MOSON.....1ST APPELLANT

JOSEPHENE CHELANGAT.....2ND APPELLANT

SERVANTHOOD & LIGHT

DEVELOPMENT FOUNDATION.....3RD APPELLANT

AND

COMMUNITY UPLIFT MINISTRIES.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Kitale J.R Karanja, J, dated on 15th and 23rd May 2012

in

Kitale H.C.C.C NO. 34 of 2011)

JUDGMENT OF THE COURT

This is an appeal from the ruling of the High Court of (J.R.Karanja J,) that arose from the respondent's Notice of Motion dated 28th January 2011, lodged simultaneously with a plaint of even date, seeking orders which in the main were that:

- 1. That the Honourable Court be pleased to appoint Mr. Esau Muneria Mengich of P.O Box 184 Eldoret as Receiver/Interim Manager of the affairs, business and property of the 3rd Defendant (3rd respondent) pending hearing and determination of the main suit upon the merits;*
- 2. That the Honourable Court be pleased to commit the possession and custody of the affairs, business and property of the 3rd defendant (3rd respondent) herein to the said Receiver/Interim Manager pending the hearing and determination of the main suit herein upon the merits or until such other time as it may be ordered;*
- 3. That the Court be pleased to confer upon the said Receiver/Interim Manager such powers as may*

be necessary to lawfully manage the affairs, business and property of the Third Defendant(3rd respondent) and in particular the following:

- a. *The taking of possession and getting into the property of the Third Defendant pending the hearing and determination of the suit;*
- b. *The management of the Circle of Light Energy Store at Kitale and selling and refilling of LPG Gas Cylinders, Stoves, Batteries as pending the hearing and determination of this suit;*
- c. *Effect and maintain security and insurances for the Third Defendant, machinery and assets pending the hearing and determination of the suit;*
- d. *To pay, upon prior approval of the parties hereto or of this Honourable Court any salaries, wages, rents, charges, or other outgoings in respect of the Third Defendant's business or property;*

But provided that the Receiver/Interim Manager may not under any circumstances sell or otherwise dispose of the business or assets including the machinery of the Plaintiff Company unless ordered or sanctioned by the Honourable Court.

An injunction order was also sought to restrain the appellants, their servants, agents or any other person acting for and on their behalf, including auctioneers, from the selling, charging, advertising for sale, disposing of, or by completing a conveyance or transfer of any sale concluded by auction or leasing, letting or otherwise interfering with the ownership of the title to and /or interest in the properties known as Kitale Municipality/Block 5/29 and Kitale Municipality/ Block 5/30 (***the suit properties***) on which was constructed the Circle of Light Energy Store pending the hearing and determination of the suit.

The application was supported by an affidavit of the same date sworn by ***James Landon Karins***.

The intrinsic facts of the case as set out in the plaint are that the respondent is an evangelical Christian non-profit making organisation founded and registered in the United States of America in 2002, while the 1st and 2nd appellants were said to be the Chairman/Country Director, and Secretary respectively of the 3rd appellant, a Non-Governmental Organisation duly registered in Kenya. Upon its registration, the respondent developed a program known as the "Circle of Light" (***the Program***) to bring modern energy to rural homes in Africa by way of provision of powered cooking systems for stoves and cylinders and low voltage lighting systems comprising deep discharge batteries and compact fluorescent lights. The program was intended to raise the living standards of people in rural areas by providing modern affordable and sustainable energy alternatives. Through the 3rd appellant, the respondent introduced and launched the Program in Western Kenya in 2003, and by mid 2007 a total of 22 Circle of Light community energy centres were established in Western Kenya.

In his affidavit in support of the Motion, Mr. Karins, the executive director of the respondent averred that to provide logistical support to the communities and home owners participating in the program, the respondent remitted a sum of US dollars 831,787.00 (approximately Kshs. 61,399,128.00) directly to the 3rd appellant for the acquisition of the suit properties, upon which it constructed a Depot all comprising an LLP filling station, 3 large warehouses a dedicated borehole and water storage facility and a central office block.

It was further deponed that the respondent equipped the Depot by procuring and shipping to the 3rd respondent bulk LP storage and handling facilities which consisted of 3 international LP bulk storage tanks of 10 tonnes each, 30 tonnes of LP gas and a sophisticated LP cylinders filling system at US dollars 283,453.00 (approximately Kshs. 17,883,975). This was exclusive of international transport costs, custom duties and VAT, which amounts were paid by the respondent. Attached to the supporting affidavit were copies sums alleged to have been wired to the 3rd appellant by the respondent.

To provide logistical support to the Program, it was deponed that the respondent purchased and shipped 2 industrial trucks, 2 trailers, 3 passenger vehicles and 2 motorcycles to the 3rd appellant at the cost of US dollars 250,381.00 (approximately Kshs. 12,287,408). Also averred to have been provided was office

furniture, IT infrastructure systems, technical systems, integration facilities, assembly components, testing systems and related assets.

It was at all times intended that within a reasonable period of five years, the program, through the 3rd appellant, would become self-sustaining. But by early 2005 it became apparent to the respondent that the objectives of the program were not being realized. As a consequence it implemented a phased withdrawal from the program comprising monthly financial support to the 3rd appellant that commenced in 2007, and was to end in 2008.

Subsequent to this the 1st and 2nd appellants ceased communicating with the respondent, and instead it was averred that they embarked on expropriating and commercialising the entire Program and assets of the 3rd appellant for their own benefit; that the 1st and 2nd appellants failed to carry out the objectives of the 3rd appellant, and to utilize the donations and assets for the purposes for which they were intended. The concern was that unless an order was issued for the transfer to the respondent of the ownership and possession of the program, the Depot and all the related assets of the 3rd appellant, the 1st and 2nd appellants would continue to unjustly enrich themselves to the detriment of the local communities.

In his replying affidavit, the 1st appellant averred that he was the Chairman of the 3rd appellant which had duly submitted all its annual accounts as required, and had been cleared by the Non-Governmental Organization Coordination Board (**NGO Board**), to whom the respondent had lodged a complaint, of any financial impropriety. The 1st appellant confirmed that the Program was initiated to raise the standards of living of rural communities, which is what the 3rd appellant had done through its officials. That the 3rd appellant was the registered owner of the suit properties and assets.

It was further deposed that the respondent was a mere donor alongside other donors and well wishers in the USA who had also raised donations in support of the 3rd appellant's activities, and that the respondent had instituted this suit to reclaim possession of the donations received by the 3rd appellant. It was further contended that **Order 41 rule 1 (2)** of the **Civil Procedure rules** prohibited the court from granting the orders for appointment of a receiver/ manager as the respondent had no right, contractual, legal or otherwise to remove the 3rd appellant from possession of the suit properties it owned.

In the ruling, the learned judge found that the respondent had established a prima facie case with a probability of success, and granted a temporary injunction to guard against the wastage, damage or alienation of the assets and suit properties by the appellants.

The court also ordered the appointment of a receiver/manager, on the basis that the respondent had shown that it had a substantial interest in the 3rd respondent.

Aggrieved by the decision of the court, the appellants brought this appeal specifying 21 grounds, which in summary are that, the learned judge fell into error when he appointed Esau Mengich Muneria as receiver manager over the 3rd appellant's assets and properties which was contrary to the provisions of the law governing Non-Governmental Organisations, in particular the **Income Tax Act Cap 470, Legal Notice No. 101 (Charitable Donations) Regulations, 2007 rule 4**; that the court failed to appreciate that the Circle of Light trade mark was not at any time owned by the respondent; that the court appointed Esau Mengich Muneria as receiver manager without ascertaining his qualifications and competencies, and handing over the 3rd appellant's property was to the appellants' detriment, having failed to find that no written agreement, mortgage, charge or debenture existed that would have pointed to the existence of a relationship between the parties and, that the court failed to make a finding on whether the 1st and 2nd appellants were eligible to be enjoined in the suit.

Further grounds were that the learned judge failed to take into account that the respondent was not a bank within the meaning of the Banking Act Cap 488 and licenced to undertake banking operations in Kenya, and further fell into error when it granted orders to the respondent without ascertaining whether it had been issued with a work permit; that the learned judge erred when he failed to take cognisance of the fact

that the respondent was a mere donor, and as such was not entitled to the orders sought; that the court arrived at the wrong conclusion that the 1st and 2nd appellants had misappropriated and mismanaged the 3rd appellant's affairs without proof or having heard the evidence; and finally that the learned judge wrongly granted the orders against well established legal principles.

Learned counsel for the appellant, **Mr. Nyairo**, holding brief for Mr. Kidiavai, commenced his submissions by faulting the learned judge for ordering the appointment of a receiver/manager to take over the management of the properties and assets of the 3rd respondent.

Counsel argued that though the 3rd appellant received support and significant donations from the respondent and other donors, there was no agreement in existence that defined the relationship between the parties, or the manner in which the donor funds were to be utilised. The 3rd appellant had purchased the suit properties which were registered in its name, together with all plant and equipment for the Program. In addition, the 3rd appellant was the registered owner of the trademark called "Circle of Light". Counsel stated that with time, the aims of the project were achieved, and the 3rd appellant completely severed its relationship with the respondent, which withdrew its funding in 2008; that things came to a head when following its withdrawal, the respondent no longer received regular reports from the 3rd appellant on the Program, which led to claims by the respondent that the 1st and 2nd appellants were misusing the 3rd appellant's assets. The respondent complained to the NGO Board which carried out in depth investigations and issued a report wholly exonerating the appellants.

The respondent was disheartened by the NGO Board's report, and filed this Motion where it alleged that a fiduciary duty existed between the respondent and the 3rd appellant on account of the donations it received from the respondent. The respondent sought an order for a receiver/manager to be appointed under **Order 41 rule 1 (1) and (2) of the Civil Procedure Rules** on the basis that it was just and convenient for the court so to do.

Counsel argued that according to the principles of **Order 41 (1) (2) of the Civil Procedure Rules**, since the respondent was neither the registered title holder of the land, nor was it in possession of the suit properties, the court ought not to have appointed a receiver /manager.

Relying on the principles set out in ***Mulla on the Code of the Civil Procedure, pages 953- 957 and Triple Eight Investments (K) Limited vs City Finance Bank Limited & Another, 2008 eKLR*** on the definition of "**just and convenient**", counsel further argued that there was nothing to show that the property belonged to, or was owned by the respondent, and neither was it shown that it had any rights to the suit properties. It was submitted that the learned judge misapprehended the legal principles to be invoked in appointment of a receiver/ manager, and in so doing, wrongly deprived the 3rd respondent of the suit properties and assets. Furthermore, the court did not take into account the report of the investigations of the NGO Board which had found that the 3rd appellant's assets had not been misappropriated.

Counsel submitted in conclusion that, no *prima facie* case had been established to warrant the grant of an interim injunction, and faulted the learned judge for the incorrect exercise of his discretion. Counsel urged us to grant order (e) of the application as prayed.

Mr. Terer, learned counsel for the respondent, opposed the appeal and submitted that the only matter for the consideration of this Court was whether the court below rightly exercised its discretion in granting the orders sought. Counsel relied on ***United India Insurance Co. Limited & 3 others vs East African Underwriters (Kenya) Limited, Court of Appeal Civil Appeal No. 36 of 1983***, on the principles of granting injunctions. In his view, the learned judge properly considered the matters before him, analysed the facts, and came to the right conclusion that the respondent had made out a *prima facie* case, with the likelihood of success.

The court found that the Program was a partnership between the parties based on the remittances and

financial support to the 3rd appellant which totaled Kshs. 200 million, and granted an injunction. Regarding the appointment of a receiver/manager, the court took into account the need to preserve the assets so as to safeguard them from wastage.

On the issue of locus standi, the court found that this was not a matter for consideration at that stage in the proceedings.

We have considered the application and the submissions of counsel, and find that the issue before us is whether a *prima facie* case with a probability of success was made out by the respondent necessitating the exercise of discretion by the learned judge to firstly, grant the interim injunctive relief sought against the appellants and secondly, to appoint a receiver manager to take over the management of the 3rd appellant.

On the issue of whether the learned judge properly exercised his discretion to grant the temporary injunction, the learned judge was satisfied that the respondent had established a *prima facie* case with a probability of success.

The principles established in *Giella vs Cassman Brown* [1973] EA 358 require that to order an injunction as prayed, the court must be satisfied that,

“a)The applicant had established a prima facie case with probability of success;

b)The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and if

c)The court was in doubt, the application would be determined on a balance of convenience.”

With reference to the establishment of a *prima facie* case, Lord Diplock in the case of *American Cyanamid vs Ethicon Limited* [1975] AC 396 stated thus,

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities, that is the end of any claim to interlocutory relief.”

The respondent avers that it contributed substantially towards the affairs, assets and income of the 3rd appellant. In the affidavit in support of the application, Mr. Karins averred that by the time the program was launched in the former Western Province, various sums amounting to a total of US Dollars 200 million were remitted to the 3rd appellant to purchase the suit properties, to construct the lighting and cooking gas Depot in Kitale. Further contributions went towards equipment for the project, all valued at Kshs. 17,883,975/- (or US Dollars 238,453). Also purchased and shipped were motor vehicles and motorcycles valued at Kshs. 12,287,408/- (or US Dollars 250,581). It was also deponed that various amounts were remitted to the 3rd appellant to cover administrative and operational costs between the years 2002 and 2008 of a sum of Kshs. 51,973,796/- (or US Dollars 714,695).

Further sums remitted included Kshs. 107,134,496/- (or US Dollars 1,428,460) for transport, and to import cooking and lighting systems and Kshs. 53,765,000/- (US Dollars 716,886) for the rural home owners participating in twenty two (22) community cooperatives.

On their part, the appellants have not denied that substantial sums were remitted to initiate the Program. They denied that, the remittances were from various donors, of which the respondent was merely one of the many that remitted funds to the 3rd appellant for the program.

Without concluding with finality, when we consider the materials that were before the court, they seem to point towards an extant relationship between the respondent and the 3rd appellant based on remittances of substantial sums from the respondent that were used to purchase the suit properties and assets in favour of

the 3rd appellant. That said, we are satisfied that the learned judge rightly concluded that the respondent had made out a *prima facie* case with a probability of success.

As to whether the respondent stood to suffer irreparable loss is a matter that can be discerned from the record. Paragraph 52 of James Landon Karin's affidavit averred thus;

"...during the period between the 2002 and 2008 all donations and provisions of financial, material, or technical support made by the Plaintiff to the Third Defendant were only intended to be used for the advancement of the Circle of Light Program in Kenya and participants of the programme living in the rural areas, and not for personal commercial purposes and benefit to the First and Second Defendants as board members of the Third Defendant, which intention and purpose those Defendants were aware of."

Paragraph 53 further stated;

"... that the assets of the Third Defendant having been acquired through donations for a charitable purpose and specifically the advancement and objectives and goals of the Circle of Light Programme, the First and Second Defendants have no right to use the same for personal commercial gain."

At Paragraph 57 the averments continued that;

"...subsequent to the break in relationship with the Plaintiff (mid-2008), the First and Second Defendants sold the programme's cooking systems (LP Cylinders and cooking-stoves) provided by the Plaintiff at full retail prices to personal other than participating Circle of Light community home owners/beneficiaries, and have refunded, neglected and or declined to account to the Plaintiff for the donations that it received and the proceeds from the sale and utilization of the same."

Without conclusively determining the issue, which would be prejudicial to the impending proceedings before the High Court, our cursory examination of these averments shows that the assets and the suit properties were to be utilized through the Program to benefit the local communities in western Kenya. Without doubt, they are integral to the Program, and if not safeguarded, there is the possibility of the Program, and by extension the respondent suffering irreparable loss and harm not capable of being refunded in damages.

Given our findings in respect of the requisite principles, it is our view that, the ends of justice would be better served by the preservation of the suit properties and assets pending the determination of the suit. As such, we are satisfied that the learned judge properly exercised his discretion to grant a temporary injunction in respect of the suit properties and related assets, and we can find no reason to interfere with this decision.

We now turn to the complaint that the court was wrong to order the appointment of a receiver/manager, and deprive the 3rd appellant of its management, property and assets property.

The legal principles for the appointment of a receiver manager are set out in ***Order 41 rule 1 (1) and (2)*** of the ***Civil Procedure Rules***.

Order 41 rule 1 (1) stipulates:

"Where it appears to the court to be just and convenient, the court may by order—

(a) appoint a receiver of any property, whether before or after decree;

(b) remove any person from the possession or custody of the property;

**(c) commit the same to the possession, custody or management of the receiver;
and**

(d) confer upon the receiver all such powers as to bringing and defending suits and for the realisation, management, protection, preservation, and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of such documents as the owner himself has, or such of those powers as the court thinks fit.”

Sub rule (2) further stipulates:

“Nothing in this rule shall authorise the court to remove from the possession or custody of any person property whom any party to the suit has not a present right so to remove.”

The provisions endow the court with discretion to order the appointment of a receiver/manager in any circumstances which are just and convenient. But the proviso set out at **sub-rule 2** requires that in seeking such appointment, the applicant must demonstrate that it has an existing right to the property.

Halsbury’s Laws of England, 4th Edition, Volume 39, paragraph 828 stipulates the criterion to be adopted by courts in the appointment of receivers where a title is in dispute as follows:

“... an interlocutory application for a receiver by a person asserting a purely legal title will be entertained, and a receiver may be appointed if the court thinks that the plaintiff will probably succeed at the hearing and that, in all the circumstances of the case, the appointment is just and convenient.”

Correspondingly, *Mulla on the Code of the Civil Procedure (supra)*, defines “just and convenient”, as meaning that;

“...the Court should appoint a receiver for the protection of rights or the prevention of injury...the Court should not appoint a receiver of property in the possession of the defendant who claims it by a legal title unless the plaintiff can show prima facie that he has a strong case and a good title to the property.”

We can find nothing to show that the respondent had any legal or other title to the 3rd appellant’s property that would establish the basis for the appointment of a receiver/manager. To the contrary, there is evidence to show that the titles of the suit properties are registered in the 3rd appellant’s name, and it is also undisputed that at the time, the appellants were in possession of the properties, and retained the control and management of the 3rd appellant’s business and assets.

Given this state of affairs, we find no basis upon which the learned judge appointed a receiver/manager at the interlocutory stage of the proceedings over the 3rd appellant’s suit properties and assets. We consider this to be a misdirection on the part of the court which, in our view, is adequate justification for interference with the trial court’s decision. We do not deem it necessary to go into the other issues complained of lest we prejudice the trial pending before the lower court.

Accordingly, we allow this appeal in part and set aside the order appointing a receiver/manager, but uphold the order of temporary injunction granted by the High Court. Since the decision is in favour of both the parties, each party to bear their own costs in the High Court and the appellants shall have half the costs of the appeal.

It is so ordered.

Dated and delivered at Kisumu this 27th day of May, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR