



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 238 OF 2012

BETWEEN

KENYA SUGAR BOARD..... APPELLANT

AND

MUMIAS SUGAR COMPANY LIMITED 1ST RESPONDENT

BUSIA SUGAR COMPANY LIMITED 2ND RESPONDENT

BUSIA OUTGROWERS COMPANY LIMITED 3RD RESPONDENT

(CONSOLIDATED WITH CIVIL APPEAL NO. 230 OF 2012)

BUSIA SUGAR COMPANY LIMITED..... APPELLANT

AND

MUMIAS SUGAR COMPANY LIMITED 1ST RESPONDENT

KENYA SUGAR BOARD LIMITED 2ND RESPONDENT

BUSIA OUTGROWERS COMPANY LIMITE..... 3RD RESPONDENT

(Being an appeal from the ruling and/or decision of the High Court of Kenya at Bungoma (Muchelule, J.) delivered on 7th May, 2012

in

HCCC No. 66 of 2011)

JUDGMENT OF THE COURT

INTRODUCTION

1. This appeal relates to setting aside of a consent judgment by both a party to the consent and a third party who is directly affected by the consent judgment but who did not participate in the proceedings that gave rise to the consent. The appeal also examines the propriety of proceedings commenced against a company under receivership without the sanction of the Receiver.

BACKGROUND

2. The Kenya Sugar Board (hereinafter referred to as “**KSB**”), the appellant, held a debenture over all the assets of Busia Sugar Company Limited (*hereinafter referred to as “**BSC**”*), the 2nd respondent. The debenture, dated 5th April, 2004, *inter alia*, was a floating charge and secured a sum of **Kshs.20,400,000/=** plus interest thereon and made KSB the beneficial owner of all current and future assets of BSC. The debenture was to remain valid unless discharged.

3. BSC was made to repay the amount advanced to it, and consequently, by a Deed of Appointment dated **1st March, 2006**, KSB, the debenture holder, appointed **Jones Ndubi** as Receiver and Manager of the assets and property charged under the debenture.

4. Meanwhile, on 22nd June, 2006, Mumias Sugar Company Limited (hereinafter referred to as “**MSC**”), the 1st respondent, registered a charge over land parcel number **Bukhayo/Nasewa/1500** (*hereinafter referred to as “**the suit land**”*), owned by BSC to secure a sum of Kshs.100,000,000/= which it had advanced to BSC. The charge was executed by Jones Ndubi for and on behalf of BSC.

5. On 8th July, 2011 MSC, in an effort to realize its security over the charged property, filed a suit through Wetangula, Adan & Makokha Advocates against BSC, to wit, **HCCC No. 66 of 2011**, in the High Court of Kenya at Bungoma, and sought leave to sell the suit land to Kaplony Enterprises Limited by private treaty.

6. On 11th July, 2011 BSC entered appearance through Wattimah Mutenyo & Company Advocates. On the same day a consent order was recorded allowing the orders sought by MSC. On 3rd August, 2011 the parties recorded a further consent directing the Chairman of Nambale Land Control Board to issue consent for the transfer of the suit land to Kaplony Limited and for the District Land Registrar, Busia, to issue a title deed to the suit land to Kaplony Limited.

7. Subsequently, Wattimah Mutenyo & Company Advocates, KSB and Busia Outgrowers Company Limited filed three separate applications, each seeking to set aside the said consent orders.

8. Caroline Mutenyo Wattimah Advocate stated, *inter alia*, that the first consent was entered through non-disclosure of material facts by the advocates of MSC, and the signature on the second consent dated 4th August, 2011 on her part was forged. She blamed one Nobert Wattanga Advocate, of Wetangula, Adan Makhoha & Company Advocates for misleading her into believing that BSC had no objection to the recording of the consent to sell the suit land by private treaty.

9. Nobert Wattanga filed a replying affidavit and denied the allegations made by Caroline Mutenyo Wattimah.

10. The application by KSB stated, *inter alia*, that it had a debenture over the suit land and all movable and immovable assets of BSC and that the registration of the charge between MSC and BSC was fraudulent. It was further stated that Jones Ndubi, the Receiver/Manager of BSC was an employee of MSC and had severally acted contrary to the interests KSB.

11. Busia Outgrowers Company Limited, a farmers company comprising of over 25,000 farmers who grow sugarcane in the Busia Sugar Zone, and who had previously been contracted by BSC, stated that it was the said farmers who gave out parcels of land that constituted the suit land, which they alleged had been fraudulently sold. They sought to be joined as parties to the suit between MSC and BSC and to set aside the impugned consent orders.

RULING OF THE HIGH COURT

12. In his ruling, the learned judge observed that MSC knew about the debenture by KSB over the assets of BSC, and that it was KSB that had placed BSC under receivership. That notwithstanding, the learned judge declined to grant the orders sought in the three applications. He stated, *inter alia*, he had been “restrained by the fact that the suit land is now registered in the names of a third party, Kaplony Limited, who is not a party to the suit or applications and who has not been heard to enable the Court to interfere with the registration. ”

13. The learned judge further held that BSC and KSB could sue Kaplony Limited over the suit land. The court further held that KSB was in communication with Kaplony Limited with a view to licensing it to build a sugar factory on the suit land, and therefore KSB could not be heard to complain that the suit land had been acquired fraudulently.

APPEAL BEFORE THIS COURT

14. That is the decision that triggered these two appeals, No. 230 of 2012, filed by BSC, and No. 238 of 2012, filed by KSB. The two appeals were consolidated and heard together. That was vide an order made on 30th October, 2014. In the said order, the court further directed the two appellants to file affidavits to confirm that Kaplony Limited, the alleged purchaser of the suit land, which had neither taken part in the proceedings nor been served with the record of appeal, was not interested in these appeals and would not be affected by any orders issued therein. The affidavits were to be filed within fourteen days from 30th October, 2014.

15. It is not clear whether the said affidavits were filed. However, from a number of annexures that are contained in the documents filed by MSC, it is apparent that Kaplony Limited was well aware of the proceedings before the High Court as well as the appeals before this Court.

16. In their memoranda of appeal, the appellants faulted the learned trial judge: for holding that the only claims they had was as against Kaplony Limited, for taking into account unpleaded matters and hence arriving at a wrong conclusion, for holding that the suit land was registered in the name of Kaplony Limited, for fettering his decision in consideration of the three applications, for disregarding a consent recorded before him on 30th January, 2012 granting part of the application by KSB, and for failing to hold that the said consents were fraudulent in nature.

17. When the appeal came up for hearing, **Mr. Magare** appeared for KSB, **Mr. Kamau Lagat** held brief for Mr. Chepseba for BSC and **Mr. Makokha** appeared for MSC. **J. O. Makali & Company**, advocates for Busia Outgrowers Company Limited, though served with a hearing notice did not attend court.

18. We shall not reproduce the submissions made by counsel. Although the memorandum of appeal in Civil Appeal No. 238 of 2012 raises 21 odd grounds of appeal, most of which we think are unnecessarily repetitive, the two main issues for determination in the two appeals are whether the appellants demonstrated that there was any fraud, collusion or any other sufficient reason that would enable a court to set aside a contract, and whether the learned judge in rejecting the applications exercised his discretion appropriately.

19. Mr. Magare cited **BROOK BOND LIEBIG (T) LTD v MALYA [1975] E.A. 266**, where the predecessor of this Court held that a consent judgment may only be set aside for fraud, collusion or for any reason which would enable the court to set aside an agreement. Similarly, in **WASIKE v WAMBOKO [1988] KLR 429**, this Court held that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out.

20. It is therefore necessary that we carefully consider the arguments advanced by Wattimah Mutenyo & Company Advocates (Mutenyo) as well as KSB in their respective applications with a view to determining whether they satisfied the requirements as set out in the aforesaid decisions whose principles

were cited by both the appellants and the respondents.

21. In the affidavit sworn by Mutenyo in support of her application, she stated:

“2. THAT on 10/7/2011, one Mr. Nobert Watanga, Advocate and associate in the firm of Wetangula, Adan Makokha & Co. Advocates did inform me that there was a matter in which their firm had received instructions from both the plaintiff and the defendant to represent them in this matter through Mr. Makokha a partner in the said firm.

3. THAT since they could NOT represent both the defendant and the plaintiff, they had instructions from the defendant to find an advocate JUST for purposes of recording consent.

4. THAT on the 11/7/2011 a consent and a memorandum of appearance already prepared by the office of Wetang ’ula, Adan, Makokha & Co. advocates was presented to me and duly believing the counsel as an officer of the court duly executed the same (Annexed is the consent and the memorandum of appearance and marked CMW1, CMW 2 and CMW 3 respectively)

5. THAT the counsel left with the copies for filing and promised to bring me my copies and introduce me to the instructing defendant later in the day to no avail.

6. THAT on the 21/7/2011 some people allegedly from the defendant’s Company came to my office demanding to have a look at their file and indicated they had not instructed any advocate to represent them in the matter.

7. THAT I could not talk to them as I had a matter in court and thus scheduled a meeting with them on the following day the 22/7/2011 when they did not turn up.

8. THAT my attempts to get documents and more information and or being introduced to the defendant by the plaintiff ’s counsel were futile and unfruitful.

9. THAT the said Mr. Watanga advocate indicated to me that he was not conversant with the matter and he referred me to Mr. Makokha, a partner in Wetangula, Adan Makokha & Co. Advocates whom he said was more conversant with the matter and had proper instructions.

10. THAT my efforts to trace Mr. Makokha on phone were unsuccessful and I went to his office where he indicated to me that am at liberty to refer anyone who would come to my office over this matter to him, an answer which was not satisfactory to me and raised suspicion on fowl (sic) play.

11. THAT later I received a letter from the lands office, Busia, informing us that the suit land Bukhoyo/Nasewa/1500 could not be transferred as per our consent order dated 11/7/2011, since there were prohibitory orders that were yet to be lifted. (Annexed is the letter dated 26/7/2011 marked CMW 4). ”

22. In reply to Mutenyo’s affidavit, Simiyu Wattanga deponed in a sworn affidavit, *inter alia*:

“4. THAT I remember well that on 11th July 2011 at 8.00 p.m. (sic) while at court 4 handling case no. 383 of 2010, I was approached by Madam Carolyne Watimah who indicated to me that she has (Sic) received instructions from representative of Busia Sugar Co. Limited to enter appearance and agree on the settlement of this matter to reduce issue of costs.

5. THAT I indicated to her that after clearing the matter before court, I will inform Mr. Makokha about the issue of negotiation.

6. THAT after clearing the matter before court 4, I called Mr. Makokha whom we discussed about the issue and agreed to prepare the draft consent for Madam Wattimah to look at and

consult her client.

7. THAT draft consent was prepared by Mr. Makokha for Madam Wattimah to go through and approve.

8. THAT upon finding that the draft consent was okay, I was given other copies by Mr. Makokha to handover to Madam Wattimah to execute the same for filing.

9. THAT the said consent dated 11th July 2011 which was precise and clear was duly signed by Madam Wattimah and immediately I filed the same and duly adopted by the court.

10. THAT the fact and issues of the consent was clear (sic) and there was no misrepresentation or concealment or misleading information.

11. THAT the firm of MUTENYO WATTIMAH & CO. ADVOCATES having accepted to enter appearance and executed consent on behalf of the defendant, it is presumed that whatever they were doing was within the law and based on their client's instructions and they cannot turn around and allege they did not have full and adequate instructions."

23. Simiyu Makokha advocate also swore an affidavit and stated:

"4. THAT at no time or at all did I enter into negotiations with the firm of Mutenyo Wattimah (sic) & Co. advocates to request them to represent and defendant herein.

5. THAT I am duly surprised that the firm of advocates who have entered appearance as appearing for the defendant can turn around and state that they don 't know their clients.

6. THAT from the months of August 2011 September and partly October 2011, I had been requested by my doctor to take some rest as I was suffering from fatigue.

7. THAT at no time or at all did I avoid to meet Wattimah Advocate and or refuse to take her calls.

8. THAT I have always been open to the said advocate and at no time have I ever misled her to sign something she was not authorized. "

24. Both Mr. Simiyu Wattangah and Simiyu Makokha are advocates in the law firm known as Wetangula Adan & Makokha Advocates. Although Makokha expressed surprise about the averments made by Mutenyo concerning him, he did not deny the contents of paragraphs 5, 6, 7 and 8 of Simiyu Wattangah 's affidavit.

25. The learned judge correctly observed that BSC did not swear any affidavit to deny that it had not instructed Mutenyo to enter into any consent with MSC on its behalf. BSC was under receivership and the company was not doing business. It is only Jones Ndubi, the Receiver/Manager, and who was also an employee of MSC, who could have sworn an affidavit for and on behalf of BSC, but he did not do so.

26. The status of BSC was well known to MSC. By a letter dated 27th February, 2006 addressed to Dr. Evans Kidero, the then Managing Director of MSC by KSB, MSC was made aware that BSC had been placed under protective receivership on the basis of its shaky liquidity status. As at that date, as a secured creditor, KSB 's financial interest in BSC stood at **Kshs.337,324,077.90**. KSB requested MSC to identify a suitable person for appointment as Receiver/Manager. That is how Jones Ndubi was appointed as the Receiver/Manager.

27. It appears that both MSC and the Receiver were acting concert to defeat the interests of KSB, the debenture holder over all the assets of BSC. In the affidavit sworn by **Solomon Odera**, Acting Chief Executive Officer of KSB in support of the application to set aside the two consents, he stated, *inter alia*,

the terms of the debenture made KSB the beneficial owner of all the assets of BSC, BSC was not at liberty to charge any of its assets without consent of KSB, and the consent of KSB was necessary before BSC could dispose of any of its properties, except in ordinary cause of business.

KSB was neither aware nor did it consent to the charge that was executed between BSC (*represented by the Receiver*) and MSC. The original title to the suit land was held by KSB when MSC purported to dispose of it. The Receiver was acting contrary to the terms of his appointment and in utter abuse of his powers as spelt out in the debenture dated 5th April, 2014.

28. Although Mr. Makokha submitted that as at the date the suit land was charged to MSC the debenture and the appointment of the Receiver had been declared null and void vide a ruling dated 7th June, 2007 by Ombija, J. in **HCCC No. 7 of 2006**, the trial judge had been informed that the said ruling had been reviewed and held, *inter alia*, that Jones Ndubi had no capacity to bind KSB. The Receiver, without authority of the KSB, had sworn an affidavit for and on its behalf.

29. Turning to the proceedings that sought the sale of the suit land by private treaty, **H.C.C.C. No. 66 of 2011 (O.S.) MUMIAS SUGAR COMPANY LIMITED VS BUSIA SUGAR COMPANY LIMITED**, there is nothing to indicate that KSB, as the debenture holder of over all the assets of BSC, a fact that was well known to MSC, was made aware of the suit.

30. All the above were major underlying factors that gave rise to the impugned consents. The first consent was for entry of judgment against BSC and for leave to sell the suit land by private treaty. Mutenyo did not dispute that she had signed the consent order, although she admitted that she had no instructions from BSC and only relied on what she was allegedly told by the advocates representing MSC. We would agree with Muchelule, J. that in the circumstances, her conduct as an advocate was extremely reprehensible. That alone ought not to have prevented the learned judge from considering all the relevant circumstances relating to the sale of the suit land. The purported sale was outrightly fraudulent, a fact that was known or ought to have been known to MSC.

31. The trial court, in refusing to set aside the consent orders, cited **HIRANI v KASSAM [1952] 19 EACA 131**, where it was held that, *prima facie*, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action and those claiming under it. However, that presumption is rebuttable. There was no evidence that BSC had been served with any court process by the MSC's advocates or BSC was even aware of the suit, leave alone instructing any firm of advocates to record a consent to compromise the suit.

32. The trial court did not pay any regard to Mutenyo's complaint about forgery of her signature on the second consent order directing the Chairman of Nambale Land Control Board to grant consent for transfer of the suit land to Kaplony Limited, and to the District Land Registrar, Busia, to issue a title deed to the said purchaser. It was evidently clear that the signature on that consent order was quite different from that of Mutenyo on the memorandum of appearance and on the first consent order.

33. The Land Registrar had written to the court on 26th July, 2011 giving good reasons as to why he was unable to comply with the court order, including existence of earlier court orders prohibiting any transactions in respect of the suit land. Had the trial court given due consideration to all the above, we think it would have exercised its discretion in favour of the appellants.

34. There was also no evidence that the suit land had been registered in the name of Kaplony Limited. Apart from the Land Registrar's letter of 26th July, 2011 expressing his inability to transfer the suit land to Kaplony Limited, which was in the court record, on 10th October, 2011, the trial court had set aside the purported sale of the suit land and reinstated BSC as the registered proprietor thereof. The correspondence between Kaplony Limited and KSB between August and November, 2011 regarding a proposal by Kaplony to establish a sugar project in Busia County did not make any reference at all to the litigation that was ongoing. Besides, that correspondence alone could neither confer any proprietary right upon Kaplony Limited nor be construed to mean that KSB had no valid claim over the suit land.

35. For these reasons, the appeal lodged by KSB is hereby allowed. The ruling delivered by the trial court on 7th May, 2012 in Bungoma HCCC No. 66 of 2011 is hereby set aside. MSC shall bear KSB's costs of this appeal as well as the costs in the High Court matter. We make no order as to costs in favour of BSC and Busia Outgrowers Company Limited.

36. As regards appeal No. 230 of 2012 by BSC, although the two appeals arise from the same High Court ruling, all the advocates for the parties, including Mr. Kamau Lagat for BSC, were of the view that the appeal is not competent. Mr. Makokha submitted that the notice of appeal was filed by Mutenyo Wattimah & Co. Advocates but the memorandum of appeal and the record of appeal were however filed by Chepseba Lagat & Associates. No notice of change of advocates was filed by the latter. BSC was under receivership and thus had no capacity to file the appeal, save under the authority of the Receiver, counsel submitted. He urged the court to strike out the appeal.

37. In the circumstances of the matter that was before the trial court, did BSC really require consent or approval of the Receiver to commence the appeal? In **SAMUEL KAMAU MACHARIA & ANOTHER V KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2012] eKLR**, the Supreme Court delivered itself as hereunder:

“The question as to whether the receiver’s power to commence or defend proceedings in the name of a company under receivership is exclusive has received judicial attention in foreign jurisdictions. While it remains the position that a receiver and manager supplants the board of directors in the control, management and disposition of the assets over which the security rests, it is 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 the directors are supplanted will vary with the scope of the receivership and management vested in the appointee. Directors have continuing powers and duties. Their statutory duties include: the preparation of annual accounts; the auditing of those accounts; calling the statutory meetings of shareholders; maintaining the share register and lodging returns. (See HAWKESBURY DEVELOPMENT COMPANY LIMITED V LANDMARK FINANCE PTY LTD [1969] 2 NSW 782) ”

38 The Supreme Court went on to cite the case of **NEWHART DEVELOPMENTS LIMITED V CO-OPERATIVE COMMERCIAL BANK LIMITED [1978] 2 ALLER 896 (CA)** where it was held that:

“the power given to the receiver to bring proceedings was an enabling provision so that he could realize the company’s assets and carry on business for the benefit of the debenture holders. The provision did not divest the directors of the company of their power to pursue a right of action if it was in the company’s interest and did not in any way impinge prejudicially upon the position of the debenture holders by threatening or imperiling the assets which were the subject of the charge. ”

39 In the circumstances of the case that gave rise to this appeal, we do not think that the Receiver could have filed or sanctioned the filing of an appeal which would have had the effect of challenging his own actions. The board of directors of BSC was not divested of its power to pursue an appeal that was in the company’s interest and did not prejudice the interests of KSB, the debenture holder. Mr. Magare, learned counsel for KSB, supported the appeal in principle, save for his reservations regarding its competence.

40. In our view, and for the aforesaid reasons, the appeal is competent, notwithstanding the fact that it was initiated when BSC was under receivership. In any event **rule 104 (b)** of this **Court’s Rules** provides that:

“A respondent shall not, without the leave of the Court, raise any objection to the competence of the appeal which might have been raised by application under rule 84

41. The two appeals were consolidated way back in 2014 and no application was ever made to strike out appeal No. 230 of 2012. We are not inclined to strike it out as urged by counsel. The appeal is competent

and for reasons already expressed, we allow it. MSC shall bear KSB's costs of this appeal as well as the costs in the High Court.

Dated and Delivered at Eldoret this 14th day of June, 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