IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 74 OF 2011

BETWEEN

INDUSTRIAL & COMMERCIAL

DEVELOPMENT CORPORATION (ICDC) …………......……….. APPELLANT

AND

PATHEON LIMITED ………………..…….………..….……… RESPONDENT

(An appeal from a Judgment and Decree of the High Court of Kenya at Milimani, Nairobi (Warsame, J.) dated 13th June, 2008 ***in H. C. C. C. No. 713 of 1998)***

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JUDGMENT OF THE COURT

1. ICDC, the appellant, was both a shareholder and creditor of Pan Vegetable Processors Ltd (PVP) which had an arrangement with Patheon Limited, the respondent, to process dried vegetables for export by the respondent. Following the insolvency of PVP, the appellant placed it under receivership pursuant to a debenture it held over the company?s assets and appointed Mr. Ephraim Majani as a receiver.

2. Subsequently, by a lease dated 31st December, 1992 the receiver leased out PVP?s factory situate on L.R No. 1144/681 (suit premises) to the respondent for a period of three years at a monthly rent of Kshs.500,000/=. It is not in dispute that at the time the factory was leased out it was not operational and required some repairs. It was the respondent?s case that it was agreed between the receiver and the respondent as demonstrated by the letter dated 3rd December, 1992 that the respondent would carry out the necessary repairs and the amount expended would be reimbursed.

3. In July, 1994 the receiver found a party interested in purchasing the suit premises, and served the respondent with one month notice to vacate the same. The respondent rushed to court with an application and suit to stop the eviction. The Principal Magistrate?s Court at Nakuru being PMCC No. 1376 of 1994 issued an injunction order restraining the eviction of the respondent pending the determination of the suit. Aggrieved with the subordinate court?s decision, the appellant filed Judicial Review proceedings in the High Court being Misc. Applic. No. 1179 of 1994 seeking orders of certiorari and prohibition to stop the subordinate court from proceeding further.

4. Following a meeting held on 8th August, 1997 between officers of the appellant, the respondent and the receiver a compromise in the following terms was reached and recorded in the High Court suit on 11th October, 1994:-

i. ***That Patheon Ltd. do give vacant possession by 11th November, 1994.***

ii. ***That ICDC, PVP and official receiver do take accounts on any sums that may be expended by the plaintiff on the suit premises during the subsistence of the tenancy agreement and whether the plaintiff owed any money to the receiver manager.***

iii. ***That Nakuru PMCC No. 1376 of 1994 be and is hereby stayed forthwith.***

5. The respondent gave vacant possession of suit premises which was sold to a third party and the proceeds thereon surrendered to the appellant. Later on accounts were taken in the presence of the appellant?s officers namely, Mr. Ndomi, the Deputy Corporation Secretary, Mr. Magaiwo, the Deputy Internal Auditor and Mr. Mukemba, Finance Controller and the respondent?s Directors. The respondent?s claim was based on the amount expended towards the repair of the suit premises. Out of the respondent?s claim of Kshs.18,326,681/= only Kshs.10,698,844/= was substantiated. Thereafter, vide a letter dated 4th September, 1997, the appellant?s Executive Director, Mr. Edgar Manasseh (DW2), confirmed taking of accounts and acknowledged the amount owing to the respondent was Kshs.10,698,844/=. By a letter of even date the respondent indicated its acceptance of the amount herein above mentioned as the total amount due.

6. The respondent made several follow ups on the payment of the said amount but by a letter dated 12th November, 1997 the appellant declined to pay on the grounds that the claim had arisen during the period of receivership and that the respondent owed PVP Kshs.6,000,000/=. Later on Mr. Majani ceased to be the receiver and in May 1998 the appellant appointed Mr. Vincent Macharia Wahoro (PW2) as a liquidator of PVP which by then was undergoing liquidation. Mr. Wahoro confirmed the veracity of the respondent?s claim of Kshs.10,698,414/= and concluded that the appellant was liable on the basis of the agreement between the parties. He also prepared a report dated 14th May, 1998 to that effect and forwarded the same to the appellant?s Executive Director for directions. However, the respondent was still not paid.

7. The foregoing culminated in the respondent filing suit in the High Court against the appellant seeking *inter alia* payment of the amount of Kshs.10,698,414/=. It was the respondent?s case that there was a clear agreement between the parties and the receiver that once accounts were taken establishing the amount due to the respondent the appellant would pay the same. At no time did Mr. Majani, the receiver, or the appellant adduce any evidence in support of the allegation that the respondent owed the receiver a sum of Kshs.6,000,000/=.

8. In response, the appellant filed a statement of defence and a pleminary objection contending that the respondent?s suit was *res-judicata* due to the aforementioned suits and that the proper party who ought to have been sued was the receiver and not the appellant. According to Mr. Edgar Manasseh, the appellant?s then Chief Executive Officer (DW1), the letter dated 4th September, 1997 merely indicated that the respondent had availed documents which indicated that the amount owing to the respondent was Kshs.10,698,844/= and the same was conditional upon the approval of the appellant?s board; he had no authority to bind the board but could only make a recommendation which could be accepted or rejected. In the end, the Board rejected the respondent?s claim.

9. Mr. Majani (DW2) maintained that when the company went into liquidation he called upon all creditors to prove their claims; the respondent never proved any claim. Further, no accounts were taken in compliance with the consent order during his tenure. According to him, the respondent?s claim was fictitious. It was the appellant?s case that it was not liable for the debts of PVP and that the respondent ought to have pursued its claim in accordance with the receivership laws.

10. Upon considering the matter on merits, the learned Judge on 13th June, 2008 entered judgment in favour of the respondent in the sum of Kshs.10,698,844/=. Aggrieved with that decision the appellant has lodged this appeal citing 15 grounds some of which relate to a subsequent ruling for review of the judgment in respect of interest awarded. The appellant complains that the learned Judge erred in law and in fact by:-

i. ***Misdirecting himself in law by failing to find that the letter dated 4th September, 1997 was written subject to the approval of the appellant?s board and on a „without prejudice? basis and therefore could not be a basis of an offer and acceptance of settling the respondent?s claim;***

ii. ***Failing to consider the respondent?s evidence that the receiver was not present during the alleged taking of accounts;***

iii. ***Failing to find that H.C Misc. Applic. No. 1179 of 1994 contemplated taking accounts between the respondent and the receiver;***

iv. ***Finding that the receiver was an agent of the appellant contrary to the provisions of the Companies Act;***

v. ***Failing to find there was no nexus or privity of contract between the appellant and the respondent to give rise to liability;***

vi. ***Failing to find while considering an application for review of the judgment that the trial Judge had properly exercised his discretion in awarding interest from the date of judgment;***

vii. ***In finding there was an error on the face of the record;***

viii. ***Sitting on appeal of the judgment of the trial Judge while considering an application for review;***

ix. ***Finding that the letter dated 3rd December, 1992 was binding on the receiver.***

11. Mr. Fred N. Ojiambo, Senior Counsel, appearing for the appellant, in his submissions condensed the grounds into two. The first was whether the High Court was right in holding that the appellant who was a debenture holder was an agent of the receiver. He argued that that finding was the basis upon which the High Court found the appellant liable. In his view that finding was not proper in law because a receiver?s obligation is only to the company of which he is a receiver. Citing the case of ***Lubega -vs- Barclays Bank (U) Ltd*** ***(1990 - 1994) EA 294*** Mr. Ojiambo submitted that a receiver is a legal agent of the debtor company and not the debenture holder. Secondly, he faulted the learned Judge for finding that the appellant had made an offer to pay the respondent Kshs.10,698,844/= vide the letter dated 4th September, 1997. He argued that the letter was not a firm offer but was subject to the approval of the appellant?s board. Placing reliance on ***Cutts -vs- Head & Another*** ***(1984) 1 ALL ER 597***

Mr. Ojiambo contended that the letter and/or offer was made on a „without prejudice? basis. Therefore, the debenture holder could not be held liable for the debts of the receiver. He urged us to allow the appeal.

12. Mrs. Njeri Onyango, learned counsel for the respondent, submitted that the appellant wholly owned the PVC and the relation of the receiver and that of the appellant was not merely that of receivership, but went much beyond. If that had been the case, she asked why then did the appellant file the judicial review proceedings seeking an order of certiorari and prohibition stopping any further proceedings in the lower court? According to her, the appellant was the main player in the taking of accounts. Mrs. Onyango argued that the conduct between the appellant and the receiver revealed a relationship of principal and agent since the receiver constantly sought

instructions from the appellant. She urged us to dismiss the appeal.

13. In a brief rejoinder, Mr. Ojiambo submitted that the consent order did not require the appellant to pay anyone; the bottom line was that the appellant rejected the respondent?s claim.

14. We have considered the record, submissions by counsel and the law. As this is a first appeal, we are enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and arrive at our own independent conclusion, but always bearing in mind and making allowance for the fact that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour. See the case of ***<u>Selle -vs- Associated Motor Boat Company Ltd</u>. [1968] EA 123.***

15. As correctly observed by the trial court the main issue was whether the respondent was entitled to reimbursement of the expenditure on repairs it carried out, if any, in the suit premises and whether the appellant was bound to reimburse the same. On the first issue, it is clear from the record that before the lease between the receiver and the respondent was executed the factory was run down and needed substantial repairs before it could be operational. This state of affairs was brought to the attention of the receiver by the respondent who by a letter dated 3rd December, 1992 sought the receiver?s permission to undertake the repairs on condition that the expenditure would be reimbursed. The receiver, Mr. Majani, did admit receiving the said letter, remarking on it that „it is in order? and appending his signature thereon. This was clearly an indication of the receiver?s acceptance of the respondent?s offer. In ***<u>Shore -vs-Wilson</u> (1842) 9 CI & Fin 355, 565*** Tindal C.J. held:

> ***"The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such a case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible......"***

See also ***<u>Savings and Loans Kenya Limited -vs- Mayfair Holdings Limited</u> (2012) eKLR.***

16. On the second issue, it is also not in dispute that pursuant to consent recorded in H.C. Misc. Applic. No. 1179 of 1994 the parties herein (including, especially, ICDC) took accounts in the appellant?s premises wherein they found that the respondent?s claim of Kshs.10,698,414/= was substantiated by the receipts adduced by the respondent. We take note that this figure was also confirmed by Mr. Wahoro, the liquidator who was appointed after the receiver left.

17. So who was to reimburse the respondent? We concur with the trial court that the relationship between the receiver and the appellant in this case was that of principal and agent. Why do we say so? The receiver was appointed by the appellant who was both majority shareholder and a debenture holder in PVP. In addition the receiver was an employee of the appellant. Further, Mr. Majani testified that he reported all activities to the appellant and all proceeds from the sale of PVP went to the appellant. ***The Concise Dictionary of Law, 2nd Edition, page 17*** defines an "agent" as,

> ***"A person appointed by another (the principal) to act on his behalf, often to negotiate a contract between the principal and a third party."***

In ***<u>Garnac Grain Co. Inc. -vs- H.M. Faure & Fair Dough Ltd and Bunge Corporation</u> (1967] 2 All E.R. 353*** Lord Pearson with the concurrence of the

House used the words-

> ***"The relationship of the Principal Agent can only be established by the consent of the***

Principal and Agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it… the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct."

We are of the considered view that this relationship was further exhibited by the fact that the appellant took part in the accounts taking exercise even in the absence of the receiver. The consent order specifically required the appellant, among others, to "take accounts". The appellant was a key player also in the litigation before both the lower courts.

18. We find that the appellant by its conduct of taking accounts and by the letter dated 4th September, 1997 bound itself to reimburse the respondent its proved expenditure. An extract of the said letter written by the appellant?s then Executive Director, Mr. Manasseh is set out herein below:-

"RE: YOUR CLAIM AGAINST PVP LTD FOR KSHS. 18,326,681/=

Following our meeting held on 19th August, 1997 to review your claim and after perusing through the documents produced by yourselves, we are pleased to inform you that the amount payable to you is Kshs. 10,698,844/=. This amount was arrived at after disallowing all repairs (as agreed in our meeting) post-1993 operations because the receivership could not have been responsible for consumables like operating apparatus, oil etc for the period 1994. …………….

However, please note that the settlement proposals are subject to the approval of the Board which will be sought after your comments or concurrence."

19. That letter was a clear indication of the appellant?s intention to reimburse the respondent. We find that the appellant cannot claim that Mr. Manasseh had no authority to bind it by that letter and therefore the appellant is estopped from going back on the representation it made to the respondent by its actions. Furthermore, it is based on this representation that the respondent vacated the suit premises and stayed its suit. The respondent also communicated its acceptance of the said amount by a letter of even date. Based on all those representations and conduct, the respondent acted to its detriment. In ***Serah Njeri Mwobi -vs- John Kimani Njoroge (2013) eKLR*** this Court held:-

"It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced."

See ***The Law of Contract 3rd Ed. By G.H. Treitel –*** P.342)

20. As regards, the issue of the consent of the appellant?s board we rely on the rule in ***Turquand?s case*** as was propounded in ***Royal British Bank -vs- Turquand (1856) 119 E.R. 886*** and hold that whether or not the consent was given is an internal management issue and cannot afford a defence to the appellant. The respondent was entitled to assume that the appellant had complied with its internal rules and regulations before entering into consent, taking accounts and making the offer it did in its letter dated 4th September, 1997. We find that the respondent had no actual knowledge of these internal rules or of any suspicious circumstances putting him on inquiry.

21. Lastly, pursuant to the notice of appeal on record the appeal herein is in respect of only the judgment dated 13th June, 2008. Therefore, we have no jurisdiction to consider this issue of interest which was reviewed by a ruling dated 26th September, 2008. In ***Safaricom Limited -vs-***

***Ocean View Beach Hotel Limited and two Others** - Civil Application No. 327 of 2009 [2010] eKLR* Omolo JA held,

> ***"I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal the Court of Appeal would have no business to meddle in the decision of the High Court."***
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> Emphasis added.

22. The upshot of the foregoing is that this appeal lacks merit and is hereby dismissed with costs to the respondent.

Dated and delivered in Nairobi this 18th day of December, 2015.

ALNASHIR VISRAM

………………………….

JUDGE OF APPEAL

F. SICHALE

…………………………

JUDGE OF APPEAL

S. ole KANTAI

……………….……….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR