



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, J.J.A)

CIVIL APPEAL NO. 112 OF 2012

BETWEEN

TOP TIME ENTERPRISES LIMITED.....APPELLANT

AND

P.V.R.RAO AS RECEIVER/MANAGER APPOINTED BY

KENYA COMMERCIAL BANK LIMITED TO RUN

NYALI BEACH HOTEL LIMITED

(IN RECEIVERSHIP).....1ST RESPONDENT

KENYA COMMERCIAL BANK LIMITED.....2ND RESPONDENTS

(An appeal against the Ruling of the High Court of Kenya at Mombasa (Kasango J) dated 15th December, 2011

In

H.C.C. Suit NO. 202 of 2010)

JUDGMENT OF THE COURT

[1] This appeal arises from a ruling in which the High Court (*Kasango J*), dismissed an application for summary judgment brought by Top Time Enterprises Limited (hereinafter referred to as the Appellant), who was the plaintiff in the suit filed in the High Court. The appellant had sought to recover the sum of Kshs.3,441,058.40/- from P.V.R. RAO in his capacity as receiver/ manager of Nyali Beach Hotel Limited (in receivership) (hereinafter referred to as the 1st respondent), and Kenya Commercial Bank Limited (hereinafter referred to as the 2nd respondent), jointly and severally. Pursuant to its rights under a Debenture instrument entered into with Nyali Beach Hotel Limited, the 2nd respondent had appointed the 1st respondent as receiver of the Hotel. The amount claimed was the balance due in regard to goods sold and delivered by the appellant to Nyali Beach Hotel Limited while it was under receivership.

[2] The 1st and 2nd respondent filed a defence in which the 2nd respondent conceded having appointed the 1st respondent as receiver manager of Nyali Beach Hotel Limited, but denied the appellant's claim maintaining that pursuant to the instruments of receivership and a deed of indemnity registered by the Commissioner of Stamp Duty, the 1st respondent was not an agent of the 2nd respondent, but was in fact an agent of Nyali Beach Hotel Limited. The 1st respondent further denied having entered into any contractual relationship with the appellant during the pendency of the receivership.

[3] The appellant's application for summary judgment, was anchored on the grounds that the respondents were indebted to the appellants in the sum of Kshs.3,441,058.40; that there was no defence to the appellant's claim; that the amount claimed was lawfully due from the respondents to the appellant; that there was no specific denial of the contents of paragraph 4 of the plaint in the written statement of defence filed by the respondents; that there was no suggestion in the defence that the appellant did not supply goods to Nyali Beach Hotel Limited (in receivership); that the appointer of a receiver/manager remains liable for contracts entered into by the receiver/manager on behalf of a company in receivership whilst the receivership is ongoing.

[4] The application was also supported by an affidavit sworn by a director of the appellant **Atul Dwarkadas Ruparelia** to which was annexed copies of purchase orders, invoices, delivery notes and a statement dated 30th November 2009, showing that the sum of Kshs.3,441,058.40/- was due as at 30th November 2009, on account of goods sold and delivered.

[5] In response to the application for summary judgment, **John Oringo**, a manager with the 2nd respondent, swore a replying affidavit in which he denied the appellant's claim averring that according to clause 10 of the Debenture, pursuant to which the 2nd respondent appointed 1st respondent as receiver manager, the receiver manager was the agent of Nyali Beach Hotel Limited (in receivership; that this fact was further reinforced by a deed of indemnity which also identified the company under receivership as the principal of the 1st respondent; that in any case, the receivership of Nyali Beach Hotel Limited, had come to an end and the ownership had reverted to the directors of the company; and finally that the evidence relied upon by the appellant in support of its application for summary judgment was disputed.

[6] The reasons for the dismissal of the appellant's application for summary judgment is evident from the following extract of the ruling of the learned judge:

“ In this case, the defendant's case is that the Debenture provided that the receiver would be an agent of the company. In my view the main issue that shall be before the Court at the trial of this case will be whether it is the defendants or the Nyali Beach Hotel who are liable to pay the plaintiff's debt. In raising that issue, in my view the defendants have raised a bona fide triable issue, in my view, this is a genuine issue that cannot be dealt with in a summary manner. The plaintiff did as much admit that to be an issue when its learned counsel in his written submissions stated... ‘real issue that arises is; who is responsible (liable) for payment of Kshs.3,441,058/- to the plaintiff...’ ...it is an issue that must go for trial for determination. The other related issue is whether the plaintiff is bound by the terms of the Debenture... it is for that reason that I find that the application is not merited and it is dismissed with costs being in the cause”

[7] Learned counsel **Mr. A.B. Shah** who argued the appeal on behalf of the appellant, submitted that the 2nd respondent in appointing the receivers was undertaking to pay the suppliers. He noted that the Debenture was between the bank and its debtor –Nyali Beach Hotel Limited, and that the suppliers had nothing to do with the Debenture as the goods were supplied to the receivers at their request. He pointed out that all the orders which were exhibited were placed by Nyali Beach Limited in receivership, and that the goods were supplied to the company when it was in receivership.

[8] Mr. Shah quoting Halsbury's Laws of England Third Edition, argued that the contract did not absolve the receiver from liability as the powers of Nyali Beach Hotel Limited were paralyzed, and the receiver

was acting as principal, and therefore the receiver was personally liable, although they had recourse to the appointer. Mr. Shah therefore asserted that there was no triable issue and thus the learned judge was wrong in rejecting the application for summary judgment.

[9] On his part, **Mr. Gichamba** learned counsel for the respondents, argued that the Court found at least one triable issue which was who was liable to pay for the goods; that the 1st respondent having been appointed by the Debenture holder, the Debenture instruments showed that its actions were that of the company under receivership; and that the rejection of the application was proper.

[10] In **Nairobi Golf Hotel (Kenya) Ltd v Lalji Bhimji Sanghani Builders & Contractors Civil Appeal No. 5 of 1997** the Court considering the provisions of Order XXXV Rules 1 and 2 of the former edition of the Civil Procedure Rules had this to say:

“ It is trite that in an application for summary judgment under Order XXXV Rule 1 of the Civil Procedure Rules, the duty is cast upon the defendant to demonstrate that he should have leave to defend the suit. His duty in the main is limited to showing prima facie the existence of bona fide triable issues or that he has an arguable case. On the other hand it follows, a plaintiff who is able to show that a defence raised by a defendant in an action falling within the purview of Order XXXV is shadowy or a sham is entitled to summary judgment”.

[11] Applying the above principle, it was imperative that it be demonstrated to the learned judge that there was at least one triable issue, and that the issue was a bonafide issue and not just a sham issue raised for the sake of delaying the suit.

[12] In its defence, and the replying affidavit that was sworn in response to the application for summary judgment, the respondents maintained that it was not liable to the appellant as the 1st respondent did not enter into any contractual agreement with the appellant, and that the 1st respondent was not an agent of the 2nd respondent but an agent of Nyali Beach Hotel Limited. The issue we have to determine in this appeal is whether given the circumstances in which the goods were ordered, supplied and delivered, was the defence raised by the respondents that they were not liable for payment of the goods a bona fide defence justifying the rejection of the application for summary judgment?

[13] In this case, the purchase orders, invoices and delivery notes which were annexed to the affidavit that was sworn in support of the application for summary judgment all confirmed that the goods were ordered and delivered to Nyali Beach Hotel Limited while it was under receivership. It has not been disputed that as the receiver manager, the 1st respondent was the one controlling the affairs of Nyali Beach Hotel Limited during the relevant period of the receivership. It follows that in that capacity the 1st respondent ordered and contracted with the appellant for the supply of the goods. The question is whether in undertaking the affairs of Nyali Beach Hotel Limited in receivership and ordering for the supplies the 1st respondent undertook any personal liability, or whether the 2nd respondent was the one liable as the debenture holder who put the company under receivership, or whether Nyali Beach Hotel Limited or its directors was the one liable. In other words there is an issue of law concerning the liability of a receiver or manager of a company under receivership.

[14] The law regarding the liability of a receiver has been well captured in the following extract from **Halsbury’s Laws of England Third Edition volume 6** at paragraph 975, which was relied upon by the appellant:

“ Liability of receiver. A receiver or manager of the property of a company appointed under the powers contained in any instrument (a), is, notwithstanding that he may be an agent of the company and able to bind it by his contracts, to the same extent as if he had been appointed by order of the Court (b), personally liable on any contract entered into by him in the performance of his functions except in so far as the contract otherwise provides and is entitled in respect of that liability to indemnity out of the assets; but nothing in this

provisions is to be taken as limiting any right to indemnity which he would have apart therefrom, or as limiting his liability on contracts entered into without authority or as conferring any right to indemnity in respect of that liability.”

[15] The same principle is captured in **“The Law and Practice as to Receivers appointed by the High Court of Justice or Out of Court”** by William Williamson Kerr, 9th edition at page 298 -301 as follows:

“Persons contracting with a receiver and manager who is carrying on the business of a company and are cognizant of his appointment, must be taken to know that he is contracting as principal, not as agent for the company, whose powers are paralyzed;

Receivers and managers appointed by the court (except the so called receivers appointed in lunacy (c), and probably receivers and managers of statutory undertakings (d), are personally liable to persons dealing with them in respect of liabilities incurred, or contracts entered into by them in carrying on the business (e), unless the express terms of the contract exclude as they may do, any personal liability (f); but subject to a correlative right to be indemnified out of the assets in respect of liabilities properly incurred, (g) for receivers are not agents of any person but principals (h) and are therefore assumed to pledge their personal credit...

Similarly, receivers and managers appointed by debenture holders or mortgagees under the powers of an instrument are personally liable to persons dealing with them with knowledge of their position; for they are agents for the mortgagor or mortgagee according to circumstances...”

[16] Thus the general legal position is simply put, that the receiver or manager of a company under receivership acts as a principal in entering into any contracts in the performance of his functions, and is therefore personally liable on the contracts entered into by him in his capacity as receiver, unless the contract provides otherwise.

[17] The issue of liability that has been raised in the defence is anchored on the interpretation of the Debenture instrument and the Deed of Indemnity taking into account the relevant law relating to liability of receivers of the property of the company placed under receivership. The issue could be said to be triable to the extent that it requires interpretation of documents and application of the law, but is it a bona fide triable issue given the clear position of the law on the liability of a receiver, and the clear provisions of the Debenture instrument and the Deed of indemnity?

[18] In our view the appellant complicated the position by muddying the waters, when it sued the 1st and 2nd respondent as being jointly and severally liable. How this joint and several liability arises, is not obvious and is an issue that can only be established through evidence. Further, it is not clear how the 2nd respondent’s liability to the appellant arises given Clause 10 of the debenture instrument that provided that any receiver appointed by the 2nd respondent under the debenture instrument was to be an agent of the company placed under receivership. The appellant has not exhibited any special contractual provision entered into between it and the 1st respondent or 2nd respondent that could bring the 2nd respondent’s liability into play. Thus the defence does raise a bona fide triable issue in this regard.

[19] We have considered whether it would have been proper to allow the summary judgment as against the 1st respondent only. However the appellant specifically applied: **“that summary judgment be entered against the “1st and 2nd defendants jointly and severally or alternatively against the 2nd defendant as claimed in the plaint...”** Thus it would not have been proper to allow the application against the 1st respondent only. In the circumstances we uphold the order of the learned judge rejecting the application for summary judgment although for different reasons. Accordingly we dismiss the appeal, and order the appellant to pay costs of the appeal to the 2nd respondent.

Those shall be the orders of the Court.

Dated and delivered at Mombasa this 4th day of April, 2014

H.M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F.SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR