IN THE COURT OF APPEAL AT

NAIROBI

Civil Appeal 2 of 2007

1. **KIERAN DAY**
2. **LAWRENCE NGAMAU**
3. **NDUNGU GATHINJI**
4. **NATIONAL BANK OF KENYA LTD**
5. **INTERNATIONAL FINANCE CORPORATION**
6. **LASIT LIMITED….....APPELLANTS**

AND

CERES ESTATES LIMITED (IN RECEIVERSHIP.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Milimani (Ochieng, J) dated 28th October, 2005

in
H.C.C.C. NO 4356 OF 2003)
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JUDGMENT OF THE COURT

This is a short appeal. It is against the ruling by Ochieng, J dated 28th October 2005 whereby the learned Judge ordered the 6th appellant, Lasit Limited, to be made a defendant in the suit which had been instituted by the respondent, Ceres Estates Limited (In receivership),against the 1st to 5th appellants in 2003.

The facts giving rise to the dispute, the subject matter of the appeal now before us, are largely not in dispute. They may briefly be stated as follows. The respondent was the registered proprietor of all those pieces of land known as L.R. Nos 9905, 9906 9010, situate North of Nakuru District (the suit land). The titles comprise of about 739.7 acres or thereabouts and the land is mainly used for the growing of coffee and tea. By a loan agreement dated 10th April, 1997 between Ceres Estates Limited, and National Bank of Kenya Limited, the 4th appellant, the respondent borrowed from the 4th appellant a sum of US$336,791.60 and a further US$ sum equivalent to Kshs 33,370,000. By a prior loan agreement dated 13th December, 1996 International Finance Corporation, the 5th appellant herein lent to the respondent another sum of US$931,000. Both loans were secured by creating a Joint and Several Debentures, on the 30th May, 1997 between the respondent and 4th appellant and on the same date,

between the respondent and the 5th appellant. Two supplemental legal charges were also created over the fixed assets of the respondent on the said dates over the suit land.

According to the respondent, the 4th and the 5th appellants disbursed the agreed funds to the respondent but after a delay of one year with the result that the purpose for which the loans were intended deteriorated further and were overtaken by events. The events given were:-

(i) instability of coffee prices;

(ii) adverse climatic and weather conditions

(iii) Kenya Planters Coffee Union of which the respondent was affiliate, failing to pay farmers monies due upon delivery.

(iv) failure of Kenya Planters Coffee Union to advance coffee farmers funds for purchasing inputs;and

(v) delayed disbursement of Stabex Funds.

The respondent claimed that as a result of these difficulties it could not mitigate its losses and fell into grave financial difficulties and could not service the loans.

What triggered legal suits and several myriad applications was the appointment of the 1st, 2nd and 3rd appellants as receivers by the 4th and the 5th appellants on 10th March 2003 over the assets of the respondent. The said appointment was under the Joint and Several Debentures referred to herein.

The appointment, of course, was preceded by the default of the respondent in paying interest and the principal loans granted to it under the terms of the respective loan agreements and the recalling thereof.

It is worthy of note that the validity of the debentures, securities and the charges is not in dispute. The respondent accepts them. Further, the sums lent and interest charges have not been disputed.

It is also admitted by the respondent that the business for which the loans were given had collapsed and that it had not made any repayment of them. The entire farming business had come to a standstill and there were no operations on the suit land.

On 22nd July 2003 the respondent sought an interlocutory injunction, inter alia, to eject the receivers from the suit land. In a ruling dated 27th August 203, Ibrahim J dismissed the application by holding:

"the Receivers are already in possession. They were appointed on 10th March, 2003. They were appointed by virtue of valid Joint and Several debentures. The debt herein is admitted and the defaults also admitted expressly – see paragraph 23 of Mr. Dowson first affidavit. The debt continues to attract interest. On a balance, I find that the company was not carrying on any serious or flourishing business and the farm was coming to a standstill. These assets of the company constitute the Banks' securities. They have a right to take possession under a receiver/manager for protection and realization. There is no evidence to show that the company has other unsecured assets or free assets. There is a danger that if there is a short-fall after sale of the assets secured that the plaintiff can become insolvent. On the other hand, if the company were to succeed in the suit before any sale, the defendants I think are capable of paying any damages suffered."

Thereafter on 9th February 2004 the parties herein negotiated a settlement out of court. The respondent's lawyers gave a professional undertaking to pay shs. 100,000,000/- on or before the end of that month. A cheque in a purported redemption was given by the respondent but the same was recalled a month later on 10th March 2004.

It appears that nothing of significance took place until 5th May 2005, that is a year later, when the suit land together with all moveables were sold and transferred to the 6th appellant in exercise of the 4th and 5th appellants' statutory powers of sale. Four months later on 12th September 2005 the respondent lodged an application to enjoin the 6th appellant in the pending suit. Ochieng, J on 4th October 2005, though refusing to grant the injunctions sought because it was too late in the day since the sale of the suit land had been completed, nevertheless, granted an order for joinder. The grant of that order triggered this appeal.

It is averred by Mr. Rachuonyo learned counsel for the 5th appellant and Mrs. Mwangangi learned counsel for the 6th appellant respectively that:-

1 That the Learned Judge erred and misdirected himself in law in making an order that the 6th appellant, who was a bona fide purchaser for value in a sale pursuant to the exercise of statutory powers of sale, be made a defendant in the suit without any basis therefor and on the basis of mere allegations of fraud and speculations.

2 That the learned Judge erred and misdirected himself in finding that the 6th appellant would be a necessary party in the suit when, as is evident on the High Court record, the real issue therein as at the time clearly was the respondent's long standing default in the repayment of loan sums owing to the 4th and 5th appellants resulting in the exercise of statutory powers of sale by the said appellants.

3 The learned Judge erred and misdirected himself in law in finding that the 6th appellant's title in the suit property could be challenged on grounds of fraud and misrepresentation when none had been proved on the part of the appellant.

Under **Order 1 Rule 3** of the Civil Procedure Rules (the Rules) the condition precedent for the plaintiff to implead a person as a defendant in the suit is that the court must be satisfied that the presence of the party to be added, would be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. To bring a person as party defendant is not a substantive right but one of procedure and the court has discretion in its proper exercise. See **Galot & 5 Others vs Kenya National Trading Corporation [2002] 1 KLR 798.** The object of the rule is obvious- to resolve the disputes relating to the subject matter without any protraction, inconvenience and the multiplicity of the proceedings may be avoided. S**ee Anil Kumar Singh v Shir Mishra [1995] 35 C147.**

However, a necessary party may still be declined to be impleaded in the suit if it appears to the court that the same shall result in the abuse of the process of the court. **Mulla: Code of Civil Procedure 16 Edn page 1495.** Also, **Order 1 Rule 10** of the Rules prohibits joinder which if allowed would prejudice the party sought to be enjoined.

In the matter before us the respondent is insolvent. It fully admits the debt which runs into several millions of shillings and that it has never repaid and is unable to pay even a single cent of it. Despite this, the respondent has engaged the appellants in a multiplicity of suits and applications seeking to stop the sale of the suit land and the removal of receivers. Not less than five (5) applications for injunctions have been filed. All were unsuccessful.

The 6th appellant has been on the suit land for over seven (7) years pursuant to the purchase which was consented to by the respondent. In our view, procrastination of the suit by seeking a joinder would prejudice the appellants and occasion them extreme inconvenience and may expose the security to further losses which cannot be recovered because the respondent is insolvement.

The respondent has not at all made any allegations of fraud, illegality or irregularity against the 6th appellant. None of such allegations were set out in the application or the supporting affidavit nor was any draft amended plaint attached. It would follow, therefore, in our view, that the respondent did not disclose sufficient grounds to warrant the issue of the orders for joinder of the 6th appellant in the superior court.

As no fraud on the part of the 6th respondent, now the registered proprietor of the suit land, is pleaded, we would hold that no material was laid before the learned Judge upon which he would have been entitled to order the joinder of the 6th appellant for the purposes of impeachment of the transfer. See **section 23** of the **Registration of Titles Act.**

As the respondent had evidently abused the court process by filing several suits and applications so as to prevent the appellants from recovering its just debts it is undeserving of any relief. This case is a classic example of how court process can be invoked to frustrate commercial institutions from recovering the loans they genuinely lend to their customers. The suit was first lodged nine(9) years ago in 2003 and is still not yet heard substantially save for interlocutory applications. We hope the Constitution and the new Civil Procedure Rules will adequately be operationalised by the courts so as to deal with this kind of process.

In the result and for the foregoing reasons, we make the following orders:

1 The appeal is allowed.

2 The ruling of the High Court made and dated 28th October 2005 be and is hereby set aside.

3 The respondent's application dated 12th September 2005 be and is hereby dismissed with costs.

4 The appellants shall have the costs of this appeal and of the application in the High Court.

This judgment has been delivered under **rule 32 (3)** of the Court of Appeal Rules

Dated and delivered at Nairobi this 25th day of November, 2011

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

M. OLE KEIWUA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR