



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 13 OF 2010

BETWEEN

AL JALAL ENTERPRISES LIMITED APPLICANT

AND

NIC BANK LIMITED 1ST RESPONDENT

CHEGE WAIGANJO 2ND RESPONDENT

(Application for injunction pending filing, hearing and determination of the intended appeal from the ruling and decision of the High Court of Kenya at Nairobi (Kimaru, J.) dated 22nd January, 2010

in

H.C.C.C. NO. 738 OF 2008)

RULING OF THE COURT

The applicant, **AL JALAL ENTERPRISES LTD.**, brings this application under **rule 5(2)(b)** of this Court's Rules seeking one main relief, viz:-

“1. THAT this Honourable Court be pleased to grant an injunction restraining the unlawfully appointed Receivers so appointed on 24th November, 2009 whether by themselves or through their servants or any of them from moving in, taking over control managing or attempting to manage and/or taking charge over the affairs of the Applicant Company or in any other matter (sic) interfering with the Applicants' land properties, machinery, equipments and assets.”

There is also the usual prayer for costs of the application.

A brief background to this application is that on 24th November, 2009, the then advocates of the applicant (*plaintiff in the superior court*), Messrs Gichuki Kingara & Company advocates presented to the superior court a consent dated 19th November, 2009 duly executed by the said firm of advocates on behalf of the plaintiff (*the applicant herein*), Mohamed Muigai & Company advocates on behalf of the 1st Defendant (1st respondent herein), and Kimondo Gachoka Company advocates on behalf of the 2nd

Defendant (2nd respondent herein). The consent was in the following terms:-

- “1. That Chege Waiganjo and Nduati Warui be appointed as joint receivers of the suit properties. That Nduati Warui represents the interest of Al Jalal Enterprises Ltd. and Chege Waiganjo represents the interest of NIC Bank Ltd.**
- 2. That either party be at liberty, with sanction of the court, and for cause shown, to replace any of its appointed receiver.**
- 3. That the joint receivers shall exercise equal but joint powers over the assets of the plaintiff. All decisions by the receivers will be by consensus and in default be referred to court for directions.**
- 4. That the joint receivers do perfect the title over the suit properties and the new title be deposited with the joint receivers.**
- 5. That the joint receivers do take possession of the suit property forthwith.**
- 6. That the joint receivers shall have power to open, operate and have access to all the company and receivership accounts in any bank.**
- 7. That in exercise of their powers, the joint receivers shall be guided by the various instruments of debentures, the Companies Act and any other orders of court.**
- 8. That costs, legal fees and such outgoings be met from the receivership account.**
- 9. That out of the monies collected by the receivers, Kshs.500,000 per month be released to Al Jalal Enterprises Limited, less any amount owed to the receivers by Al Jalal Enterprises Limited as rent over part of the building by the company or its associates. The balance of collections be released to NIC Bank Ltd.**
- 10. That accounts be settled before trial.**
- 11. That each party’s costs of the suit and the two applications be paid by the joint receivers out of the receivership account.”**

That consent of the parties was adopted as an order of the superior court on 24th November, 2009.

On 17th December, 2009, the applicant moved the superior court by notice of motion purportedly under the provisions of **Order L Rule 1** of the Civil Procedure Rules and **Section 3A** of the Civil Procedure Act seeking various orders. The applicant sought the setting aside, varying or discharge of the above consent order. Pending the hearing of that application by the superior court, the applicant asked the superior court to “*stay the operations of the receivers, their taking office, remaining thereon and/or in any other manner taking control and charge of the affairs of the plaintiff company*”. The applicant further prayed for the superior court to terminate the appointment of the receivers which, in its view, was unlawful. The applicant further sought orders for the receivers to cease their operation in the suit premises and give vacant possession thereof to enable the directors of the applicant company take back full control of the applicant company. That is the application that was placed before Kimaru, J. for determination. The learned judge considered the rival arguments, the material placed before him and in the end dismissed that application.

In his ruling delivered on 22nd January, 2010, the learned judge said:-

“It is the plaintiff’s case that its former advocate compromised the suit to its disadvantage without its say so. In response to the plaintiff’s case, it was the defendants’ case that the said consent was entered into after protracted negotiations between the plaintiff’s former counsel and the defendants’ counsel

who are still on record. The defendants were of the view that the plaintiff had filed the present application to frustrate the receivers from performing their legal mandate.”

The learned judge considered the facts of the application and concluded his ruling thus:-

“In all the circumstances of the case, the former advocate was the agent of the plaintiff and is deemed to have full instructions of such plaintiff. For a client to disown the acts of its advocate, it must place sufficient materials that will establish cogent grounds upon which the court can set aside a contract.”

It is the foregoing that has given rise to the present application for an injunction to restrain the receivers who were appointed on 24th November, 2009 “from moving in, taking over control, managing or attempting to manage and/or taking charge over the affairs of the applicant company.”

When the application came up for hearing before this Court on 17th March, 2010, Mr. G.S. Mwanza appeared for the applicant while Mr. G. Imende appeared for the 1st respondent and Mr. G.K. Kimondo represented the 2nd respondent. In his address Mr. Mwanza confirmed that the receivers had already moved in and taken over the control of the applicant company. His main complaint was that when the receivers moved in they were aware that this application had been certified urgent and for that reason, Mr. Mwanza contended that their moving in and taking control of the applicant company was intended to defeat the course of justice. Mr. Mwanza further submitted that the consent entered into and adapted by the superior court was fraudulently secured and hence the intended appeal was not frivolous.

In his further submissions, Mr. Mwanza argued that the applicant has suffered and continues to suffer as the suit premises is a commercial building in Eastleigh where 98% of the tenants were of Somali origin. He contended that if the receivers continued in the control of the operations and the intended appeal succeeds the property will have been reduced to a shell.

In response to the foregoing, Mr. Imende pointed out that the receivers had already taken possession pursuant to a consent order. He further pointed out that the amount outstanding could be **Shs. 500 million** and hence there was no arguable appeal. He therefore asked us to dismiss this application.

On his part, Mr. Kimondo associated himself with the submissions of Mr. Imende but adding that the prayers sought have been overtaken by events. He too, urged us to dismiss this application.

We have given a brief background to what has led to this application. In an application under **rule 5(2)(b)** of this Court’s Rules, an applicant is required to satisfy the Court that the intended appeal or appeal is arguable and that unless the order sought is granted, the appeal if ultimately successful would be rendered nugatory. From what has been urged before us, it would appear that the main issue to be argued in the appeal would be whether the consent was fraudulently secured. That, in our view, constitutes an arguable issue. We have been told that the dispute is in respect of a commercial building within Eastleigh in Nairobi and that the appellant defaulted in repayment of a loan, which had been secured by the said building. We have already stated elsewhere in this ruling that the consent of the parties was adopted as an order of the superior court on 24th November, 2009. The receivers did not however move in immediately as the applicant managed to get some temporary orders on 17th December, 2009 from the superior court. But those temporary orders were set aside by Kimaru, J. in his ruling of 22nd January, 2010. From that date, the receivers were free and entitled to move in pursuant to the consent order of the superior court.

Mr. Mwanza sought to rely on the decision of this Court in **HAIRCARE BEAUTICIANS LTD. V. STANDARD PROPERTIES LTD & CAPITAL TRUSTEES LTD.** – Civil Application NO. NAI. 179 of 1998 (unreported) in which this Court stated:-

“This application was to the knowledge of the respondent as Mr. Balala rightly concedes and the applicant was evicted as the respondent stole a march over the process of the Court by evicting her before this application was heard. This Court will not sit back and encourage conduct unlawful of

wrongful as passport to favor.”

With due respect to Mr. Mwanza, the circumstances in this application are different from those in the cited authority. In the present application, the temporary orders granted on 17th December, 2009 were set aside by the ruling of Kimaru, J. on 22nd January, 2010. From that date the receivers were, of course, perfectly entitled to move in pursuant to the superior court’s consent order of 24th November, 2009. This application was filed on 9th February, 2010 and certified as urgent by a single judge of this Court on 15th February, 2010.

Hence from the foregoing it is clear that by the time the application was filed there was no order restraining the receivers from moving in. It therefore follows that by the time the application came up for hearing before us on 17th March, 2010, the court could not issue an injunction against what had already taken place.

In **MADHUPAPER INTERNATIONAL LIMITED VS. KERR** [1985] KLR 840 at p. 851 this Court said:-

“These receivers and managers were appointed not by the court or under the provisions of a statute under the debenture which are agreements between the parties interested in the property over which their appointment was made. They are not officers of the court.

So for the purposes of this application for a temporary injunction the Company has failed to persuade us that on the balance of probabilities we should exercise our discretion in its favour and extend the ex parte one we granted, even its modified form, any further.

It has not shown that its undertaking in damages is acceptable in view of its creditors and its own financial straits. It was probably in breach of two covenants in the debenture. An unsatisfied judgment against it exposes it to execution or winding up proceedings which falls foul of another one (clause 11 (a)). It did not have the money ready to be paid. See Cripps & Sons v. Wickenden, [1973] 1 WLR 944. The Thika extension is not more than a distant prospect at the moment and may for various reasons be a mirage.

This is one of the cases, in our judgment, where it would be wrong to grant an injunction pending the appeal. It would probably inflict greater hardship than it would avoid.”

Having considered all that has been urged before us for and against this application, we have come to a firm conclusion that the application (*even assuming that it had merit*) was filed too late for this Court to grant the reliefs sought. We have no alternative but to order that the application be and is hereby dismissed with costs to the respondent.

Dated and DELIVERED at NAIROBI this 30th day of April, 2010.

P.K. TUNOI

.....

JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR