REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 309 of 2003

KISSI PETROLEUM PRODUCTS LTD ……...……. APPLICANT

AND

KOBIL PETROLEUM ..…… RESPONDENT

(Application for extension of time to file and serve a notice of appeal and record of appeal from the judgment and decree of the High Court of Kenya at Milimani Commercial Court Nairobi (Ringera J) dated 4th February, 2003

in

H.C.C.C. NO. 1238 OF 2002)

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JUDGMENT OF THE COURT

This is a reference to full Court under ***Rule 54*** of the Rules of this Court against the decision of a single judge dismissing the application for extension of time for filing and serving a notice of appeal and a record of appeal.

The respondent Kobil Petroleum Limited (Kobil) sued the applicant (Kissi Petroleum Products Limited) to recover Shs.154,148,401/25 being the balance of price of petroleum products sold and delivered to the applicant. The applicant filed a defence and counter-claim denying indebtedness and counter-claiming, *inter alia*, for Shs.60,000,000/= being the deposit held, Shs.3,761,885/70 being discounts and accounts. Thereafter the Kobil applied for summary judgment and on 24th February, 2003 the superior court allowed the application for summary judgment and entered summary judgment as prayed. In allowing the application, the superior court (Ringera J, as he then was), said in part:

"***I only need to re-emphasize that the mere pleading of a counter-claim will not entitle a defendant to leave to defend to the extent of the counter-claim. There must be a claim by way of a counter-claim which is capable of raising bona fide triable issues for the defendant to be allowed to defend to the extent of such counter-claim. The present one is not such counter-claim".***

The applicant being aggrieved by that decision filed *Civil Appeal No. 56 of 2003* in this Court which was however struck out on 6th November, 2003 on the application by Kobil for the reason that the decree was defective. On 13th November, 2003 the applicant filed the present application under ***Rule 4*** of the Rules of this Court for extension of time within which to file and serve a fresh Notice of Appeal and the record of appeal. The application was however, dismissed by the single judge on 2nd April, 2004, hence

the reference.

The learned single judge was satisfied that there was no delay in filing the application. There was some delay in serving the application which the learned judge found excusable. The learned single judge however dismissed the application solely on the ground that the applicant had no power to institute the application as a debenture holder had appointed a Receiver Manager of the applicant.

Mr. Akber Abdullah Kassam Esmail, learned counsel for Kobil deposed in paragraphs 8, 9, 10 of the replying affidavit to the application for extension of time thus:

"***8. I annex hereto and marked "A" a copy my supplementary Affidavit which was filed on behalf of the respondent in support of the said application to strike out the appeal. I reiterate the contents of the said affidavit.***

9. Like in the said Appeal the Directors of the Applicant do not have any power to institute this application. Such Director became functus officio on appointment of the Receiver and Manager of the Applicant.

10. On about 3rd April, 2003, the applicant was compulsorily wound up in winding up cause No. 35 of 2002 on the ground that it was insolvent. However, on the application of the applicant this Court has stayed the winding up order".

By paragraph 13 of the supplementary affidavit referred to and annexed to the replying affidavit, Mr. Esmail had annexed a Debenture dated 26th April, 2000 by which the applicant secured monies advanced to it by Fidelity Commercial Bank Limited. Mr. Esmail also annexed a document dated 20th February, 2003 by which Fidelity Commercial Bank Ltd as debenture holder appointed M/s. Ismail Menji of Manji Senmik & Co. as manager of the applicant.

In reply David Otieno, advocate for the applicant deposed in paragraph 10 of the further affidavit:

"***I know of my own knowledge that the directors of the appellants right to pursue this appeal was not and cannot be taken away by the appointment of a receiver manager over the applicants assets".***

The learned single judge in reaching his conclusion, relied on paragraph 1159 of Halsbury's Laws of England (4th edition) thus:

"***The appointment of a receiver is one of the events which cause a floating charge to crystallize. As regards all the property comprised in the security over which the receiver is appointed, the director's powers are of necessity paralysed.***

The powers exercisable by the receiver on the other hand depend entirely upon the combination of the precise terms of the debenture and his appointment as supplemented in the case of administration receiver by statutory powers if not inconsistent with the terms of the debenture".

Mr. Oraro, learned counsel for the applicant contended that the learned single judge erred in principle when he found that the applicant had no power to bring the application. He referred to the second paragraph on page 369 of **KERR** on the Law and Practice as to **RECEIVERS AND ADMINISTRATORS** (17th Edition) to show the relationship of a receiver and a board of directors of a company. That passage states in part:

"***Although as regards the outside word the receiver is the sole person in charge of the company's operations, nevertheless, the corporate structure of the company still subsists. The directors are not thereby relieved of the normal statutory duties although the discharge of those duties may well be rendered extremely difficult or even impossible without the co-operation of the receiver ……***

However, the directors are entitled to use the name of the company for the purposes of litigating the validity of the security under which the appointment has taken place, and presumably also for bringing the kind of actions for damages for gross negligence which, in an ordinary mortgage situation could be brought by the mortgagor against a receiver".

Mr. Oraro also heavily relied on the holding in ***Newhart Development Ltd v. Co-operative Commercial Bank Ltd*** [1978] 2 All ER 896, that, a provision in a debenture empowering the receivers to bring an action in the name of the company whose assets were charged was merely an enabling provision investing the receiver with the capacity to bring such an action, and did not divest the company's directors of their power to institute proceedings on behalf of the company provided that the proceedings did not interfere with the receiver's function of getting in the company's assets or prejudicially affect the debenture holder by imperilling the assets.

Mr. Esmail, on the other hand, contended that the debenture given by the applicant to the bank was an all assets debenture charging everything to the bank; that the debenture gives powers to the receiver and the applicant cannot bring an action without the consent of receivers; that continuation with the counter-claim is going to threaten the interest of the debenture holders and commit the company to the costs of legal advisers; and that the company (applicant) has in any case been liquidated.

The principles on which the full court can interfere with the exercise of discretion by a single judge are well known – see ***Mbogo v Shah*** [1968] EA 93 and ***Samken Limited & Another v Mercedes Sanchez Rau Tussel & Another***, *Civil Application No. Nai. 21 of 1999* (unreported). The burden of showing that the single judge exercised his discretion wrongly is on the applicant. As this Court said in ***Samken Ltd*** (supra):

"***A single judge, in exercising his powers under Rule 4 is doing so on behalf of the court and full bench, must, of necessity, be very slow in interfering with the exercise of his discretion unless it is to show that the judge has committed any of the errors we have already set out".***

In this case, it is contended that the learned single judge erred in principle when he ruled that the applicant had no power to institute the application. Quoting again from ***Samkem Limited*** (supra):

"***Where on the material placed before the court the court is called upon to exercise its discretion, it is possible for the decision to go on either side and the judge chooses to go on one side it is then not open to a tribunal reviewing the exercise of that discretion to upset the judge simply because it (tribunal) could have gone the other side".***

We have considered the proceedings of 16th March, 2004 when the application for extension of time was heard by the learned single judge. We regret to say that both counsel did not address the judge fully on the legal issue of the capacity of the directors of the applicant to file the application or the appeal. Indeed, the authorities now cited were not availed to the single judge nor was the learned single judge appraised of the provision of the debenture and the special circumstances of the case. The result is that the learned single judge made a broad statement of the law which, in our view, is not necessarily erroneous.

It seems to us that the question whether it is the directors of a company or the receivers appointed under the debenture who have the capacity or legal right to institute proceedings will ultimately and invariably depend on the nature of the intended proceedings and the peculiar circumstances of each case. That is why we have said that the statement of the law made by the single judge is not necessarily wrong. It is worthy of note that Mr. Esmail intended to bring to the attention of the court and address the court on the decision in ***Tudor Grange Holdings Ltd v Citi Bank N.A.*** [1991] 4 ALL ER 1 after the conclusion of the hearing of the reference to which decision he claimed doubted the decision of ***Newhart Developments Ltd*** (supra), a decision heavily relied on by Mr. Oraro. Mr. Esmail was not however allowed to address the court on that decision on procedural grounds. It follows that until all the circumstances of this case are closely examined one cannot say that the directors of the applicant company had the absolute legal right to file the application or the appeal. Thus the decision of the single judge that the applicant had no

capacity has not been shown to be wrong.

Secondly and more importantly, the occasion for deciding whether it is the directors or the receivers of the applicant company who have the right to institute the proceedings has not arisen because Fidelity Commercial Bank (debenture holder) is not a party to these proceedings and a dispute between the applicant and the debenture holder as to which of the two has the right to institute the proceedings has not arisen. Mr. Esmail who has raised the issue is not acting for the debenture holder. Indeed, it would be highly prejudicial to the debenture holder to pronounce the rights of the parties under the debenture when one party – the debenture holder is not a party to these proceedings and when such party has not been heard. We refrain from indulging in an academic exercise.

Lastly, Mr. Esmail disclosed in his replying affidavit that on 3rd April, 2003 the applicant was compulsorily wound up in *Winding Up Cause No. 35 of 2002* but that the winding up order has been stayed. Mr. Oraro contended that the issue of liquidation was not before the learned single judge. He however, concedes that a winding-up order was infact made and that this Court subsequently stayed the winding up order. By ***Section 228*** of the Companies Act:

"***When a winding up order has been made or an interim liquidator has been appointed, under Section 235 no action or proceedings shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose".***

Mr. Esmail has relied on the ruling of Njagi J in the superior court given on 2nd March, 2004 in the execution proceedings between the same parties for the interpretation of the order staying the winding up order where the learned judge said in part:

"***The winding up order may have been stayed but such a stay is not akin to nullifying, setting aside discharging or vacating the order. The order is still alive but only stayed. In the circumstances, I do not think that a stay would justify non-compliance with Section 228".***

That interpretation is not of course binding on us but with respect, Njagi J has, in our view, correctly construed section 228 vis-à-vis the order of stay of the winding up order. The winding up order has already been made by the winding up court. It is not however operational because this Court has stayed its rigours. Such an order of stay cannot, however, whittle down the provisions of the ***section 228.*** Until the winding up order is set aside, leave of the court is still required for the continuation of the proceedings by the company. Leave to institute the appeal has not been obtained. The applicant is seeking a discretionary order. In dealing with the application, the court cannot ignore the provisions of ***section 228*** as any appeal without leave of the court would be incompetent.

For those reasons, we find that the reference has no merit. It is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 5th day of May, 2006.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR