



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: SHAH, BOSIRE & OWUOR, J.J.A

CIVIL APPLICATION NO. NAI. 1 OF 2003

BETWEEN

ANSPAR BEVERAGES LIMITED.....APPLICANT

AND

DEVELOPMENT BANK OF KENYA LIMITED.....1ST RESPONDENT

EAST AFRICAN DEVELOPMENT BANK.....2ND RESPONDENT

INTERNATIONAL FINANCE CORPORATION.....3RD RESPONDENT

ABN AMRO BANK N.V.....4TH RESPONDENT

GRAHAM SILCOCK.....5TH RESPONDENT

ADRIAN DEARING.....6TH RESPONDENT

(An application for injunction under Rule 5(2)(b) of the Court of Appeal Rules pending the filing hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Nairobi (Ringera, J) dated 20th

December, 2002

in

H.C.C.C. NO. 1155 OF 2002)

RULING OF THE COURT

On 30th October, 2002 the applicant now before us, namely ***ANSPAR BEVERAGES LIMITED*** , filed a

suit in the superior court against six defendants who are all respondents here. These are, (1) **DEVELOPMENT BANK OF KENYA LIMITED (DBK)**, (2) **E AST AFRICAN DEVELOPMENT BANK (EADB)**, (3) **INTERNATIONAL FINANCE CORPORATION (IFC)**, (4) **ABN AMRO N.V. (ABN)**, (5) **GRAHAM SILCOCK** and (6) **ADRIAN DEARING**. The suit was filed primarily to restrain the respondents from selling, disposing of, offering for sale or alienating in any manner whatsoever any of the applicant's properties, that is, land, machinery equipment, assets or stock or any portion thereof including without limitation the applicant's property known as Land Reference Number 18593, and for declarations to the effect that the contracts and agreements made between the applicant and **DBK, EADB, IFC** and **ABN** had been frustrated and that therefore the applicant was discharged from its obligations thereunder and under the **DBK/EADB** debenture, the **IFC** Charge, the **ABN** debenture and the **ABN** charge. The said debentures and charges arose out of loans or other financial advances made or to be made by the said four financial institutions to the applicant to enable the applicant to put into operation the plant to bottle and sell Schweppes and Canada Dry soft beverages. For the purposes of this ruling it is not necessary for us to go into facts in detail as will become clearer hereafter in this ruling.

At the time the suit was filed the applicant lodged an application by way of a chamber summons brought under Order XXXIX rules 1,2,3 and 9 of the Civil Procedure Rules. Inherent jurisdiction of the court was also invoked. By that application the applicant sought orders to restrain the 5th and 6th respondents, who were appointed receivers and managers under the aforesaid debentures (Receivers/Managers), from interfering with and from selling, disposing of, offering for sale, leasing, giving possession to third parties or alienating in any manner the applicant's land, properties, machinery, equipment and assets etc. By the said application the applicant also sought ejection of the Receivers/Managers from the applicant's premises.

Before the commencement of the hearing of the applicant's said chamber summons the first and second respondent's counsel took a preliminary objection to the propriety of the suit itself on three grounds. We are not concerned with the second and third grounds as the superior court (Ringera, J) did not allow striking out of the suit on those grounds. The ground upon which the preliminary objection succeeded and hence leading up to the order for striking out of the suit was formulated as under:

“The suit herein has been brought without the authority of the company and no organ of the company has met or at all to confer authority on Mr. Arvind Tanna to sue in the name of the company notwithstanding the receivership.”

The applicant was obviously aggrieved by the order for striking out of the suit and has lodged, timeously, its notice of appeal intending to challenge the striking out order.

The learned judge appreciated that where the validity of the appointment of receivers/managers was directly in question the right of the company to bring an action in its own name to challenge the receivership was not disputable. This he did on the authority of cases like ***Hastings Irrigation (K) Ltd vs. Standard Chartered Bank & 2 others*** (1982-88) I KAR 1189 and ***Manchester outfitters & another vs. Standard Chartered Financial Services*** (Civil Appeal No. 88 of 2000) (unreported). He said:

“However there is sufficient basis in them (the authorities) for deductive reasoning to the effect that a company in receivership could sue to challenge the said receivership without the permission or consent of the receiver .”

The learned judge then went on to say:

“To the extent that the preliminary point of objection was predicated on the fact that the receiver/manager's permission had not been sought by Mr. Arvind Tanna before instituting suit, the same is misconceived. However, the point was also taken that no organ of the company had given Mr. Tanna the right to institute the suit. This point is a perfectly valid one in law. A company cannot institute suit in its own name unless such action has been sanctioned by either the board of Directors or the company in general or special meeting. Such sanction is to be evidenced by a resolution to that effect. In the instant matter, like I said earlier during the

consideration of this point of objection, there is no travers e of the pleading that the suit was instituted without the authority of the company itself .”

This last referred to holding by the learned judge raise, in our view, arguable points. What is pleaded in defence need not be traversed in a reply to defence as the defence puts the matters raised in it in issue. Order VI rule 10(1) of the Civil Procedure Rules says so. It says:

“10(1) If there is no reply to defence, there is joinder of issue on that defence”.

The defence filed by first and second respondents reads as follows:

“22. the first and 2 nd Defendants will raise a preliminary point of law at the hearing of this suit that Mr. Arvind Tanna has brought this suit without the authority of the plaintiff company or the receivers and managers and that the same should be struck out and Mr. Tanna condemned to pay the costs of this suit personally.”

The reply lodged to these two defendants’ joint defence appears to us to have joined issue with the whole defence. That being our view of the matter we think that the applicant has an arguable appeal. Besides there are also affidavits of Mr. Tanna which say that he was authorized by the company to file the suit. His affidavit in support of the plaint, his affidavit in support of the application as well his “supplementary affidavit” all say that he was “duly authorized, able and competent to swear this affidavit on behalf of the plaintiff”. The learned trial Judge was obliged to presume that to be correct as what was raised before him was a preliminary point of law. The position in law is clear that for a preliminary point of law to succeed the facts as stated by the other side ought to be presumed to be correct. See *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Limited [1969] EA 696* . A preliminary objection in law is argued on the assumption that all the facts pleaded by the other side are correct, (per Newbold JA at page 701).

We need not go further into any other arguable point or points the applicant may have shown. The only matter we are left with is the issue whether or not success in the intended appeal would be rendered nugatory if the application before us is not granted. A specific question to this effect was put by us to Mr. Kamunyori for the first and second respondents. He did concede that if the stay sought was not granted and if the plant, machinery and land belonging to the company were sold to a third party or third parties there would be nothing left for the applicant to fight for in the intended appeal especially as regards recovery of its assets. Mr. Akiwumi who appeared for the 5th and 6th respondents also conceded this point although with some reluctance.

Miss Malik for the third respondent asked us not to grant the injunction sought as there was no suit in existence, the plaint having been struck out. It is our view that she misunderstood the situation. In its intended appeal the applicant intends to move the Court to resurrect the plaint; and if the appeal succeeds the plaint may be put back in its place. If that happens the applicant would be entitled to argue its chamber summons application on merits. We cannot go into the suggestion made by counsel to the effect that the plaint and the application are both eventually bound to fail. As the injunction application is still pending we cannot start our own evaluation of the merits or demerits of the application before the superior court. It will be premature to do so.

We can only, at this stage, protect the interests of the applicant to enable it to argue its intended appeal and this we can do only by granting the prayers sought. We allow the second prayer of the application, the first prayer being spent. The costs of this application will be costs in the intended appeal.

Dated and delivered at Nairobi th is 14th day of February, 2003.

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR