



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO: 272 OF 2013

MANUEL ANIDOS.....CLAIMANT

-VERSUS-

KINANGOP WINDPARK LIMITED

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

MUNIU THOITHI (SUED AS THE RECEIVER

OF KINANGOP WINDPARK LIMITED).....2ND RESPONDENT

KURIA MUNIA (SUED AS THE RECEIVER

OF KINANGOP WINDPARK LIMITED).....3RD RESPONDENT

RULING

Introduction

1. The Claimant filed his Statement of Claim on 3rd March 2015 against Kinangop Wind Park Limited, the 1st Respondent, alleging that he was wrongfully dismissal from employment. On 15th November 2016 the Claimant filed a Notice of Motion seeking leave to amend the Statement of Claim to enjoin Muniu Thoithi and Kuria Muchiru of Price Water House Coopers as the 2nd and 3rd Respondents respectively by virtue of being receivers and managers of the 1st Respondent. The Application was not opposed and when it came up for hearing on 15th May 2017, Justice Nderi Nduma allowed it as prayed. Consequently, the Claimant filed an Amended Statement of Claim enjoining the 2nd and 3rd Respondents herein.

2. Thereafter, the 2nd and 3rd Respondents (applicants) filed the present Notice of Motion on 4th March 2019, under Order 1 Rule 10 (2), Order 2 Rule 15 (1) (a) (b) and (d) of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act, seeking the following orders:

- a) This application be certified urgent and service thereof be dispensed with in the first instance.
- b) This application be heard on priority basis.
- c) The 2nd and 3rd Respondents name be struck out from the suit and the claim against the 2nd and 3rd Respondents be discontinued unconditionally.
- d) Costs of this Application be awarded to the Applicants.

3. The Application is supported by the Affidavit of Paul Wafula, the Respondent's Counsel, and is premised on the following grounds:

- a) The Claimant has filed suit *inter alia* against the 2nd and 3rd Respondents, Receivers of the 1st Respondent.
- b) The 2nd and 3rd Respondents as Receivers of the 1st Respondent are agents of a known principal and do not incur or assume any personal liability for employment contracts (**Martin John Whitehead & another v Industrial Court & another [2016] eKLR**).
- c) The Claimant's claim discloses no cause of action and cannot sustain any reasonable cause of action against the 2nd and 3rd Respondents.
- d) The Claimant's claim offends the principle of law that where a principal is known, an agent shall not be sued.
- e) The presence of the 2nd and 3rd Respondents in this suit is superfluous, unnecessary, will embarrass and otherwise delay the first resolution of the dispute herein.
- f) This suit was fixed for hearing *ex parte* by the Claimant on 27th March 2019 and I is therefore essential for the present application be determined prior to the hearing of this matter.

4. In response to the application, the Claimant filed a Replying Affidavit on 14th March 2019 sworn by James Nyiha, the Claimant's Counsel. He states that in a letter dated 4th May 2016, the firm of Njonjo Okello and Associates , the then advocates for the Respondents, informed them that the 1st Respondent was under receivership. That they did their due diligence and confirmed that indeed the 2nd and 3rd Respondents were the receivers appointed to manage the affairs of the 1st Respondent.

5. He further states that they filed an application on 15th November 2016 which sought to enjoin the 2nd and 3rd Respondents in the suit as receivers of the 1st Respondent and was served on the then Respondent's counsel on record on 21st November 2016 but it was not opposed and the court allowed it on. That thereafter the parties appeared in court on 13th June 2018 for pre-trial directions when the firm of Walker Kontos entered appearance on behalf of the 2nd and 3rd Respondents.

6. He avers that the application has been brought in bad taste and after inordinate delay with the aim of delaying this matter to the detriment of the Claimant. He further avers that receiver managers of a company under receivership are appointed to manage the affairs of the company, including any payments ordered by the Employment and Labour Relations Court.

Applicants' Submissions

7. The applicants submitted that the claim discloses no cause of action against the 2nd and 3rd Respondents. According to them this is apparent since in the entire Memorandum of Claim save for their description, the Claimant does not impute any breach of the Claimant's legal right by them to call for rebuttal from them.

8. They further submitted that the breach of the Claimant's legal rights was not actionable since as receivers of the 1st Respondent, they are agents of the 1st Respondent. They cited **Kerr and Hunter on Receivers and Administrators (18th Edition London: Sweet and Maxwell) (2005) paragraph 2-07** where they state:

“Although the receiver is technically the principal, yet of course he is not acting on his own behalf. He is still acting as receiver of the company, and his possession and control is throughout for the benefit of the debenture holders and the company to the extent of their respective interests in the assets he holds.”

9. They also relied on **City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another [2016]eKLR** where the Court of Appeal held:

“In the circumstances of this case, the 2nd respondent cannot be sued as agent where there is a disclosed principal [the appellant]. There is therefore no cause of action against the 2nd respondent. The principle of common law is that where the principal is disclosed, the agent is not to be sued. In the circumstances of this case, the principal (the appellant) is disclosed and the agent (the 2nd respondent) cannot therefore be sued. There are no factors vitiating the liability of the disclosed principal.”

10. They further submitted that it is erroneous for the Claimant to allege that they have an obligation to settle any decretal amount awarded to the Claimant against the Respondents jointly and severally in a desperate attempt to justify their joinder Respondents. The Respondent relied on the case of **Martin John Whitehead & another v Industrial Court & another [2016] eKLR** where the Court held:

“In our view, the excess of jurisdiction in the circumstances of this matter related only to the order that the receivers bore personal liability to settle the award as per the collective bargaining agreement that was entered into with the company. Secondly, by the court failing to hear the receivers on the issue of whether they could bear personal liability which issue was not part of the claim, the court acted in excess of its jurisdiction by considering extraneous matters. This was a dispute against The House of Manji, a company under receivership, and the receivers were acting as agents, thus any award is supposed to be settled by the company or by the receivers on behalf of the company from the assets of the company. Personal liability can only be ordered if the receivers are found culpable of fraud or negligence in the discharge of their duties or for particular contracts that they entered into.”

11. They further submitted that it is not necessary for them to await the full trial to determine their necessity in the suit. They relied on **Diamond Trust Bank Kenya Limited v Richard Mwangi Kamotho & 2 Others [2017]eKLR**. They concluded by arguing that the Court is empowered to grant the orders sought under Order 1 Rule 10 (2) of the Civil Procedure Rules.

Claimant’s submissions

12. The Claimant submitted that the applicants were enjoined in the suit in their capacity as receivers of the first Respondent and not in their personal capacity. They urged the Court to be guided by section 68 of the Employment Act and in particular part (d) which provides that the debts which ought to be paid by the receiver include any basic award of compensation for unfair dismissal from employment. He relied on the case of **Joseph Mburu Kahiga & another v Kenatca Taxis Limited & another [2013]eKLR** where the Court held:

“...Further to the above assessment of the petition, the respondents are sued as under receivership and the rights that ensue in such a situation and the procedure applicable, and in this case the general principle applicable where a company has been placed under receivership even in the case of a corporation like the 1st respondent it lacks the legal competence to institute suit or be sued in its own name and can only sue or be sued through the receiver or manager as that is the person/body in law that has taken over the affairs of that entity under receivership.”

13. He further submitted that the applicants have brought the application in bad taste and after inordinate delay with the aim of delaying trial. That the fact that the applicants learnt that they had been enjoined in the suit one and a half year ago and only chose to bring the present application 21 days to the hearing of the main suit.

Analysis and determination

14. After careful consideration of the pleadings, application, affidavits and submissions filed by both parties, the only issue for determination is whether the applicants are wrongfully enjoined as respondents to the suit and they should therefore be removed from the proceedings.

15. The applicants have argued that the present suit is misplaced as against them because they are agents

of the 1st Respondent, a disclosed principal and they have no obligation to settle any decretal amounts awarded to the Claimant. The Claimant, however argues that the applicants were enjoined in the suit in their capacity as receivers of the 1st Respondent and should the Court find that the Claimant was unlawfully terminated the applicants will have to pay the Claimant.

16. The Public Notice in the Sunday Nation dated 1st May 2016 annexed to the Replying Affidavit sworn by James Nyiha indicates that Muniu Thoithi and Kuria Muchiru the applicants herein were appointed as receivers of the 1st Respondent on 22nd April 2016. Further, that the receivers and managers were appointed by Deloitte Limited (the Security Trustee) on the basis of a Debenture dated 8th October 2013. The notice further indicated that the receivers were acting as agents of the Company and would accept no personal liability.

17. The Blacks Law Dictionary , 8th Edition at Page 1296 defines a receiver as:

“A disinterested person appointed by a Court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims.”

18. The foregoing definition explains a receiver’s lack of interest in his appointment and for the specific roles he is appointed to discharge. As rightly stated by the applicants a receiver acts as an agent of a principal. Pursuant to the principal –agent relationship, an agent is not liable for its principal’s actions except in specific instances where the agent enters into personal contracts with a party, or commits acts of negligence or fraud.

19. The relationship between the Claimant and the 1st Respondent is pursuant to an Employment, Agreement dated 27th November 2013. The applicants were only enjoined to the proceedings after the institution of the suit when the 1st Respondent was placed under receivership. The applicants were therefore never party to the employment contract between the parties. Their mandate as stated in the Public Notice and as required by law is for the supervision and control of its affairs in addition to conducting the 1st Respondent’s business by entering into subsequent contracts on behalf of the 1st Respondent.

20. The foregoing position is elucidated in **Charlesworth and Cain Company Law, 12th Edition by Geoffrey Morse at page 599** as follows:

“A receiver is deemed to be the agent of the company in relation to the property attached by the floating charge...Contracts entered into by or on behalf of the company before the receiver’s appointment continue in force, subject to the terms of the contract, after the appointment, but the receiver does not merely by his appointment incur personal liability on such contracts”

21. In **Surya Holdings Limited & 2 others v Cfc Stanbic Bank Limited [2015] eKLR** Gikonyo J held that:

“Receiver and Manager is an agent of the Company, but stand in a fiduciary relationship with and owes duties to both parties... The court was faced with almost similar question in the case of Kaplana Shashikant Jai and another vs. Eco Bank Ltd and another [2015] KLR and it rendered itself in extenso as follows:-Appointment of receiver outside court

A profitable discussion in this case should be one which first establishes the effect of appointment of receiver manager by the Bank. The effect of the appointment of receiver manager by the Bank crystalizes the floating charge created in a debenture over the assets of the Company into a fixed charge. The receiver is the agent of the company and the powers of the company are just delegated to the receiver so far as regards carrying on business or collecting the assets of the company... See also Halsbury’s Laws of England, Volume 39, Fourth Edition, at paragraph 938, on Receivers and Managers’ duty as agent of the company to account to the company and all parties interested including guarantors and that failure to so account may elicit an order being made directly to the Receivers and Managers...See also Medforth v Blake, [1999]

3 All ER 97 (supra) and Smiths Ltd vs. Middleton where it was held that a receiver and manager runs the company as its agent and so is answerable to the company for the conduct of its affairs as well as to keep or cause to be kept full accounts (i.e. fuller than the abstracts of receipts and payments required under s. 372(2) of the 1948 Act) and to produce those accounts to the company.”

22. Consequently, as stated in the Public Notice the applicants are agents of the 1st Respondent and pursuant to the principles in principal –agent relationship there would be no cause of action against the applicants to warrant their joinder in the suit. I follow **Martin John Whitehead & another v Industrial Court & another [2016] eKLR** where the Court of Appeal held that:

“There was no interrogation of issues of whether the appellants were negligent in the performance of their mandate or misappropriated the assets of the company for their own benefits. Unless those issues were interrogated and answered in the affirmative by the court, then the court could not order the receivers to bear personal liability to discharge contracts emanating from the collective bargaining agreement that was entered into with the company. The appointing instrument and the provisions of the Company’s Act are clear the receiver managers can only be held personally liable for the contracts they entered into.”

23. The Claimant argued that the Court should be guided under section 68 of the Employment Act. I however find that provision to be irrelevant herein. Section 68 (d) of the Employment Act provides that a debt in respect of the insolvency of the employer includes any basic award of compensation for unfair dismissal. In **Michael Oyugi & 181 others v Industrial Plant (EA) Limited (in receivership) & another [2006] eKLR** Justice J. B. Ojwang, as he then was, held:

“...it is clear that the receivers in this case, once appointed, had their primary responsibility to the secured creditors. The order of responsibility could not be reversed to obligate the receivers to preoccupy themselves with the interests, or indeed even the legal rights, of the plaintiffs. It is, I would add, not as though such legal rights were immaterial; but only that they were to take a secondary level of priority, and stood to be satisfied only after the secured claims had been met. I have to hold, therefore, that the 2nd defendant had no legal liabilities towards the plaintiffs, and ought not to have been enjoined in the instant suit.”

24. On the issue of service of the Application filed to enjoin the applicants filed on 15th November 2016, the Claimant in his Replying Affidavit states that the Application was served upon the firm of Njonjo, Okello & Associates who never opposed the application and it was allowed as prayed. This Application was only served upon the 1st Respondent and not the applicants as stated in the Affidavit of Service sworn by the process server Samuel Kinyua Ndege. Consequently, the applicants were not in a position to respond to the Application by virtue of the fact that they were not yet parties.

25. Having considered all the materials presented to the court including the authorities cited in the form of judicial precedents and books by legal scholars, I am convinced beyond peradventure that the applicants here are agents of the 1st respondent and they are wrongfully sued because their principal is known and the claim herein does fall within the general principle that an agent of a disclosed principal cannot be sued. They should therefore not be forced to remain in the proceedings before any more.

Conclusion and disposition

26. I have found that the applicants are wrongfully enjoined as respondents with their principle for no good cause and I therefore allow the Notice of Motion dated 4.3.2019 by striking them from the suit. Each party shall bear his or her own cost.

Dated, Signed and Delivered in Open Court at Nairobi this 25th day of March 2019

ONESMUS N. MAKAU

JUDGE