



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT  
AT MOMBASA  
CAUSE NUMBER 541 OF 2015  
[Consolidated with Cause Numbers 16, 17, 18 and 19, all of 2015]

**BETWEEN**

1. ROSEPHINE MUMBE MUNYOKI
2. MULWA SISI KWOKI
3. NANJAL ELIZABETH
4. DANSON IMBADU
5. RICHARD ONTONYI ONSERIO ..... CLAIMANTS

**VERSUS**

1. BLUE EDGE HOTELS LIMITED  
[MANAGING SONI HOTELS & APARTMENTS]
2. KENYA COMMERCIAL BANK LIMITED.....RESPONDENTS

*Rika J*

*Court Assistant: Benjamin Kombe*

*Mr. Nyamboye Advocate, instructed by Mburu Nyamboye & Company Advocates for the Claimants*

*Ms. Okumu Advocate, instructed by G.A. Okumu & Company Advocates for the 1<sup>st</sup> Respondent*

*Ms. Onyango Advocate, instructed by Munyao, Muthama & Kashindi Advocates for the 2<sup>nd</sup> Respondent*

---

**RULING**

1. The Claimants initiated separate Claims against the Respondents as shown in the title above. These Claims were consolidated with the consent of the Parties, on the 23<sup>rd</sup> September 2015, with Cause Number 541 of 2015 serving as the reference file.
2. The Claimants state they were and are still Employees of the Respondent. It is not clear from their Claims which Respondent they refer to. Remedies in the form of terminal dues and compensation for unfair termination are nonetheless sought against the Respondents, jointly and severally. It is again not clear at this stage, how terminal dues and compensation have accrued, if as pleaded, the Claimants are still Employees of the unspecified Respondent.
3. Greater details on the background to the dispute are contained in the Application dated 16<sup>th</sup> June 2015, filed by the Respondents. At the time of filing the Application, the Respondents were represented by the same Law Firm, and the Application therefore drawn in the name of the two Respondents. The Law Firm then representing both Respondents applied to cease acting for the 1<sup>st</sup> Respondent. That Application was not opposed and the Court allowed the Law Firm to cease acting for the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent retained the Law Firm of G.A. Okumu, and although the 1<sup>st</sup> Respondent opposes the 2<sup>nd</sup> Respondent's Application, the 2<sup>nd</sup> Respondent did not bother to amend its Application to phase out the 1<sup>st</sup> Respondent as an Applicant. This state of affairs can be explained from the factual background of the dispute mentioned at the outset of this paragraph.
4. The Respondents [read 2<sup>nd</sup> Respondent] filed the Application seeking an order for striking out of the Claim against the 2<sup>nd</sup> Respondent. It is explained in the Supporting Affidavit of the 2<sup>nd</sup> Respondent's Legal Manager, Debra Ajwang' Ogada, sworn on the 31<sup>st</sup> August 2015, that the 2<sup>nd</sup> Respondent is a Bank. It lent money to the 1<sup>st</sup> Respondent Hotel. The debt was secured through a charge against the 1<sup>st</sup> Respondent's property. There was a further security created through debenture. The 1<sup>st</sup> Respondent failed to service its debt, and the 2<sup>nd</sup> Respondent appointed a Receiver Manager upon crystallization of the Debenture. The 1<sup>st</sup> Respondent thereafter satisfied its debt obligation and receivership lifted. The 2<sup>nd</sup> Respondent has never been the owner of the 1<sup>st</sup> Respondent's Business, and has never been an Employer to the Claimants.
5. There is no nexus between the 2<sup>nd</sup> Respondent and the Claimants. There was never an Employer-Employee relationship between the 2<sup>nd</sup> Respondent Bank, and the Employees of the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent is not engaged in hotel business, did not operate the Hotel, and is in banking business. The relationship between the Respondents was governed by a contract, purposed on debt recovery, and not on creating an Employer- Employee relationship with the Claimants.
6. The 2<sup>nd</sup> Respondent submits that it did not owe a duty of care in the appointment of Receiver Manager; its duty was confined to the very least, ensuring Receiver Manager was competent. Relying on the Kenya High Court Case of *Surya Holdings Limited & 2 Others v. CFC Stanbic [2014] e-KLR*, the 2<sup>nd</sup> Respondent submits the Receiver Manager is an Agent of the Debtor Company, not the Debenture Holder. This position was similarly adopted in *Court of Appeal of Kenya in Lochab Brothers v. Kenya Furfural Co Limited & Others [1976-1985] E.A. 257*, and *Industrial Court Case between Joseph Ashioya & 165 Others v. Kenya United Steel Co. Limited [2013] e-KLR*. The 2<sup>nd</sup> Respondent urges the Court to find that the Receiver Manager is an agent of the Company placed under receivership, not of any other Company, and in particular, not an agent of the Debenture Holder such as the 2<sup>nd</sup> Respondent. Employees of the 1<sup>st</sup> Respondent have no cause of action against the 2<sup>nd</sup> Respondent Bank, and their Claim for compensation and terminal dues cannot hold against the 2<sup>nd</sup> Respondent.
7. Lastly the 2<sup>nd</sup> Respondent argues that the Deed of Indemnity between the 2<sup>nd</sup> Respondent and the Receiver Manager states, indemnity shall not render Receiver Manager an agent for any purpose. The Claimants were aware about the appointment of the Receiver Manager. The 1<sup>st</sup> Respondent acknowledges in its Replying Affidavit that there was no Employer- Employer relationship between the Claimants and

the Bank. On the point of preliminary objection filed by the Claimants, which argues that the Claimants worked under the Receiver Manager for 3 years, therefore confirming the presence of an Employer-Employee relationship, the 2<sup>nd</sup> Respondent replies this objection is factual, and offends the principle that preliminary objection must be restricted to pure points of law. The Court should reject the preliminary objection and strike out the Claims. The 2<sup>nd</sup> Respondent would incur unnecessary costs if it continued to respond to the Claim.

### 1<sup>st</sup> Respondent's Submissions

8. The 1<sup>st</sup> Respondent opposes the Application and filed an Affidavit sworn by its Director Mr. Mutegi. Its position is that the legal status of a Receiver Manager is that of an Agent for a disclosed Principal. The Principal is the 2<sup>nd</sup> Respondent. It would be premature to discharge the 2<sup>nd</sup> Respondent from the proceedings. The 2<sup>nd</sup> Respondent appointed the Receiver Manager. The Receiver Manager entered into contract with some of the Employees. The 1<sup>st</sup> Respondent has never seen these contracts. The terms and conditions of employment are unknown to the 1<sup>st</sup> Respondent. The Deed of Indemnity stated the 2<sup>nd</sup> Respondent would indemnify Receiver Manager against all actions. The 2<sup>nd</sup> Respondent's Advocates were acting for both Respondents. The cases cited by the 2<sup>nd</sup> Respondent, such as **Lochab Brothers**, determined that a Receiver Manager cannot be sued in his own name. That is why it is necessary to have the 2<sup>nd</sup> Respondent in the proceedings. The Civil Procedure Rules in any case, state that a Claim is not to be defeated on the grounds of joinder or mis-joinder of a Party. The 2<sup>nd</sup> Respondent suffers no prejudice by participating in the proceedings. The 1<sup>st</sup> Respondent does not oppose the preliminary objection made by the Claimants.

### The Claimants' Submissions

9. The Claimants swore similar Affidavits opposing the Application. They state and submit there is a clear admission in the 2<sup>nd</sup> Respondent's Pleadings that the 2<sup>nd</sup> Respondent appointed the Receiver Manager. The Respondents were dealing with each other. The Claimants were not aware there was appointed a Receiver Manager. They only learnt of this appointment in the newspapers, when the 1<sup>st</sup> Respondent's property was advertised for sale. If the 2<sup>nd</sup> Respondent is removed from the proceedings, it would be impossible for the Claimants to pursue the Claim. The Judicial Authorities relied on by the 2<sup>nd</sup> Respondent support the Claimants' position: they cannot directly bring the Receiver Manager, and have therefore properly brought the Principal. They were not aware of the receivership. Some of them such as Mulwa Kwoko and Rosephine Mumbe were employed by the Receiver Manager. The 2<sup>nd</sup> Respondent cannot run away from its responsibility.

### The Court Finds:-

10. The Claimants state in their Notice of Preliminary Objection that there was an admission by the 2<sup>nd</sup> Respondent that the Claimants worked under the Receiver Manager for 3 years. There was an Employer – Employee relationship during that period. This position is replicated in the Replying Affidavits filed by the Claimants. The Preliminary Objection is similar to the Replying Affidavits and responds to the Application on factual as well as legal grounds. It is an unnecessary addition to the Replying Affidavits and serves no useful purpose. **The Court shall therefore disregard the Notice of Preliminary Objection**, and look into the Substantive Application, and the Response given by the respective Parties.

11. The facts at this stage of the proceedings are largely uncontested. The Claimants were employed at the 1<sup>st</sup> Respondent Hotel in various capacities. The 1<sup>st</sup> Respondent was advanced a financial facility by the 2<sup>nd</sup> Respondent Bank. To secure the financial facility, the 1<sup>st</sup> Respondent charged its property, and later created a Debenture. It was late in repayment of the debt and the 2<sup>nd</sup> Respondent sought to recover its money, by selling the charged property, and by appointing Receiver Manager under the terms of the Debenture.

12. The Receiver Manager was appointed on 13<sup>th</sup> July 2012. There is a Notice of Appointment of the Receiver and a Deed of Indemnity on record, both dated 13<sup>th</sup> July 2012. Mulwa and Rosephine were employed by the Receiver. It is not disputed the Respondents were able to resolve the dispute between them, after the debt was satisfied. The Notice to the Receiver Manager, to cease acting as such, is dated 15<sup>th</sup> February 2015.

13. It is not clear from the Pleadings filed by the Claimants, when their cause of action arose. They state they were and are still Employees of the Respondent. They do not say which Respondent, and do not explain why they seek terminal dues and compensation for unfair termination if they are still in employment.

14. The assumption would be that their contracts were terminated. The Court is not able to tell if termination was during the receivership, or after. With this observation and assumption made, the Court begs to deal with the Application as follows:-

- a. Joining of Persons to a lawsuit, Leaving out Persons, or bringing in the Wrong Persons [joinder, non-joinder, or mis-joinder in legal parlance], is not intended to result in defeat of the substantive justice. This principle is accepted under the Civil Procedure Rules, as well as the Industrial Court [Procedure] Rules 2010 which regulate the procedure of the Employment and Labour Relations Court. The Rules allow the Court wide discretion in calling into the proceedings, Persons who from the Court's view, would be affected by the proceedings. Where a Party has brought another Party into the proceedings, adequate opportunity must be given to the mover of the proceedings, to establish the reasons why it is necessary to bring such a Party to Court. There ought to be no rush in discharging from the proceedings, a Party who appears in one way or the other, useful in determining the substantive issues in dispute. If at the end of the trial it is shown by appropriate evidence that such a Party was improperly brought into the proceedings, there is adequate redress in an order for costs.
- b. The questions raised in the 2<sup>nd</sup> Respondent's Application revolve around the juridical difficulty relating to the role of Receivers. The Receiver is appointed to collect and receive money. In addition, the Receiver may be given the responsibility of running the affairs of the Debtor Company. In this dispute a Receiver Manager was appointed, with a responsibility going beyond mere collection and receipt of money to service the Debt owed by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent. The common law position as enunciated in a catena of Judicial Authorities cited by the Parties is that the Receiver Manager, although appointed by the Debenture Holder, is an Agent of the Debtor Company, not the Debenture Holder. Following this principle, contrary to the views of the Claimants, the Receiver Manager would be an Agent of the 1<sup>st</sup> Respondent Hotel, not the 2<sup>nd</sup> Respondent Bank. The Receiver Manager was appointed by the Bank, a Secured Creditor, to discharge a specific obligation owed to the 2<sup>nd</sup> Respondent by the 1<sup>st</sup> Respondent.
- c. There is an alternative view of the role of Receiver Managers, and their liability in a lawsuit. Receiver Managers have been viewed as being analogous to other Persons who carry business in a fiduciary capacity. As Executors in a fiduciary capacity, they can personally be held liable for contracts entered into by them, in the course of Receiver Management. Under this school of thought, Receiver Managers are not agents of the Debtor Company, as the incidents of a Principal-Agent relationship are absent. The Debtor Company does not appoint the Receiver Manager. The Receiver Manager is there to benefit the Lender. The Receiver Manager controlled the business at the time of receivership. In this case the Receiver Manager appears to have had the power to recruit new Employees and dismiss Employees. In such a situation there is no good reason why the Receiver Manager cannot be called to account, as he is deemed to have acted on his own responsibility. Under this alternative position, the Court is persuaded the position in the *Ashioya* and *Lochab Brothers* cases, as cited in latter decisions of various Courts, is not immutable. In the English Case of *Re Mack Trucks 1 AII ER 977*, the Receiver Manager expressly terminated old employment contracts, and entered into new ones with the Employees. The Company ceased trading thereafter and the Employees brought a Claim against the Receiver Manager for wrongful

dismissal. The Receiver Manager was held liable for wrongful dismissal since he was personally responsible for the new contracts.

- d. The position that Receiver Managers cannot be sued in their own names is therefore not without exceptions. The protection given to Receiver Managers against legal liability was developed to encourage Persons into accepting the functions of Receivers, without the fear that by so accepting, they exposed themselves to liabilities which would otherwise belong to the Debtor Company or the Debenture Holder. No prudent man, this theory holds, would accept trust, and expose himself to liabilities. Receiver Managers are treated like Public Officers, who cannot be held liable for breaches of official contracts. Claims against Receiver Managers are like *actions in rem*. In **Re B. Johnson & Co [Builders] limited [1965] Ch. 634** Jenkins L.J. held that the primary duty of the Receiver Manager is to the Debenture Holder, not the Debtor Company. A strict interpretation of liability of Receiver Managers under this theory would result in Employees having insurmountable barriers in accessing industrial justice. To hold that they cannot be called to respond to a Claim altogether, even when they are alleged to have acted in breach of contracts authored personally by them, appears to this Court to be a mistaken view. It is a position which would limit Employees in accessing industrial justice.
- e. The 2<sup>nd</sup> Respondent argues it did not have control of the Receiver Manager, and therefore would not be liable to the Claimants. The Party at whose instance the Receiver Manager was appointed submits it is not chargeable with the obligations of the Receiver. In the view of the Court, Employees cannot be left dangling in the wind. Appointment of Receiver Managers does not terminate Employee's contracts. Termination would only occur if there is a concurrent sale of the business; if the Receiver enters into new contracts; or if the existing contracts are inconsistent with the receivership. There was no sale of business. Old Employees continued working under their terms and conditions of employment created at the outset. It has not been suggested that the existing contracts were inconsistent with the terms of the receivership. Some of the Employees were engaged by the Receiver Manager, and are unknown to the 1<sup>st</sup> Respondent as much as they are unknown to the 2<sup>nd</sup> Respondent.
- f. The appointment of the Receiver Manager by the Bank in 2012, therefore, did not terminate the Claimants' contracts. Some of the contracts were authored by the Receiver Manager. As Parties seem to agree they cannot bring the Receiver Manager into the proceedings, the matters raised in the dispute cannot be adequately addressed, without the involvement of the 2<sup>nd</sup> Respondent. The Court needs to know who was, or were, the Employer/s of the Claimants at particular points in time; who terminated the Claimants' contracts if indeed termination has taken place; and who should bear responsibility in case they demonstrate they were unfairly and unlawfully treated. The absence of the Receiver Manager and the Debenture Holder from the proceedings, would throw darkness into the exercise of drawing the contours of liability, in these consolidated Claims.
- g. The definition of the term 'Employer' under Section 2 of the Employment Act 2007, as well as in the other Labour Legislations, is wide enough to include other Persons, beyond the signatories to the employment contract. The term 'Employer' includes such Persons as 'Agents,' 'Factors' and 'Managers.' There is no reason to view 'Managers' as not including 'Receiver Managers.' Where the receivership is not confined to mere collecting and receiving, but extends to recruiting new Employees and determining their terms and conditions of employment; where the Receiver Manager assumes full control in the operation of the business; there is no reason why such Receiver Manager should not take responsibility for employment claims arising under the receivership. Employees are never in control of management decisions and arrangements, which affect their contracts of employment, and these decisions and arrangements must never be allowed to extinguish the pursuit of employment rights. It is only with the participation of the 2<sup>nd</sup> Respondent, whose actions, it is alleged, fundamentally affected the Employee's contracts, that the Court can be able to make a well-founded final determination.

IT IS ORDERED:-

*i. The Preliminary Objection filed by the Claimants is to be disregarded.*

*ii. The Application filed by the 2<sup>nd</sup> Respondent seeking to strike out the Claims as against the 2<sup>nd</sup> Respondent, is rejected.*

*iii. Parties to schedule the main dispute for full hearing when they are ready.*

*iv. Costs of the Application in the cause.*

**Dated and delivered at Mombasa this 19<sup>th</sup> day of February, 2016.**

**James Rika**

**Judge**