



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 170 OF 2014

ROSABEL WAGICUYU NYAMU.....CLAIMANT

v

KIERAN DAY ..

IAN SMALL (Being sued as Receivers of Karuturi Ltd).... RESPONDENTS

RULING

1. The Claimant, through a Motion dated 26 May 2014 sought leave to sue the Respondent company Karuturi Ltd which was under receivership. In the same motion, the Claimant sought temporary injunctive relief against the Respondent from evicting her from the house she had been allocated during her employment.
2. Accompanying the motion was a Memorandum of Claim in which the Claimant alleged that she had been appointed as a Pack House Manager and later promoted to General Manager,
3. It was also averred that she had been allocated a house to reside in but around 21 May 2014, the Respondent denied the Claimant access to the house without notice or reasonable cause and that her property were locked up in the house.
4. The motion was heard *ex parte* by Ongaya J on 26 May 2014, and the Judge directed the Respondent to permit the Claimant access to the house, pending *inter partes* hearing on 29 May 2014.
5. The Respondent was served with the motion and it filed Grounds of Opposition on 28 May 2014.
6. The motion was not heard on 29 May 2014 to allow the Respondent file a replying affidavit. The interim orders were extended until 5 June 2014. The Respondent filed a replying affidavit sworn by one Joseph Ndungu Njuguna on 3 June 2014.
7. On the same day, the Respondent filed a Response and a Notice of Preliminary Objection and submissions to support the objection. The grounds of the objection were to the effect that
 1. The application is fatally defective and otherwise incompetent for misjoinder. The Receivers are agents of the Company in Receivership and have no personal liability for any claims against the Company arising from its contract with the Claimant.
 2. No cause of action can be agitated against the Receivers in their own name and the proceedings ought properly to be made against the Company.
8. On 12 June 2014, the Claimant filed an Amended Memorandum of Claim to include a claim for Kshs 2,625,000/- being pay in lieu of notice, salary arrears, redundancy payment and gratuity.
9. The Claimant filed submissions to the Preliminary Objection on 25 July 2014. The preliminary objection is the subject of this ruling.

Respondent's submissions

10. The Respondent's submissions are straightforward. It is that Receivers cannot be sued in their personal capacity. It was further submitted that a receiver is the agent of the company in receivership and any action should be commenced in the name of the company in receivership.
11. It was further submitted on the authority of *The Law of Receivers and Companies* London: Sweet & Maxwell (1986) at page 10, that the dismissal of an employee is an act of the company and not the receiver and any claim should be made against the company.
12. The Respondent also made reference to the cases of *Lochab Brothers v Kenya Furfural Co. Ltd* (1983) KLR and *Joseph Ashioya & 165 others v Kenya United Steel Co. (2006) Ltd & Ar* (2013) eKLR where it was held that receivers are agents of the company.
13. The Respondent urged the Court to dismiss the suit with costs.

Claimant's submissions

14. The Claimant opposed the objection and submitted that it is the receiver who perpetrated the illegalities which forced the Claimant to institute legal proceedings.
15. The Receivers, it was submitted were acting on their own volition and that the Receivers should not be allowed to hide under the umbrella of receivership to perpetuate an illegal act.
16. The Claimant further submitted that the suit could be rescued through amendments pursuant to Article 159 of the Constitution.

Evaluation

17. The law regarding cases involving receivers and managers was set out clearly in by the Court of Appeal in *Lochab Brothers v Kenya Furfural Co. Ltd* (supra). The Court held that

A receiver cannot sue in his own name as receiver since he has no property vested in him and so acquires no right of action by his appointment. Nor can the Court give a receiver leave to sue as receiver. The receiver's duty is to take care of and receive the property which is put under his charge and he is not at liberty and is not entitled to bring an action in his own name. Thus the second respondents had no *locus standi* and they could not bring the proceedings in their own name. They were authorised to take proceedings only in the name of the company whose agents they were.

18. I applied the above holding in the *Ashioya* case, wherein I observed that similar principles should apply where a receiver is sued.
19. The Claimant has resisted the law as known by invoking Article 159 of the Constitution. In my view, the Constitution is sacrosanct and its provisions must be hallowed. Where any statutory or common law does not match the constitutional imperatives, such law must give way.
20. The Claimant has not shown how the substantive law on receivership and who to sue does not meet the constitutional threshold. She wants to rely on the constitutional provision urging the Court not to pay undue regard to procedural technicalities.
21. In my view, at the rate Article 159 of the Constitution is being invoked by parties who have not complied with both procedural and substantive law, there is a real danger that Article 159 may soon turn into an unruly horse, albeit a constitutional horse.
22. Article 159 of the Constitution cannot and should not be the elixir where a litigant has failed to comply with procedures and no reason at all is offered for the failure.
23. Parties should genuinely attempt to comply with procedural law (which is one of the compulsory subjects at law school).
24. In the *Ashioya* case, I found the case against Price Waterhouse Coopers incompetent and dismissed the Claim against it. Price Waterhouse Coopers was the second Respondent while Kenya United Steel Co. (2006) Ltd, was the first Respondent. The suit against the company survived.
25. In the instant case, it is only the 2 Receivers who are sued as joint Respondents. The company is not a party. The suit against them is incompetent.

26.The Claimant's cause of action is not yet time barred and she may bring a fresh suit against the correct parties.

Conclusion

27.The Court upholds the preliminary objection and orders that the Memorandum of Claim herein be struck out with no order as to costs.

Delivered, dated and signed in open Court in Nakuru on this 28th day of November 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Simiyu instructed by Simiyu & Co. Advocates

For Respondents Mr. Wamaasa instructed by Hamilton Harrison & Mathews & Co. Advocates