

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 121 of 2018

**ARISING FROM MISC. APPLICATION NO. 133 OF 2017 AND CIVIL SUIT NO. 977
of 2016)**

THREEWAYS SHIPPING SERVICES (GROUP) LTD:.....APPLICANT

VERSUS

KABIITO KARAMAGI

STANDARD CHARTERED BANK(U) LTD:.....RESPONDENTS

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

This is an Application brought by Threeways Shipping Services Group Limited as the Applicant against Kabiito Karamagi and Standard Chartered Bank Uganda Limited the Respondents.

The Applicant seeks orders that the ruling and order of this court in Miscellaneous Cause No. 133 of 2017 directing the 1st Respondent to continue acting as Receiver of the Applicant be reviewed.

It is grounded on the following;

- 1) That the Applicant is aggrieved by the court ruling and order in Misc. Cause No. 133 of 2017 directing the 1st Respondent to continue acting as receiver of the Applicant where he is conflicted as an advocate of the 2nd Respondent at the same time.
- 2) That the 1st Respondent is a potential witness in the main suit No. 977 of 2016 Threeways Shipping Services Group Limited and Another vs Standard Chartered Bank Uganda Limited.
- 3) That the 1st Respondent cannot act lawfully as Applicant's Receiver and 2nd Respondent's lawyer because both parties' interests are adverse to each other and this is prejudicial to the Applicant.
- 4) That it was therefore an evident error and omission for court not to take into account the 1st Respondent's conflict of interest which was apparent on the face of the record before arriving at its decision.

The background to this suit is that the Applicant received facilitation from the 2nd Respondent. Their relationship developed problems wherein the 2nd Respondent allegedly defaulted in the servicing of the loan which resulted into the 2nd Respondent appointing the 1st Respondent as Receiver in a bid to recover what it alleged was due to her.

This appointment was an act in exercise of its powers derived in a Debenture created over the assets of Threeways Shipping Services Group Limited. The Applicant received the 1st Respondent as the Receiver so appointed but subsequently its Directors resisted and refused to hand over the management of the Company to the 1st Respondent.

In a bid to take over the management of the Company the 1st Respondent applied to this court seeking declarations as to the duties and functions of the Receiver appointed over the assets and undertaking of Threeways Shipping Services Group Limited.

The foregoing formed the basis of the Application and it is in that regard that Misc. Application No 133 of 2017 was heard and decided. It is the resultant Ruling that the Applicant seeks this court to review.

In the Ruling it was found that on being appointed by the 2nd Respondent, the 1st Respondent responded with the acceptances and notifications as was expected of a person appointed a Receiver. It was also this court's finding through analysis of the various communication between the 1st Respondent and the Directors of the Applicant that the Applicant herself had accepted and recognized the appointment. The communication also indicated that the Applicant had acknowledged the commencement of the Receivership.

Having come to that conclusion the court then proceeded to give directions on the duties of the Receiver as summarized in **Re Pantmaenog [2004] 1 AC 158** namely that; it was his duty to make returns and accounts, owe fiduciary duties to the Company and investigate the causes of the Company's failure and conduct of the managers. In this he would be expected to deal very strongly against those engaged in culpable conduct.

The foregoing goes for professional efficiency, devoid of complacency which might have led the business to decline. The conclusion was that such a Receiver was expected to take charge of the business and have the final say over all operational decisions taking over from the Directors.

A good Receiver would be expected this court held "to make use of every opportunity to restructure and if possible breathe fresh life into the Company."

In all these proceedings the question of conflict of interest did not arise. In my view it did not arise because as it stands now the law does not expressly prohibit the appointment of a Receiver from the same firm representing a creditor. That notwithstanding, a person with exhibited interest bent to the derailing of the purpose of the Receivership with open and declared bias should not remain in place as Receiver.

I would like to add that a party to the cause will not ordinarily be appointed Receiver unless both parties consent or there are special circumstances present which makes such an appointment for the best interest of all concerned.

It is not in dispute that any person, shareholder can sue the Receiver in their own names and right where there are interested parties and have beneficial interests which are threatened by the Receiver. Such a situation arises where the Receiver is the wrongdoer for example when he acts in breach of his fiduciary duty or he conducts his duty with gross negligence.

He will also be sued where the aggrieved feels that vital interest of the Company are at risk from the Receiver himself or even if it is from somewhere else, he refuses to take any steps to avert the harm. Under such circumstances the Directors are entitled to use the name of the Company to litigate. Save for the foregoing, it will be improper for the Company suing the Receiver in his name because this would amount to the Company suing itself.

In an Application for review the court must look and consider an error apparent on the face of the record. Counsel for the Applicant submitted that to appoint an Advocate of the 2nd Respondent was an error on the face of the record because there was a conflict of interest.

An error apparent on the face of the record must be an error on a substantial point of law staring one in the face, leaving there no options of two or more opinions. But an error which has to be

established by a long process of reasoning or on points where there maybe conceivably two opinions cannot be said to be an error apparent on the face of the record,

Mere error or wrong or erroneous view of evidence or of law is not necessarily a ground for review even where it may be a ground for appeal; **AIR Commentaries on the Code of Civil Procedure by Chitaley and Rao (4ed) Volume 3 pg. 3227.**

In my view the position in the instant case cannot be declared an error on the face of the record because there are circumstances where advocates can be appointed as Receivers notwithstanding their relationship with the firm that has taken the Applicant to court; **In Re Advisory Opinion to the Governor (Depco) 593 A 2d 943 (1991).**

That notwithstanding, a Receiver may be removed at the instance of the shareholders/Directors of a Company under circumstances of misfeasance, gross negligence, fraud, fundamental breaches, transgressions and obvious bias exhibited by the Receiver.

The foregoing did not form part of the proceedings in Misc. Application No. 133 of 2017. What court is being asked to do now is to review something that was never under contention. To base an Application for review on a prayer which did not form part of the original Application to be reviewed is improper and would occasion injustice in as much as it was not under consideration in the earlier proceedings; **National Labour Party and Another vs Head of Civil Service and Director of Personnel Management Civil Application No. 287 of 2000.**

In my view the Applicant was free if she had the grounds for removal of the Receiver to proceed in an original form and seek such removal instead of jumping on a wagon with a different load of luggage.

In conclusion, there being no apparent error on the face of the record and the subject of this Application having not arisen and considered in Misc. Application No. 133 of 2017, court finds the Application devoid of merit and is dismissed.

Costs shall abide the final decision of the suit.

Dated at Kampala this 20th day of June 2018

HON. JUSTICE DAVID K. WANGUTUSI

JUDGE