

JOHN VERJEE & ANOR

v

SIMON KALENZI & ORS

COURT OF APPEAL OF UGANDA AT KAMPALA

COURT OF APPEAL CIVIL APPEAL NO. 71 OF 2000
(ON APPEAL FROM HIGH COURT MISC. APPLICATION NO. 897 OF 2000)

BEFORE:

HON. LADY JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. MR. JUSTICE A. TWINOMUJUNI, JA.
HON. LADY JUSTICE C.N.B. KITUMBA, JA.

September 18, 2001

JUDGMENT

KITUMBA, JA.: This is an appeal against the ruling of the High Court , (Byamugisha J., dated November 1, 2000.) whereby the respondents were successful in objector proceedings in Miscellaneous Application No. 897 of 2000. The High Court made an order releasing the movable and immovable property of the judgment debtor, M/S Clovergen Foods Ltd, from attachment.

The facts leading to this appeal are briefly as follows:

The appellants were the successful plaintiffs in High Court Civil Suit No. 376 of 1998 against the judgment debtor. Judgment was given in their favour on June 8, 1998. A warrant of attachment and sale of the judgment debtor's immovable property comprised in LRV 2144 Folio 16 Plot M 101 Entebbe Municipality Mpigi District was issued on June 21, 2000. A second warrant was issued to the appellants on June 30, 2000 for the sale of the judgment debtor's movable property. On July 5, 2000 court bailiffs moved in to attach Plot M.101 Entebbe. The respondents who were in possession of the said plot by virtue of their having been appointed by the East African Development Bank as receivers filed objector proceedings on the grounds that:

1. The said properties were not liable to attachment as they were in the hands of the respondents as receivers and managers of the judgment debtor company for the benefit of East African Development Bank as debenture holders.
2. East African Development Bank had a fixed charge on the said properties.

These grounds were supported by the affidavit of Simon Kalenzi. It was opposed by two affidavits in reply of John Verjee, one of the judgment creditors.

At the hearing of the application the appellants challenged the claimed possession by the respondents on the grounds as stated below. Firstly, that the legal mortgage which the East African Development Bank had over the immovable property lapsed when the lease on LRV 2144 Folio 16 Plot M 101 Entebbe expired on May 31, 1998. The equitable mortgage which the East African Development Bank claimed, by registration of the caveat in the Land Office on December 21, 1999, was also void because it was not registered under the Companies Act. Secondly, that the debenture under which the receivers were appointed was also void for lack of registration under the Companies Act. The learned trial judge found for the respondents and made an order releasing all the movable and immovable properties of the judgment debtor from being attached on the ground that the respondents were in possession as receiver managers.

Dissatisfied with the above ruling, the appellants have appealed on six grounds.

Since there is overlapping in some of the grounds, I propose to deal with them in the following order. I will consider grounds 1,3 and 5 together and grounds 2,4 and 6 also jointly.

Grounds 1,3 and 5 read as follows:

“1. The Learned Judge erred in law and in fact in finding and holding that the Respondents were the proper applicants and had the Locus Standi to bring the application the subject of this Appeal and in the manner which they did, in their own names.

3. The Learned Judge erred in law and in fact when she ordered for the release of the attached property only on account that they were attached whilst in the possession of the Receivers as Agents of the East African Development Bank Ltd. as the alleged Legal Mortgagees.

5. The Learned Judge erred in law in finding that the Respondents had an interest or any interest at all in the attached property”

The appellants were represented by two counsel namely:

Mr. Harit Seith who argued grounds 1, 2 and 5 and Mr. Peter Nkuruziza, who argued grounds 3, 4 and 6. Mr. Walubiri represented the respondents. On grounds 1,3 and 5 the arguments of counsel for the appellants centered on two issues. Firstly, that the respondents did not have the legal capacity to bring objector proceedings. Secondly, that the respondents had neither legal title nor interest of any kind in the property to enable them to institute objector proceedings against the appellants.

Learned counsel for the appellants, contended that respondent had no locus standi to bring objector proceedings in their names. In law a receiver can bring an action in the company's name. In the instant appeal it is the East African Development Bank which should have instituted the suit. He relied on *Lochab Brothers v Kenya Furtal Co. Ltd. and 2 others* 1982-88 1 KAB 335. In that case the appellant obtained a judgment against respondent for 8hs. 1,186,554/60 and applied for execution by attachment and ,sale of the property. The Development Finance Company of Kenya acting under powers contained in two debentures, appointed the second the third

respondents as receiver managers of the first respondent. The receivers objected to the sale by the court brokers. The High Court allowed the objection but on appeal it was held that the receivers did not have any interest, legal or equitable in the property seized. The debentures under which they were appointed did not confer upon them the power to bring proceedings in their names. The proceedings were a nullity and should not have been allowed to proceed.

Counsel submitted further that the respondents had to prove that they had an interest in the property. According to the affidavits of both Kalenzi and Onen it is the East African Development Bank which has interest in the property and not the respondents. He cited *Kasozi Damba v Male Construction Services Co.* HCCS No. 51/1997 (Unreported).

He urged that the learned trial judge was wrong to find that the respondents were in possession as legal mortgagees and therefore had an interest. This was contrary to all available evidence on record. The notice of appointment annexures C and D to the affidavit of Kalenzi showed that the respondents were appointed as receivers and not as legal mortgagees.

In reply, Mr. Walubiri, learned counsel for the respondents, conceded that technically the receiver has no title but has possessory rights. When there are conflicting rights between the rights of the judgment creditor and the receiver, those of the latter prevail. Ordinarily the receiver does not sue in his own name but can institute an action if his possessory rights are interfered with. He relied on *Exp. Sacker* (1888) 22,QBD, 179 and *Huse London Electricity Supply Corp.* [1902] 1 Ch 411 Counsel contended that the learned Justices of the Court of Appeal of Kenya dealt with the general rule but did not consider the exceptions, He urged that the objector has to prove possession of the property but not ownership. He contended that in *Kasozi Ddamba v Male Construction Services Company* (supra) the learned judge did not address himself to the law and that the case should be disregarded. He conceded that the legal mortgage had expired. However, by clause 3A of the debenture, a fixed charge was created on all the judgment debtors' properties. When the lease expired and was renewed, the legal Mortgage was automatically revived.

Mr. Walubiri reasoned that according to Section 18 of the Mortgage Decree a debenture is a mortgage. In support of his arguments he relied on *A.K. Detergents v East African Development Bank* Court of Appeal Civil Appeal No.17/98 (unreported). In that case a receiver had been appointed by the bank under a debenture. The receiver sold land and the sale was challenged on the ground that the debenture had not been registered under the Registration of Titles Act. Manyindo, DCJ, as he then was, held that there was a legal mortgage created by the debenture.

The law is that objector proceedings are proceedings of a special nature. Order 19 Rule 56 provides:

“The claimant or objector shall adduce evidence to show that at the date of attachment he had some interest in the property attached”

It is appreciated that the receiver in law acquires no right of action by virtue of his appointment. *Lochab Brothers v Kenya Furtal Co. Ltd.*(supra) and *Kasozi Ddamba v Male Construction service Co.* (supra) are distinguishable from the instant appeal. In both authorities the receiver manager were appointed after attachment of the properties. However, in the instant appeal the issue before court was whether the respondents had a right to bring the action They instituted the

objector proceedings on the ground that they were in possession and had an interest as receiver managers for East African Development Bank. I am therefore inclined to hold that the respondents had the locus standi as they had possessory interest in the property Grounds 1,3 and 5, fail.

I now turn to grounds 2, 4 and 6 which read as follows:

"2. The learned Judge erred in failing to find that the Debenture under which the Respondents had been appointed as Receivers of the Judgment debtor company as well as any mortgage (either legal or equitable) over the judgment-debtor company's land were both invalid and void as against the attachment creditor due to non registration under the Company's Act and further that the Respondents or the East African Development Bank had no interest in the attached property.

4. The Learned Judge erred in law and in fact by failing to find that the Legal Mortgage of East African Development Bank Ltd. was void and of no effect the same having lapsed and further holding that "the question of whether the mortgage had lapsed is not within the scope of the investigations.

6. The learned Judge failed in holding that the burden of proof was on the Respondent herein to establish that the Debenture as well as any mortgage (legal or equitable) pursuant to which they claimed a lawful interest in the attached property was duly registered as required under the mandatory provisions of S.96 of the Companies Act and that the Respondents had failed to discharge the same"

The gist of counsel's complaint in grounds 2,4 and 6 relate to failure to register the debenture and the Mortgage under section 96 of the Companies Act. Counsel contended that the debenture under which the respondents were appointed was not registered under Section 96 of the Companies Act. According to the averments contained in the affidavit of Steven Onen a legal officer of the East African Development Bank, the judgment debtor executed a legal mortgage on LRV 2144 Folio 15, Plot M 101 Entebbe as security for money advanced. The lease expired on 31st May 1998 but was extended for a further term of 44 years. The East African Development Bank lodged caveat on the land. The title deeds were deposited with Norwegian Agency for Development Co-operation on behalf of the lenders. Counsel conceded that an equitable mortgage was created but was invalid by virtue of non registration under the Companies Act. He relied on English authority of *In Re Molton Finance Ltd.* 1968 1 Ch.325 where it was held that the deposit of deeds and documents was merely ancillary to the equitable charge created and the contractual right to their retention was lost when the charge was voided for non registration under the Companies Act. Counsel for the appellants, contended that the respondents had the legal burden to prove that the debenture and the mortgage under which they claimed were valid. Counsel argued that it was raised in the affidavit of John Verjee that the equitable mortgage and the debenture under which the respondents claimed were void. The burden of proof that they were legal shifted to the respondents but they did not discharge it. He cited *Trans Africa Assurance Company Ltd. v National Social Security Fund* Supreme Court Civil Appeal 1 of 1999 (unreported) for the proposition that the objector should prove that he is in possession. Counsel further complained that the judge was wrong to hold that the question

whether or not the mortgage had lapsed was not within the scope of investigation"

Walubiri, learned counsel for the respondents, submitted to the contrary. He contended that the legal or equitable interest created in the land for the respondents could not be taken away by non registration under the Companies Act. The Mortgage Decree (Decree 17/75) and the Registration of Titles Act (Cap 205) were supreme. Counsel urged further that the contention that the debenture and the mortgage were null and void due to non registration in accordance with the Companies Act were never specifically pleaded. The respondent's could not reply to generalities. The trial court could not make a finding on the matter when there was no evidence before it. The respondents had to prove possession only and they did so. I disagree with Mr. Walubiri's submission with regard to the appellants' pleadings. In the additional affidavit of John Verjee it is averred as follows:

"5. That I am informed by my lawyers M/S Kasirye, Byaruhanga & Co. Advocates of Postal Address Box Number 10946 Kampala, Uganda whose advice I verily believe to be truthful that the mortgage debenture dated October 20, 1994 and annexed to the applicants' affidavit is null and void and of no legal effect as it offends the provisions of the Companies Act Cap. 85. .

6. That the legal mortgage exhibited as F in the affidavit of Simon Kalenzi lapsed when the lease on LRV 2144 Folio 16 Plot M 101 expired on May 31, 1998.

7. That I am informed by my lawyers named herein before and whose advice I verily believe to be truthful that the interest of East Africa Development Bank as an equitable mortgagee by virtue of a caveat registered on December 21, 1999 is void for want of registration under the Companies Act Cap 85.

The deponent clearly pleaded that the equitable mortgage and the debenture were void because they offended the provisions of the Companies Act. However, in my view, it was immaterial to the decision of the case whether the averments were controverted or not.

In her judgment the learned trial judge did not consider the issue of the registration of the debenture or the mortgage, and rightly so in my view. She held that what was required in objector proceedings was *to* prove that the objector is in possession. She quoted the provisions of order 19 Rule 57 and stated:

"The *guiding principles in cases of this nature* were set out in the case of *Herilal & Co. v Buganda Industries Ltd.* [1960] EA 318 where the Court said:

"The question to be investigated is whether at the date of the attachment the Judgment debtor or the objector was in possession, or where the Court is satisfied that the property was in the possession of the objector, it must be found whether he held it on his own account or in trust for the Judgment debtor. The sole question to be investigated is thus one of possession. Questions of legal right and title are not relevant, except so far as they may affect the decision as to account of or in trust for the Judgment debtor, or some other person. To that extent the title may be

part of the investigation. But ultimate questions of the trust or complicated questions of trust or complicated questions like the benani nature of a transaction are not within the scope of the inquiry and are not intended to be gone into."

This decision was quoted with approval by WAMBUZI C.J in *Transafrica Assurance Co. Ltd v. National Social Security Fund* (supra).

Since there is no dispute about possession of Plot M 101 Entebbe by the Receivers the question is whether they are in possession in account of the Judgment debtor or on behalf of someone else. –

Although I agree that receivers are in law the agents of the debtor company, they hold the property to pay the debts of the company”

She held that respondents were in possession not on behalf of the judgment debtor but for East African Development Bank.

I agree with the statement of law as stated above by the learned trial judge. I find that she correctly applied the law to the facts. In objector proceedings it did not matter whether the respondents held as legal mortgagees or as receivers. The issue which had to be investigated by the court and decided was that of possession. To that extent the judge was right when she held that "the question of whether the mortgage has lapsed is not within the scope of this investigation" Grounds 2,4 and 6, too, fail.

Before I take leave of this appeal I would like to mention that the court was informed by counsel for the respondents during the hearing of this appeal that the legality of the debenture is being challenged by the appellants in a substantive suit in the High Court. Counsel duly sent to the registry of this court the plaint and the Written Statement of Defence in HCCS No. 1804 of 2000 John Verjee and Another v Simon Kalenzi & 6 others

I have perused the same and found that what counsel stated from the bar is true. I am of the view that the issue of no registration of the debenture or otherwise are not matters to be decided in objector proceedings and the appellants are aware of that legal position. That is most probably the reason why they filed HCCS 1804 of 2000 in the High Court in December, 2000. In the result I would dismiss this appeal with costs to the respondents here and in the court below.

TWINOMUJUNI, J.A: I have read, in draft, the judgment of my Lord, Hon. Lady Justice C.N.B. Kitumba, JA. I agree with the conclusion that this appeal should fail. I will only add a few remarks for emphasis only.

The facts of the case and the grounds of this appeal are ably reflected in her Lordships judgment. In allowing the objector proceedings in the High Court, the learned trial judge stated what she believed to be the applicable law as follows:

“The guiding principles in cases of this nature were set out in the case of *Herilal & Co. v Uganda Industries Ltd. (1960)* EA 318 where the court said:

“The question to be investigated is whether at the date of the attachment the Judgment debtor or the objector was in possession, or where the Court is satisfied that the proper(v was in the possession of the objector, it must be found whether he held it on his own account or in trust for the Judgment debtor. The sole question to be investigated is th us one of possession. Questions of legal right and title are not relevant, except so far as they may effect the decision as to account of or in trust for the Judgment debtor, or some other person. To that extent the title may be part of the investigation. But ultimate questions of the trust or complicated questions of trust or complicated questions like the benani nature of a transaction are not within the scope of the inquiry and are not intended to be gone into. ”

This decision was quoted with approval by WAMBUZI, C.J in Civil Appeal No. 1/99 *Transafrika Assurance Co. Ltd v. National Social Security Fund* (unreported).

Since there is no dispute about possession of Plot M 101 Entebbe by the Receivers the question is whether they are in possession in account of the Judgment debtor or on behalf of someone else.

Although I agree that receivers are in law the agents of the debtor company, they hold the property to pay the debts of the company."

I totally agree with this statement of the law, Whether the mortgage or the debentures through which the Receivers obtained possession are valid or not is an issue of title which can only be investigated in proceedings in which the judgment debtor is a party. It is not within the scope of inquiry in objector proceedings. Once a Receiver had taken possession of the property before attachment, that property cannot be attached by the other subsequent decree holders against judgment debtor. By virtue of possession, the Receivers also acquire the right to commence action in court in their own right to protect their right of possession, This is even acknowledged in the case of *Lochab Brothers v. Kenya Furtal Co. Ltd. And 2 Others* 1982-88 1 KAB 335on which the appellants heavily relied.

MUKASA-KIKONYOGO, DCJ I have had the benefit of reading in draft the judgment prepared by KITUMBA J.A. I agree that for the reasons she gave this appeal must fail. I have nothing useful to add except to thank the learned counsel for both parties for the industry they exhibited and the extensive research carried out.

Since TWINOMUJUNI, J.A. holds a similar view the appeal is dismissed with costs to the respondents in this court and the High Court.

SIMON KALENZI & OTHERS

v

JOHN VERJEE & ANOTHER

HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT)

HIGH COURT MISC. APPLICATION NO. 897 OF 2000
(Arising out of H.C.C.S. No. 376 of 1998)

BEFORE: HON. LADY JUSTICE C.K. BYAMUGISHA

November 1, 2000

RULING

BYAMUGISHA, J: This application by Notice of Motion was brought under the provisions of Order 19 rules 55, 56, 57 and 89 of *Civil Procedure Rules* seeking orders that:

1. The movable and immovable properties of the Judgment/debtor particulars of whereof are set out in the affidavit of Simon Kalenzi be released from attachment.
2. The costs of the application be provided for.

Two grounds were cited as a basis for the application namely that:

1. The said properties are not liable for attachment as they are in the hands of the Applicant as Receivers and Managers of the Judgment Debtor Company for the benefit of Messrs, East African Development Bank as Debenture holders.
2. M/S East African Development Bank have a fixed charge on the said properties. These grounds were supported by the affidavit of Simon Kalenzi and were opposed by two affidavits sworn by John Verjee one of the Judgment Creditors.

When the matter came before me, counsel on both sides made spirited submissions regarding the matters raised in the application. In order for the applicant to succeed in this application he has to satisfy the requirements of the law under which it was made. Rule 55 states that where any objection is made on the ground that such property is not liable to attachment the Court will proceed to investigate the claim. The burden is on the objector to adduce evidence to show that at the date of the attachment he had some interest in the property attached. Rule 57 provides that:

“Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the Judgment debtor or of some person in trust for him, in the occupancy of a tenant or other person paying rent to him or that being in the possession of the

Judgment debtor at such time, it was so in his possession not on his own account or as his own property but on account of some other person, the Court shall make an order releasing the property, wholly or to such an extent as it thinks fit from attachment.”

In the matter now before Court, it is the case for the objectors that they were appointed receivers by the East African Development Bank on the May 30, 2000 and upon their appointment they took over possession and management of all the movable and immovable properties of Clovergen Fish and Foods Ltd. It is also being contended that on 5th day of July, Court bailiffs and policemen occupied the premises at the site in execution of the orders of attachment and sale of the movable and immovable properties of Clovergen Fish and Foods Ltd.

On the otherhand, the Judgment/Creditor John Verjee deponed in his affidavits that when the decree was taken for filing on the June 8, 2000 at the Registrar of Companies Registry, there was no notification of the appointment of a Receiver/Manager for the Judgment/debtor. He also averred that the legal mortgage lapsed when the lease on LRV 2144 Folio 16 Plot M 101 expired on May 31, 1998. The affidavit is silent as to whether the Receivers are in possession on behalf of East African Development Bank.

The guiding principles in cases of this nature were set out in the case of *Herilal & Co v Buganda Industries Ltd* [1960J EA 318 where the Court said:

“The question to be investigated is whether at the date of the attachment the Judgment debtor or the objector was in possession, or where the Court is satisfied that the property was in the possession of the objector, it must be found whether he held it on his own account or in trust for the Judgment debtor. The sole question to be investigated is thus one of possession. Questions of legal right and title are not relevant, except so far as they may affect the decision as to account of or in trust for the Judgment debtor, or some other person. To that extent the title may be part of the investigation. But ultimate questions of trust or complicated questions like the benani nature of a transaction are not within the scope of the inquiry and are not intended to be gone into”

This decision was quoted with approval by WAMBUZI C.J in Civil Appeal No. 1/99 - *Transafrica Assurance Co Ltd v National Social Security Fund* (unreported).

Since there is not dispute about possession of Plot M 101 Entebbe by the Receivers the question is whether they are in possession in account of the Judgment debtor or on behalf of someone else. Although I agree that receivers are in law the agents of the debtor company, they hold the property to pay the debts the company. In the instant case, the receivers are in possession according to the affidavit of Kalenzi after they were duly appointed by East Africa Development Bank as legal mortgagees. The question of whether the mortgage lapsed is not within the scope of the investigations.

It was submitted by counsel for the respondents that receivers cannot bring an action in their own names as they have no interest in the attached property. With respect I do not agree. Objector proceedings are by their very nature brought by anyone in possession objecting to the attachment.

I will therefore allow the application and order the release of the property whose particulars were

given in the annexures from attachment.

Application allowed.