



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
BANKRUPTCY & WINDING-UP CAUSE 16 OF 1983 & 36 OF 1982
IN THE MATTER OF ESAGERI SAWMILLS LTD
AND
IN THE MATTER OF COMPANIES ACT CONSOLIDATED WITH
IN THE MATTER OF PLANTS & ERECTIONS LTD
AND
IN THE MATTER OF THE COMPANIES ACT
RULING

These applications are brought by 2 companies Copal Ltd and Hanil Ltd and one Anil Panchmatia against the Official Receiver and Provisional Liquidator of 2 companies (Now in Liquidation) namely Esageri Saw Mills Ltd and Plan and Erections Ltd. The application arises out of the seizure of certain goods on the premises of Copal Ltd by the Official Receiver & Provisional Liquidator of the last 2 named companies. The liquidator was acting under powers conferred on him by Section 239 of the Companies Act which in effect requires (the word "shall" is used) to take into his custody or under his control all the property and things in action of the company o appears to be entitled.

Mr Panchmatia on his own behalf and on behalf of the 2 solvent companies says that the goods seized are the property of himself and the solvent companies and not the property of the companies in liquidation. I should perhaps add here that Mr Panchmatia is with his wife or has been the directors and principle shareholders in all 4 companies.

The applications are brought under subsection 5 of Section 242 of the Companies Act. This subsection provides:

"if any person is aggrieved by any action or decision of the liquidator that person may apply to the Court and the Court may confirm, reverse or modify the act or decision..... complained of and make such Order in the premises as it thinks just."

Mr Nowrojee asks me to exercise this power in these cases by reversing the seizure by the Official Receiver of the goods and restoring them to M Panchmatia and his 2 solvent companies. Neither in E.A.

no in countries (such as the United Kingdom or the Republic of Ireland) which have similar provisions, has a jurisdiction to do this ever been exercised in a reported case. I must accordingly bear 2 principles in mind:

(1) I should take care to contain the jurisdiction of the Court within the ancient meles without removing the mark (Lord Chancellor Bacon to Mr Justice Hulton) and

(2) I am not a liberty to decline a jurisdiction imposed upon me by an Act of Parliament (Furler vs Stump 3H & N.a p. 531).

I must accordingly confirm reverse or modify the act or decision complained of (i.e. the seizure) and make such order as I think just. This phrase in another statute (the Land Adjudication Act) has been said by Miller (the AG. J.A.) to be expression of "a statutorily empowered latitude" (Mathenge vs. Ngechi 1979 K.L.R. at Op.63). Even though I have this latitude, I feel that in the exercise of this discretion, I should be guided by Lord Cole (discretion when applied to a Court of Justice means sound discretion guided by law. It must be governed by rule not by humour, it must not be arbitrary, vague and fanciful but legal and regular).

Mr Nowrojee has argued very persuasively that the applicants have been deprived by the action taken by the liquidator under section 239 of his right to establish the ownership of the goods seized by the liquidator. The entry on Capols Ltd property was unlawful and the liquidator should not be entitled to hold on to the proceeds of his wrongful seizure. I am not satisfied that Mr Nowrojee's clients have been deprived of their rights to bring an action for detinue against the liquidator and therein establish their entitlement to the goods: likewise I do not accept the proposition that if goods are seized pursuant to a wrongful entry on land, that the executing creditor loses his right to custody or possession of the goods. The only right in my view that the owner of the land has for an unlawful entry is an action of trespass for damages.

If the exercise of my discretion has to be guided by law, it appears to me that I should bear in mind the provisions of Order XXI Rules 53 to 58 which deal with objections to attachment by a person other than the Judgment Debtor. Even a cursory reading of these rules demonstrate that it is the objector who must establish his claim. The applicants in this case have failed signally to establish their claim to be property. Mr Panchmatia is saying in effect that the property seized belongs to his solvent companies and not as his Employers told the Liquidators agent, that the property belongs to the insolvent ones. This I am afraid reminds me of the Judge who said to his brother Judge, that the cattle so admired by the 2nd Judge were his wives: the Judge who had long experience in Bankruptcy said "I have heard this story before." The conduct of Mr Panchmatia in the winding up proceedings was to put it mildly obstructive. In these proceedings I do not have to find which party is telling the truth but I am not satisfied that the Applicant's have a probability of success in establishing their entitlement to the goods seized.

In consequence, the onus clearly being on the applicants to persuade me to reverse or modify the liquidators action, the application fails and I dismiss both applications with costs. I should like however to make it clear that I do not accept the contentions of the Official Receiver and liquidator that the application is ill conceived or that the powers of the Official Receiver should not be filtered or interfered with. The Official Receiver must act in accordance with law and must abide the consequence should he fail to do so.

January 14, 1987

SHIELDS, J



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