**Githungo v Fidelity Shield Insurance Co Ltd and others**

**Division:** High Court of Kenya at Nairobi

**Date of ruling:** 3 May 2004

**Case Number:** 641/01

**Before:** Ochieng AJ

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Civil procedure – Amendment – Substitution of plaintiff – Suit commenced by receiver of a company*

*whose business was subsequently purchased – Whether purchaser of business entitled to substitution as plaintiff – Whether suit may properly be brought by court-appointed receiver. [2] Civil procedure – Appointment of receiver by court – Management powers of receiver – Whether receiver has power to institute civil proceedings without leave of court – Order XL, rule 1 – Civil Procedure Rules. [3] Company – Receiver – Power to sue in own name – Receiver appointed by court – No leave of court sought prior to institution of suit – Whether receiver had properly instituted suit in his own name – Whether substitution of plaintiff will be allowed after institution of suit.*

**RULING**

**OCHIENG AJ:** This is an application by the Plaintiff for substitution. The Plaintiff, Charles Kariuki Githungo (suing as the Receiver Kenya Duty Free Complex), is also seeking the consequential order of amendment of the plaint, so as to reflect the substitution. It is the Plaintiff’s case that the substitution is essential so as to bring before the Court a party whose presence is necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions in this suit. In order to make a decision on this application it is vital to first understand the complex history behind the World Duty Free Company Limited. The first fact that must be appreciated is that there have been two (2) companies bearing exactly that very same name. The first of the two companies was incorporated at the Isle of Man. The date of its incorporation has not been disclosed to the Court. However, I believe that it is safe to assume that if indeed the said company was incorporated, the said incorporation must have been in 1998 or earlier. I say so because as at 24 February 1998, the said company was placed under receivership, by a court order made by Owuor J (as she then was). I will hereafter refer to first company as WDF (IM). The second World Duty Free Company Limited was registered in the British Virgin Islands on 16 October 2001. This company was thereafter registered as a foreign company in Kenya on 21 November 2001. The registration in Kenya was necessitated by the provisions of section 366 of the Companies Act (Chapter 486) of the Laws of Kenya. This second company will hereafter be cited as WDF (BVI). The Plaintiff has sworn an affidavit in which he *inter alia* stated that Kenya Duty Free Complex was placed under receivership by an order issued by Owuor J (as she then was) on 24 February 1998. Strictly speaking, that deposition is inaccurate. As I understand it, Kenya Duty Free Complex is a business name used by WDF (IM). The company behind that business was WDF (IM) as at 24 February 1998. A reading of the order made by Owuor J confirms that it is WDF (IM) that was placed under receivership. However, the inaccuracy in the Plaintiff’s affidavit does not have any impact on this application. The order placing WDF (IM) under receivership was in the following terms: “That one Mr Michael Scanlon of PO Box 49794 Nairobi be and is hereby appointed to act as a receiver for the Third Defendant and do take over management and control of the Third Defendant’s operations at both Jomo Kenyatta and Mombasa International Airports Duty Free Complexes as well as the warehouse on land registration numbers 209/10882/15 and 209/10882/16 along Mombasa Nairobi Road”. Subsequently, on 30 July 1998 the Plaintiff was appointed as the receiver, to replace Mr Scanlon. The Plaintiff’s terms were exactly the same as those of Mr Michael Scanlon, set out above. It is the Plaintiff’s contention that the said terms of appointment were so wide as to also give the receiver the power to sue and be sued on behalf of the company, WDF (IM). The Plaintiff says that when he filed the plaint herein on 27 April 2001, he had *locus* to sue on behalf of the company. Thereafter, Mbaluto J delivered his judgment in *Pattni v Ali and others* [1998] LLR 1195 (CCK). The Plaintiff says that the effect of that judgment was, *inter alia*, to terminate the receivership, and thus hand over the company back to its directors. The said judgment was delivered on 25 September 2001. Meanwhile, WDF (IM) had on 30 March 1999 entered into a contract of insurance with the First Defendant for compensation, in accordance with the Fidelity Insurance contract. The First Defendant declined to compensate WDF (IM), prompting this suit. Following the incorporation of WDF (BVI), on 16 October 2001, and its registration in Kenya on 21 November 2001, the business known as Kenya Duty Free Complex was transferred to WDF (BVI). A certificate of registration of change of particulars was registered on 15 October 2002. The effect of the change of particulars was that WDF (BVI) became authorised to continue the business previously carried on by WDF (IM). In compliance with the provisions of Order I, rule 10(3) of the Civil Procedure Rules, WDF (BVI) has given its written consent to become the plaintiff instead of the current Plaintiff, if this Court does grant orders for substitution. Initially, the Defendants did object to the consent on the grounds that it was given late. However, at the end, the First Defendant conceded that consent could be given at any time. In response to the application, the First and Fourth Defendants have vigorously opposed it. The First Defendant submits that the very suit itself is non-founded as the Plaintiff did not have *locus* to institute it. It is said that the plaint is void *ab initio*, and it ought therefore not to be given a lease of life by the substitution being sought. The First Defendant does, correctly, point out that WDF (IM) was put under receivership by the court, so as to protect its assets whilst the parties in that suit continued to fight over ownership of the company. The said appointment was made pursuant to the provisions of Order XL, rule 1, which stipulates as follows: “(1) Where it appears to the court to be just and convenient, the court may by order: ( *a*) A ppoint a receiver of any property whether before or after decree; ( *b*) … ( *c*) … ( *d*) C onfer upon the receiver all such powers as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits and the execution of such documents as the owner himself has, or such of those powers as the court thinks fit”. A reading of this rule makes it clear that the appointment of a receiver does not by itself confer upon the receiver absolute power over the company. When the court appoints a receiver, it may by order, confer upon the receiver all such powers as the court thinks fit. My understanding is that the receiver only has such power as the court may confer upon him by an order. If the court order appointing the receiver does not specifically confer a particular power on the receiver, it would be deemed that the receiver did not get any such power. I do not therefore accept the Plaintiff’s contention that the orders of Owuor J did give the receiver very wide powers, including the power to sue and to be sued on behalf of the company. The only powers that the court conferred upon the receiver are those that were specified in the court order. Thus, in my understanding, when the court gave power to the receiver to take over the management and control of operations of the business and warehouses, the receiver was not necessarily empowered to sue or be sued on behalf of the company. In my view, it is important to bear in mind the fact that the appointment of the receiver was made in a suit in which the parties were fighting over the ownership of the shares in the company. In those circumstances, the most important concern of the court was to safeguard the company whilst the dispute was being resolved through litigation. In order to safeguard the company assets, the court granted an injunction to, *inter alia*, restrain two Defendants from interfering with the company, its shares and its warehouses. However, in recognition of the need to have the company’s operations continue, the court appointed an independent receiver. Later on, when the Plaintiff was appointed as the receiver by Kuloba J on 30 July 1998, the court said that his appointment would be on the same terms as those that applied to his predecessor, Mr Michael Scanlon. And as if to further clarify the terms of the Plaintiff’s appointment, Kuloba J also ordered as follows: “2. That Charles Kariuki Githungo be and is hereby appointed receiver of the Third Defendant’s operations at Jomo Kenyatta International Airport Nairobi and Moi International Airport, Mombasa, as well as the warehouses on land registration number 209/10882/16 to replace the Applicant/Second Defendant, Michael Scanlon. 3. … 4. … 5. … 6. T hat Charles Kariuki Githungo shall be the receiver for the time being and shall account for the management control and operations of the Third Applicant in the Kenya Duty Free Complex by submitting to the registrar f the High Court his accounts in regards to management control and operations on or before 24 of every third month, unless the Court of Appeal make a variation”. The emphasis placed by Kuloba J on the “management control and operations of the Third Applicant in the Kenya Duty Free Complex” and the requirement that the Plaintiff do regularly give accounts in that regard, further persuades me that he too was satisfied that the powers of the Plaintiff extended only that far, and no further. If I needed any further persuasion of the correctness of my understanding of the powers given to the Plaintiff, I believe that it is forthcoming from the decree given by Mbaluto J on 25 September 2001. It is to be noted that claim (c) is in the following terms: “An order appointing an interim receiver/manager from the names proposed by the Plaintiff/Applicant in his affidavit, to solely manage, control and administer *all the day to day operations* of the Third Defendant including the Duty Free Complex’s in Jomo Kenyatta International Airport Nairobi, Moi International Airport Mombasa and the warehouses in Nairobi till the final determination of this suit” (emphasis mine). The Plaintiff clearly wished to have a receiver/manager to manage, control and administer all the day-to-day operations at the Duty Free Complexes and at the warehouses. I therefore hold that the power given to the Plaintiff did not entitle him to sue on behalf of the company. It has not been easy for me to arrive at a decision on this point. I have asked myself what would happen if someone who had contracted with the company, flagrantly breached the contract during the time when the receiver was still in place. If the breach was such that it would occasion grave loss to the company, would not the receiver be obliged to institute legal action so as to safeguard the company? From a logical perspective, there can be no doubt that the receiver would be expected to take appropriate legal action to safeguard the assets of the company. But the law says he cannot just assume that he had authority to institute proceedings. *Mulla on the Code of Civil Procedure* Volume II states at 1533, that: “A receiver cannot sue or be sued except with leave of the Court by which he was appointed receiver … There is no statutory provision which requires a party to take leave of the court to sue a receiver. The rule has come down to us as part of the rules of equity, binding upon all Courts of Justice in this country. It is based on upon public policy which requires that when the court has assumed possession of a property in the interests of litigants before it, the authority of the court is not to be obstructed by suits designed to disturb the possession of the court. The institution of such suits is in the eye of the law a contempt of the authority of the court and, therefore, the party contemplating such a suit is required to take leave of the court so as to absolve himself from that charge”. So, having held earlier herein that the order appointing the Plaintiff as a receiver did not specifically give him authority to sue or be sued, the Plaintiff would have had to seek leave of the court to institute these proceedings. The second ground of objection to the application is that the receiver did not have *locus* to sue in his own name. *Kerr on the Law and Practice as to Receivers* (16 ed) states at 168 that: “A receiver acquires no right of action by virtue of his appointment: he cannot sue in his own name as receiver, eg for debts to a company, or to parties over whose assets he has been appointed receiver; nor can the court authorize him to do so. In such cases he must maintain the action in the name of the person or persons who would be entitled to sue apart from his appointment”. The Court of Appeal for Kenya expressed exactly the same point of view in *Lochab Brothers v Kenya Furfural Co Ltd and others* [1982] LLR 77 (CAK) Madan JA (as he then was) expressed himself thus: “A receiver cannot sue in his own name as a receiver, since he has no property vested in him, so he acquires no right of action by his appointment. Nor can the court give a receiver leave to sue as receiver. According to the practice, a receiver was never allowed to originate any proceedings *Parker v Dunn* 50 EA 195 at 196. As a comparison a receiver appointed in an action, is to take care of, and receive the property which is put under his charge. He is not at liberty, and is not entitled, to bring an action in his own name; the reason being, that he has no property vested in him. His appointment does not vest any property in him”. Kneller JA put it in the following words: “Lucie-Smith J followed the English authorities before 1939 on the point. They held that a receiver acquires no right of action because he has been appointed as such, so he cannot sue in his own name as receiver, and the court cannot authorize him to do so. He must maintain the action in the name of the person or persons entitled to sue, who would be the one who has the legal or equitable title on which the action is founded. The fact is, the property which is put under his care and the income which he is entitled to receive does not vest in him”. Chesoni AJA (as he then was) expressed the same view, in the following words: “In this case the receivers have no interests, legal or equitable, in the attached goods. The legal interest in the goods is held by the debenture holder ie DFCK Limited. That being the case the receivers were not entitled to bring objection proceedings against execution creditors without joining the holders of the legal interest in those goods as parties to the action. The receivers had no *locus standi* in the matter and their action was a nullity in law”. This case before me was filed by the receiver. In accordance with the *dicta* of the Court of Appeal in the *Lochab Brothers* case (*supra*), I do also hold that the Plaintiff did not have *locus standi* to bring this suit in his own name. Therefore his action is a nullity and so also the suit instituted by him. In effect, even if the order appointing the Plaintiff as a receiver could be construed as having been wide enough to empower the said receiver to institute these proceedings, the suit itself is then a nullity because it was brought by the receiver in his own name. And once the suit is a nullity, it cannot possibly be given a new life by substitution of the Plaintiff. That which is a nullity *ab initio* remains so for all time. The third ground upon which the application is opposed is that the company which is seeking to substitute the Plaintiff was incorporated long after the contract in issue was entered into. It will be recalled that WDF (BVI) was incorporated on 16 October 2001. Meanwhile, paragraph 10 of the draft amended plaint states that the insurance contract between the Plaintiff and the First Defendant was entered into on 26 May 1999. Thereafter, at paragraph 14 of the draft amended plaint, it is stated that the cause of action accrued on the nights of 1 and 2 September 1999. For those reasons, the Defendants submit that the intended Plaintiff is not a person who is necessary for the determination of the real matter in dispute. I do share the same view, as I am unable to comprehend how a company that was incorporated long after the cause of action had accrued will be necessary for the determination of a dispute between parties who had contracted and later fallen out before WDF (BVI) was incorporated. As far as the Applicant is concerned, WDF (BVI) is the successor in title to WDF (IM). In an endeavour to explain the relationship between the two WDFs, the Applicant has annexed Exhibit CKG 4(b), a certificate of registration of a change of particulars. By that certificate Kenya Duty Free Complex notifies the whole world that: “World Duty Free Company Limited (limited company incorporated in British Virgin Islands) are now registered as carrying on business at land registration number 9042/289 Jomo Kenyatta International Airport, Cargo Terminal, Nairobi, PO Box 19122, Nairobi under the business name of Kenya Duty Free Complex”. Mr Wambua *Kilonzo* submitted that the certificate was evidence that the proprietorship of World Duty Free (IM) was changed to World Duty Free (BVI). Frankly, I do not understand that submission. These two companies are in my view two distinct persons. If WDF (IM) wished to change its proprietors, they could simply have caused shares to change hands. I do not comprehend how the creation of WDF (BVI), which then takes over the business of Kenya Duty Free Complex at the Jomo Kenyatta International Airport, Nairobi, is proof that WDF (IM) proprietorship had changed to WDF (BVI). One cannot help but wonder why the action taken was necessary, in any event. By his affidavit the Applicant says at paragraph 5 that: “By a subsequent decree of this Honourable Court issued on 27 September 2001 my appointment as the receiver was revoked and the management of Kenya Duty Free Complex reverted to World Duty Free Company Limited”. In my view, once WDF (IM) had taken charge of its destiny, they could have been properly made the Plaintiff instead of the receiver (assuming of course that the suit itself had not been a nullity). The Applicants have not illustrated to the court the real nexus, if any, between WDF (IM) and WDF (BVI). We do not know what has become of WDF (IM). We do not know if, in law, WDF (BVI) is a successor in title to WDF (IM). By simply having Kenya Duty Free Complex business at Jomo Kenyatta International Airport, Cargo Terminal, Nairobi taken over by WDF (BVI) does not by itself prove that WDF (IM) did assign to WDF (BVI) its choses in action. It must not be lost on anyone that it is on the certificate of registration of a change of particulars, dated 15 October 2002, that land registration number 9042/282 Jomo Kenyatta International Airport, Cargo Terminal Nairobi is first mentioned. Prior to that date, we had heard about two warehouses land registration numbers 209/10882/15 and 209/10882/16, along Mombasa Road. We had also heard about Kenya Duty Free Complexes at Jomo Kenyatta International Airport Nairobi, and Moi International Airport, Mombasa. One is therefore left wondering why the WDF (BVI) ought to be construed as the successor in title to WDF (IM), yet the former only took over one asset; and which in any event we do not know whether or not was previously in the hands of WDF (IM). Page 52 of [2004] 1 EA 45 (HCK) I hold that the Applicant has failed to satisfy me that there is such a legal nexus between WDF (IM) and WDF (BVI) that would enable the court conclude that one was the successor in title to the other. **Conclusion** The Applicant has not proved to me that World Duty Free Limited (BVI) is a party whose presence is necessary to enable the Court effectually and completely to adjudicate upon and settle all or any of the questions involved in the suit. I therefore decline to substitute the Plaintiff, Charles Kariuki Githungo (suing as the receiver of Kenya Duty Free Complex), with World Duty Free Company Limited (BVI). Furthermore, the Plaintiff did not have legal authority to institute the proceedings now before the Court. But even more important, is the fact that if he had had authority to institute proceedings, the Plaintiff was wrong to have instituted these proceedings in his own name. Consequently, the plaint itself is a nullity. Whereas, I do recognise that there is no application before me to strike out the plaint, I do nonetheless believe that the decision to strike out the plaint is merely a direct and inescapable consequence of my refusal to substitute the Plaintiff. Accordingly, I do hereby dismiss the application dated 26 March 2003. I also strike out the plaint dated 27 April 2001. The costs of the application and the suit are awarded to the Defendants. For the Plaintiff:

*GW Kilonzo* instructed by *Wambua Kilonzo & Co*

For the Defendants:

*Information not available*