

**20 November 2002**

**Reference No. 4/2002**

**COMESA COURT OF JUSTICE**  
**STANDARD CHARTERED FINANCIAL SERVICES, A.D. GREGORY AND C. A. CAHILL**  
**v.**  
**COURT OF APPEAL FOR THE REPUBLIC OF KENYA**

**JUDGMENT**

**BEFORE:** LORD PRESIDENT: K. R. A. Korsah

LORD JUSTICE: A. Nyankiye; J. B. Kalaile; J. M. Ogoola; J. Mutsinzi

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Citation: SCFS v. Kenya Court of Appeal, Reference No. 4/2002, Judgment (COMESACJ, Nov. 20, 2002)

Represented By: APPLICANT: Fredrick H. Ngatia; James Gacoka RESPONDENT: Harit Sheth; Richard M. Kariuki

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JUDGMENT OF THE COURT

Lord Justice Korsah delivered the Judgment of the Court.

[1] The facts according to the Applicants, so far as they are relevant to this application, are that: Standard Chartered Merchant Bank Limited of 33/36 Gracechurch Street, London E C 3 VOAX (“SCMBL”) agreed to grant a loan facility in foreign currency to Manchester Outfitters (Suiting Division) Limited (now known as King Woolen Mills Limited) – hereinafter referred to as “Manchester Outfitters.”

[2] By a guarantee dated 5th April 1982, the 1st Applicant guaranteed to SCMBL repayment of the loan. Later, due to financial constraints, Manchester Outfitters requested the 1st Applicant to pay on its behalf, in terms of the guarantee, the debt to SCMBL and convert the company’s liability to Kenya currency so as to ease the foreign currency fluctuation. Thus the 1st Applicant was subrogated for SCMBL.

[3] On 5th September 1990, the 1st Applicant, under the powers conferred upon it by a debenture, appointed the 2nd and 3rd Applicants as receivers and managers of the undertaking of Manchester Outfitters.

[4] Manchester Outfitters and its holding company: Galot Industries Limited (hereinafter collectively called “the Companies”) challenged the appointment of the 2nd and 3rd Applicants as receivers and managers by the 1st Applicant in the High Court of Kenya at Nairobi in Civil case No. 5002 of 1990 against the Applicant in a plaint dated 26 September 1990.

[5] In the plaint the Companies sought the following declarators and orders against the Applicants:

(a) A Declaration against the Applicants that the appointment of the 2nd and 3rd Applicants as receivers and managers on the debenture dated 5th April, 1982 was invalid and ought to be revoked;

(b) A Declaration that the appointment of the 2nd and 3rd Applicants as receivers and managers was voidable as it was in bad faith and that the debenture given by Manchester Outfitters (Suiting Division) Limited was unenforceable and should be set aside rectified and discharged;

(c) An injunction against the 2nd and 3rd Applicants from acting as receiver and managers of Manchester Outfitters (Suiting Division) Limited or otherwise from interfering with its operations;

(d) An order for delivery of possession of all assets and property of Manchester Outfitters (Suiting Division) Limited in the possession of 2nd and 3rd Applicants;

(e) Damages and Costs.

[6] The Applicants filed a defence and counterclaim against the Companies claiming Kshs,24,837,999/- being the outstanding debt with interest thereon at the rate of 19% from 1st February 1992, and further sought a declaration that the debenture dated 5th April, 1982 issued by Manchester Outfitters (Suits Division) Limited was a valid and subsisting security for the indebtedness of Manchester Outfitters to the 1st Applicant.

[7] On 30th July, 1999, the High Court of Kenya, after a full trial, dismissed the Companies suit and entered judgment for the 1st Applicant on its counterclaim. No order having been issued to restrain the disposal of the assets of the Companies pending the intended appeal, the assets were sold in furtherance of the said judgment delivered by the High Court and pursuant to the power conferred by the charge and debenture respectively.

[8] The Companies appealed against the decision of Githinji J. to the Court of Appeal of the Republic of Kenya, the Respondent herein. On 4th October, 2002, the Respondent in a majority judgment overturned the decision of the High Court and gave judgment in favour of the Companies in the sum of Kshs. 251,000,000/- (US \$3,157,500.00) with interest at 14% p.a. payable within 30 days of judgment.

[9] The relief sought by the Applicants in this Court is an order of suspension: "to restrain the Respondent by itself or whomsoever from allowing, permitting, suffering or in any manner causing any execution to issue against the Applicants arising from the decision made on 4th October 2002 by the Respondent".

[10] Firstly it is clear from the relief sought, that the Court of Appeal of the Republic of Kenya, in the exercise of its appellate jurisdiction, made a decision in favour of other parties – Manchester Outfitters and Galot Industries Limited - with which the Applicants are aggrieved and dissatisfied. There is no doubt that, assuming that this Court had the jurisdiction to grant the relief sought, the grant of it would seriously prejudice those parties in whose favour the Court of Appeal for the Republic of Kenya made the decision, without their being heard. Today it is a cornerstone of justice that nobody should be condemned or punished without being given the opportunity to be heard. This is encapsulated in the aphorism *audi alterem partem*. Notwithstanding these strictures of the law, the Applicants have instituted this application without notice to the Companies. The need for these two companies to be apprised that proceedings have been mounted to deprive them of the fruits of their judgment, is paramount.

[11] Rule 36 of the Comesa Court Rules empowers this Court:

"....at any time, after hearing the parties, order that two or more cases concerning the same subject matter shall, on account of the connection between them, be joined for the purposes of the written or oral submission or of the final judgment. The cases may subsequently be disjoined."

[12] At first blush, it would appear that the Rule embraces only “Joinder of Causes” and not “Joinder of Parties”. But since the Rule stipulates that a joinder may be ordered: “for the purposes of the written or oral submissions or at the final judgment,” and this application may result in a final judgment which would deprive King Woolen Mills Limited and Galot Industries Limited of the fruits of their victory in the Court of Appeal of the Republic of Kenya, it is just and equitable that such determination be made only after entertaining their written or oral submissions.

[13] For the good administration of justice, the Court is of the view that all parties materially affected by the decision of the Court of Appeal of Kenya in the case between the Applicants and the Companies, which is sought to be impugned, must be accorded a fair and impartial audience by being joined as parties herein.

[14] In any case, if one does not find solace in the invocation of Rule 36 of the Rules of the Comesa Court of Justice to the facts of this application, one may have recourse to subrule (2) of Rule 2 of the Rules which confers on this Court, the inherent power to meet the ends of justice. The said subrule (2) reads:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Court.”

[15] It cannot be doubted that the ends of justice would best be served by extending the right to be heard to the Companies before this Court embarks on a course which may result in prejudice to them.

[16] The only issue left for determination is the issue of costs.

[17] Following the service of the Applicants’ urgent application for an order of suspension on the Respondent, Advocate Harit Sheth was appointed on 7th November 2002 to protect the interests of the Court of Appeal of the Republic of Kenya. By 13th November, 2002, the Respondent had prepared and filed in the Registry of this Court a Notice of Preliminary Objections to the Jurisdiction of this Court. On 14th November 2002, Advocates of the Respondent, in attempted compliance with a directive of the Judge President, filed written observations on behalf of the Respondent and appeared in the Court today to protect the interests of the Respondent.

[18] Counsel for the Applicants urged the Court to award the Respondent costs only up to 11th November 2002 because on that day a letter was dispatched to the Advocates of the Respondent advising them of the Applicants’ intention to substitute another party for the Respondent on the date of hearing. Mr. Sheth for the Respondent countered this argument by pointing out that the letter advising them of the substitution was received on 12th November 2002, by which time written

observations made pursuant to an order of the Judge President had already been dispatched for filing in this Court. This Court remarked that, notwithstanding notice of the application for substitution being given to counsel for Respondent it would have been rather cavalier on the part of Counsel and also a mark of discourtesy to the Court for Counsel not to present themselves before this Court. In any event the question of costs had not been addressed until today.

[19] It is accordingly ordered that:

(a) the Republic of Kenya be substituted for the Court of Appeal for the Republic of Kenya, as Respondent in Reference No. 4 of 2002 before this Court.

(b) King Woolen Mills Limited and Galot Industries Limited be made Respondents to the Reference before this Court;

(c) Reference No. 4 of 2002, duly amended as, above be served on the Respondents. Thereafter the application is to take its normal course;

(d) the costs of the application up to the time the substitution was made is awarded to the Court of Appeal of the Republic of Kenya; and

(e) in terms of paragraph 2 of Article 34 of the COMESA Treaty no execution be levied in respect of the judgment of the Court of Appeal of the Republic of Kenya dated 4th October 2002 which was the subject matter of the appeal between the Companies and the Applicants, pending the final determination of Reference No. 4 of 2002.

[20] Dated and delivered at Lusaka this 20th November 2002.

K.R.A. Korsah

Lord Justice

A. Nyankiye

Lord Justice

J.B. Kalaile

Lord Justice

J.M. Ogoola

Lord Justice

J. Mutsinzi

Lord Justice