



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**MISC. CIVIL APPLICATION NO. E043 OF 2020**

**BETWEEN**

**EAST AFRICA CABLES PLC.....APPLICANT**

**AND**

**ECOBANK KENYA LIMITED.....RESPONDENT**

**RULING NO. 3**

**The Application**

1. This cause was commenced by a Notice of Motion dated 3<sup>rd</sup> February 2020 under the provisions of **Order 40 rules 1, 4** and **Order 51 rule 1** of the *Civil Procedure Rules* (“the *Rules*”), **sections 1A** and **3A** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* and **Article 159(2)(d)** of the Constitution and all other enabling provisions of the law. It seeks the following relief;

[1] THAT this application be certified as urgent and be heard ex parte in the first instance.

[2] THAT the appointment of Mr Kereto Marima as receiver in relation to certain assets of the Applicant by the Respondent by Deed of Appointment of Receiver dated 31<sup>st</sup> January 2020 be suspended pending the hearing and determination of this Application.

[3] THAT the Respondent be restrained from appointing any other person as receiver of specific assets of the Applicant or at all pending the hearing and determination of this Application.

[4] THAT the appointment of Mr Kereto Marima as receiver in relation to certain specific assets of the Applicant by Deed of Appointment dated 31<sup>st</sup> January 2020 be revoked.

[5] THAT the Respondent be permanently restrained from appointing Mr Kereto Marima or any other person as receiver of certain specific assets of the Applicant predicated upon the presentation of a petition for liquidation of the Applicant dated 19<sup>th</sup> December 2019 by SBM Bank (Kenya) Limited in Insolvency Petition Number E 171 of 2019 or any other reasons cited in the Deed of Appointment of Receiver dated 31<sup>st</sup> January 2020.

[6] THAT this Honourable Court do grant such other orders as it may deem appropriate and expedient in the circumstances of this cause.

[7] THAT the costs of this cause be awarded to the Applicant.

2. The application is supported by the affidavit and supplementary affidavit of Paul Muigai, the Chief Executive officer of East Africa Cables PLC (“the Company”), sworn on 3<sup>rd</sup> February 2020 and 18<sup>th</sup> February 2020 respectively and the grounds set out on the face of the application. The application is opposed by the respondent (“the Bank”) through the Replying Affidavit of Sammy Miringu, a Remedial officer, sworn on 7<sup>th</sup> February 2020. The parties also filed written submissions which their respective counsel highlighted at the hearing.

3. The underlying facts on which the application is based are common ground. The Company obtained various banking facilities from the Bank from 2011 secured by a two specific debentures dated 7<sup>th</sup> December 2011 and 30<sup>th</sup> July 2013 for Kshs. 150,000,000.00 and Kshs.

100,000,000.00 respectively and a debenture dated 11<sup>th</sup> March 2015 making the secured aggregate sum Kshs. 350,000,000.00. On 9<sup>th</sup> December 2019, the SBM Bank Kenya Limited lodged **HC Insolvency Petition No. E171 of 2019** (“the Insolvency Petition”) against the Company which was advertised on 27<sup>th</sup> January 2020 in the print media.

4. On 31<sup>st</sup> January 2020, the Bank made an immediate demand to the Company for payment of Kshs. 190,536,400.16. It simultaneously appointed a receiver over certain assets of the Company by Deed of Appointment of Receiver dated 31<sup>st</sup> January 2020. It is the action of appointing the Receiver that precipitated the filing of the Notice of Motion dated 3<sup>rd</sup> February 2020 which is now under consideration.

5. I wish to point out the Insolvency Petition is still pending as I declined to strike it out by a ruling dated 17<sup>th</sup> February 2020 (see **East Africa Cables Limited v SBM Bank (K) Limited HC ML IP No. E171 of 2020 [2020] eKLR**).

#### **Procedural issue**

6. Before I deal with the substantive issues in this matter, let me dispose of the procedural issue I raised regarding the Company’s application. I drew the Company’s attention to the fact that these proceedings were commenced by a Notice of Motion without an underlying plaint.

7. The Notice of Motion seeking relief was made under, inter alia, **Order 40 rules 1 and 4** of the **Rules**. **Rule 1** thereof states as follows:

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

8. Counsel for the Company cited several decisions to argue that a suit may be brought through various means including a Notice of Motion and that in any case the nature of the matter was short and simple and easily determined. He added that the overriding objective demanded that the matter be dealt particularly in light of **Article 159(2)(d)** of the Constitution which obliges this court to determine matters without undue regard to technicalities.

9. I would only cite the decision of the Court of Appeal in **Geoffrey Ndungu Theuri v Law Society of Kenya NRB CA Civil Appeal No. 5 of 1985 [1988] eKLR** where Kwach JA., summarized the position as follows:

I have no doubt in my own mind that the learned judge was quite right in striking out the application and in refusing to review it. The mode of bringing civil suits is set out under order 4 rule 1 and order 36 in the case of originating summons. Order 39 rule 1 states:

“1. Where in any suit it is proved by affidavit or otherwise-

(a) .....

(b) .....

the court may by order grant a temporary injunction to restrain such act ... as the court thinks fit until the disposal of the suit or until further orders.”

The order specifically refers to a suit which is defined under section 2 of the Civil Procedure Act in these terms: “suit” means all civil proceedings commenced in any manner prescribed under the Civil Procedure Rules and an applicant is not entitled under order 39 of the Civil Procedure Rules to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused section 3A of the Civil Procedure Act does not give the court the power to act without jurisdiction.

10. Since the respondent did not press the issue of defect in the proceedings and the parties ventilated the entire dispute, I need not decide the issue and will now proceed to deal with the substance of the case before me.

#### **Applicant’s Case**

11. The Company’s case is that whereas its business has not been doing well; it has been in the process of restructuring its operations. In that regard, it engaged its creditors including its bankers to restructure its debt. Mr Muigai deponed that he had been involved with negotiations with the Bank over the last one year resulting in a comprehensive restructuring proposal forwarded on 23<sup>rd</sup> January 2020. The Company proposed to pay instalments of Kshs. 5,000,000/- in March, June, September and December. At the time the Company had successfully restructured 82% of the debt. Mr Muigai noted that the Bank’s debt constituted 7.55% of the total indebtedness by the Company.

12. Mr Muigai further deponed that as negotiations were proceeding, SBM Bank, an unsecured creditor accounting for 12.45% of the debt

filed and advertised the Insolvency petition. The Company, in response, took out an advert in the local newspapers dated 28<sup>th</sup> January 2020 in which it informed the public that it was undergoing a debt restructure plan and had completed restructure of 82% of its total banking facilities. It added that, “The Company has continued to engage all the lenders and has made significance (sic) progress to complete the remaining phase which includes the debt with SBM Bank Kenya Limited.”

13. The Company admits that the presentation of the Insolvency Petition would ordinarily be an event of default entitling the Bank to appoint a receiver under its securities but asserts that in this case, the appointment undermines the Company’s efforts to restructure the debt which it is fully committed to completing by ensuring that all creditors are paid in full in the restructured format.

14. Counsel for the Company, Mr Waiyaki, outlined written submissions to support the application. He raised three substantive issues in support of the application. The first issue was the appointment of the receiver was triggered by filing of the liquidation petition which was defective hence the appointment should not be upheld.

15. The second issue raised by Mr Waiyaki is that prior to appointment of the receiver the parties had engaged in correspondence leading to the Company having a legitimate expectation that its debt would be restructured. Counsel submitted that the Bank having actively participated in the restructuring negotiations, it was now estopped from appointing the receiver in the manner it did. Counsel relied on **section 120 of the Evidence Act (Chapter 80 of the Laws of Kenya)** which provides as follows:

120. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representatives shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

16. Counsel further referred to several decisions among them **748 Air Services Limited v Theuri Munyi [2017] eKLR** which cited with approval **McIkenny v Chief Constable of West Midlands [1980] All ER 227** and **John Mburu v Consolidated Bank of Kenya CA Civil Appeal No. 162 of 2015 [2018] eKLR** in which the Court of Appeal affirmed the position in **D & C Builders v Sidney Rees [1966] 2 QB 617** where Lord Denning, MR stated as follows:

It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties.

17. The applicant submitted that doctrine of estoppel applied to this case since the Bank’s representation and conduct in the course of negotiations led it to believe that the Bank would not exercise its strict rights under the Debenture particularly in view of the fact that an agreement on restructuring had been reached and the only issue pending as at 23<sup>rd</sup> January 2020 was an agreement on documentation.

18. Counsel for the Company also submitted that the appointment of a receiver was a drastic remedy and should not be exercised lightly due to the consequences of such an appointment. He referred to the dicta of Ringera J., in **Jambo Biscuits v Barclays Bank of Kenya Limited, Andrew Gregory and Abdul Zahir Sheikh [2003] 2 EA 434** where he stated that, “[I] think it is a notorious fact of which judicial notice may be taken that receiverships in this country have tended to give kiss of death to many a business.” Counsel pointed out that the appointment would cause irreparable loss to the Company including catering for the costs of the receiver which are very high, the availability of funds to support 210 employees, suppliers, secured and unsecured creditors and shareholders.

19. The final issue raised by the Company is whether the court has the power to interfere with the appointment of a receiver. Mr Waiyaki submitted that the Court has discretion and power to intervene in the appointment of a receiver under a debenture under **section 3A of the Civil Procedure Act** which preserves the inherent power of the court to make such orders as are necessary to meet the ends of justice. Counsel added that in any case the court has the power to intervene where the power of appointment is exercised oppressively and without basis and where the circumstances of the case allow it to do so. He cited the case of **Sparex and Industries Limited v Fina Bank Limited CA Civil Application No. NAI 25 of 2000 [2000] eKLR** and **Re Masklyne British Typewriters Ltd [1898] 1 Ch 133**.

20. Counsel urged the court should grant the orders sought on the basis that in the circumstances that it was not only just and legal to do so but that it also made commercial sense to revoke the appointment of the receiver as the failure to do so would jeopardize the operations of the Company.

### **Respondent’s Case**

21. The Bank’s case was that it had a valid and undisputed right to appoint a receiver which right was not disputed by the Company. The Bank pointed out that the Company had defaulted in servicing its facilities and that the same had fallen into arrears whereupon it made several demands for payment of outstanding amounts. Ms Lubano, counsel for the Bank, submitted that continued default entitled it to exercise any of its rights under the Debenture including appointment of a receiver which it did. She added that in this case there was no dispute regarding default and since no irregularity or invalidity in appointment had been demonstrated by the Company, there was no basis for the Company to challenge the appointment of the receiver or for the court to intervene in such appointment. Counsel cited the case of **Re: High-Plast Limited ML HC IP No. E001 of 2019 [2019] eKLR** where the Court observed that:

The rights of the Secured Creditor under the charge are intact. These rights are subject to the legal regime that regulates the processes of executing these rights. The secured Creditor is held accountable in the exercise of rights under the registered charge. In order to exercise statutory power of sale, the Secured Creditor does not require the Court’s intervention. In the circumstances this Court cannot grant orders to impair the exercise such rights unless the Court’s jurisdiction is triggered by procedural non-compliance of mandatory statutory provisions of relevant legislation or if the validity of the registered charge that confers priority

rights is challenged.

22. In response to the submission that the Bank was estopped from appointing a receiver on the basis of negotiations to restructure the debt, the Bank's position was that the Company put forward several proposals which the Bank did not accept. It stated that the Company did not accept the Bank's terms for settlement and that at the end no agreement was reached hence it was not correct to state that the Bank had waived its right to enforce the debenture. Ms Lubano submitted that no waiver or estoppel can be implied on the basis of a non-binding or inconclusive settlement discussions. She referred to **Re SS Agri Power Ltd [2017] EWHC 3563 (Ch), 2017** where the court rejected the argument that the Debenture holder waived its rights to appoint a receiver as a result of entering into negotiations in the absence of a signed agreement. Counsel further pointed out that in any case, the terms of the Debentures exclude the operation of a waiver to limit or restrict the Bank's right to enforce the Debentures.

23. The Bank affirmatively submitted that it appointed a receiver on the ground that the Company had defaulted on its obligation under the Debenture and not by reason of the filing of the Insolvency Petition by an unsecured creditor. The Bank relied on the instrument of appointment of the Receiver which was clear on this point. In any case, it submitted, the filing of a liquidation petition against the Company entitled it to appoint a receiver. Ms Lubano further submitted the pendency of liquidation proceedings against the Company did not affect the rights of a secured creditor nor is the appointment subject to supervision by the court, a position affirmed in **Ruling No. 2** in this matter where I held as follows:

[20] I find that the law is settled that a secured creditor is entitled to exercise its rights under the security document or statute in the event of default by the company. That power is not subject to insolvency proceedings commenced against the company by any other creditor. Further, an administrator or liquidator cannot interfere with the exercise of those rights.

24. The Bank further submitted that the application to suspend or revoke the appointment of the receiver has been overtaken by events as the receiver has already taken control of the secured asset. Counsel relied on the case of **Deeya Hardware and Wholesalers Limited v Southern Credit Banking Corporation Limited and 2 Others KKG HCCC No. 38 of 2008 [2008] eKLR** where the court held that:

[T]he Receivers are already in place. By being asked to restrain them from acting as Receivers, this court is being actually requested to terminate their appointments and to remove them. It would appear that the plaintiff is seeking a mandatory injunction, couched in negative terms.

25. The Bank discounted the argument that the Company would suffer loss and damage following the appointment of the receiver. Counsel submitted that the Receiver can only take control of the assets specified in the debenture and does not interfere with the other business assets of the Company or its operations. It was further submitted that the adverse effects of appointing a receiver is not a ground for setting aside, suspending or revoking the appointment and that while the Bank is only required to act in good faith in appointing a receiver, it does not owe the Company a duty of care in such appointment. Counsel cited the case of **Re Potters Oils Limited [1986] W WLR 201** where it was held that:

The debenture-holder is under no duty to refrain from exercising his rights merely because to exercise them may cause loss to the company or its unsecured creditor

26. Counsel also relied on **Madhupaper International Limited v Kerr CA Civil Application No. NAI 116 of 1985 [1985] eKLR** where the Court of Appeal observed that:

It is correct law that a debenture holder which has this right is under no duty to refrain from exercising its rights because doing so might cause loss to the company or its unsecured creditors .... so there could be no duty to refrain because the company is bent on building up another business which the debenture holder is sure is doomed to failure from the outset.

27. Ms Lubano concluded that the Company had not established that the Bank acted in bad faith in appointing the receiver or that there were compelling reasons or any reasons to suggest the appointment or indeed conduct of the receiver was oppressive to warrant the court's interference in the manner urged by the Company. Counsel quoted the case of **Kenya United Steel Company v Kenya Commercial Bank Limited CA Civil Application No. NAI 109 of 2005 [2005]** where the Court of Appeal stated that:

[I]t was not appropriate, with the above principles for the Court to interfere in the passage of the receivership unless it could be shown that the conduct of the receivers and managers was seriously oppressive, or nor in accordance with the recognised principles of law and commercial practice, or that there were clear and compelling reasons to do so.

## Determination

28. From the depositions and submissions by the parties, the Company does not dispute the right of the Bank to appoint a receiver under the Debentures. It also admits indebtedness and the fact that the filing of the Insolvency Petition against it entitles the Bank to appoint a receiver. The issue for consideration is whether this court, in the circumstances of this case, should remove the Receiver appointed by the Bank under the Debentures.

29. Both parties are agreed that the court should not intervene in the appointment of a receiver unless it is shown that the appointment is in bad faith, is irregular and void and that there are compelling reasons to find that the conduct of the receiver is oppressive to warrant the court's intervention (see **Kenya United Steel Company v Kenya Commercial Bank Limited (Supra)**). The Company does not make any allegation in the depositions of Mr Muigai that since appointment, the conduct of the Receiver has been oppressive or would warrant his removal hence this inquiry must be limited to the manner and process of appointment.

30. I would also add that in line with the dicta in **Madhupaper International Limited v Kerr (Supra)**, the debenture holder has no duty to

refrain from appointing a receiver on account of the likely prospects of injury to the company, its employees, creditors or shareholders. The general observations by Ringera J., in the *Jambo Biscuits Case (Supra)* that appointment of a receiver signals the death of a company, is not a reason to remove a receiver. The applicant must bring itself within the established legal principles in order for the court to remove a receiver duly appointed under a debenture.

31. The Company has raised two principal grounds to attack the appointment of the receiver. The first is that the appointment was triggered by the Insolvency Petition. The filing of a liquidation is an event of default under the debentures which entitles the Bank to appoint a receiver. In this case though, the instrument of appointment is clear that the appointment was made pursuant to a demand of indebtedness. Either way, the Company has not proved that the appointment is irregular, void or falls outside the four corners of the debentures.

32. The next ground of challenge is that the Bank was estopped from appointing a receiver on the ground that parties had been engaging in negotiations prior to appointment of the Receiver. While there is evidence of correspondence between the parties negotiating a restructure of the debt, no agreement was reached. From the authorities cited (see *John Mburu v Consolidated Bank of Kenya (Supra)*) and for the doctrine of estoppel to apply, the party relying on it must show that it changed its position relying a clear representation that the party making the representation would not exercise or enforce its rights.

33. There is no evidence that the Bank represented to the Company that it would not exercise its remedies under the Debentures and that the Company changed its position based on such a representation. The reality is and the facts disclose that the parties were negotiating a restructure of the debt. The parties made offers and counter offers and an agreement was not reached. Unless the negotiations result in a written agreement, the Debentures themselves exclude the possibility of waiver of the parties' rights and obligations. I therefore find that such negotiations or conduct cannot amount to estoppel or waiver.

34. The Company has not established any grounds for this court to intervene and remove the Receiver who has been regularly and validly appointed by the Bank under the Debentures.

### **Disposition**

35. I dismiss the Notice of Motion dated 3<sup>rd</sup> February 2020 with costs to the respondent.

**DATED** and **DELIVERED** at **NAIROBI** this 17<sup>th</sup> day of **MARCH** 2020.

**D. S. MAJANJA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango.

Mr Waiyaki instructed by Mboya Wang'ongu and Waiyaki Advocates for the applicant.

Ms Lubano instructed by Oraro and Company Advocates for the respondent.