



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E170 OF 2019**

**KIRIMARA HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**MURINGA HOLDINGS LIMITED.....1<sup>ST</sup> DEFENDANT**

**GURSHAN SINGH BRAR.....2<sup>ND</sup> DEFENDANT**

**ZACHARIA N. BARAZA T/A SIUMA AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. Through the application dated 6<sup>th</sup> June 2019, the applicant herein seeks the following orders:

**a) Spent.**

**b) That the honourable court be pleased to issue a temporary injunction restraining the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from proceeding with the sale of the property of the 1<sup>st</sup> defendant which was attached in levying of distress by the proclamation issued by the 3<sup>rd</sup> defendant on the 18<sup>th</sup> February 2019 pending the hearing and determination of this application.**

**c) That prayer 2 above be confirmed upon inter parties hearing pending the hearing and determination of the suit.**

**d) That the court be pleased to declare and/or pronounce that the assorted assets, of the 1<sup>st</sup> defendant as detailed out in the proclamation dated 18<sup>th</sup> February 2019 by the 3<sup>rd</sup> defendant are charged to the applicant/plaintiff by virtue of the debenture dated 13<sup>th</sup> May 2016 and the said charge stands in priority to the levying of distress by the 2<sup>nd</sup> defendant.**

**e) That consequent to prayer (d) herein above being granted, the court be pleased to discharge, vary and/or rescind the attachment of the assorted assets listed on the Proclamation Notice dated 18<sup>th</sup> February 2019 by the 3<sup>rd</sup> defendant.**

**f) That the costs of the application be borne by the defendants.**

2. The application is brought under Order 40 Rules 1, 2, 3 and 4 and Order 50 Rules of the Civil Procedure Rules (CPR). The application is supported by the affidavit of the applicant's Director sworn on 6<sup>th</sup> June 2019 and the supplementary affidavit dated 11<sup>th</sup> July 2019.

3. A summary of the applicant's case is that it advanced the sum of Kshs 40 million to the 1<sup>st</sup> respondent which sum was secured by the creation of a floating debenture by the plaintiff on the assets of the said 1<sup>st</sup> defendant/respondent. On 18<sup>th</sup> February 2019, the 2<sup>nd</sup> respondent appointed the 3<sup>rd</sup> respondent to levy distress on the 1<sup>st</sup> respondent's property which the 3<sup>rd</sup> respondent proceeded to proclaim. By an instrument of appointment, the plaintiff appointed a receiver on 19<sup>th</sup> February 2019.

4. Through an order obtained in the Chief Magistrate's Court Milimani in Miscellaneous Application No. 366 of 2019, the 3<sup>rd</sup> respondent, with the assistance of the police, sought to levy distress in the 1<sup>st</sup> respondent's property on **LR. No. 1525/1 Kinale** thereby triggering the instant application and suit in which one of the prayers sought is a declaration that the assorted assets that are the subject of the distress and proclamation dated 18<sup>th</sup> February 2019 are charged to the applicant by the virtue of the debenture dated 13<sup>th</sup> June 2018 and that he said charge stands in priority to the levy of distress by the 2<sup>nd</sup> respondent.

## The 2<sup>nd</sup> respondent's case

5. The 2<sup>nd</sup> respondent opposed the application through his replying affidavit sworn on 24<sup>th</sup> June 2019 wherein he avers that he was a Director and shareholder in the plaintiff company but ceased to hold both positions and sold his shares to the applicant deponent who is also a shareholder and Director of the 1<sup>st</sup> respondent and further, that the applicant has all along been aware of his claim against the 1<sup>st</sup> respondent.

6. He states that he is the registered owner of that LR No. 1525/1 Kinale and that sometime in the year 2005, he entered into a license Agreement with the 1<sup>st</sup> defendant who breached the terms of the said agreement thereby prompting him to file Nairobi ELC Case No. 1469 of 2014 wherein the court on 17<sup>th</sup> June 2015 issued orders directing the 1<sup>st</sup> respondent to pay monthly rent including any rent arrears on or before 2015.

7. The 2<sup>nd</sup> respondent's case is that the 1<sup>st</sup> respondent did not comply with the said court orders thereby prompting him to move to levy distress and to seek the court's order for security while levying distress.

8. He states that the recovery of rent/license fees from the 1<sup>st</sup> respondent is therefore valid as it follows a valid court order which has not been varied or set aside.

9. The parties respective advocates filed written submissions in support of their positions which I have carefully considered and I note that the main issues for determination are:

- a) Whether the plaintiff's debt ranks in priority to the 2<sup>nd</sup> respondent's distress for rent.
- b) Whether the prayers sought in the application are merited.

10. It was not disputed that the applicant is debenture holder over the 1<sup>st</sup> respondent's assets as shown in the duly registered debenture document attached to the applicants' supporting affidavit as annexure "DK1". At Clause 16, 17 and 19 of the said debenture, the plaintiff and the 1<sup>st</sup> respondent agreed as follows:

**16. The principal moneys and interest and other moneys hereby secured shall immediately become due and payable without any demand protest or other notice of any kind all of which are expressly waived by the company on the happening of any event stated hereunder;**

**a. If any amount due by the company hereunder or under any other agreement made between the company and the lender is not paid on the due date for payment thereof ( whether or not demanded) or if any amount due by the company under any other agreement or instrument made available by the lender or any other creditor, lender person or persons, or company is not paid on the due date for payments thereof; or**

**b. If a distress or execution either by virtue of any court order, decree nor process or otherwise howsoever is levied or enforced upon or issued against any part of the property and assets of the company or the company commits any act or default by reason of which any such distress or execution might be levied; or**

**c. If a receiver is appointed by any court or by any other person over any part of the property and assets or the company; or**

**d. If an order is made or a resolution is passed for the winding up of the company or a petition for such winding up is filed or notice of a meeting to pass such resolution is issued; or**

**e. If a notification of charge either by court order decree or process or the direction of the Commissioner of Income Tax or any other authority is registered against any immovable property of the company; or**

**f. If the company without consent of Lender, ceases to carry on its business or thereafter to cease to carry on the same or sells or otherwise dispose of or shall threaten to sell or dispose of all or a material part of its assets (other than in the normal course of trading) whether by one or a series of transactions related or not or changes he nature or mode of conduct of its trading in any material respect; or**

**g. If the company commits or attempts or purports to commit a breach of the covenants and agreements herein or in any other security created by the company in favour of the Lender contained or implied or if any of the warranties and representations made by the company in the existing security and herein contained are found to be false or incorrect; or**

**h. If any governmental authority shall condemn, nationalize seize or otherwise acquire or appropriate all or any substantial part of the property or assets of the company; or**

**i. If any civil war, revolution, insurrection, action by local national or foreign or international forces, blockade, riot or any event being Acts of God or otherwise beyond control of the company shall seriously impair the efficient and proper conduct of the business of the company or render the same unreasonably hazardous; or**

**j. If a petition is filed or an application is made in respect of or any order is made or any resolution is passed for or any notice is issued to convene a meeting for the purpose of passing such resolution by any interested party for the winding up or**

dissolution of the company pursuant to the provisions of the Companies Act( Chapter 486 of the Laws of Kenya); or

k. If the company defaults under any trust deed loan agreement debenture or under any hire purchase credit sale lease or similar agreement or under any guarantee bond or other third party obligation or if any borrowing or other money payable under those documents or obligations becomes or is capable of being declared payable prior to its stated maturity or is not paid when due or if any debenture mortgage charge or other security from time to time created by the company becomes enforceable; or

l. If any company stops payments or becomes unable to pay its debt within the meaning of Section 220 of the Companies Act or if the company proposes or enters into any composition or arrangements with its creditors or any class of its creditors; or

m. If any licenses, authorization, consent or registration at any time necessary or desirable to enable the company to comply with its obligations to the Lender or to carry on its business in the normal course shall be revoked withheld or materially modified or shall fail to be granted or perfected or shall cease to remain in full force and effect; or

n. If the company charges, pledges or otherwise encumbers ( by way of fixed or floating security) any of the property and assets hereby charged or attempts so to do without the consent in writing to the Lender; or

o. If any guarantees indemnity or other security created in favour of the Lender is in jeopardy or is not or cease to be in full force and effect or is voidable or unenforceable or is disputed revoked or terminated or it becomes unlawful or impossible for the Lender to exercise any right or power vested in it under any such security and is considered by the Lender to be material; or

p. If any of the above events occurs in relation to any third party which now or hereafter has guaranteed or provided security or given an indemnity in respect of any of the moneys obligations or liabilities secured by this debenture.

17. The floating charge by the Debenture shall immediately crystallize and attach by way of fixed charge to the property and assets comprised herein then subject to the floating charge without presentment, demand, protest or notice if the Lender shall take any action to enforce the debenture and shall also automatically crystallize and attach as aforesaid without any presentment demand protest or notice of any of the events specified in sub-clause(b) (c ) (d) (f) and (n) of Clause 17 hereinabove and upon such crystallization the legality or validity of this charge shall not be challenged by the company on any reason whatsoever.

19. At any time after the principal money hereby secured become payable either as a result of lawful demand being made by the Lender or under the provisions of the Clause 17 hereof and so that no delay or waiver of the rights to exercise the powers hereby conferred shall prejudice the future exercise of such powers and without prejudice to any other remedies provided by law the Lender may appoint in writing under the hand of any of its officers or attorneys or under its common seal any person or persons whether an officer or officers or agent or agents of the Lender or not to be a receiver or receiver and manager or joint receiver or receivers and managers of the property and assets hereby charged or any part thereof in this debenture referred to as a "receiver" upon such terms as to remuneration or otherwise as the Lender shall think fit and may in like manner from time to time remove any receiver or receiver and manager or joint receivers or receivers and managers so appointed and appoint another or others in his or their stead. Where more than one receiver and manager is appointed, the receivers or receivers and managers shall have the powers to act severally unless the Lender shall specify otherwise in their appointment.

11. Having regard to the above highlighted terms of the debenture agreement, I find that it is clear that in the instant case, the circumstances under which the debenture/floating charge over the 1<sup>st</sup> respondents' property would crystallize had arisen. I say so because the applicant had already appointed a receiver upon the 1<sup>st</sup> respondent's failure to pay the debt when demanded and the levy of the distress, for rent on the 1<sup>st</sup> respondent's property was also imminent. It was also not disputed that the applicant appointed a receiver on 19<sup>th</sup> February 2019 to secure its interests way before 12<sup>th</sup> April 2019 when the 2<sup>nd</sup> respondent actualized the order to levy distress.

12. My finding is that by appointing a receiver on 19<sup>th</sup> February 2019, the applicant herein initiated the process of preserving its rights under the debenture and thus, the process of distress for rent, which was at the time of the said appointment incomplete, took the 2<sup>nd</sup> place in priority below the plaintiff's secured debt. I am guided by the decision in the case of **Lochab Brothers Kenya Limited v Kenya Furfural Ltd** [1983] eKLR wherein while addressing the issue of crystallization of a debenture, the Court of Appeal stated as follows:

**"When a debenture has created a floating charge over the whole movable property of a company which is a going concern, it attaches to the property as it varies from time to time. If any of the company's property is subsequently attached in execution that property, although in the custody of the court broker, remains the property of the company and therefore subject to the floating charge. On the appointment of a receiver the charge crystallizes; that is, it becomes a fixed charge over the movable property of the company as at that date including any attached property which has not yet been sold."**

13. The court further addressed the question of the ranking of debts and stated categorically that;

**"And what it is if the debenture holder appoints the receivers and managers after the broker gets the warrant and or after he has attached the goods which are the security for the loan but before their sale? The floating charge is valid and has priority over the seizure by the broker"**

14. In the present case, I find that while it is not in contention that the 2<sup>nd</sup> respondent is entitled to levy distress or the outstanding rent from the 1<sup>st</sup> respondent. The only caveat in this case is that the 2<sup>nd</sup> respondent's right ranks second after the applicants rights under the debenture.

15. Having appointed a receiver to look into the financial affairs of the 1<sup>st</sup> respondent, I find that the 2<sup>nd</sup> respondents claim will be one of the issues that the said receiver will consider claiming with after resolving the applicants claim under the debenture.

16. The 2<sup>nd</sup> respondent challenged the appointment of a receiver on the basis that the applicant has not satisfied requirements under Part XI of the Insolvency Regulations under Regulation 102-109 and Section 537 of Insolvency Act which stipulates as follows:

*(1) A general meeting of the creditors of a bankrupt may establish a creditors' committee to perform the functions conferred on it by or under this Part.*

*(2) A general meeting of the creditors of a bankrupt may not establish such a committee, or impose functions on such a committee, while the Official Receiver is the bankruptcy trustee in respect of the bankrupt's estate, except in relation to appointing a person to be bankruptcy trustee instead of the Official Receiver. 103.*

*(1) A creditors' committee may not perform its functions if at any time the Official Receiver is bankruptcy trustee in respect of the bankrupt's estate. expert to assist the bankruptcy administration of the bankrupt's No.18 Entitlement of partner's creditor to prove debt at creditors' meeting. Creditors may appoint expert or committee to assist bankruptcy trustee. Creditors' right to inspect documents. Committee of creditors may be established. Exercise by Cabinet Secretary of functions of creditor's No. L8 tt20 Insolvency.*

*(2) If, in the case of a bankruptcy, no creditors' committee exists and the bankruptcy trustee in respect of the bankrupt's estate is a person other than the Official Receiver, the functions of the creditors committee are to be performed by the Cabinet Secretary, except in so far as the insolvency regulations otherwise provide. Division 9-Bankrupt's property after bankruptcy 104. (1) Until the bankrupt is discharged-*

*(a) all property (whether in or outside Kenya) that the bankrupt acquires or that passes to the bankrupt vests in the bankruptcy trustee without that trustee having to intervene or take any other step in relation to the property, and any rights of the bankrupt in the property are extinguished; and*

*(b) the powers that the bankrupt could have exercised in, over, or in respect of that property for the bankrupt's own benefit vest in the bankruptcy trustee.*

*(2) This section is subject to sections 106 and 124.*

*(3) This section does not apply to property that is vested in the bankrupt under an order made under section 120(3). 105. If the bankruptcy trustee is replaced, the property and powers vested in the former bankruptcy trustee under this Act vest in the replacement bankruptcy trustee. 106. Property held by the bankrupt in trust for another person vests in the bankruptcy trustee, who shall assume control of the property and deal with it for the benefit of the beneficiaries of the trust. 107.*

*(1) If a bankruptcy trustee considers it necessary to do so, the bankruptcy trustee may apply to the Court for an order under subsection (2).*

*(2) On the hearing of an application made under subsection (1), the Court may order that any money due to the bankrupt, or any money to become due or payable to the bankrupt, is assigned or charged to, or in favour of, the bankruptcy trustee.*

*(3) The assignment or charge is a discharge to the person who pays the bankruptcy trustee 2015 committee. Status of property acquired during bankruptcy. Property vests in replacement bankruptcy trustee. Property held in trust by bankrupt. Court may order money due to bankrupt to be assigned to bankruptcy trustee. 2015 Insolvency 108. The bankruptcy trustee shall apply the following payments in accordance with the Second Schedule (Priority of payments to preferential creditors)-*

*(a) any amount paid by the bankrupt under section 150; and*

*(b) any amount paid to the bankruptcy trustee under an order made under section 107. 109.*

*(1) This section applies if a bankruptcy order has been made in respect of a debtor but, before the order was made, a creditor has-*

*(a) issued execution against the debtor's property; or*

*(b) attached a debt payable by the debtor.*

*(2) If this section applies, the creditor may retain the benefit of the execution or attachment (including the proceeds) only if the creditor completed the execution or attachment-*

*(a) before the bankruptcy order was made; and*

*(b) before the creditor had notice that an application for such an order had been lodged.*

*(3) The creditor may retain as against the bankruptcy trustee a payment made by the bankrupt in the course of the execution or attachment to avoid the execution or attachment as if-*

*(a) the payment was the proceeds of the execution or attachment; and*

*(b) the execution or attachment was completed when the payment was made.*

*(4) The right of a creditor under this section to retain the benefit of an execution or attachment is subject to Division 19.*

Section 537 Insolvency Act.

*(1) A person who appoints an administrator of a company under section 534 shall lodge with the Court-*

*(a) a notice of appointment that complies with subsections (2); and*

*(b) such other documents as may be prescribed by the insolvency regulations for the purposes of this section. No.18 Restrictions on the power of holder of floating charge to appoint administrator. Administrator not to be appointed if relevant floating charge is not enforceable. Holder of relevant floating charge to notify the Court on appointing administrator. 1340 No. 18 Insolvency*

*(2) A notice of appointment complies with this subsection if-*

*(a) it includes a statutory declaration by or on behalf of the person who makes the appointment-*

*(i) that the person is the holder of a qualifying floating charge in respect of the company's property;*

*(ii) that each floating charge relied on in making the appointment is (or was) enforceable on the date of the appointment; and*

*(iii) that the appointment is in accordance with this Part; and*

*(b) it identifies the administrator and is accompanied by a statement by the administrator-*

*(i) that the administrator consents to the appointment;*

*(ii) that in the administrator's opinion the purpose of administration is reasonably likely to be achieved; and*

*(iii) giving such other information and opinions of a kind prescribed by the insolvency regulations for the purposes of this section.*

*(3) A statutory declaration under subsection (2) is not effective unless it is made during the period prescribed by the insolvency regulations for the purposes of this section.*

17. In this case, I have perused annexure "DK3" attached to the applicant's supporting affidavit which is the copy of the notice of appointment of the receiver. I find that the fact that the applicant appointed a receiver is not in dispute and such appointment has not been set aside. The crystallization of the debenture in this case was to happen in the event of appointment of a receiver or in the levying of distress for rent. Therefore, even assuming that a receiver had not been appointed, the fact that the 2<sup>nd</sup> respondent had levied distress would activate the crystallization of the debenture.

18. Turning to the issue of whether orders of injunction should issue in this case, I note that the principles governing granting of orders of injunction were set out in the celebrated case of *Giella v Cassman Brown Co. Ltd* (1971) EA 358 wherein the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows:-

***"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."***

19. In the present case, I have already found that the applicant has established that it had a debenture agreement with the 1<sup>st</sup> defendant which debenture crystallized in priority of the 2<sup>nd</sup> respondent's debt that is the subject of the distress for rent. Clearly therefore, the applicant has established a prima facie case against the respondents with probability of success.

20. On the irreparable harm to be suffered by the applicant if the injunctive orders sought are not granted, I note that the amount secured by the debenture has been stated to be kshs 40 million. The applicants case is that the 1<sup>st</sup> respondent has defaulted in repaying the debt thereby prompting it to appoint a receiver so as to assist in the recovery of the outstanding debt in accordance with the terms of the debenture. The 1<sup>st</sup> respondent did not file any response to the application to counter the applicant's claim and therefore one can say that the applicant's claim is not contested. I therefore find that going by the huge amount in dispute, the applicant may suffer irreparable loss in terms of its financial resources unless the orders sought are granted.

21. I further find that in the circumstances of this case, the balance of convenience tilts in favour of granting the orders sought in the instant application.

22. Consequently I allow the application dated 6<sup>th</sup> June 2019 in the following terms:

*a) That an order of temporary injunction is hereby issued to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from proceeding with the sale of the property of the 1<sup>st</sup> defendant which was attached in levying of distress by the proclamation issued on 18<sup>th</sup> February 2019 pending the hearing and determination of the suit.*

*b) A declaration is hereby issued that the assorted assets, of the 1<sup>st</sup> defendant as contained in the proclamation by the 3<sup>rd</sup> defendant dated 18<sup>th</sup> February 2019 are charged to the applicant/plaintiff by virtue of the debenture dated 13<sup>th</sup> May 2016 and the said charge stands in priority to the levying of distress by the 2<sup>nd</sup> defendant.*

*c) That as a consequent to prayer (b) hereinabove an order is hereby issued to rescind the attachment of the assorted assets listed on the Proclamation Notice dated 18<sup>th</sup> February 2019.*

*d) That the costs of this application shall abide the outcome of the main suit.*

**Dated, signed and delivered in open court at Nairobi this 30<sup>th</sup> day of September 2019.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

No appearance for applicant.

Mr. Mbote for 2nd defendant

Court Assistant - Otieno