



**REPUBLIC OF KENYA**

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

**COMMERCIAL DIVISION & ADMIRALTY DIVISION**

**CIVIL SUIT NO 78 OF 2014**

**SURYA HOLDINGS LIMITED.....1<sup>ST</sup> PLAINTIFF**

**RHEA HOLDINGS LIMITED.....2<sup>ND</sup> PLAINTIFF**

**KARUTURI LIMITED.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**CFC STANBIC BANK LIMITED.....DEFENDANT**

**RULING**

1. In a Ruling dated and delivered on 13<sup>th</sup> October 2016, this Court found that Karuturi Limited (hereinafter the Company or the 3<sup>rd</sup> Plaintiff) had admitted owing CFC Stanbic Bank Limited (hereinafter the Bank or the Defendant) a sum of USD 4,028,194.30 and Khs.2,706,994.13 together with interest thereon being the Pre-receivership Debt. Surya Holdings Limited (The 1<sup>st</sup> Plaintiff) and Rhea Holdings Limited (The 2<sup>nd</sup> Plaintiff) had provided securities to support the facilities that gave rise to this debt.

2. The Company was placed under Receivership by the Bank on 10<sup>th</sup> February 2014. On that date, Kieran Day and Ian Small were appointed by the Bank as joint Receivers and Managers. The role of Receiver and Managers (hereinafter The Receiver Managers) has since been taken up jointly by Muniu Thoithi and Kuria Muchiru. The function of a Receiver Manager is, in addition to undertaking his duties as a Receiver, to manage the business of the Company for the period of the Receivership. It also needs to be mentioned that on 30<sup>th</sup> March, 2016 the Court in Winding up Cause 12/2013 issued Winding up Orders against the Company.

3. In the application that was partly determined by the Ruling, the Bank had asserted that the indebtedness of the Company had grown after the Receivership. In the Ruling the Court ordered that a Forensic Audit be undertaken to review all the business and operational transactions undertaken during the Receivership period so as to establish the amount, if any, owed by the Company to the Bank during the Receivership period. That Audit would enable the Court make a final determination on the Bank's application of 21<sup>st</sup> June 2016.

4. The parties herein concurred that Deloitte Consulting Limited undertakes the Audit. In respect to the terms of Reference for the Audit, it was agreed that in addition to the Court Order, it would be what was contained in the Bank's Advocates letter of 27<sup>th</sup> October 2016 and the Plaintiff's Advocates letter of 3<sup>rd</sup> November 2016. By virtue of that Agreement the scope of the Audit was to include the following:-

- An audit of the expenses paid for by the Bank on behalf of the Company during the receivership period.
- An audit of repayments, if any, made by the Company to the Bank during the receivership period.
- An audit of the balance outstanding from the Company and due to the Bank in respect of expenses paid for by the Bank on behalf of the Company during the receivership period.
- Review of the production and export volumes of the Company during the receivership period.
- Ascertaining the revenues made by the Company during the receivership period.
- Ascertaining the average prices achieved by the Company during the receivership period.
- Review of the expenses and payments made by the Company during the receivership period and;

- Ascertaining the amount of outstanding creditors in respect of the receivership period.
- To consider the findings and Report made by PKF, which includes;
  - a) Investigate and make findings regarding alleged misconduct, including sales to Karuturi Limited BV, unaccounted production, understated value of sales and how it was perpetrated, by whom and establish possible financial loss suffered by Karuturi Limited.
  - b) Review the production and yield records to establish production of stems to sales over the period and compare to the industry average and historical performance.
  - c) Analyse utilization of the packaging materials and reconcile to exports, packages and match to revenue reported.
  - d) Review all payments including payments to casual workers and suppliers during the period or receivership.
  - e) Reconciliation of VAT and other tax returns.
  - f) Review of all business plan/viability or any other assessment for any additional loans taken by the Receivers.
  - g) Review of loan covenants and any additional facilities and establish the balances.
  - h) Analysis of assets and investments acquired/sold/liquidated over the period under receivership.
  - i) Analysis of inventories/raw materials including packaging during the period of receivership.
  - j) Analysis of records kept by Karuturi Limited's staff and Employees' Union for cross verification.
  - k) Make independent viability assessment on the work compare to 2007-2012 costs revenue and production with the same over the period under receivership.
  - l) Perform any additional work that may be required arising from the findings from the above including forensics for any monies lost on account of misconduct or otherwise.

5. The Audit was conducted and Deloitte prepared its Report which was duly submitted to Court. The Report made the following conclusions which was said to be based on the findings of the Audit.

- (i) The expenses paid by the Bank on behalf of the Company from the period 10<sup>th</sup> February 2014 to 31<sup>st</sup> December 2016 amounted to USD 9,461,583.89.
- (ii) The pre-receivership debt stood at USD 6,264,602.71. This amount included interest and penalties.
- (iii) A total of 9,081,750 Flower stems could not be accounted for.
- (iv) A Company by the name Twiga BV was incorporated to facilitate the sales of exported Flowers. The proceeds received by Twiga from the sale of Flowers were remitted to the Company, to pay Suppliers of the Company or to pay for Expenses and Commissions incurred by Twiga BV.
- (v) In respect to VAT there was an under declaration of Kshs.15,774. There was also a possibility that VAT for the sale of Flowers amounting to Euro 1,770,544 had not been charged.
- (vi) The accusation by the Directors of the Company that the Receivers had violated a transfer pricing agreement entered with KRA did not have merit.
- (vii) A physical verification of assets confirmed the existence of all assets indicated in the Asset Register.
- (viii) The Audit established that between 10<sup>th</sup> February 2014 and 6<sup>th</sup> May 2016 a total of 403,415,498 of Flower Stems of good quality had been harvested. The Auditors were unable to find prove that supported an allegation by Union officials that the Receiver and Managers had grossly understated the production.
- (ix) The Bank extended credit facilities to the Receiver Managers by allowing them to overdraw their accounts. This was to enable the Company pay its Suppliers. The facilities were charged interest equivalent to 28.8% of the total expenses for the period 10<sup>th</sup> February 2014 to 31<sup>st</sup> December 2016.

6. Counsel for the opposing sides made comments in respect to the findings by the Auditor. Mr. Wadabwa for the Plaintiffs invited this Court to make an Order for further inquiry. The complaints and concerns of the Plaintiffs can be abridged. It was submitted that the Court had already made a finding in respect to the pre-receivership debt and it was beyond the scope of the Audit to return any finding in this regard. Secondly, it was argued that the overdrafts permitted to the Receiver Managers by the Bank to pay for Receivership expenses amounted to

the grant of facilities by the Bank. In addition, it was argued that the Bank generated a trading deficit by manipulating the number of produced Stems, proceeds of Sale, the Exchange Rate applicable to the Revenues, Freight payments and Tax payments on a loss making enterprise.

7. The Plaintiffs urged the Court to find that there was no trading deficit to justify the expenses incurred during the Receivership. And that the deficit borne out by the Receivers trading could not be visited on the Guarantors. Citing various English authorities Counsel for the Plaintiff made the following propositions:-

- The Receivers, and by extension the Bank, is liable for the alleged Trading deficit.
- The powers of a Company Receiver Manager appointed by Court flow from the Debenture under which he is appointed. In the matter at hand, the Debenture allows the Receiver Manager to trade, carry on business and even borrow monies.
- Where the Receiver Manager decides to run the business of the Company, he must exercise due diligence.
- Where a Receiver abuses rather than exceeds his mandate through fraud, mala fides, and probably recklessness, the Receiver will be acting in breach of his duty thereby entitling Court intervention.
- Under both statute and equity, the Receiver Manager owes a duty of care to both the Mortgagor, Mortgagee and Sureties in undertaking his duties.
- Under Section 348 of the Companies Act, the Receiver Manager is personally reliable for contracts entered into by himself.
- Where a Creditor impairs a Surety's position through carelessness or omissions, the Surety is discharged from the resultant loss.
- The right to charge interest or expenses to the Surety terminates with a Winding up Order at which point the debt ceases to be legally recoverable from the Surety. And that therefore any interest levied on the Principle Debt from the date the Winding up Order was given cannot be claimed by the Bank.

8. In addition the Debenture which forms the subject of the Receivership was faulted as being void to the extent that it has ascribed liability for the defaults of the Receiver Manager to the Company. The argument being that it was void as it was in conflict with section 206 of the Repealed Companies Act which is the law applicable to this dispute.

9. In response Mr. Ogunde conceded that there was already a finding by the Court on the pre-receivership debt and arguments around that item was therefore moot. That really is the position. The Court made a final finding on the pre-receivership debt and it is a none issue.

10. On the post receivership debt the Bank takes a view that the alleged variances detailed by the Defendant are erroneously derived, unfounded, misleading and aimed at diverting the attention of the Court from the true findings of the Audit. The Defendant requested Court to make the following orders:-

- (i) A declaration that the post receivership debt is a total of the sums set out in tables 65, 62 and 5 of the Audit Report together with further expenses that the Receivers continue to incur to secure the Assets and preserve its value from 31<sup>st</sup> July 2017 until payment in full.
- (ii) That the Plaintiffs do pay the pre and post receivership debts within 30 days and in default the Injunction issued on 11<sup>th</sup> June, 2014 be lifted and the Defendant be at liberty to enforce the securities held.

11. As the Court resolves the rival arguments, it must remind itself that it ordered the Audit to enable it make a final and complete determination of the Application dated 21<sup>st</sup> June 2016. The context in which the order was made is crucially important so that the Court is not distracted by any noises that may not be relevant for now.

12. Earlier, Hon. Gikonyo J. had been asked by the parties to determine two Applications and the Judge did so in a Ruling of 14<sup>th</sup> July 2015. One of the Applications was by the Bank. In a Notice of Motion dated 17<sup>th</sup> December 2014, the Bank sought that the Court discharge its order of 11<sup>th</sup> June 2014 in which it had restrained the Receiver Managers from selling the properties known as LR. Nos.10854/60,12248/19, 12248/20, 12248/21, 122481/38, 25261 and 25262.

13. The Court declined to grant that request and reiterated that the injunction would remain until the hearing of the suit. Owing to what it saw as an Admission on the part of the Plaintiffs, the Bank mounted another application dated 21<sup>st</sup> June 2016 in which it sought that the suit be marked as adjusted and compromised and further that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs settle the amount found due within 30 days or in default, the Bank be at liberty to exercise its rights not limited to the right to sell the assets covered and contained in the securities given by the Plaintiffs. In effect that on default, the Orders of Injunction be discharged.

14. It is in partial determination of the Application, that this Court found that the Plaintiffs had made a plain admission that the Company owed the Bank a sum of USD 4,028,194.30 and Kshs.2,706,994.13 together with interest thereon being the pre-receivership debt. It is in that

same decision that the Court found it necessary to order a Forensic Audit of the Receivership operations so as to establish any further amount which may be due and owing by the Company. The outcome of that Audit is the subject of the discussion in this decision.

15. It is also necessary to make mention of the other application which was determined by Hon. Gikonyo J in that composite decision of 14<sup>th</sup> July 2015. It is the Notice of Motion dated 28<sup>th</sup> August 2014 in which the Plaintiffs sought to be granted unrestricted access to the Company's entire business enterprise including financial records in the possession of the Receiver Managers, for purposes of allowing potential Investors an opportunity to access and inspect the Company's financial viability, with a view of buying out the Company debt to the Bank. That plea was granted.

16. The Audit has returned a verdict that the debt by the Company has substantially increased during the Receivership period. The debt would now include sums due to Creditors other than the Bank (USD 6,337,120.48), amounts paid on behalf of the Company in Receivership and interest thereon (USD 9,461,538.89) and additional expenses incurred in farm preservation from 1<sup>st</sup> January 2017 to 31<sup>st</sup> July 2017 (USD 978,849.36). The Audit also makes mention of expenses necessary to secure and preserve the assets from 31<sup>st</sup> July 2017 to date and until settlement of the entire debt.

17. The Plaintiffs do not accept the post-receivership debt found in the Audit. Other than accounting issues raised, the opposition is grounded substantially on two grounds. First, that it is the Receiver Managers who generated a trading deficit by manipulating the number of produced Stems, proceeds of Sales, Exchange Rate applicable to Revenues, Freight payment and Tax payments. In addition by allowing the Receiver Managers a free hand, a facility of USD 6,734,083.25 was wrongly advanced to the Company.

18. Let me consider the first issue. It must be recalled that, at the instance of the Plaintiffs, the scope of the Audit was to include the following:-

*“investigate and make findings regarding alleged misconduct, including sales to Karuturi Limited BV, unaccounted production, understated value of sales and how it was perpetrated, by whom and establish financial loss suffered by Karuturi Limited”.*

19. Looking at the conclusion of the Report returned by Deloitte there is no finding that the Receiver Managers misconducted themselves. And as to the sales to Karuturi Limited BV, the Report stated,

*“Karuturi BV was a Company incorporated in the Netherlands by Mr. Ram Karuturi. The Company was wound up as a result of bankruptcy”.*

20. What about unaccounted production and understated value of sales? The Report noted,

“6.4.1 Based on the analysis of Flower sales from production to sale, we noted that 9,081,750 Flower stems could not be accounted for in the overall process. This represented for 2.25% of the total graded stems as shown below.

| Year   | Variance between production and dispatch | Variance between sold stems and dispatched stems | Total variance |
|--------|--|--|----------------|
| 2014   | 4,118,152.00                             | 16,317,169.00                                    | 20,435,321.00  |
| 2015   | 4,429,493.00                             | (22,109,839.00)                                  | (17,680,346.0) |
| 2016   | 6,076,463.00                             | 6,948,953.00                                     | 13,025,416.00  |
| Totals | 14,624,108.00                            | 27,836,883.00                                    | 15,780,391.00  |

6.4.2 this variance was however reduced to 9,081,750.60 Flower stems after accounting for flowers that were discarded or used for decorative purposes as shown below:-

| Variance between produced stems and sold stems | Discarded stems as per schedule provided by Receivers and Managers | Total variance |
|--|--|----------------|
| 15,780,391.00                                  | 6,698,641  | 9,081,750.00   |

21. In the Plaintiff as it stands the Plaintiffs had complained that the Receiver Managers appointed by the Defendant were degrading and devaluing the assets and reputation of the Company. A complaint of further misconduct that is said to have happened post the filing of the Pleadings is one that may be introduced into this matter by way of an Amendment to the Plaintiff. While the Plaintiffs gave minute details of what it perceived as erroneous conclusions drawn by the Auditor from his own findings, the Court formed a quick and early view that it may not be able to resolve those issues without giving the Auditor an opportunity to defend the Report. However, for now, and on the basis of the Audit that was jointly agreed by the protagonists it is not apparent that the Receiver Managers appointed by the Bank have failed to fully account for the Flower stems produced and/or sold or the proceeds of the Sales other than the Flower stems which constitute 2.25% of the total graded stems alluded to in paragraph 20 of this Decision. Even on the accusation that the Receiver Managers paid taxes on a loss making enterprise, the Audit Report was not particularly harsh on the Receiver Managers. The Report states:-

“6.6.1 Based on our analysis, we noted that the Receiver and Manager may have under declared local flower sales by KES 114,363. This may have led to under declaration of VAT obligation by a total of KES 15,774. This is equivalent to 0.96% of the tax due.

6.6.2 We noted one consignment to VD Berg which had been booked as local sale in the Tally accounting system. According to the Receiver and Manager, this particular documents for the consignment were not provided and the entry was therefore booked as a local sale. The respective VAT charge for the sale amounting to EUR 1,770.544 was not charged”.

In comparison with the volume of Sales made during the receivership, the Sales for which Tax was found not to have been charged was almost insubstantial.

22. Similarly the allegation by the Directors of the Company that the Receiver Managers had violated the agreed transfer policy agreement with KRA was discounted by the Auditor. The Report noted:-

“6.7.2 After assessing the nature of the relationship between KLIR and Twiga BV, we noted that the issue of transfer pricing does not arise. KLIR did not make flower sales to Twiga BV and Twiga BV only facilitated the trading operations of KLIR. In addition, Twiga BV remitted its revenues from stem sales back to KLIR or made direct payments to KLIR creditors”.

23. I turn to the next issue. It is common ground and borne out by the Report that ‘*stanbic allowed the Receivers and Managers to overdraw the KLIR accounts in paying the Receivership expenses*’. Those overdrawn accounts attracted interest. This has led a lively debate as to how those post receivership advances should be characterized. The Plaintiffs are emphatic that the Bank granted an overdraft to the Company to fund a trading deficit without the consent and or acquiescence of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs who were mere Guarantors.

24. The Bank on the other hand see this as the Receiver Manager’s expenses and not a loan. Further it is asserted that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had agreed that they would be liable to all post receivership advances made by the Bank, the cost of receivership as well as post receivership creditors. This is said to be in the Affidavit of Ram Karuturi of 24<sup>th</sup> March 2016. An argument is therefore made that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are estopped from making submissions to the contrary.

25. A final decision of this issue will have to await another day if and when presented for determination via an Amendment to the Plaint but this Court should and is entitled by the nature of the matter it is asked to resolve to make some observations at the stage.

26. The Plaintiffs do not doubt that the Receiver Managers have power to trade, carry on business and even borrow monies. The Plaintiffs submitted that,

“*In our case, the subject debenture allows the Receiver Manager to trade, carry on business and even borrow monies*”.

It may well be from this acknowledgement that the Plaintiffs had in an affidavit sworn on their behalf by Sai Ramakrishna Karuturi on 24<sup>th</sup> March 2016 deponed as follows:-

“In view of the totality of the foregoing matters, it would not be in the interests of justice to allow the application or the orders sought by the Receivers/Managers. The Plaintiffs have made the following offer/proposal to the Defendant Bank and pray that any order should be made only in accordance with this offer/proposal:

a) The Plaintiffs would pay the pre-receivership debt of USD 4,028,194.30 and Kshs.2,706,994.13 together with all lawfully accrued interest up to the date of settlement. This payment would be made within 30 days of a settlement being recorded in Court. Upon payment of the debt, the Bank would lift the Receivership over the 3<sup>rd</sup> Plaintiff.

b) Upon settlement of the pre-receivership debt in a) above the Bank shall discharge the charges over the properties and the Company shall provide alternative and adequate security to secure any post receivership debt. In this regard, the Plaintiff intends to offer as security 25 acres of unencumbered land also situated in Naivasha.

c) There shall be a forensic audit to ascertain the balance of any amount claimed to be owing including post receivership advances made by the Bank, the cost of receivership and post receivership creditors. The forensic auditor shall be appointed solely by the Plaintiffs. The forensic audit shall be conducted in conjunction with the Receivers. In the event of a disagreement between the auditor and the Receivers the matter shall be settled by a third audit firm being either KPMG, Deloitte or Ernst & Young and their determination shall be final. The costs of the third audit firm shall be borne equally by the Bank and Karuturi Limited.

d) The sum verified by the auditors shall be paid within sixty (60) days of the verification. In default, the Bank shall have the right to enforce the legal charges it holds over the land.

e) Upon settlement of the post receivership debt, the Bank shall forthwith discharge and release any and all charges and security being held by the Bank against the Plaintiffs”.

f) Each party shall bear its own legal costs and expenses herein and in connection with and/or arising out of this consent agreement. (my emphasis)

27. What irks the Plaintiffs is that the Bank extended a line of credit to the Company without the Consent or acquiescence of the 1<sup>st</sup> and 2<sup>nd</sup>

Plaintiffs. The Bank argues that the advances were neither overdrafts nor loans. Yet it may be curious that the Bank is seeking interest on USD 2,727,700.66 on the advances. The Bank will be hard pressed to explain why it is levying interest on the overdrawn accounts if there was no pre-approved limit or if the overdraft was otherwise not formal.

28. That said, an underlying theme to the Plaintiffs case, reflected in the Plaintiff, is that prior to the appointment of the Receiver Managers, the Company was a viable business which should not be allowed to collapse. That was the same stance taken by the Plaintiffs as at 24<sup>th</sup> March 2016 when Mr. Karuturi deposed:-

“By their conduct and actions, it still is and has always been evidence that the Defendant is singularly and unreasonably intent on achieving only one objective- which is selling off the Plaintiff’s properties and assets in spite of any and/or all attempts made on behalf of the Plaintiffs to redeem the debt owed or the Court’s decision that the 3<sup>rd</sup> Plaintiff’s business enterprise can be revived and should be continued”.

29. It must have been in that spirit that the Plaintiffs acknowledged that the Receiver Managers would have to incur certain expenses to support trading operations aimed at preserving, and perhaps at enhancing, the value of the Company. If those expenses were incurred legitimately then the Plaintiffs should have no reason to complain.

30. But the Plaintiffs do not think so and allege that a false trading deficit has been generated as a justification for the Bank injecting further funds. That this has been achieved through manipulation of the number of produced stems, the proceeds of sale out of the said stems, the exchange rate applicable to the Revenues, Freight payments of FOB contracts and Tax payment on a loss making enterprise.

31. The Audit Report has, at least on the face of it, debunked the veracity of the Plaintiffs notion of a false and deliberately generated Trading deficit. This Court had earlier set out some findings made in the Report which answered the specific concerns raised by the Plaintiffs in the terms of reference it had proposed. The Report did not find credence in the Plaintiffs allegations that the Trading deficit is false or has occurred as a result of the reckless or fraudulent acts of the Receiver Managers.

32. That said, because the Bank has so far conceded that the monies advanced to Receiver Managers to support the operations of the Company were not formal advances in the form of pre negotiated and approved overdrafts or loans, there may be a reason to hold that the interest claimed by the Bank on these advances is underserved. A final determination on this, as on the other matters discussed in this decision, is a call to be made by the Trial Court. For now I must find that the interest on any post-receivership advances cannot be called up before a determination on merit is made in respect thereof.

33. Back to the root of the matter. The genesis of the Audit Report which is the subject of this decision was a proposal by the Plaintiffs on how the Company’s post receivership debt, if any, could be ascertained. That proposal, it bears reproducing, was that:-

“ There .....be a forensic audit to ascertain the balance of any amount claimed to be owing including post receivership advances made by the Bank, the cost of receivership and post receivership creditors. The forensic auditor shall be appointed solely by the Plaintiffs. The forensic audit shall be conducted in conjunction with the Receivers. In the event of a disagreement between the auditor and the Receivers the matter shall be settled by a third audit firm being either KPMG, Deloitte or Ernst & Young and their determination shall be final. The costs of the third audit firm shall be borne equally by the Bank and Karuturi Limited.

The Bank embraced this proposal albeit with some modifications.

34. After hearing rival arguments, the Court on 13<sup>th</sup> October 2016 made orders on how the Auditor to undertake a Forensic Audit would be appointed. It has to be said that the Court Order did not substantially differ from the proposal put forward by the Plaintiffs. In the Court order the first option was that the parties would jointly appoint the Auditor. After a passage of considerable time, the parties settled on Deloitte Consulting Limited as the Auditor. The parties, on their own, clarified the scope of the Audit. This was, needless to say, consensual. The Plaintiffs had in their initial proposal suggested that a third Audit by either KPMG, Deloitte or Ernst & Young be a final determination of the matter. As it has turned out the Auditor jointly appointed by the parties is Deloitte who had been trusted and earlier proposed by the Plaintiffs as one of the firms that could, with finality, settle any disagreement between the disputants herein. The Auditor has now returned that Report and the Bank accepts its findings. The Plaintiffs on the other hand sought to challenge those findings.

35. It would be wrong and unjudicial for this Court to, offhand, accept or dismiss the Plaintiffs censure of the Report as the nature of the arguments raised by the Plaintiffs require that the Auditor be given a hearing. The Court will grant the Plaintiffs an opportunity to disprove the findings of the Auditor. For that reason the Court restrains itself from making a holding that the finding of the Auditor constitutes a final ascertainment of the post receivership debt. That said, it is the view of the Court that on the basis of the Audit the Bank has made out a prima facie case that the following constitutes, if in part, the post receivership position;

(i) Expenses in preserving the Farm from 1<sup>st</sup> January 2017 to 31<sup>st</sup> July 2017 - USD 978,849.36

(ii) Monies advanced post-receivership upto 31<sup>st</sup> December 2016 (excluding any charge on interest) .....USD 6,734,083.25.

(iii) Outstanding sums to other Creditors incurred during the Receivership.....USD 6,337,120.48.

Circumstances have changed since 11<sup>th</sup> June 2014 when the Court issued an order of Injunction restraining the Receiver Managers from selling the charged properties and enterprise consisting in the Company. That the Company is truly indebted to the Bank is now ever the clearer. There is an admission by the Plaintiffs in respect to pre-receivership debt and an ascertainment by an Audit of the post-receivership

debt (although I have held that the ascertainment by the Audit does not constitute a final determination). It must follow that there can be no reason for the Injunction to be allowed to subsist when a debt, which is unquestionably substantial, remains unpaid. While the post receivership debt is still contentious, at least from the Plaintiffs point of view, whatever sums may be found to have been undue, after a Trial, can be repaid by the Bank. An Audit from professionals was proposed by The Plaintiffs and an Audit has been undertaken. The Court, for now, is inclined to rely on the findings of the Report to make orders that it considers just and reasonable in the circumstances. An observation by the Auditor, that has not been faulted by either side, is that the last known production at the Farm was 6<sup>th</sup> May 2016 and the farm was descending into a State of disrepair and costs continue to be incurred in preservation of the farm. The Court keeps this in view as it makes its orders herein.

36. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs will be given an opportunity to pay the debts so as to forestall a forced Sale. As to the timelines this Court bears in mind that in respect to the pre-receivership debt, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have for sometimes now indicated their willingness and ability to pay. The latest was through an application dated 10<sup>th</sup> August 2017, which seeks an Order from the Court that the Bank immediately accepts the payment of the sum of USD 3,878,194.30 and Khs. 2,706,99.13 and discharges its guarantees and discharge LR. Nos 10854/60, 122448/19, 12248/20, 12248/21, 12248/38, 25261 and 25262. In respect to the post receivership debt the preliminary offer by The Plaintiffs was to pay it within 60 days of verification.

37. These now are the Orders of Court:-

a) It is hereby declared that the 3<sup>rd</sup> Plaintiff owes the Defendant a sum of USD 4,028,194.30 and Kshs. 2,706,994.13 together with contractual interest as contained in the facility Agreement executed between the 3<sup>rd</sup> Plaintiff and the Defendant being the pre-receivership debt.

b) The pre-receivership debt set out above shall be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs within sixty (60) days hereof.

c) The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs shall within 90 days hereof pay to the Defendant the following sums:-

(i) USD (US Dollars) 6,337,120.48 being the sums outstanding to Creditors other than the Defendant during the receivership period.

(ii) USD (US Dollars) 6,734,083.25 being monies advanced by the Defendant post the receivership period upto 31<sup>st</sup> December 2016.

(iii) USD (US Dollars) 978,849.36 being expenses incurred by the Bank in preserving the Assets of the Company from 1<sup>st</sup> January 2017 to 31<sup>st</sup> July, 2017.

d) The firm of Deloitte Consulting Limited shall undertake an immediate Audit to establish further expenses that may have been incurred in preservation of the Assets of the Company from 1<sup>st</sup> August 2017 to date and shall within 30 days hereof file the said Report for the further orders of this Court.

e) In default of payment of the monies as set out in (a), (b) and (c) above, the orders of Injunction granted on 11<sup>th</sup> June 2014 in favour of the Plaintiffs shall stand discharged and the Defendant shall be at liberty to exercise all or any of its rights in respect of the advances made to the 3<sup>rd</sup> Plaintiff including but not limited to the right to sell Assets covered or contained in the securities given by the Plaintiffs to the Defendant.

f) Each party shall bear its own costs of the Application of 21<sup>st</sup> June 2016.

**Dated, Signed and Delivered in Court at Nairobi this 19<sup>th</sup> day of January, 2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Owino for the Plaintiffs

Ogunde for the Defendant

Court clerk - Alex