



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 446 OF 2015

KSC INTERNATIONAL LIMITED

(UNDER RECEIVERSHIP.....1ST PLAINTIFF

KUNDAN SINGH UBHI.....2ND PLAINTIFF

OPKAR SINGH UBHI.....3RD PLAINTIFF

RIPTHUMAN SINGH UBHI.....4TH PLAINTIFF

VISTA WINDOWS LIMITED.....5TH PLAINTIFF

HIGHLANDS CANNERS LIMITED.....6TH PLAINTIFF

VERSUS

BANK OF AFRICA (K) LIMITED.....1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED.....2ND DEFENDANT

I & M BANK LIMITED.....3RD DEFENDANT

KOLLURI VENTAKA SUBBARAYA KAMASASTRY....4TH DEFENDANT

DELLOITTE CONSULTING LIMITED.....5TH DEFENDANT

SAMUEL OKETCH ONYANGO.....6TH DEFENDANT

HARVEEN GADHOKE.....7TH DEFENDANT

RULING

1. The 6th and 7th defendants/Applicants through an application dated 26th July 2018 brought pursuant to order 40 Rule 1(a), 2 and 4(1) of the Civil Procedure Rules, Order 51 Rule 1, Sections 1A, 1B and 3A of the Civil Procedure Act, Section 734(2) of the Insolvency Act, 2015, Section 1024(6) of the Companies Act 2015 and all other enabling provisions of the Law) seek the following orders:-

1) This Application be certified as urgent and be heard ex-parte in the first instance.

2) This Honourable Court be pleased to issue an order of temporary injunction restraining the 2nd, 3rd and 4th Plaintiffs, their agents, servants, employees and/or any other person acting or purporting to act on their behalf from interfering with Receivers control and possession of the assets of the 1st Plaintiff Company, including the 1st Plaintiff's premises situate along Baba Dogo Road, pending the hearing and final determination of this application.

3) This Honourable Court be pleased to direct the OCS Baba Dogo Road Police Station, to provide security and enforce the

Orders of this Court, pending the hearing and final determination of this application.

4) This Honourable Court be pleased to issue an order of temporary injunction restraining the 2nd, 3rd and 4th Plaintiff's their agents, servants, employees and/or any other person acting or purporting to act on their behalf from interfering with Receivers control and possession of the assets of the 1st Plaintiff Company, including the 1st Plaintiff's premises situate along Baba Dogo Road, pending the hearing and determination final determination of this suit.

5) This Honourable Court be pleased to direct the OCS Baba Dogo Road Police Station, to provide security and enforce the Orders of this Court, pending the hearing and final determination of this suit.

6) The 6th and 7th Defendants/Applicants, being the Receiver of the 1st Plaintiff Company, and having been appointed as such under the repealed Companies Act Chapter 486 Laws of Kenya prior to the commencement of the Companies Act No. 17 of 2015 and the Insolvency Act No. 18 of 2015, continue in office as Receivers of the 1st Plaintiff, without any obligation to apply for an extension of Term in terms of Regulation 141 of the Insolvency Regulations 2016, until the debt owing to the 1st, 2nd and 3rd Defendant Banks, is fully paid or until further orders of this Court.

7) Costs be in the cause.

2. The application is based on the grounds on the face of the application being *interalia*:-

1) The Applicants are duly licenced Insolvency Practitioners appointed as Receivers and Managers of KSC International Limited (In Receivership) (hereinafter "the Company") by Bank of Africa, KCB Bank and I & M Bank pursuant to their respective debentures on 18th February 2015 which assignment remains incomplete to date.

2) The Applicants are yet to complete their assignment by virtue of a Court Order issued in this Court, where the Court issued a temporary injunction restraining any disposal of the Company's assets by the Receivers and Managers pending full hearing and determination of this suit.

3) The matter was partly heard by the late Learned Judge Joseph Louis Onguto and as a matter of fact the Plaintiff's had closed their case and on 1st March 2018 the 1st Defendant commenced its defence and counterclaim before the late Judge but was not concluded, only for the parties to receive news of his shocking demise later that evening.

4) On Friday 8th June 2018 at about 11.00 am, learned Judge Grace Nzioka in the presence of all Advocates and some of the parties, including the 3rd and 4th plaintiffs, declined to interfere with her existing orders of 20th March 2018, extending time to the Receivers/Applicants hereto, to complete their assignment, issue in Misc. Cause No.141 of 2018.

5) In a well-orchestrated forceful entry action, at about 3 pm, barely four hours after leaving the Court, the 3rd and 4th plaintiffs broke down a wall surrounding the premises to the first plaintiff) where the 6th and 7th Defendants/Applicants are the Receivers thereof, and stormed into the company's premises assisted by goons, broke all padlocks, threw out the security men guarding the premises, installed their own, entered the offices and stores to the said company, and carries away items, papers and goods of unknown value and description and blocked entrance to the premises.

6) The illegal action by the 3rd and 4th Plaintiffs was based on their allegation that the term of the Receivers had ended under the Insolvency Act 2015.

7) The receiver's assistant one Robert Habwe, rushed to the premises, and seeing the damage and activities ongoing, immediately rushed to the OCS Baba Dogo Road Police Station, who finally at about 7 pm, summoned the 3rd and 4th plaintiffs to his office, and barred them from re-entering the company's premises again.

8) The OCS Baba Dogo Road Police Station however requested the Receivers/applicants, through their representative present at the Police Station one Robert Habwe, to move this Honourable Court on Monday 11th June 2018, to expressly authorize him to maintain security at the premises of the Company, while keeping out the 3rd and 4th plaintiffs out of the company Premises.

9) The Receivers/Applicants moved the Court accordingly in the same Misc. Cause 141 of 2015 and Learned Judge Nzioka issued the temporary injunction Orders on 12th June 2018, pending determination of the application *inter-partes*.

10) In order to avoid duplicity of matters, Learned Judge Nzioka has on 19th July, 2018 set aside her Orders of 11th June extending the term of the Receivers (which Orders had been sought by the Receivers owing to uncertainty on the application of Regulation 141 of the Insolvency Regulations to existing receiverships and as a matter of abundant caution) and has further extended her Orders of 12th June 2018 for a period of ten days only, to allow the "Receivers to seek similar Orders in this matter, which is the main file.

11) The Present application is thus most urgent in order to secure the premises of the Company, where assets and goods running into hundreds of millions of Kenya Shillings are stored.

12) The Defence hearing in this suit is scheduled to proceed on 23rd October 2018 and 25th October 2018.

13) Unless this Honourable court issues the Orders as sought, which are consistent with those issued by Learned Judge Farah Amin issued on 6th May 2016 in this same matter, then the Receivers are fearful that the 2nd, 3rd and 4th Plaintiffs shall storm into the premises of the 1st Plaintiff company and just like on 6th May 2016 and again on the 8th of June 2018, forcefully retake the premises and assets, rendering this suit to be an academic exercise and placing into jeopardy the assets charged by the 1st Plaintiff company to the 1st, 2nd and 3rd Defendant Banks who are owed Billions of Kenya Shillings by the 1st Plaintiff Company.

14) Pursuant to Section 734 (2) of the Insolvency Act, 2015, Section 1024(6) of the Companies Act 2015, 6th and 7th Defendants/Applicants, being the Receivers of the 1st Plaintiff Company, and having been appointed as such under the repealed Companies Act Chapter 486 Laws of Kenya prior to the commencement of the Companies Act No.17 of 2015 and the Insolvency Act No.18 of 2015, continue in office as Receivers of the 1st Plaintiff, without any obligation to apply for an extension of Term in terms of Regulation 141 of the Insolvency Regulations 2016, until the debt owing to the 1st, 2nd and 3rd Defendant Banks, is fully paid or until further orders of this Court.

15) The question as to whether the Receivers are properly in office, is a subject for determination in the ongoing hearing in this matter.

3. The application is further supported by affidavit of Harveen Gadhoke, a joint Receiver and Manager of KSC International Limited (*in receivership*) together with Samuel Onyango. The affidavit reiterates the grounds relied on in support of the application and on the face of the application. The deponent has attached a true copy of the court's order annexure "HG-3" issued on 22nd September 2015 granting a temporary injunction restraining the defendants, themselves, their agents, employees or anyone acting under their instructions from selling and/or disposing any assets of the plaintiff until the application is heard *interparties*; in respect of Land **L.R. No.336/108**; that on 8th June 2018 Hon. Lady Justice Nzioka declined to interfere with the existing orders of 20th March 2018, extending term to the Receivers/Applicant's hereto, to complete their assignments, issued in Misc Cause No.141 of 2018.

4. It is further deponed that the plaintiff broke down a wall surrounding the premises of the 1st plaintiff and stormed to the Companies premises assisted by goons and carried away items (**see annexure HG-4**) being photographs of the illegal breaking into the premises; which acts were based on allegation that the Receivers term had ended under the Insolvency Act 2015 (**see exhibit HG-5 and HG-6**).

5. It is further deponed by the Applicant's that pursuant to Section 734 (2) of the Insolvency Act, 2015, Section 1024(6) of the Companies Act 2015, the 6th and 7th Defendants/Applicant's being the Receivers of the 1st Plaintiff Company, and having been appointed as such under the Repealed Companies Act (*chapter 486 Laws of Kenya*) prior to the commencement of the Companies Act No. 17 of 2015 and the Insolvency Act No. 18 of 2015, they continue in office as Receivers of the 1st plaintiff, without any obligation to apply for an extension of Term in terms of Regulation 141 of the Insolvency Regulations 2016, until the debt owing to the 1st, 2nd and 3rd Defendant Banks, is fully paid on until further orders of the court; adding further they are aware that the question as to whether the receivers are properly in office, is a subject for determination in the ongoing hearing in this matter.

6. The Application is supported by the 2nd Defendant KCB; 3rd defendant I & M Bank Limited but strenuously opposed by the 1st, 2nd, 3rd, 4th, 5th and 6th plaintiffs.

7. The counsel for the 1st, 2nd, 3rd and 4th Plaintiffs/Respondents relied on the Replying affidavit of Opkar Singh Ubhi sworn on 20th August 2018.

8. The 5th plaintiff relied on grounds of opposition dated 20th August 2018 raising 4 grounds being as follows:-

1) **The Motion is an abuse of the court process and is founded on suppression and/or misrepresentation of material facts.**

2) **The Applicants are not entitled to the equitable relief sought as:**

i) **They have not come to this Honourable Court of Equity with clean hands.**

ii) **They seek to found a cause of action on their own wrong doing.**

iii) **They seek to approbate and reprobate.**

3) **The Applicants are estopped by the doctrines of election and res judicata having successfully moved this Honourable court in Miscellaneous Application No. 141 of 2018.**

4) **Sections 734(2) of the Insolvency Act, 2015 and section 1024(6) of the Companies Act, 2015 are not applicable to the circumstances of this case and the Motion.**

9. The 6th plaintiff on his part filed grounds of opposition listing them from (a) to (h) being as follows:-

a) The said application is frivolous, vexatious and lacks merit.

b) The said application violates mandatory provisions of the Civil Procedure Act and is therefore fatally defective.

c) The said application premised on a failure to appreciate the fundamental distinction between the question "whether the applicants were lawfully appointed as receivers of the 1st plaintiff". (which is the central issue pending determination in this suit) and the question "whether the applicants are entitled in law to continue acting as receivers of the 1st Plaintiff under the provisions of the repealed Companies Act and without regard to the provisions of the Insolvency Act 2015"

(which was the central issue raised in Miscellaneous Application No.141 of 2018.

d) The said application is fatally defective as the applicants are advancing two mutually exclusive arguments: On the one hand, they are arguing that they were rightfully granted orders of injunction by the honourable Justice Grace Nzioka on 12th June 2018 (which orders were premised on the theory that their term needed to be extended and had been extended vide the orders issued on 20th March 2018 by the Honourable Justice Grace Nzioka) and at the same time urging this court to extend the said injunctive orders, or grant them similar orders on the theory that their term did not need to be extended and accordingly the setting aside of the orders of 20th March 2018 did not affect them which is grossly preposterous!

e) The central argument advanced in the said application to the effect that the provisions of Section 734 of Insolvency Act 2015 and Regulation 141 of Insolvency Regulations 2016 did not apply to the applicants is WHOLLY mistaken as section 1024 of the Companies Act 2015 (like ALL other provisions of the said legislation) do not govern corporate insolvency proceedings (from receivership/administration to liquidation) which matters are governed exclusively by the provisions of the Insolvency Act. Accordingly, section 1024(6) confined solely to "Any act, matter or process which commenced before the commencement of the Companies Act 2015 and which relate solely to the incorporation, registration, operation, management, regulation, appointment of auditors and to related matters, as outlined in the preamble to the Companies Act 2015 which defines the scope of that legislation.

f) The said application is defective as the applicants are attempting to use the provisions of the Companies Act to defeat or circumvent clear provisions of the Insolvency Act and Regulations made thereunder.

g) The said application is premised upon gross misrepresentation of fundamental issues of facts as well as law thereby disentitling the applicants to equitable reliefs owing to the equitable doctrine that "He who comes to equity must come with clean hands".

h) The applicants are acting in bad faith in clear violation of the letter and spirit of the Insolvency Act 2015 as the orders sought vide the said application are not intended to further the interests of the debenture holders, the creditors of the 1st Plaintiff nor even the 1st Plaintiff itself, but on the contrary are merely intended to serve the selfish interest of the Applicants whose only objective is to continue drawing hefty fees without doing anything to the detriment of the debenture holders, the 1st Plaintiff and its other creditors.

10. At the hearing each counsel submitted on their written submissions except Mr. Gachuhi, learned Advocate, for the 3rd defendant who had not filed any written submissions but was allowed to submit orally on the point of law only. Mr. Karugo, learned Advocate for the 6th and 7th Applicants submitted on his written submissions filed on 18th September 2018; whereas Mr. Musyoka learned Advocate for 2nd Defendant submitted on his submission filed on 17th September 2018; Mr. Sarvia, learned Advocate, for the 1st, 2nd, 3rd and 4th plaintiffs submitted on his submissions dated 13th September 2018; Mr. Macharia, learned Advocate, for the 5th plaintiff submitted on his submission dated 17th September 2018 whereas Mr. Arwa, learned Advocate for the 6th plaintiff submitted on the submissions dated 14th September 2018.

11. I have very carefully considered the application, the Replying affidavit, and grounds of opposition as well as the written submissions and oral submissions and the issues arising for consideration are as follows:-

a) Whether the Applicants were required to apply for extension of term of their appointment as the receivers of the 1st plaintiff?

b) Whether the Applicants have locus standi to file and seek the orders sought in the present application?

c) Whether the Applicants have met the threshold for the grant of injunctive orders sought?

d) Whether various averments made by the plaintiffs herein are sub judice the main suit herein and whether they ought to be disregarded?

A. Whether the Applicants, were required to apply for extension of term of the receivership in respect of the 1st plaintiff's asset?

12. The Applicants have annexed documents in support of their contention that they are duly licenced insolvency practitioners as per "HG-1" vide notices of appointment dated 15th March 2015 and 20th March 2015 by the 1st defendant and the 3rd defendant respectively; as receivers and managers of the 1st plaintiff. True copies of Notice of appointment of the Applicants as receivers and managers of the plaintiff are marked as Exhibit "HG-2". The appointment of the Applicants as receivers and managers of the 1st plaintiff is not contested but is

admitted by the 1st, 2nd, 3rd and 4th plaintiff's in the Replying affidavit of Opkar Singh Ubhi sworn on 20th April 2018; the 5th and 6th defendants do not challenge the appointment of the Applicants as Receivers and Managers of the 1st Plaintiff herein.

13. The appointment of the Applicants therefore were made prior to the commencement of the Companies Act 2015 and the Insolvency Act 2015 both of which came into effect on 15th June 2016.

14. Under the relevant section, thus **section 734(1)** of the Insolvency Act 2015, the appointment of the Applicants is "*past event*" means any of the following that has occurred before the commencement:-

(a) The passing by the company of a special resolution resolving that the company be wound up;

(b) The making of an application to the Court for a winding up order in respect of the company;

(c) The appointment of a liquidator or provisional liquidator in respect of the company;

(d) A failure by the company to deliver the statutory report to the Registrar or to hold the statutory meeting required under the repealed Companies Act;

(e) Failure by the company to commence its business within a year from its incorporation or, if the company has suspended carrying on business, the elapse of a whole year since the business was suspended;

(f) A reduction of the number of members of the company, in the case of a private company, below two, or, in the case of any other company, below seven;

(g) The inability of the company to pay its debts;

(h) In the case of a company incorporated outside Kenya and carrying on business in Kenya—the commencement of winding-up proceedings in respect of it in the country or territory of its incorporation or in any other country or territory in which it carries on or formerly carried on business;

(i) The appointment of a receiver of in respect of the company by the holders of the company's debentures;

(j) The appointment of a receiver and manager in respect of the property of the company.

15. The term "*commencement*" is said to mean the coming into operation of parts VI to X of the Insolvency Act which came into effect on 18th January 2016 vide Legal Notice No.1 of 2016. The Applicants were appointed as Receivers and Managers of the 1st plaintiff on 15th March 2015 and 20th March 2015 prior to commencement of part VI-X of the Insolvency Act 2015 on 18th January 2016, their appointment was therefore "*past event*" in terms of section 734(1) (i) and (j) of the Insolvency Act.

16. Under **Section 734(2) of the Insolvency Act** it is provided:-

"(2) Despite the repeal of the Companies Act, or of Parts VI to IX of that Act, those Parts, and any other provisions of that Act necessary for their operation, continue to apply, to the exclusion of this Act, to any past event and to any step or proceeding preceding, following, or relating to that past event, even if it is a step or proceeding that is taken after the commencement."

17. Part VI to IX of the Companies Act, referred to under Section 734 (2) of the Insolvency Act, deal with *inter alia*; the powers of a debenture holder to appoint a Receiver and Manager and Section 348 of the Companies Act provide for powers of appointment of a Receiver and Manager of the assets of a company by the holder of a debenture.

18. Section 734(3) of the Insolvency Act provides:

"(3) Subsection (2) has effect subject to any transitional regulations in force under section 736 that relate to the insolvency of companies and other bodies corporate."

The aforesaid section is expressly made subject to any transactional regulations made thereto. The transactional regulations to which section 734(2) is subject to Rule 141 of the Insolvency Regulation 2016; which Rule 141 should be interpreted in the context of the governing transitional provisions of the parent Act; thus section 734 of the Insolvency Act.

19. I have considered the rival submissions on whether the Insolvency Act affects the appointment of the Applicants as Receiver and Manager of the 1st plaintiff assets. From the reading of Section 734 of the Insolvency Act; as regard the Appointment of the Applicants, who were appointed before the repeal of the Company Act Cap 486, I find by dint of the transactional provisions of Insolvency Act, 2015, the provisions of the Insolvency Act, 2015, and the Insolvency Regulations do not apply to the receivership or the receivers herein. I am further of the considered view that the Applicants having been appointed as Receivers and Managers of the 1st plaintiff prior to the commencement of the relevant parts of the Insolvency Act, the activities of the Applicants as Receivers and Managers of the 1st plaintiff continued to be regulated under the Companies Act, Cap 486 of the Laws of Kenya to the exclusion of the Insolvency Act altogether.

20. On the above point I draw support from the judgment delivered by learned Judge Fred A. Ochieng in **re Winding Up of Karuturi Limited (2016) eKLR** where the court held:-

"The appointment of the Receiver/Managers is a step following or a step relating to the past event: therefore, even though it is a step which was taken after the commencement of the Insolvency Act, the applicable law is the Companies Act, to the exclusion of the Insolvency Act."

21. Further the same position was approved by Hon. Justice Tuiyott in **Suraya Holdings Limited & 4 others Vs. ICICI Bank & another (2018) eKLR** where the court held:-

"It follows, on the reading of subsection 2, that the provisions of the Companies Act V parts or Vi to IX of that Act, and any other provisions of the repealed Act necessary for their operation will continue to apply (to the exclusion of the Insolvency Act) to any step or proceeding following the past event, even if it is a step or proceedings that is taken after the commencement."

22. It should further be noted that under Companies Act, Cap 486, until receivership is lifted by an order of court, or until the debt owed is paid in full or otherwise the receivership is lifted, receivership of a Company continue uninterrupted until completed. Further it should be noted that the Companies Act, Cap 486, did not provide for an automatic expiry of any receivership nor did it set a time limit of any receiver and manager appointed under the Companies Act, Cap 486 to warrant any application for extension of term of a receiver appointed under the Companies Act. I therefore find and hold that the Applicants as receivers having been operating under the Companies Act Cap 486 and not under the Insolvency Act, as contested by the Respondents, the Applicants were not and are not required to seek any extension of their term as Receivers and Managers of the 1st plaintiff. The contention by Respondents that the Applicant's term as Receiver and Managers of the 1st plaintiff expired on 18th January 2017 is without legal support. I also find the Applicants filing of Hc Misc No. 141 of 2018 seeking *inter-alia*: - extension of term of the pending Receivership assignment under Regulation 141 of Insolvency Act, which has since been withdrawn, was not necessary and was superfluous by virtue of the provisions Section 734(2) of the Insolvency Act which clearly and expressly provided for the continuation and regulation of the 1st plaintiff's receivership under the repealed Companies Act. I further find and hold the aforesaid suit was unnecessary as the same could not oust the mandatory and clear provisions of Section 734 (2) of the Insolvency Act vesting continuation and regulation of 1st plaintiffs receivership to the repealed companies Act.

23. The Respondents relied on Regulation 141 of the Insolvency Regulation which provides thus:-

"(1) As soon as practicable after acquisition, the bankrupt shall notify the bankruptcy trustee of any property that—

(a) Was acquired by, or passed to, the bankrupt before discharge; and

(b) Is divisible among the creditors.

(2) A bankrupt who, without reasonable excuse, fails to comply with subsection (1) commits an offence and on conviction is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both.

24. The regulation issued under the Parent Act could not override the mandatory provisions of the Act; thus Section 734 (1) of the Insolvency Act, which a "past event" is excluded from the provisions of the Insolvency Act. Section 31 of the Interpretation and General Provisions Act provide:-

"Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of a subsidiary legislation-

a)...

c) No subsidiary legislation shall, unless a contrary intention appears, have effect with reference to the making of a subsidiary legislation-."

25. In view of the above the 1st plaintiff's receivership continued and was expressly regulated under the Companies Act, Cap 486, to the exclusion of the Insolvency Act as provided under section 734 (2) of the Insolvency Act; Regulation 141 of the Insolvency Regulation, being a subsidiary legislation, could not override the provisions of section 734 (2) of the Insolvency Act and result in automatic termination of the 1st plaintiff's receivership as contended by the Respondents in their submissions.

26. The above becomes more apparent on consideration of the provisions of section 1024 (6) of the Companies Act, 2015 which provides:-

"(a)Any act, matter or process required or permitted to be done under, or for the purpose of, a provision of the repealed Act had been started before the commencement of this section but had not been completed before that commencement; and No. 17 of 2015 Companies [Rev. 2017] –

(b) No provision of this Act corresponds to that provision of the repealed Act, the act, matter or process shall or (as the case requires) may be completed under that provision as if the provision had not been repealed."

27. The appointment of the Receivers and Managers; of the 1st plaintiff on 15th March 2015 and 20th March 2015 was an act permitted to be done by the Companies Act. The placement of the 1st plaintiff under receivership had been started before the commencement of section 1024 of the Companies Act 2015 but the same has not been completed and is yet to be completed. That there an order issued by Hon. Mr. Justice Ogolla stopping the disposal of the assets of the 1st plaintiff pending the determination of the suit herein. I am also aware there are no corresponding provisions under the Companies Act 2015 or Insolvency Act 2015, providing for a right to appoint a Receiver and Manager of a Company as was provided under the Companies Act 486. It is herein clear that section 1024(6) of the Companies Act is clear that Receivership of the 1st plaintiff shall be completed under the provisions of the Companies Act, Cap 486 as if the provision of Cap 486 has not been repealed.

28. It is my finding and holding that by dint of section 1024(6) of the Companies Act, 2015 the Applicants appointment as Receivers and Managers of the 1st plaintiff continue uninterrupted even after the commencement of the Insolvency Act. They must therefore continue under the Companies Act, 486 until the suit is heard and determined. I find there is no basis and no need either for the Applicants to apply for extension of the term of their receivership over the 1st plaintiff's assets.

29. It has been contended by the Respondents that the Applicants had resigned with effect from 31st May 2018. It is contended by the Applicants they only retired from their employment; however this should not be confused with retirement as Receivers and Managers of the 1st plaintiff. No document has been exhibited or tendered in respect of the Applicants' having retired as Receivers and Managers of 1st plaintiff assets nor is there any document tendered from discharging their duties as Receivers and Managers of 1st plaintiff assets. The Applicants retirement from Deloitte Consulting Limited, does not stop them nor bar them from continuing to act as Receivers and Managers, as their appointment is personal whereas Deloitte consulting Limited role is to provide administrative and secretarial support for the discharge of their functions. I therefore find as the Applicants appointment as Receivers and Managers of the 1st plaintiff remained regulated under Companies Act, 486, they were not required to apply for extension of term of receivership of 1st plaintiff under the Insolvency Act, which I find inapplicable in the case of Appointment to the 1st plaintiff's receivership.

B. WHETHER the Applicants have locus standi to file and seek the orders sought in the present application?

30. The Respondents contention in this matter is that the Applicants do not have locus to file the present application *inter alia*; on an account of their term as receivers having expired on 18th January 2018; that their application do not meet the criteria set out under order 40 of Civil Procedure Rules. The Applicants think otherwise.

31. Section 40 Rule (1) of the Civil Procedure Rules provides:-

"(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 [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165.

(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."

32. The Respondents have taken a view that only a plaintiff or a defendant with a counterclaim can seek an order of injunction. My reading of order 40 of Civil Procedure, is that where any party, be it a plaintiff, or defendant or interested party is able to prove by an affidavit or otherwise that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree, the party may move court for appropriate orders. In the instant case there is no dispute the Applicants were appointed to manage the assets of the 1st plaintiff. The plaintiffs in this suit are seeking *inter alia*; to have the receivership lifted. There is dispute about the receivers appointment. I find that the Applicants as such have locus to file the present application as provided for under Order 40 1(a) Civil Procedure Rules, as the property in dispute in a suit is in a danger of being wasted, damaged or alienated by the parties in the suit.

33. The Applicants as Receivers and Managers have power to carry out Company's business which power includes, the power to file, defend and compromise suits on behalf of a company. It is trite law that upon the appointment of Receivers and Managers of a Company, director's power in respect of management of company are suspended.

34. In **Kerr and Hunter on Receivers and Administrators**" 18th Edition London, Street and Maxwell (2005) at paragraph 331 it is provided:-

"Although the receiver is technically the principal, yet of course he is not acting on his own behalf. He is still acting as receiver of the company, and his possession and control is throughout for the benefit of the debenture holders and the company to the extent of their respective interests in the assets he holds."

35. In view of the above I am satisfied the Applicants have established they have *locus* to participation in these proceedings and even file the present application.

C. Whether the Applicant's have met the threshold for the grant of injunctive orders sought?

36. It is now well established principle of law that before an injunctive relief can issue, the applicant thereof must meet the conditions set out in the case of **GIELLA Vs CASMAN BROWN & Co. Ltd (1973) EALR 358**, the primary condition being that the applicant must show a *prima facie* case with probability of success.

37. The applicants application is seeking many prayer being Nos. 4 and 6 as captured in the application. The application is premised under order 40 Rule 1(a) and (2) of Civil Procedure Rules 2010 which provides:-

"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

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit."

38. The thrust of the above mentioned provision is that where the property is subject of the suit is in danger of being wasted, damaged or alienated or wrongly sold by any party to the suit or where anybody is committing a breach of a contract, the other party may apply to the court for necessary orders and that the court may grant a temporary injunction to restrain the wrongful party from committing the acts or breach of the contract.

39. In case of **Nairobi Mamba Village Vs. National Bank of Kenya (2002) E.A 197** it was held that a party seeking to prevent alienation, wastage or damage to the property in dispute under order XXXIX of Civil Procedure Rules must establish that he has legal rights to such property. In this case therefore the Applicants are bound to prove that they have legal rights to continue exercising control and possession over the assets and business of the 1st plaintiff. The Applicants are required to show that they have a *prima facie* case before injunctive orders can issue.

40. For the Applicants therefore to justify grant of an interlocutory injunction, they must satisfy the conditions set down in the classic case of **Giella Vs Casman Brown & Co. Ltd (1973) E.A 358** that is:-

i) The applicant must show a prima facie case with a probability of success.

ii) 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; and

iii) If the court is in doubt, it will decide an application on the balance of convenience."

41. On the *prima facie* case, it was defined in the case of **Mrao Ltd Vs First American Bank of Kenya Ltd (2003) KLR 125** as follows:-

"....a prima facie case is a case which, on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

42. In the instant case, the Applicants have since their appointment on 15th March 2015 and 20th March 2015 been in control and possession of the assets of the 1st plaintiff including the 1st plaintiff's premises, however on 8th January 2018, it is alleged the 2nd, 3rd and 4th plaintiff's unlawfully stormed to the 1st plaintiff's premises along Baba Dogo Road, broke down a wall surrounding, the said premises, threw out all the security men employed by the Applicants, entered the offices of the Applicants took away items, papers and goods of unknown value and description. On an application to the court on 11th June 2018, an interim injunction was issued halting the acts of the 2nd, 3rd and 4th Plaintiff's herein; which orders lapsed on 29th July 2018 necessitating the present application. The Applicants in support of their application have attached true copies showing the illegal actions of the 2nd, 3rd and 4th plaintiffs and exhibited as **Exhibit HG-4**.

43. The Respondents in proceeding to take possession and taking items from the 1st plaintiff's, premises without a court's order to that effect acted illegally and infringed on the Applicants' rights of control and possession of the 1st plaintiff's assets. The Respondents in so doing acted illegally by entering into the 1st plaintiff's premises constituting a breach of the terms of the Debenture allowing the Applicants to take over the control and assets of the 1st plaintiff. I find that the Applicants have established a *prima facie* case with probability of success.

44. On irreparable injury if the Respondents unlawful action is allowed to continue this suit will be rendered a mere academic exercise and would place into jeopardy the assets charged by the 1st plaintiff company to the 1st, 2nd and 3rd defendant's banks who are owed billion of Kenya shillings by the 1st plaintiff company. In view of the foregoing I find that the injury to the Applicant's 1st, 2nd and 3rd Defendants bank, who are owed billions of Kenya shillings by the 1st plaintiff cannot be compensated by way of damages.

45. On balance of convenience, it is asserted that since Applicants were appointed as Receivers and Managers to 1st plaintiff assets, the amount due to the defendants have since 2015 not been paid; the plaintiff are yet to satisfy the debt owed to the 1st, 2nd and 3rd defendants banks to date. It is prudent and of paramount importance to safeguard all assets of the 1st plaintiff to protect the interest of the 1st, 2nd and 3rd defendant's bank, by way of temporary injunction. I am therefore satisfied that the balance of convenience in this matter automatically tilts in favour of granting the temporary orders for injunction. All in all the Applicants have satisfied the conditions requisite for the grant of an orders for temporary injunction in this matter.

46. On prayer No.6 in the application the Applicants are seeking the following orders:-

"The 6th and 7th Defendants/Applicants, being the Receiver of the 1st Plaintiff Company, and having been appointed as such under the repealed Companies Act Chapter 486 Laws of Kenya prior to the commencement of the Companies Act No. 17 of 2015 and the Insolvency Act No. 18 of 2015, continue in office as Receivers of the 1st Plaintiff, without any obligation to apply for an extension of Term in terms of Regulation 141 of the Insolvency Regulations 2016, until the debt owing to the 1st, 2nd and 3rd Defendant Banks, is fully paid or until further orders of this Court."

47. I note prayer No. 6 in the Applicants application seeks an order in the nature of a declaration to the effect that the Applicant's *"continue in office as Receivers of the 1st plaintiff without any obligation to apply for an extension of Term in terms of Regulation 141 of the Insolvency Regulations 2011, until the debt owing in the 1st, 2nd and 3rd defendant banks, is fully paid or until further orders of the court"*.

The Respondents are objecting to the granting of prayer No.6 and they content the court is being asked to make a declaration and a final determination of a contested matter in an interlocutory application and without subjecting the matter to a full trial.

48. In a case of **Ukwala Supermarkets & 2 others Vs. Paul Mburu Waithaka & another (2003) eKLR**, the court held:-

"With regard to the prayer seeking a declaration, in my view this court has no jurisdiction as this stage to grant such a declaration...

...With regard to prayer 5 again this seeks a declaration, which cannot be granted on an interlocutory application."

49. Similarly the Court of Appeal in the case of **Kenya Deposit Insurance Corporation Vs. Richardson & David Limited & Another [2017] eKLR**, the Court stated as follows:-

"It is in our jurisprudence that a Court will not at a preliminary stage determine with finality contested issues in litigation. The appellants' counsel was correct in his submissions in this regard and the decision cited by him in Vivo Energy Kenya Ltd Vs. Maloba Petrol Station & 3 Others [2015] eKLR does buttress this proposition. Excepting where there are special circumstances, it is wrong for a Judge to grant at an interlocutory stage of proceedings final orders, thus disposing of the suit before parties are heard. The right to be heard is fundamental and only in extremely rare circumstances will a court of law issue orders the effect of which is to determine the suit with finality or to render the suit superfluous."

50. In view of the nature of prayer No.6 in the Applicants application and the authorities thereto, it is clear that at this stage this court must refrain from making any orders that may have a preemptive effect on the suit pending before this court as what is sought is a final finding or determination in prayer No.6 of the application. The application granted should not be granted at the interlocutory stage without having heard this matter fully which is already pending defence. I therefore find prayer No.6 of the Applicants application to be misguided and not tenable at this stage. The same cannot be granted at this stage. It has to await full hearing.

D. Whether the various allegations made by the plaintiffs are sub-judice and deserving to be disregarded by this court?

51. Section 6 of the Civil Procedure Act provides:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

52. In this suit, the Applicants contend that the plaintiff has raised several issues including the expiry of the Applicant's term of Receivers of the 1st plaintiff's contracts with the third parties to be determined and also accused the Applicants of allowing the 1st plaintiff's machineries to rot and fall into complete disrepair and that the 1st plaintiff's receivership was converted to administration under the Insolvency Act 2015 and terminated automatically at the lapse of one year after commencement of the Insolvency Act 2015.

53. I have now carefully perused the pleadings and I am satisfied that the foregoing matters are substantially and materially in issue in the suit herein which is part heard and scheduled for defence on 23rd and 25th November 2018. I find by attempting to determine the issues raised in the interlocutory application would pre-empt the full determination. I therefore find that the issues raised are not ripe for determination at this stage as they are central to the determination of the main suit herein as per section 6 of the Civil Procedure Act.

54. The upshot is that the Applicants application is merited. I proceed therefore to grant the following orders:-

a) An order of injunction restraining the 2nd, 3rd and 4th Plaintiffs, their agents, servants, employees and/or any other person acting or purporting to act on their behalf from interfering with Receivers control and possession of the assets of the 1st Plaintiff Company, including the 1st Plaintiff's premises situated along Baba Dogo Road, pending the hearing and final of this suit.

b) The OCS Baba Dogo Road Police Station to provide security and enforce the Orders of this Court, pending the hearing and final determination of this suit.

c) The 6th and 7th Defendants/Applicants, being the Receivers of the 1st Plaintiff Company, and having been appointed as such under the repealed Companies Act Chapter 486 Laws of Kenya prior to the commencement of the Companies Act No. 17 of 2015 and the Insolvency Act No. 18 of 2015, to continue in office as Receivers of the 1st Plaintiff, without any obligation to apply for an extension of Term in terms of Regulation 141 of the Insolvency Regulations 2016, until the debt owing to the 1st, 2nd and 3rd Defendant Banks, is fully paid or until further orders of this Court.

d) Costs be in the cause.

Dated, signed and delivered at Nairobi this 22nd day of **October, 2018.**

.....

J .A. MAKAU

JUDGE