



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 522 OF 2015**

**IMPERIAL BANK LIMITED (IN RECEIVERSHIP).....PLAINTIFF**

**VERSUS**

**W.E TILLEY (MUTHAIGA) LIMITED.....1<sup>ST</sup> DEFENDANT**  
**PRIMECATCH (EXPORTS) LIMITED.....2<sup>ND</sup> DEFENDANT**  
**MARA FISH PACKERS LIMITED.....3<sup>RD</sup> DEFENDANT**  
**J FISH KENYA LIMITED.....4<sup>TH</sup> DEFENDANT**  
**VICTORIAN DELIGHT LIMITED.....5<sup>TH</sup> DEFENDANT**  
**RUBY RED LIMITED.....6<sup>TH</sup> DEFENDANT**  
**VALUE PAK FOODS LIMITED.....7<sup>TH</sup> DEFENDANT**  
**FROM EDEN LIMITED.....8<sup>TH</sup> DEFENDANT**  
**AQUALITE LIMITED.....9<sup>TH</sup> DEFENDANT**  
**ZULFIKAR HAIDERALI JESSA.....10<sup>TH</sup> DEFENDANT**  
**NASIR HAIDERALI JESSA.....11<sup>TH</sup> DEFENDANT**  
**NARGIS JESSA.....12<sup>TH</sup> DEFENDANT**  
**NADIR AZIZALI JESSA.....13<sup>TH</sup> DEFENDANT**  
**FIROZ JESSA.....14<sup>TH</sup> DEFENDANT**  
**SALIM JESSA.....15<sup>TH</sup> DEFENDANT**  
**IRFAN SHAMSHADIN JESSA.....16<sup>TH</sup> DEFENDANT**

NASHIV HAIDERALI JESSA.....	17 <sup>TH</sup> DEFENDANT
MARMO E GRANITO MINES (T) LIMITED.....	18 <sup>TH</sup> DEFENDANT
MARMO MARBLE (U) LIMITED.....	19 <sup>TH</sup> DEFENDANT
FISHWAYS UGANDA LIMITED.....	20 <sup>TH</sup> DEFENDANT

## RULING NO.2

1. The application before me was brought by **IDB CAPITAL LIMITED**, who are seeking leave to be enjoined to the suit.
2. The applicant's contention is that unless it is enjoined to the suit, there was a possibility that it might be condemned unheard.
3. It is the applicant's case that it holds Debentures which were offered by the 5<sup>th</sup> and the 9<sup>th</sup> Defendants.
4. Following the institution of the proceedings herein and the interim orders which were made by the court, the applicants feel that the properties over which the Debentures related, have been left uninsured; exposed to vandals, auctioneers and other perils. The said properties had, in the opinion of the applicant, been abandoned or neglected, so that they continue to waste unabated.
5. In the circumstances, the applicant asks the court for a partial review or variation of the orders, so that the applicant is granted the mandate to safeguard and to enforce the Debenture securities it holds over the assets of the 5<sup>th</sup> and 9<sup>th</sup> Defendants.
6. The applicant has provided proof of the Debentures and also of the disbursement of the funds to the two defendants.
7. Pursuant to the provisions of the Debentures, the applicant had a right to, *inter alia*, appoint Receivers over the charged properties, if the borrowers defaulted in their obligations.
8. As far as the applicant was concerned, if Receivers were appointed, their functions and roles would include the insurance and the maintenance of the securities, as well the determination of pragmatic ways of possibly continuing or of reviving operations.
9. The applicant also pointed out that the other function or role of the Receivers would be determine whether or not to sell any of the securities.
10. In this instance, the 5<sup>th</sup> and 9<sup>th</sup> Defendants are said to have defaulted in servicing the debts which they owe the applicant.
11. The two defendants are said to have blamed their defaults on the interim injunction which this court granted in this case.
12. The effect of the orders herein are said to have effectively paralyzed the business operations and the finances of the 5<sup>th</sup> and 9<sup>th</sup> Defendants.
13. As a consequence of the said paralysis, the two defendants are said to have abandoned their Plant, Machinery and Assets, so that the same are now wasting away.
14. It is the absence of the defendants from the places where the securities charged to the applicant are based, that has resulted in a very adverse impact on the securities.

15. The applicant appreciates that persons who may have committed wrongs should perhaps have their assets frozen. However, the applicant believes strongly, that “*Innocent Depositors*” and “*innocent Lenders*”, such as the applicant should be accorded protection by the courts. It is the applicant’s submission that parties who were innocent should not be vanquished, in the process which was initiated by the plaintiff.

16. The applicant faults the plaintiff for failing to protect its interests. Instead, the plaintiff is said to be undermining the rights of the applicant, as the Debenture securities had been left exposed and unattended.

17. As regards joinder, the plaintiff submitted that because the fact about the institution of these proceedings was publicized in the daily newspapers on 28<sup>th</sup> October 2015, the applicant could have sought joinder earlier than it has now done.

18. Secondly, the plaintiff pointed out that the Imperial Bank is now under the receivership of the Statutory Receiver Manager who was appointed by the Kenya Deposit Insurance Corporation (**KDIC**). The said Deposit Insurance Corporation has the mandate of protecting innocent depositors from fraudulent actions of the management of Kenyan Banks.

19. It is one thing for a person to have the mandate to perform or to undertake tasks, such the protection of innocent depositors; and quite another thing altogether to actually perform the said tasks.

20. In this case, the applicant is saying that the Debenture securities are literally wasting away. The plaintiff has not controverted that assertion.

21. Secondly, the applicant is not a depositor in the Imperial Bank. It is a financial institution which granted a loan to each of the 2 named defendants.

22. Therefore, even assuming that the **KDIC** was actually performing its function of protecting innocent depositors, that task would not extend to looking after the interests of the applicant.

23. I find that if the Debenture securities which were given to the applicant as security for the facilities it granted to the 5<sup>th</sup> and 9<sup>th</sup> defendants, were not properly secured, the applicant’s interests would be seriously prejudiced.

24. Secondly, even though the court did grant an order which effectively put a freeze on the assets of the defendants, that was not a licence to the plaintiff to let the assets waste away.

25. Neither the plaintiff nor the defendants would stand to benefit if the defendants assets were lost or were spirited away or were allowed to waste away.

26. I would have expected the plaintiff to demonstrate to the court that the assets were secure, so that they would of real value to either the plaintiff or the defendants or the depositors, at the end of the day.

27. As the plaintiff has not provided the court with information which would satisfy me that the assets in issue were properly secured, I have come to the conclusion that it is in the best interests of the applicant, the plaintiff and the depositors to enjoin the applicant to this suit, so that it can, when necessary draw the court’s attention to what is required so as to safeguard the assets in question.

28. Of course, by making reference to assets in this application, that means the debenture securities which the 5<sup>th</sup> and 9<sup>th</sup> defendants had offered to the applicant.

29. If I were to lift the *mareva* injunction at this stage, the applicant would proceed to realize the securities. And if the securities were realized, it is possible that the assets which might ultimately be useful in compensating innocent depositors, would no longer be available, if the plaintiff’s claim were successful.

30. I also appreciate the fact that the plaintiff's claim against the defendants includes claims of unjust enrichment. If such claims were to succeed, it is possible that the court could order for the tracing of all assets which may have been acquired using money which had been obtained fraudulently.

31. At this moment in time, it is not known whether or not the 5<sup>th</sup> or 9<sup>th</sup> defendants will be found liable for unjust enrichment. But because there is a possibility of such finding, it would be imprudent to allow the applicant or any other person to sell-off the debenture securities at this stage.

32. In this specific instance, there is a possibility that the finances provided by 5<sup>th</sup> and 9<sup>th</sup> defendants, towards "*the project?*" may have been proceeds from unjust enrichment.

33. In the result, whilst I grant leave to the applicant to be enjoined to this suit, I reject the request for setting aside or for varying the interim orders which were issued by this court on 27<sup>th</sup> October 2015.

34. The costs of the application dated 14<sup>th</sup> February 2017 shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 27<sup>th</sup> day of July 2017.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Muchiri for the Plaintiff

Miss Mugo for Issa for the 2<sup>nd</sup> to 9<sup>th</sup> Defendants

Ayisi for Singh Gitau for 1<sup>st</sup> & 14<sup>th</sup> Defendants

Maweu for IDB (Capital)

J. Oyuke for Fidelity Commercial Bank

Collins Odhiambo – Court clerk.