



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION & ADMIRALTY DIVISION
CIVIL SUIT NO 78 OF 2014

SURYA HOLDINGS LIMITED.....1ST PLAINTIFF

RHEA HOLDINGS LIMITED.....2ND PLAINTIFF

KARUTURI LIMITED.....3RD PLAINTIFF

Versus

CFC STANBIC BANK LIMITED.....DEFENDANT

RULING

1. This Court is asked to determine the Application dated 21st June 2016, in which the Defendant seeks the following orders:-

1. The Application be certified urgent and be heard in the first instance.
2. Prior to determination of other prayers in this application, the Defendant be granted leave to make this application as against the 3rd Plaintiff which is in liquidation.
3. The suit be marked as adjusted and compromised on the following terms:-
 - a) The 1st and 2nd Plaintiffs shall within thirty (30) days, pay to the Defendant the sum of USD 4,028,194.30 and Kshs.2,706,994.13 together with contractual interest as contained in the Facility Agreement that were executed between the 3rd Plaintiff and the Defendant. (“The Pre Receivership”).
 - b)The 1st and 2nd Plaintiffs shall at their own cost appoint a forensic auditor within 30 days for the date hereof to , in conjunction with the interested parties, review all the business and operational transactions undertaken by the 3rd Plaintiff from the time it was placed under receivership to determine the amount owed to the Defendant. If there is any disagreement on the amount, the same will be settled by a third audit firm being KPMG, Deloitte or Ernest & Young who shall be appointed by either party within seven days of a disagreement and their determination will be final. The appointed firm shall determine the issue in dispute within fourteen days of appointment.

c) The 1st and 2nd Plaintiffs will thereafter, within 60 days, make payment to settle all the sum certified in the aforesaid audit after which the Defendant will discharge any security it will be still be holding in respect of advances made to the 3rd Plaintiff.

d) If the 1st and 2nd Plaintiffs default in making the payment referred to in clause (a) or (c) above on its due date, the Defendant shall thereupon be at liberty to exercise all or any of its rights in respect of advances made to the 3rd Plaintiff including but not limited to the right to sell assets covered or contained in the securities given by the Plaintiffs to the Defendant.

4. Upon the making of orders in (2) above, all interim orders be discharged forthwith.

5. The Plaintiffs do pay the costs of this Application and the suit.

2. In the Plaint filed herein on 3rd March 2014, the Plaintiffs aver that the Defendant granted certain banking facilities amounting to US\$6,590,000 to the 3rd Plaintiff against the following securities.

a) Securities created against the 2nd Plaintiff Rhea Holdings Limited's properties:-

i) Charge over Land Reference Number 10854/60 (Title No.I.R 87312), in the name of Rhea Holdings Ltd;

ii) Debentures created by Rhea Holdings ltd in favour of the Defendant.

b) Securities created against the 1st Plaintiff Surya Holdings Limited's properties:-

i) Charge over Land Reference Number 12248/20, 12248/21, 12248/38, 25261 and 25262 in the names of Surya Holdings Limited;

ii) Debenture created by Surya Holdings Ltd, in favour of the Defendant.

c) Debentures created by the 3rd Plaintiff, Karuturi Limited in favor of the Defendant.

Together "*The Securities*"

Rhea Holdings Limited is the 2nd Plaintiff while Surya Holdings is the 1st Plaintiff.

3. It is averred that the value of the charged assets aforesaid was USD 90,951,630 as at 20th June 2012.

4. A grievance by the Plaintiff is that, in default of its contractual duty and obligations, the Defendant failed to advance the entire facilities. But that notwithstanding, the Plaintiffs have in fulfillment of their contractual obligations repaid a substantial part of the term loan. The Plaintiffs aver that as of the date of filing suit they had repaid USD 743,443.00. That further that as at 28th February 2014 Plaintiffs have paid to the Defendant a further sum of USD 400,000,000.00 (perhaps a typo!) and that the term loan is in credit and the Plaintiffs are no longer in default.

5. That inspite of the above, the Defendant on 10th February 2014 appointed Kieran Day and Ian Small as Receivers over the assets of the 3rd Plaintiff. The Plaintiffs challenge the said appointment as irregular, premature, in bad faith and oppressive. The reasons which are set out in paragraph 22 of the Plaint need not be restated for the purpose of the matter at hand.

6. The Plaintiffs further plead that the Defendant issued Statutory Notices dated 6th September 2013 seeking to exercise its Power of Sale as charge pursuant to Section 90(3) and 96(1) of the Land Act. In furtherance thereto, the Defendant has instructed its agent, Legacy Auctioneering Services to issue a 45

days Redemption Notice dated 29th January 2014.

7. The Plaintiffs allege that the Defendants' conduct is actuated by malice and bad faith which has been particularized in paragraph 28 of the Plaint.

8. In the end the Plaintiffs seek the following prayers:-

1. A declaration that the Defendant is in breach of its obligations contained in the various Facilities documents and that they cannot rely on the same contract, the contracts being the Charges, Debentures, Letters of Guarantee and Indemnity and Facility Letter.

2. A declaration that the appointment of Kieran Day and Ian Small as receivers of the 3rd Defendant Karuturi Limited was unlawful, illegal and void *ab initio*.

3. A permanent injunction do issue restraining the Defendant, by itself, its appointed receivers, servants, auctioneers, agents, or advocates or any of them or otherwise from advertising or offering for sale, or purporting to sell, or in any other way alienating the 1st and 2nd Plaintiffs' pieces or parcels of land known as:-

c) Land Reference Number 10854/60 (Title No. I.R 87312), in the name of Rhea Holdings Ltd;

d) Land Reference Numbers 12248/19, 12248/20, 12248/21 12248/38, 25261 and 25262 in the name of Surya Holdings Limited;

or otherwise howsoever dealing with the aforesaid parcels of land.

4. A Permanent order of injunction do issue restraining the Defendant, by itself, its servants or agents, or advocates or any of them or otherwise from appointing a receiver manager, liquidator, or any other person whatsoever, to interfere with the status, management or operations of the 1st and 2nd Plaintiffs.

5. A Permanent order of injunction restraining the Defendant, by itself, its servants, auctioneers, agents, or advocates or any of them or otherwise form advertising or offering for sale, or purporting to sell, or in any other way alienating all those pieces or parcels of land known as:-

c) Land Reference Number 10854/60 (Title No. I.R 87312), in the name of Rhea Holdings Ltd;

d) Land Reference Numbers 12248/19, 12248/20, 12248/21 12248/38, 25261 and 25262 in the name of Surya Holdings Limited;

or otherwise howsoever dealing with the 1st and 2nd Plaintiffs' aforesaid parcels of land.

6. A mandatory injunction do issue to compel the Defendant and its appointed Receivers and Managers, Kieran Day and Ian Small or any other receiver or manager or agent appointed by it, to leave the premises of the 3rd Plaintiff and an order lifting the Receivership.

7. Costs of this suit.

8. Any other relief that the Honourable Court may deem just and convenient.

9. At the time of filing the Plaint, the Plaintiffs also presented an Application for Injunction which was determined by Gikonyo J. on 11th June 2014 as follows:-

76. "Accordingly, I find and hold the Receivers and Managers IAN SMALL and KIERAN DAY

are the receivers and agents of the 3rd Plaintiff of the company having been properly appointed. They will continue to be in possession and control of the company, and to exercise that control for the benefit of the Debenture-holder (the Defendant) and the Company to the extent of their respective interests in the assets and business of the company. In exercising their mandate in accordance with the terms of the Debentures herein and the charges thereto, the Receivers and Managers herein are, however, restrained from selling: 1) the charged properties herein namely, a) LR NO 10854/60 (Title No. I.R.87312), in the name of Rhea Holdings Ltd; and b) L.R No.12248/19, 12248/20, 12248/21, 12248/38, 25261 and 25262; or 2) the enterprises consisting in the 3rd Plaintiff Company until the determination of this case.

77. The upshot is that the application dated 28th of February 2014 succeeds only in part and to the extent that I have specifically allowed above. I will not however, make an order for costs given the outcome of the application. It is so ordered”.

10. On 21st October 2015 the Bank appointed Muniu Thoithi and Kuria Muchiri as the new Receivers and Managers of the 3rd Plaintiff. These two joined the suit as Interested Parties and by an Application filed on 7th March, 2016 sought the following prayers:-

1. This application be certified as urgent and the Court grants a hearing date on a priority basis.
2. Paragraph 3 of the Injunction Order dated 11th June 2014 be reviewed as to vary or set aside the restriction against the receivers selling the charged properties or a portion thereof being:
 - a. LR Bi, 10854/60 (Title No. IR 87212) in the name of Rhea Holdings Limited; and
 - b. LR Nos 12248/19, 12248/20, 12248/21, 25261 and 25262 in the name of Surya Holdings Limited.
3. Paragraph 4 of the Injunction Order dated 11 June 2014 be reviewed so as to vary or set aside the restriction against the receivers selling the enterprise of Karuturi Limited (the company).
4. Paragraph 1(b) of the Access Order dated 15 July 2015 be reviewed so as to vary or set aside the interim injunction issued on 11 June 2014.
5. In the alternative to prayers 2-4, this Honourable Court do issue directions to the Applicants as to what steps they should take in light of the Company's deepening insolvency and the restriction placed on disposition of its undertaking and make such orders as are equitable and just.
6. The costs of this application be awarded to the Interested Party.

11. It is in answer to that Application that Sai Ramakrishna Karuturi, the Chairman and Managing Director of the 1st and 2nd Plaintiffs is said to have made certain admissions which compromise the entire suit. Those admissions are alleged to be in paragraph 37 of his Affidavit sworn on 24th March, 2016. The contents thereof shall be set out in their entirety at a later stage in this Decision.

12. In support of the Application now before Court Mr. Alforne Kisilu, the Regional Head-Business Support and Recoveries of the Defendant swore an Affidavit on 21st June 2016, in which he stated that the Defendant had no objection to the Resolution of the Dispute as proposed by the Plaintiffs in Paragraph 37 of Karuturi's Affidavit aforementioned.

13. In a Replying Affidavit sworn on 19th August 2016, Mr. Karuturi opposed the Notice of Motion and raises the following issues:-

- a) That his earlier Affidavit of 24th March, 2016 is not an admission.

b) That the contents of the controversial Affidavit must be looked at in their totality and against the background of the Application to which it was responding and the contentious environment within which the averments were made.

c) There are impending proceedings for the Receivers fraudulent actions and the Application is intended to obviate those proceedings.

d) The Defendant is yet to file a Defence and the Application is an attempt to distract the Court from the failure to comply within the required time.

14. Arising from the Application as presented, the Replying Affidavit and Counsel's address to Court, this Court sees the following as issues requiring its determination.

(a) Did the Plaintiffs make the offer on a "without prejudice"?

(b) If the answer to (a) is in the negative, did a compromise arise out of that offer?

(c) If the answer to (a) and (b) are in the negative, is the offer sufficient for purposes of making out an Order for Striking out or on admissions?

15. But first an issue that did not attract any controversy. The Applicant seeks Leave to make the Application against 3rd Plaintiff which is in liquidation. A Winding Up Order against the 3rd Plaintiff was made on 30th March 2016 and Leave is required to proceed against the 3rd Plaintiff. That is granted.

16. Mr. Wandabwa appearing for the 3rd Plaintiff argued that the Application must fail because it relies on matters which are encapsulated on correspondence marked 'without prejudice' and that at any rate the proposal made by the Plaintiff was rejected.

17. It may be that the offer was conceived or first made in correspondence that was exchanged on a 'without prejudice' basis. However this Court is not asked to look at that correspondence. The offer that is the subject of the Application is the one that was set out in the Affidavit of Mr. Karuturi. It was presented to Court as a possible resolution to the dispute. When the offer was made it was not stated to be made on a without prejudice basis. And if it was the intention of the Deponent that it was a privileged communication, then that was not made clear from the Affidavit. This was an offer made within the proceedings and the Court is entitled to examine its contents and decide on its implication.

18. In arguing the Application, Mr. Ogunde for the Defendant asked this Court to find that there was a compromise under the Provisions of Order 25 Rule 5 of the Civil Procedure Rules as the proposal contained in paragraphs 37 of the said Affidavit was accepted by the Defendant. The Plaintiffs on the other hand do not think that there is a lawful or enforceable agreement upon which a compromise can be effected.

19. In determining whether or not a lawful agreement or compromise has been reached for purposes of Order 25 Rule 5, Justice Odero said as follows in Javan Lewa Mute Vs. Shiva Enterprises Ltd [2013]eKLR,

"The key question to which this Court must address its mind is whether there was in fact any compromise leading to the adjustment of the suit. At the same time the court must exercise great care not to impose an adjustment/compromise upon an unwilling party and not to descend into the arena of the dispute.

It is conceded by both parties and there can be no doubt that negotiations were underway. An agreement to compromise a suit must be established by the general principles which govern the law of contract. In the case of *STOPER – VS- MANCHESTER CITY COUNCIL* [1974] 3 ALL GR Lord Denning held that:

“A contract is formed when there is, to all outward appearances a contract”.

A compromise has similar elements to a contract. The parties must have the capacity and authority to compromise. There must be an offer and acceptance, and valuable consideration. Although acceptance of an offer should be made within a reasonable time, delay in acceptance is immaterial when the party making the offer is not prejudiced by it.

20. So as to scrutinize whether there was a compromise it is necessary to set out the proposal put forward by the Plaintiff in paragraph 37 of Mr. Karuturi’s Affidavit of 24th March 2016 which reads:-

"In view of the totality of the foregoing matter, 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 US\$ 4,028,194.30 and Kshs.2,706,994.13 together with 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 3rd 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 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 audit 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 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 and other costs and expenses herein and in connection with and/or arising out of this consent agreement”.

21. While stating that it has accepted this offer, the Defendant requests the Court to mark the suit as adjusted and compromised as follows:-

a) The 1st and 2nd Plaintiffs shall within thirty (30) days, pay to the Defendant the sum of USD 4,028,194.30 and Kshs.2,706,994.13 together with contractual interest as contained in the Facility Agreement that were executed between the 3rd Plaintiff and the Defendant. (“The Pre Receivership”).

b) The 1st and 2nd Plaintiffs shall at their own cost appoint a forensic auditor within 30 days for the date hereof to , in conjunction with the interested parties, review all the business and operational transactions undertaken by the 3rd Plaintiff from the time it was placed under receivership to determine the amount owed to the Defendant. If there is any disagreement on the amount, the same will be settled by a third audit firm being KPMG, Deloitte or Ernest & Young who shall be

appointed by either party within seven days of a disagreement and their determination will be final. The appointed firm shall determine the issue in dispute within fourteen days of appointment.

c) The 1st and 2nd Plaintiffs will thereafter, within 60 days, make payment to settle all the sum certified in the aforesaid audit after which the Defendant will discharge any security it will be still be holding in respect of advances made to the 3rd Plaintiff.

d) If the 1st and 2nd Plaintiffs default in making the payment referred to in clause (a) or (c) above on its due date, the Defendant shall thereupon be at liberty to exercise all or any of its rights in respect of advances made to the 3rd Plaintiff including but not limited to the right to sell assets covered or contained in the securities given by the Plaintiffs to the Defendant.

6. Upon the making of orders in (2) above, all interim orders be discharged forthwith.

22. However, even a cursory glance at the position taken by the Defendant reveals that there is no convergence on some aspects of the offer.

23. Whereas there is an agreement that the pre-receivership debt by the Plaintiffs is US\$ 4,028,194.30 and Kshs.2,706,994.13 together with accrued contractual interest upto the date of settlement and that the same should be paid within 30 days of the recording of a Settlement, what is to follow is not agreed. The Plaintiffs crave that upon that payment of the pre-receivership debt, receivership over the 3rd Plaintiff be lifted and all existing securities be discharged. They further proposed that an alternative but adequate Security be availed to secure the Post-Receivership debt. The Defendants on the other hand are only willing to let go the existing Securities upon settlement of **both** the **Pre** and **Post-Receivership**. Clearly there is no consensus on an important aspect of the dispute.

24. It is agreed that a Forensic Audit be undertaken to review all business and operation transactions undertaken during the time of Receivership but there is no complete agreement on who should appoint the Auditor. The Plaintiffs insisted that this should be their exclusive call while the Defendants want the involvement of their agents, the Interested Party.

25. Unlike what the Counsel for the Defendant wanted the Court to believe his Client does not accept the offer as made. The Defendant does not accept the offer wholly, it prefers an a la carte of it! There was no consensus on at least two items as I have set out above. One of which is **not** insubstantial. There is no agreement or compromise as envisaged by the Provisions of Order 25 Rule 5 of The Civil Procedure Rules.

26. But that would not be the end of the matter because the Motion before me was expressed to be also brought under the Provisions of Order 2 Rule 15(b) (a) and (d) and order 13 Rule 2. The former is on striking out of Pleadings and the latter for Judgement or Orders on Admission. While it is true that the Application did not expressly bespeak those Orders, the face of the Motion clearly invoked the two provisions. And the Plaintiffs would not have been under any illusions about this as it made responses to application as presented. See for instance paragraphs 3 and 4 of the Replying Affidavit of Mr. Karuturi where he depones:-

3. The contents of Paragraph 4,5,6 and 8 of the affidavit are not true. At no time did the 3rd Plaintiff or any of the Plaintiffs herein admit the debts as alleged, or at all.

4. I am informed by Counsel, which information I verify believe to be true that what is referred to as an admission of the debt is not an admission. For example, the Claim by the pre-receivership claim by Defendant was USD 4,028,194.30 and Kshs.2,706,994.13. The present claim lodged with the 3rd Plaintiff's liquidators is Kshs. 1,568,433,362/= . The 1st and 2nd Plaintiffs, as Guarantors, were not consulted before this astronomical rise in debt that is now loaded on their securities. ***Annexed hereto and marked "SRK-1" is a copy of Form No.63 filed by the Liquidators I Winding up Cause No. 12 of 2013.***

In addition, the Plaintiffs Counsel made submissions on it.

27. This Court shall deal with the two together. The Defendants' argument is that the debt is admitted by the 3rd Plaintiff and as the 1st and 2nd Plaintiffs are guarantors they cannot maintain these proceedings any further as the Principal debt is conceded. On the other hand, the Plaintiffs take a view that the debt was not admitted and the contents of the Affidavit of 24th March 2016 need to be examined within the context in which the Affidavit was sworn.

28. As this Court has held earlier, the proposal made in paragraph 37 was made in an Affidavit to Court and was not on a without prejudice basis. Even if the proposal was a culmination of non-binding correspondence between the parties, the deposition in the Affidavit were not expressed to be on a without prejudice basis. And if, for arguendo, the contents of paragraph 37 are privileged, what is to be said of the express admissions contained in paragraph 16 of the same Affidavit is which Mr. Karuturi deponed:-

“The Directors and Shareholders have previously made various offers for settlement of the Principal debt amount, approximately USD 4,028,194.30 and Kshs.2,706,994.13 that obtained pre-receivership. They have also made various proposals on how to deal with any post receivership debts”.

29. The Court further observes that when swearing the Affidavit Mr. Karuturi does so on behalf of all the three Plaintiffs (see paragraph 2 of his Affidavit). There is therefore an admission by all the three Plaintiffs that the 3rd Plaintiff owed the Defendant a sum of USD 4,028,194.30 and Kshs.2,706,994.13 as at the dated of Receivership. The Trio cannot resile on this admission.

30. How does this finding benefit the Defendant? Had the Defendant asked that I enter Judgment on admission against Plaintiffs then that request would be rather intriguing because the Defendant has not filed a counterclaim. However, a look at the provisions of Order 13 Rule 2 (which I set out below) grants the Court to discretion to give Judgment or make **any other Order** on the basis on admissions made in pleadings or otherwise.

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just”.

31. An examination of the Plaintiff shows that the Plaintiffs claim was essentially premised on an allegation that the Defendant was wrongfully and unlawfully pursuing its Statutory and Contractual remedies when there was no default on the part of the 3rd Plaintiff and as asserted in paragraph 13 of the Plaintiff,

“The Plaintiffs aver that term loan is in credit, the Plaintiffs are no longer in default and hence no rights subsist on behalf of the Defendant”.

However there is now an admission that the 3rd Plaintiff owed the Defendant a substantial sum of USD 4,028,194.30 and Kshs.2,706,994.13 as at the date the Receiver was appointed.

32. With this admission the entire substratum of the Plaintiffs' claim vanishes. Were it not be for one issue this Court would have struck out the Plaintiff and dismissed the Plaintiff' suit at this stage. This is the issue. It is clear to this Court that the parties agree that the post-Receivership debt needs to be ascertained and an audit undertaken on the business and operational transactions during the Receivership. It is an acknowledgement by both sides that as things stand this dispute cannot be resolved without attention to the Post-Receivership affairs. Final Orders on this matter should not be made until the Post-Receivership position is clear.

33. While the Court makes a finding that the Plaintiffs have made an plain admission that the 3rd Plaintiff

owes the Defendant a sum of USD 4,028,194.30 and Kshs.2,706,994.13 together with interest thereon being the pre-receivership debt, it will not discharge the Interim Orders or dismiss the Suit and instead orders as follows:-

(i) The parties herein shall within 14 days hereof, jointly, appoint a Forensic Auditor to review all the Business and Operational Transactions undertaken during the Receivership period and to determine the amount, if any, owed by the 3rd Plaintiff to the Defendant.

(ii) In the event of a disagreement on the appointment of a Forensic Auditor, the Court to do so.

(iii) The Forensic Auditor shall within 30 days of appointment file his/her findings with Court and provide copies thereof to the parties.

(iv) The Court shall make further Orders upon receipt of that Report.

(v) To the extent of the Orders made above, the Defendant has partly succeeded and will have half the Costs of the Motion of 21st June 2016.

Dated, Signed and Delivered in Court at Nairobi this 13th day of October,2016.

F. TUIYOTT

JUDGE

PRESENT;

Owino for Plaintiffs

Ogunde for Defendant/Respondent

Kakade for interested party

Alex - Court Clerk