



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 107 OF 2014**

**ASTERISK LIMITED.....PLAINTIFF**

**- VERSUS -**

**HUMMING HEALTHCARE LIMITED.....DEFENDANT**

**RULING NO. 2**

1. The plaintiff, **ASTERISK LIMITED**, has brought an application seeking two substantive reliefs, as follows;

**“2. THAT this Honourable Court be pleased to enter Judgement on admission against the Defendant for the sum of United States Dollars, One Hundred and Forty Eight Thousand, Two Hundred and Eighty One (USD 148, 281) and Kenya Shillings Nine Hundred and Eighty Four Thousand Seven Hundred and Fifty Eight (Kshs. 984, 758).**

3. **THAT this Honourable Court be pleased to issue a Temporary Injunction restraining the Receiver Manager and Kenya Commercial Bank Limited, their agents and/or employees from releasing to the Defendants and/or its agent the surplus of the proceeds of sale of the Defendants assets, pending hearing and determination of the Application herein”.**
2. In support of its quest for judgement, the plaintiff exhibited 2 letters which show that the parties negotiated a settlement.
3. The defendant, **HUMMING HEALTHCARE LIMITED**, wrote to the plaintiff on 3<sup>rd</sup> October 2014, stating as follows;

**“We refer to the above subject matter and all preceding meetings to the meeting held today between Mr. Dipen Rajani and Nadeem Popat.**

**This is to confirm that both parties have resolved that Humming Healthcare Limited will pay Asterisk Limited the principal amount as demanded by Asterisk Limited plus an interest of USD 25,000 in full and final settlement of Asterisk Limited’s claim”.**

4. Mr. Dipen Rajani, of Asterisk Limited responded to that letter on 28<sup>th</sup> October 2014. His said response was marked for the attention of Nadeem Popat, of Humming Healthcare Limited.
5. The substantive part of the letter stated as follows;

**“We confirm the meetings between yourself and the undersigned and further confirm**

**that the parties agreed to resolve the matter in the following terms:**

1. **Humming Healthcare shall pay the principle sum of Kshs. 984,758 and USD 123,281.**
2. **Humming Healthcare shall pay interest of USD 25,000 which the sum of interest is conditional on payment of the principal (and interest) within 6 weeks from the 3<sup>rd</sup> October 2014.**
3. **Asterisk shall instruct its advocates to withdraw Hccc No. 107 of 2014 on settlement of 1 and 2 above”.**

6. The defendant did not challenge the details set out in the plaintiff’s letter dated 28<sup>th</sup> October 2014. If the said details were not accurate, the defendant should have been expected to reject them altogether, or to indicate the exact parts which were not accurate.
7. As the defendant did not reject any of the terms of the plaintiff’s letter, it is deemed that the terms of the letter dated 28<sup>th</sup> October 2014 embodied the exact terms of the agreement between the parties.
8. I further find that the terms of the agreement constitute a plain and obvious admission by the defendant. There is no room for any doubt about the extent of the defendant’s liability to the plaintiff.
9. The admission is unequivocal. Furthermore, the admission was made after this suit was filed in court, and the said admission made it clear that it was in relation to the case. There cannot be any doubt, therefore, that the parties intended to have the admission spell out their respective positions in this case. In other words, the defendant definitely intended the terms and conditions of their negotiated settlement, become part and parcel of this case.
10. In the circumstances, I find and hold that the plaintiff is entitled to judgement against the defendant, for the following sums of money;

- a. **Kshs. 984,758/-,**
- b. **USD 123, 281.00, and**
- c. **USD 25,000.00.**

11. Accordingly, Judgement is hereby entered in favour of the plaintiff for those sums.
12. I also order that the defendant will pay to the plaintiff, the costs of the suit.
13. The second aspect of the application was for an injunction.
14. To the extent that the injunction sought was to last until the application was heard and determined, the same is already spent, as the application has now been determined.
15. In any event, the plaintiff’s prayer for an injunction is pegged on something which had no certainty about it.
16. The defendant was placed under receivership by the **KENYA COMMERCIAL BANK LIMITED**. The Receiver Managers are **KERETO MARIMA** and **IAN SMALL**, who were appointed on 18<sup>th</sup> December 2014.
17. According to Kereto Marima, the defendant’s business and assets were sold on 31<sup>st</sup> March 2015.
18. Notwithstanding that sale, the Receiver Managers were yet to complete their job. Therefore, it was not possible for the Receiver Managers to tell whether or not they would eventually be any surplus funds.
19. The plaintiff was aware of the sale. However, the plaintiff’s director, **DIPEN MORARJI RAJANI**, was unable to tell whether or not there would be any surplus or residue of funds, after the claims of the Debenture Holder and the attendant costs were fully recovered.
20. If the court were to issue an order for an injunction, and it later turns out that there were no surplus funds, the court would have acted in vain. The injunction would have been issued on the basis of a hypothetical situation. The court would have made a serious error to issue an injunction whose foundation was speculative.
21. When a company is under receivership, what constitutes surplus?
22. I begin answering that question by first indicating that just because the Debenture-Holder, who appointed the Receiver had recovered its debt, does not necessarily imply that the money which was still available was surplus.

23.The law clearly defines the responsibility of a Receiver to the persons who are owed money by the company.

24.The Receiver is supposed to utilize the assets of the company in the following order of priority;

- a. **Costs of the realization;**
- b. **Cost, including the remuneration of the Receiver;**
- c. **The Debenture-Holder's debt, if the Debenture was secured by a Floating Charge;**
- d. **Preferential Creditors**
- e. **Other Creditors.**

25.The fact that a Creditor had obtained Judgement against the Company did not make him a Preferential Creditor.

26.When a Judgement is obtained against the company, it simply provides confirmation that the company owes the Decree-Holder. But the Judgement does not amount to the securing of the debt.

27.The Decree-Holder remains an unsecured creditor. The Decree does not confer priority over preferential Creditors.

28.Therefore, even after granting Judgement in favour of the plaintiff in this case, that could not elevate the plaintiff to the level of a preferential creditor.

29.The plaintiff will have to await its turn, alongside other unsecured creditors. It is only after the costs of the realization of the assets; the costs of the receivership; the remuneration of the Receiver Managers; the Debenture-Holder (*Kenya Commercial Bank Limited*); and the secured creditors, if any, had been paid, that the plaintiff could hope to get payment.

30.At present, it was thus premature for the plaintiff to assume that there would be any surplus funds, after the payment of creditors who rank in priority over the plaintiff.

31.In any event, the Receiver Managers were not parties to this suit. Therefore, there is no substantive relief sought in the plaint against them. In the circumstances, even if the plaintiff had sought an injunction pending the hearing and determination of the suit, the same could not have issued as there are no issues in the suit, which are to be determined between the plaintiff and the Receiver Managers.

32.The same reasoning applies to the Kenya Commercial Bank Limited.

33.By seeking orders against the Receiver Managers and the Kenya Commercial Bank Limited, the plaintiff compelled them to respond to the application. When responding to the application, the Receiver Managers and the Kenya Commercial Bank Limited have had to incur expenses. Those expenses would need to be paid from the assets of the company, unless the plaintiff pays them.

34.If the expenses were paid out of the company's assets, that would have a direct negative impact on the company's assets, which could otherwise have been available for paying debts.

35.In order to safeguard the assets of the company, I now order the plaintiff to pay to the Receiver Managers and to Kenya Commercial Bank Limited, their costs of the application. Meanwhile, the application for an injunction is dismissed.

**DATED, SIGNED and DELIVERED at NAIROBI this 14<sup>th</sup> day of September 2015.**

**FRED A. OCHIENG**

**JUDGE**

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

Miss Ithondeka for the Plaintiff

Ochieng for the Defendant

Collins Odhiambo – Court clerk