REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 13 OF 2014

UNISPAN LIMITED.....PLAINTIFF

-VERSUS-

AFRICAN GAS & OIL LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff moved the court *vide* the Notice of Motion dated 4th February 2014 expressed to be brought under Section 1A, 1B, 3A and 63 of the Civil Procedure Act and Orders 40 and 41 of the Civil Procedure Rules for the following orders:

a. **Spent;**
b. **Spent;**
c. **That Ms. Manjit Giddie or any other fit and proper person be appointed as Receiver/Manager of the Defendant Company African Gas & Oil Limited for the purposes of taking into their possession and custody the property and assets of the Defendant Company on such terms and conditions as may appear to this Honourable Court to be appropriate and fit in the circumstances pending hearing and determination of this suit;**
d. **That the Receiver/Manager's remuneration be paid from the assets of the Defendant Company;**
e. **Spent;**
f. **That the Defendant Company African Gas & Oil Limited be restrained whether by itself or through its directors, agents and/or servants from continuing to trade whilst the Defendant is insolvent and unable to meet its financial obligations as and when they fall due pending the hearing and determination of this suit;**
g. **That the Defendant Company African Gas & Oil Limited be restrained whether by itself or through its directors, agents and/or servants or howsoever else from alienating, selling, charging or transferring the property known as plot numbers 4737, 1515, 1798 and 3690 (on which the LPG storage and distribution terminal facilities which was constructed by the Plaintiff stand) and all its other assets and/or movable property pending hearing of this suit; and**
h. **That the costs of this application be provided for.**

2. The Application is supported by the Affidavit of RAVINDER SINGH and on the grounds on its face.

THE ARGUMENTS AND SUBMISSIONS

The Plaintiff's Submissions

3. The Plaintiff's case is that the Defendant owes it Kshs. 122,373,040.11 which amount the Plaintiff claims to have arisen out of an Agreement dated 15th February 2011 between the parties herein under which the Plaintiff was to construct an LPG storage and distribution terminal at the Defendant's property in Miritini, Mombasa.

4. The Plaintiff claims that pursuant to the Agreement, it commenced construction as agreed and a Payment Certificate Number 22 was issued by the Project Engineer for Kshs. 52,705,718.74 for settlement by the Defendant. That the Defendant only paid Kshs. 14,785,421.89 out of that Certificate leaving a balance of Kshs. 37,920,296.85 which is still outstanding.

5. The Plaintiff further claims that another Payment Certificate Number 23 was issued on 24th October 2013 for Kshs. 122,373,040.11 but the same has also not been paid by the Defendant.

6. It is the Plaintiff's contention that on 14th June 2013, it issued a formal demand notice to the Defendant under **Section 220** of the Companies Act demanding payment of Kshs. 52,705,718.74 certified under Certificate Number 22 but save for Kshs. 14,785,421.89, the Defendant declined to pay the said amount.

7. The Plaintiff also avers that on 16th December 2014 (sic), it issued another formal demand notice to the Defendant under **Section 220** of the Companies Act demanding payment of Kshs. 122,373,040.11 certified under Certificate Number 23 but the same remains unpaid to date. The Plaintiff now submits that the Defendant is insolvent for the reason that it has failed to pay up its debt despite being served with the said statutory notices.

8. The Plaintiff submits that the Defendant does not dispute the amount owed. That there is not a single paragraph in the Defence or the Replying Affidavit where the Defendant disputed the figure of Kshs. 122,373,040.11 certified in Certificate Number 23. That the Defendant admitted the Plaintiff's claim in its letter dated 14th January 2014 in which the Defendant requested for a meeting to amicably decide on all outstanding payments and to negotiate the terms and modalities of settling the same. The Plaintiff submitted that the said letter, although written on a without prejudice basis, should be admitted in court to show that the claim is not disputed. In that regard, Mr. Khagram, learned counsel for the Plaintiff relied on the case of **Co-operative Bank of Kenya Limited v. Shiraz Shabudin Sayani (High Court of Kenya at Mombasa Civil Case No. 23 of 1999**) in which **Waki, J.** (as he then was) admitted in evidence a letter marked "**without prejudice**".

9. The Plaintiff's case is that despite the Defendant's insolvency, caused by its inability to pay its debt when they fall due, the Defendant continues to trade thereby incurring further debts which its assets will not be able to satisfy. The Plaintiff submits that it is fraudulent and wrongful for the Defendant to continue trading while it is unable to pay its debts. The Plaintiff asks the court to restrain the Defendant from trading while it is insolvent and also to appoint a receiver/manager to preserve the Defendant's assets pending hearing and determination of this case.

10. Mr. Khagram learned Counsel for the Plaintiff submitted that this Court has jurisdiction to appoint a receiver to preserve the company's assets pending hearing and determination of the suit. He relied on the cases of **Uhuru Highway Development Limited v Central Bank of Kenya & 3 Others [1998] eKLR** (hereinafter "the **Uhuru Highway Case**") and **Nasir Ibrahim Ali & 2 Others v Kamlesh Mansukhalal Damji & Another, Nairobi Civil Appeal No. 72 of 1998** (hereinafter "the **Nasir Ibrahim Case**"). In both cases, it was held that the High Court has jurisdiction to appoint a receiver to manage the affairs of the company during the pendency of the suit.

11. The Plaintiff's learned counsel further relied on **Kerr on the Law and**

Practice as to Receivers (16th Edition) where the author writes that the purpose of appointing a receiver is to preserve property from some danger which threatens it. The Plaintiff therefore submits that since the Defendant and its directors are wasting the Company's assets by trading while the company is insolvent, this court should appoint a receiver to manage the assets of the Defendant's in order to curtail such wastage. The Plaintiff urged the court that it is in the interest of both parties that a receiver is appointed to preserve the assets of the Company.

12. Finally, the Plaintiff urged the court that it has satisfied the conditions laid down in the case of **Giella v Cassman Brown [1973] E.A. 358** for the grant of the interlocutory restraining orders.

The Response by the Defendants

13. The Defendant opposed the Application through a **Replying Affidavit** sworn by **ASHOK DOSHI** on 4th March 2014.

14. The Defendant denied that it owes the Plaintiff the amount claimed. The Defendant claims that it fully paid the amount certified in Certificate Number 22 which the Project Engineer had reduced by way of amendment from Kshs. 52,705,718.74 to Kshs. 14,785,421.89. The Defendant therefore denied that Kshs. 37,920,296.85 was still owing to the Plaintiff under Certificate No. 22. The Defendant submitted that if the Plaintiff was aggrieved by the amendment by the Project Engineer, then the Plaintiff should seek redress against the Project Engineer and not the Defendant.

15. The Defendant denied that it had admitted the Plaintiff's claim of Kshs.122,373,040.11 through its letter dated 14th January 2014. Mr. Buti, learned counsel for the Defendant, submitted that the said letter was inadmissible in evidence as it was written on a "**without prejudice**" basis. To support his submission, Mr. Buti relied on **Sharkar's Law of Evidence (12th Edition)** where the author writes that "**The words *"without prejudice"* simply mean this: "I make you an offer, if you do not accept it, this letter is not to be used against me**." Mr. Buti therefore urged that the said letter should not be used to prove that the Defendant had admitted the Plaintiff's claim.

16. The Defendant argued that this court has no jurisdiction to appoint a receiver in proceedings commenced by way of plaint and which fall under the provisions of the **Civil Procedure Act** and the **Rules** made thereunder. That a receiver can only be appointed in a winding up petition under the **Companies Act** and the **High Court (Winding Up) Rules)**. Mr. Buti submitted that by serving the Defendant with statutory notices under **Section 220** of the **Companies Act**, the Plaintiff had submitted itself to the jurisdiction of the Companies Act and the next step available to the Plaintiff was to file a winding up petition and not this suit. That since the Plaintiff chose to file this suit, it cannot rely on the statutory demand notices which were served under a different statutory regime to show that the Defendant is unable to pay its debts. Mr. Buti submitted that a receiver/manager could only be appointed under the circumstances spelt out in **Sections 347 and 348 of the Companies Act**. Further, Mr. Buti was of the view that **Order 41 Rule 1** of the **Civil Procedure Rules** was only applicable where the applicant is a judgment creditor and not before the decree is obtained.

17. Mr. Buti sought to distinguish the **Uhuru Highway** and **Nasir Ibrahim Cases** on the basis that the circumstances under which the receivers were appointed in those cases were different from the circumstances obtaining herein. That in the two cases, there were many ills complained of and there was grave danger of the assets being wasted which is not the case here.

18. Mr. Buti further submitted that the Plaintiff has not satisfied the conditions necessary for the appointment of a receiver because the Plaintiff has not made allegations of vandalism, dissipation, wastage or alienation of property by the Defendant, the Plaintiff only gave one name of a proposed receiver and no security has been pledged by the Plaintiff.

19. Mr. Buti, while relying on the case of **Matic General Cont. Ltd v Kenya Power and Lighting Co. Ltd [2001] 2 EA 440**, argued that appointing a receiver is a draconian measure that if wrongly made, will leave the Defendant with little commercial prospect of reviving itself and recovering its former self.

20. Finally, the Defendant submitted that it is not convenient to grant injunctions sought as doing so would trigger the major stake-holder in the Company to move into the Defendant's premises for the realization of its securities and neither the Plaintiff nor the Defendant will benefit from such a move.

THE ISSUES

21. The Orders sought by the Plaintiff may be categorised into two main areas:

a. the order for appointment of a receiver and to restrain the Defendant from trading while insolvent; and

b. the order for injunction to restrain the Defendant from transferring its named property pending hearing the suit.

22. In my view therefore, the main issues before the court for determination are as follows:

i. Whether this court has jurisdiction to appoint a receiver in proceedings commenced by way of plaint;
ii. If the answer to (i) above is in the affirmative, whether the circumstances of this case justify the appointment of a receiver; and
iii. Whether the interim restraining orders sought by the Plaintiff should be granted.

ANALYSIS

Jurisdiction to Appoint Receiver

23. The Defendant argues that the proceedings herein were commenced by way of Plaint and the same are governed by the provisions of the **Civil Procedure Act (Cap. 21)** and the **Rules** made thereunder. That there are no provisions available in both the **Civil Procedure Act (Cap. 21)** and the **Civil Procedure Rules** for the appointment of a receiver in any proceedings governed by that Act. According to the Defendant, the jurisdiction of a court to appoint a receiver over the assets of a company only arises under the provisions of **Part VI (ii)** of the **Companies Act** and where there is compliance with the **High Court (Winding Up) Rules**.

24. **Section 63** of the **Civil Procedure Act** provides as follows:

> **"In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—**
>
> **(a) issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;**
>
> **(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;**
>
> **(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;**

(d) appoint a receiver of any property and enforce the

performance of his duties by attaching and selling his

property;

(e) make such other interlocutory orders as may appear to the court to be just and convenient."

25. **Section 63** of the Civil Procedure Act has been actualized by **Orders 40** and **41** of the Civil Procedure Rules. Of relevance to the appointment of a receiver is **Order 41 Rule 1** which provides as follows:

> **"1. (1) Where it appears to the court to be just and convenient, the court may by order—**
>
> **(a) appoint a receiver of any property, whether before or after decree;**
>
> **(b) remove any person from the possession or custody of the property;**
>
> **(c) commit the same to the possession, custody or management of the receiver; and**
>
> **(d) confer upon the receiver all such powers as to bringing and defending suits and for the realisation, management, protection, preservation, and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of such documents as the owner himself has, or such of those powers as the court thinks fit."**

26. The Kenyan courts have invoked the jurisdiction under **Section 63** of the Civil Procedure Act and **Order 41** of the Civil Procedure Rules to appoint a receiver in proceedings commenced by way of Plaint.

27. **Mbogholi Msagha, J.** relied on the said provisions in the **Uhuru Highway Case** to appoint a receiver/manager. The learned Judge stated as follows:

> **"I believe I have the jurisdiction to address the application and make orders thereunder under the provisions of section 63 of the Civil Procedure Act and Orders 39 and 40 of the Civil Procedure Rules. The orders to be made under Orders 39 and 40 of the Civil Procedure Rules aforesaid are covered by section 63 (c) (d) and (e). The key words in section 63 aforesaid I believe are that the court in a given situation may act "In order to prevent the ends of justice from being defeated."**

28. Orders 39 and 40 of the repealed Civil Procedure Rules were retained as Orders 40 and 41 respectively of the Civil Procedure Rules, 2010.

29. In the **Nasir Ibrahim Case**, **Shah, J.A.** (as he then was) held as follows in a majority judgment:

> **"As I see it, the appointment of a receiver under S. 63 (d) of the Civil Procedure Act and Order 40 of the Civil Procedure Rules as reinforced by the inherent powers of the High Court and also ex-dibitio justitiae, <u>if the circumstances of the case so warrant can be made when just and convenient</u>...**
>
> **It is my view that the High Court has power to so appoint a receiver during the pendency of the suit and it has power to order such appointment on an ex-parte application <u>in appropriate circumstances</u>**.(emphasis added)

30. In my view, the High Court has the jurisdiction, under **Section 63** of the Civil Procedure Act and **Order 41** of the Civil Procedure Rules, to appoint a receiver during the pendency of the suit, in appropriate circumstances. It is therefore not right as argued by the Defendant, that a receiver can only be appointed in winding up proceedings under the Companies Act. Additionally that power is not affected by the form of demand made by the Plaintiff, as in this case where the Plaintiff made a demand under Companies Act. It suffices that a demand is made.

31. Having established that the High Court has jurisdiction to appoint a receiver in appropriate circumstances, I now proceed to address the question of whether the circumstances of this case justify the appointment of a receiver.

Whether a Receiver should be appointed in this case

32. The key words in **Order 41** are "**where it appears to the court to be just and convenient**". The cases cited above show that a court should only appoint a receiver where the circumstances of the case so require and where it is just and convenient to do so. It is therefore important to point out that while the High Court has jurisdiction to appoint a receiver, the decision of whether to appoint a receiver or not depends on the circumstances of each case. One such circumstance under which a receiver can be appointed, as was rightly pointed out in the **Nasir Ibrahim Case**, is where there is a need "to avoid imminent danger and dissipation of assets."

33. **Kerr on the Law and Practice as to Receivers (16th Edition)** (hereinafter "Kerr") says that the purpose of appointing a receiver is "to preserve property from some danger which threatens it." The author goes on to state as follows at page 33:

> **"General creditors may, like specific encumbrancers, have a receiver of the property of their debtor, provided they can show to the court the existence of circumstances creating the equity on which alone the jurisdiction arises. Thus, where it is made to appear that an executor or devisee is wasting the personal or real estate, a receiver may be appointed..."** (emphasis mine)

34. The jurisdiction to appoint a receiver, although founded on statute, has been said to be equitable in origin. That jurisdiction is discretionary and the court can decide, based on the circumstances of the case, whether to appoint a receiver or not.

35. **Kerr** says at page 34 that a strong case must be made out to warrant intervention by the court:

> **"Still, although general creditors may have a receiver of the property of the debtor, a strong case must be made out to warrant the interference of the court. The court will not, unless a clear case is established, deprive a person of property on which the claimant has no specific claim, in order that if he establishes his claim as a creditor, there may be assets wherewith to satisfy it."** (emphasis mine)

36. Has the Plaintiff made out a strong and clear case to warrant appointment of a receiver by the court? Is there an imminent and real danger of dissipation of the Defendant's assets in a manner that is likely to defeat the Plaintiff's claim should the same succeed? In order to answer these questions, I have considered the circumstances under which the respective receivers were appointed in the **Uhuru Highway Case** and the **Nasir Ibrahim Case**.

37. In the **Uhuru Highway Case**, the learned judge addressed his mind to the allegations of mismanagement and dissipation of assets levelled against Mr. Kittony, the receiver appointed by the 1st Defendant in that case as well as the evidence annexed in support of the allegations. The learned Judge made the following observations:

"The allegations levelled against Mr Joseph Kittony and the management of the hotel center on incompetence, mismanagement, theft and fraud which are eroding the business and assets of the

plaintiff.

On the foregoing, I found the fears expressed on behalf of the plaintiff to be well founded and decided to dispense with service in the first instance and hear the application Ex-parte.

...the grounds upon which the application is made are:

(i) THAT the first defendant/respondent has failed to properly furnish any or all accounts since the 15th March, 1994 to date.

(ii) THAT the first defendant/Respondent acting by itself and/or by its agent or employee Joseph Kittony has failed to administer the hotel in a sound and competent manner appropriate to the standard of a preferred hotel.

(iii) THAT Joseph Kittony is eroding the assets afore stated to such an extent and at such a speed that only a mere shell shall be left unless action is taken to stem the damage presently being done.

Mr Rebelo the learned counsel for the plaintiff/applicant has taken the court through the two affidavits together with the annextures thereto. Saying that this is a classic case of a game keeper turned poacher, he submitted that, the Chief Executive of the hotel who should be Mr Kittony, the General Manager and Financial Controller whether by indolence, negligence or sheer disregard are causing serious losses running into millions of shillings. There is evidence of fraud and thefts. It is his submission that had the hotel been properly managed from 15th April, 1998 when Mr Kittony took possession, control and management, without thefts and frauds over the last four years, the hotel would have earned sufficient monies to have paid off the alleged debt under the charge.

...Mr Rebelo has pointed out the failures of Mr Kittony as stated in the affidavit of Mr Pattni. Such failures include the Golden Beach Hotel in Mombasa which is said to have never recovered from Mr

Kittony's mismanagement. The other is the hotel group known as African Tours and Hotels Limited which is said to be insolvent and suspended by the Nairobi Stock Exchange. "See KMP7". He is said to have been or still is its managing director.

Some reports in respect of the mismanagement of the Grand Regency Hotel have been annexed to Mr Pattni affidavit as "KMP9". Notes and recommendations made by auditors have not been addressed. Mr Kittony has allowed and or permitted a large number of persons to stay at the hotel and enjoy its facilities at complementary basis. This has been annexed as "KMP10".

Substantial luxury items have been removed from the hotel to furnish the residence of the General Manager at Muthaiga. A manager was also arrested for theft from the hotel. See annextures "KMP11" and "KMP12".A private restaurant by the name of After Hours Restaurant at Village Market, Gigiri has benefited from the transfer of movables, food and other items from the hotel. The said restaurant is not and has never been an asset of the plaintiff and is said to be an instrument or device for syphoning materials out of the hotel for the benefit of the Financial Controller and the General Manager. See "KMP16".

Annexed to Mr Pattni's affidavit as "KMP14" is a bundle of letters of complaints showing that some valued clients made of Embassy and Diplomatic personnel, and Canadian

Armed Forces have stopped using the hotel due to embarrassment and mismanagement. Above all a sum of Ksh. 44 million owed to the hotel has not been collected from debtors for unknown reasons. The list is not exhaustive. At the end of it all, the picture that comes out is that of a profile of mismanagement, incompetence and sheer plunder. If that is not arrested, irreparable loss shall surely result. In view of the foregoing, I consider it my duty to appoint a receiver/ manager to save the situation. (emphasis mine)

38. Thus, in the **Uhuru Higway Case**, there were not only grave allegations of mismanagement, incompetence and absolute wastage of the company's property that would have led to irreparable loss if not arrested, but also the allegations were backed by evidence annexed to the affidavit in support of the application for appointment of a receiver.

39. In the **Nasir Ibrahim Case**, **Shah, J.A.** (as he then was) made the following observations:

> ***"In his affidavit in support of the application for appointment of a receiver, the plaintiff has attempted to show how he paid the purchase price of US $ 13,750,000 to the first two defendants. The plaintiff also attempts to show that the first defendant had, through the company, transferred a considerable quantity of furniture, equipment, large sums of money and very substantial quantities of stock from Kenya Duty Free premises and warehouses in Kenya to Zanzibar. The Plaintiff alleged that the 1st Defendant had been "milking" the duty free shops in Kenya through weekly transfers of minimum of US$ 100,000 every Wednesday by courier on Emirate Airlines and that the complexes were in the process of being sold to third parties; that although the two warehouses on Mombasa Road, known as L.R. Nos. 209/10882/15 and 209/10882/16 were stated to be assets of the company, were fraudulently transferred by the first defendant to himself instead of to the company..."***

40. The thread that runs through the two cases is that, in order to succeed in an application for appointment of a receiver, the Applicant must attempt to show that the company's assets are in real danger of being dissipated due to either mismanagement, sale, transfer or any other fraudulent dealing. In my view, the allegations as to dissipation must bear the specific and exact particulars of how the directors or the management of the company is involved in such dissipation.

41. In the instant case, the main grounds in the support of the application for appointment of a receiver are that:

a. **The Defendant and its directors have and continue to trade wrongfully and/or fraudulently having been fully aware that the Defendant was insolvent and unable to pay its debts.**

b. **The continued trade by the Defendant and incurring further debts is prejudicial to the Plaintiff; and**

c. **It is imperative that the Defendant's property and assets are placed into the possession and/or custody of a court appointed receiver in order to safeguard the interests of all the Defendant's creditors and minimize further exposure to the wrongful and/or fraudulent trading activities perpetrated by the Defendant and/or its directors.**

42. These allegations are also contained in the Affidavit in support of theApplication. At paragraph 26 thereof, it is stated as follows:

> **"That it is clear that the Defendant's directors, as at the date of the Settlement Agreement referred to above, knew that the Defendant was insolvent and unable to meet its financial obligations as and when they fell due. Nevertheless, they carried on the business of the company with intent to defraud the creditors of the Defendant and wrongfully obtained credit under the pretext that the Defendant was in a financially sound position and able to meet its payment obligations under the aforestated**

Agreements."

43.At paragraph 35 of the Supporting Affidavit, it is stated as follows:

> **"That by the Defendant continuing to conduct business (and in the course thereof incur further debts) whilst insolvent the Plaintiff's position is highly affected to its other creditors detriment and prejudice and in the event it is required to share pro-rata with (sic) from the value of the assets in order to recover the amounts due it (sic) should the Defendant be permitted to have a free hand in trading and incurring debts."**

44.I have gone through the Application as well as the Supporting Affidavit. Save for paragraphs 26 and 35 quoted above, no other allegation is made which touches directly on the question of why the Defendant's assets are under danger of being wasted.

45.Although the Plaintiff's case, as I understand it, is that if a receiver isnot appointed, the Defendant will not be able to satisfy any decree passed in favour of the Plaintiff due to the wastage and dissipation of the Defendant's assets, the Plaintiff has not made any direct allegations that the Defendant, its directors or management is alienating, dissipating, wasting, or transferring the Company's assets.

46.In deed, when Mr. Khagram, learned counsel for the Plaintiff waschallenged to refer to the specific paragraphs in which allegations of dissipation and/or transfer of the Company's assets had been pleaded, this is how he responded:

> **"When the company continues to trade when it cannot pay my client's debt, that is wasting the asset. After incurring more debt there may not be [any] money to meet the debts. Dissipation does not mean getting rid of asset."**

47.Thus, the Plaintiff's claim is that the Defendant is not in a position to satisfy its debts yet it continues to trade. That by continuing to so trade, the Defendant is incurring more debts such that it will not be in a position to satisfy the Plaintiff's decree should the case succeed. That trading while the Company is insolvent amounts to fraudulent and wrongful trading. That is why the Plaintiff wants the court to appoint a receiver to manage the Defendant's assets pending the determination of this case.

48.In my view, the mere allegation that the Defendant is continuing to trade while insolvent should not necessarily lead the court to appoint a receiver unless attempt was made to demonstrate that such continued trading was fraudulent, wrongful or intended to defeat the Plaintiff's debt. The Plaintiff must attempt to show that the continued trading by the Defendant is not in the ordinary course of the Company's trade or business. I say so because by continuing to trade, the Company could be undertaking that which it was ordinarily formed to do or doing what it normally does in its ordinary course of business and thereby generating more income and improving the Company's assets rather than wasting the same. It is upon the Plaintiff to show that the continued trade is affecting the Company negatively. In my view, the Plaintiff ought to have given particulars of the alleged trading, with whom the Defendant is engaged in the trading, whether the trading is outside the Company's objects or ordinary cause of business and whether the trading is fraudulent and aimed at dissipating the Company's assets in such a way as to defeat the Plaintiff's decree, if obtained.

49.The Plaintiff has alleged that the Defendant is incurring more debts but again no particulars of such debts have been supplied. Who are the creditors and what is the quantum of such debts? Are the debts way above the company's assets so that the assets will not be able to satisfy the decree if obtained? It was incumbent upon the Plaintiff to supply these particulars and annex evidence in support of the same. No such particulars or evidence have been supplied.

50. While arguing the Application, Mr. Khagram referred to the Annexture (Charge to Equity Bank over LR. No. MN/VI/4838 MOMBASA) at page 4 of Replying Affidavit of ASHOK DOSHI to demonstrate that the Defendant borrowed money from Equity Bank Limited. Counsel however admitted that he did not know the quantum of the said debt. Even then, that document at page 4 is a Charge dated 16th July 2011 and the same cannot be said to be a borrowing done with an aim of defeating the Plaintiff's claim which arose in the year 2013.

51. It is my considered view that for the Court to exercise its discretion to appoint a receiver, the Applicant needs to demonstrate that there are grave instances of mismanagement of the company and a great danger of wastage of the company's assets such that if the Court does not intervene, the company will be reduced to a mere shell. That can only be achieved if the Plaintiff's allegations are supported by specific particulars and evidence. That is what happened in the **Uhuru Highway Case** and **Nasir Ibrahim Case**.

52. In the **Uhuru Highway Case**, there were specific allegations that, for instance, the company was being mismanaged, assets were being transferred and ferried to a private residence of a third party, stock was being used in a third party hotel, a manager had been arrested for theft, valued clientèle had stopped visiting the hotel leading to loss of business, and Kshs. 44 million had not been collected from debtors. All these allegations were particularised and backed by evidence annexed to the application.

53. In the **Nasir Ibrahim Case**, there were allegations of transfer of furniture, equipment, large sums of money and substantial quantities of stock from Kenya to Zanzibar as well as transfer of land from the company to an individual's name. Again these allegations were backed by evidence.

54. In order to decide whether to exercise its discretion to appoint a receiver to manage the company's assets during the pendency of the suit, perhaps the test to be applied is for the court to ask itself whether, on the basis of the allegations made, if the court does not intervene to appoint a receiver, irreparable loss shall surely result. If in the court's view the allegations are such that if the court does not intervene, and the acts complained of continue to be perpetrated, the company would be left with nothing, then the court must exercise its discretion and appoint a receiver. If however there is nothing placed before court to show, on a *prima facie* basis, that the company is being run down in such a way as to defeat the Plaintiff's claim, the court should be very reluctant to intervene.

55. The Plaintiff's allegations in the instant case are too broad, general and lacking in material particulars. The same do not show how the Defendant and/or its directors are dissipating the Company's assets. There are no allegations of mismanagement, transfer, plunder or dissipation of assets, only of continued trading while the Company is insolvent. The Plaintiff has not attempted to show that if the court does not intervene to appoint a receiver, irreparable loss shall result.

56. The Plaintiff identified properties belonging to the Defendant, namely, **Plot numbers 4737, 1515, 1798** and **3690**. The Plaintiff is seeking preservation of these properties pending determination of its case. In my view, the Plaintiff recognizes that these properties can be applied to satisfy its decree should the claim succeed. That is why it wants them preserved. However, no allegation has been made that the Defendant has transferred or intends to transfer the said properties. Even if such allegation was made, the Defendant, through its learned counsel Mr. Buti, gave an undertaking that it will not sell or transfer the said properties until this case is heard and determined. The undertaking, which was made in court and placed on the record, is significant in the sense that it shows, on a *prima facie* basis, that the Defendant is not intent on defeating the Plaintiff's claim by transferring or dissipating its assets, a condition that is requisite for this court to exercise its discretion to appoint a receiver. The court is enjoined by **Order 41** to exercise such discretion in a <u>just and convenient manner</u>.

57. Mr. Buti pointed out that appointing a receiver is a draconian step. Although the receiver, if appointed, will be an officer of the court, acting under the court's directions, the truth of the matter

is that the company's liberty to trade when a receiver is appointed will be greatly curtailed. The company will not be at much liberty to, for instance, freely enter into contracts, source for business, deal in assets or even carry out trading in its ordinary way of business. That is why the court is called upon to exercise its discretion only in just and convenient circumstances. My finding is that it will be unjust to appoint a receiver to manage the Defendant's assets yet that very Defendant has given an undertaking that it will not dispose of the subject properties, from which the Plaintiff may ultimately recover its decree.

Prayer for Injunction

58. The Plaintiff seeks injunction to restrain the Defendant from trading while insolvent pending hearing of the suit. As already discussed above, nothing has been produced to show that the alleged trading by Defendant is likely to affect its assets in a negative way. I therefore do not find a reason why the Defendant should be so restrained.

59. Regarding the prayer for injunction against transfer of properties, the Defendant has voluntarily undertaken (on record) not to transfer the properties the subject of the prohibitory order until this case is determined. That as it may be I find that the interest of justice will best be served by granting restraining order against disposal of Defendant's immovable properties.

Further Observations

60. The parties addressed the court on the issue of whether the Plaintiff's claim against the Defendant is admitted. In my view, it is not for the Court to determine, now, whether the debt is admitted or not. This is not an application for judgment on admission or for summary judgment or even for the striking out of the Statement of Defence. If the court were to make a finding at this stage that the Plaintiff's claim is admitted, there would be nothing left for the main trial. In my view, it is not a requirement that the Plaintiff should establish the Defendant's indebtedness before a receiver can be appointed. As already observed, all the Plaintiff needs to do is to show that there are grave instances of mismanagement and dissipation of the company's assets to the extent that will lead to irreparable loss if not arrested. The issue of whether the Defendant admitted the Plaintiff's claim should therefore await the main trial of the case.

61. On the admissibility of the Defendant's letter dated 14th January 2014 entitled 'without prejudice', one needs to consider the provisions of Section 23(1) of the Evidence Act Cap 80. It provides-

> **"In Civil cases no admission may be proved if it is made either upon an express condition that evidence of it is not given or in circumstances from which the Court can infer that the parties agree together that evidence of it should not be given."**

The side note to that Section is entitled "Admissions made without prejudice in Civil Cases." The letter written by Defendant dated 14th January 2014 was in the following terms-

> **"14th January 2014**
>
> **A. B. Patel & Patel Advocates**
>
> **Oriental Building, First Floor,**
>
> **Nkrumah Road,**
>
> **P.O. Box 80274-80100,** **"Without Prejudice"**
>
> **MOMBASA**
>
> **Attn: Mr. Sanjeev Khagram**

Dear Sirs,

RE: DEMAND FOR OUTSTANDING PAYMENTS

We refer to the above and to your client's notice dated 16th December 2013.

In response thereto we hereby suggest that your client Unispan Limited and our team meet to amicably decide on all outstanding payments due to them and to negotiate the terms and modalities of settling the same.

We believe that at this moment an amicable settlement shall augur well for both parties.

Kindly obtain instructions from your client and revert.

Yours Sincerely,

ASHOK DOSHI

DIRECTOR"

The policy behind the Courts not admitting in evidence without prejudice communication was discussed in the book 'Principles of Evidence' by Alan Taylor where the learned author stated thus-

> **"These are negotiations conducted on the basis that, if no agreement is reached, evidence of the offers and counter-offers made and rejected is not admissible, but if agreement is reached, a binding contract is thereby concluded. The policy underlying the rule was explained by Oliver LJ in Cutts v Head (1984) thus:**
>
> > ***… parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings … The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability. As was explained in Rush & Tompkins Ltd v Greater London Council (1989), the rule applies to exclude 'all negotiations genuinely aimed at settlement whether oral or in writing.'***
>
> **… It is worth stressing that if the negotiations lead to agreement, an enforceable contract is established. If one party then wishes to deny or resile from what has been agreed, the communications can be relied upon to prove the contract and its terms, because in such a situation, the question is whether there has been a concluded agreement, and it would be impossible to decide it without looking at the correspondence."**

The Plaintiff did not show to this Court as required under Section 23(1) above or as stated in the book quoted above that the parties had reached an agreement to justify this Court consider the 'without prejudice' correspondence. It therefore follows that at this interlocutory stage the Court rejects Plaintiff's reliance on the Defendant's letter of 14th January 2014. It is however open at trial for the Plaintiff to prove the admissibility of that letter.

CONCLUSION

62.In light of the foregoing, I make a finding that the Plaintiff herein, unlike in the two cases of

Uhuru Highway and **Nasir Ibrahim** cited above, has not laid a satisfactory basis upon which a receiver should be appointed. The Plaintiff has not demonstrated that there is an imminent and real danger of dissipation of the Defendant's assets in a manner that is likely to result in irreparable loss. The Plaintiff, in my view, has not made out a strong and clear case to warrant appointment of a receiver by the court. To use the words of Shah J.A in the Nasir Ibrahim Case, the Plaintiff has failed to create "***the picture of mismanagement, incompetence and sheer plunder***". The prayer for appointment of a receiver is hereby declined. However, should circumstances arise as to warrant the appointment of a receiver during the pendency of this case, the Plaintiff is given liberty to so apply.

63. This Court order the prohibitory order do issue pending the hearing and determination of this case over properties known as Plot No. 4737, 1515, 1798 and 3690.

64. Save as ordered in paragraph 63 above the other prayers in the Notice of Motion dated 4th February 2014 are dismissed. The costs of the Notice of Motion shall be in the cause.

65. Liberty is hereby granted for any party to apply.

DATED and DELIVERED at MOMBASA this 9TH day of APRIL, 2014.

MARY KASANGO

JUDGE