



**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 78 OF 2013**

**CABLE ONE LIMITED.....PLAINTIFF**

**VERSUS**

**IMPERIAL BANK LIMITED.....1<sup>ST</sup> RESPONDENT**

**OKUKU AGENCIES.....2<sup>ND</sup> RESPONDENT**

**MANSUKHAL DEVSHI HIRANI.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

1. The application before the court is the Plaintiff's Notice of Motion dated **1<sup>st</sup> March 2013** and filed in Court on **7<sup>th</sup> March 2013**. It is expressed to be brought under **Order 51 rule 1, Order 40** of the **Civil Procedure Rules** and **Sections 1A, 1B and 3A** of the **Civil Procedure Act**.
2. The application is seeking for one main order that pending the hearing and determination of this suit, this Court be pleased to grant an order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents either by themselves and/or agents and/or servants from attaching the head-end control room equipment or any other assets of the Plaintiff's Company in relation to any debenture or other securities that might be existing over the Plaintiff's assets entered between the previous owner(s) and the 1<sup>st</sup> Respondent.
3. The application is based on the grounds stated therein and is further supported by the affidavit of **SACHIN SHAHA** described as one of the Plaintiff's directors and sworn on **1<sup>st</sup> March 2013**. In his affidavit, the deponent has laid a factual background of his relationship with the 1<sup>st</sup> and 3<sup>rd</sup> Respondents and how he consequently acquired the head-end control equipment which is the subject matter herein.
4. It is averred by the deponent that sometime in the year 2011, the 3<sup>rd</sup> Respondent approached him for financial assistance to revamp his Company (South Keyboll Television Network Limited) which was at the verge of winding up. The deponent accepted the 3<sup>rd</sup> Respondent's request and agreed to finance the company by purchasing 50% of issued share capital in the company at **Kshs. 12,000,000/=**. Mr. Sachan further avers that the 3<sup>rd</sup> Respondent issued a list of Company assets to him as at 1<sup>st</sup> May 2011 which included the subject matter herein being the head-end control room equipment (herein "the equipment").
5. It is also stated by the deponent that on 25<sup>th</sup> September 2012 he entered into a deed of settlement

- with the 3<sup>rd</sup> Respondent, which agreement at clause 10 provided that the 3<sup>rd</sup> Respondent was to pay him Kshs. 10,000,000/= within 90 days failure of which the equipment would vest in him as opposed to the Company. By the expiry of the 90 days, the 3<sup>rd</sup> Respondent was yet to pay the proposed sum of Kshs.10, 000,000/= and it is the deponent's position that for that reason the goods automatically vested in himself.
6. The deponent further states that soon after the foregoing circumstances, the Plaintiff's other directors approached him and requested to purchase the said assets. He sold the said assets to them vide the Agreement of Sale dated **27<sup>th</sup> December 2012**. The deponent avers that on or about **19<sup>th</sup> February 2013**, he found a Notice of attachment of property by the 1<sup>st</sup> Respondent's agent being the 2<sup>nd</sup> Respondent slipped under his office premises door with a signature purported to be his own. The said Notice sought to attach the Plaintiff's assets which he had sold to them.
  7. He further avers that he later noticed that the Notice of attachment from the 2<sup>nd</sup> Respondent was in respect of a debenture that was entered into between the 1<sup>st</sup> Respondent and South Keyboll Television Network Limited for the sum of Kshs. 12,490,000/= where the assets of the said Company were used as security. It is the deponent's position that he cleared his portion of the loan that was borrowed from the 1<sup>st</sup> Respondent in his capacity as one of the Company directors of South Keyboll Television Network Limited.
  8. It is the Applicant's case that the 1<sup>st</sup> Respondent's claim is only for the assets of the South Keyboll Television Network Limited and therefore it cannot purport to attach property that has been transferred to a third party being the Applicant herein.
  9. The 1<sup>st</sup> Respondent opposed the application through the affidavit of its legal officer, **HILDA WANJIKU**, sworn on **19<sup>th</sup> March 2013**. It is averred that on or about **22<sup>nd</sup> October 2009**, the 1<sup>st</sup> Respondent (herein "the bank") advanced to South Keyboll Television Network (herein the "borrower") banking and credit facility for **Kshs. 8,790,000/=** to import cable television equipment. On the same date, the Bank and the borrower entered into an agreement to govern the banking facility to be advanced to the borrower. *Attached and marked as "HW-2" is a copy of the agreement dated 22<sup>nd</sup> October 2009.*
  10. It is further averred that on **4<sup>th</sup> February 2010**, the borrower applied for an increase in the banking and credit facility and the same was increased to **Kshs. 12,490,000/=**. On **24<sup>th</sup> August 2010**, the borrower made a Company resolution confirming their acceptance of the credit facility from the Bank. The deponent further states that the bank and credit facility advanced to the borrower was later secured by way of a debenture dated **26<sup>th</sup> October 2010**. This, according to the deponent, created a floating charge over the assets of the borrower.
  11. It is averred by the deponent that the 3<sup>rd</sup> Respondent later on introduced Mr. Sachin Shaha as a business partner and that the bank is not aware of how the two entered into their business relationship. It is further averred that as from November 2010, the borrower started defaulting in repaying the credit facility and despite numerous demands from the Bank, they neglected and or refused to clear the balance of the credit facility. This prompted the Bank to appoint the 2<sup>nd</sup> Respondent as its agents to collect the said equipment.
  12. The deponent explains that through a letter dated **11<sup>th</sup> March 2013**, the Bank instructed the 2<sup>nd</sup> Respondent to collect the equipment which was secured by the floating charge over the assets of the borrower. It is the deponent's position that this was in accordance with the provisions of the debenture agreement. It is then that the 2<sup>nd</sup> Respondent confirmed that the equipment for collection was in the possession of the Plaintiff/Applicant and hence the decision by the 2<sup>nd</sup> Respondent to issue the notice to the Plaintiff's physical address.
  13. The deponent affirms that it is not correct that the Plaintiff only came to know about the debenture upon service of the notice of attachment because Mr. Sachan was fully aware of the existence of the debenture when he was coming on board the management of the borrower and upon his introduction by the 3<sup>rd</sup> Respondent to the bank. She further affirms that it is not correct that the borrower had cleared its portion of the loan borrowed from the bank. It is therefore the deponent's assertion that the Plaintiff has approached the Court with unclean hands by alleging that the director has settled its part of the loan facility secured by the debenture.
  14. It is the 1<sup>st</sup> Respondent's case that they are well within the legal provisions as regards

- crystallisation of a floating charge and the acts of the 2<sup>nd</sup> Respondent are well within the legal requirements as to realisation of a debenture. It is further the 1<sup>st</sup> Respondent's case that the Plaintiff has not established a *prima facie* case to warrant issuance of the orders sought and the balance of convenience tilts to the 1<sup>st</sup> Respondent to enable it realise its debenture which secured the loan facility advanced.
15. The Plaintiff filed two supplementary affidavits both sworn on **19<sup>th</sup> April 2013** by Kioko Mulwa and Sachan Shah respectively.
  16. In reply to the supplementary affidavits sworn on behalf of the Plaintiff, the 1<sup>st</sup> Respondent filed a further affidavit sworn by its legal officer on **3<sup>rd</sup> May 2013**. In the said affidavit, the deponent reiterates the entire contents of her replying affidavit sworn on **19<sup>th</sup> March 2013**. She goes ahead to state that the main interest of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is the realisation of the Debenture dated **26<sup>th</sup> October 2010** through crystallisation of the assets charged over the debenture.
  17. The deponent avers that the 1<sup>st</sup> Respondent is unaware of the sale or transfer of the head-end control room equipment from the 3<sup>rd</sup> Respondent to the Plaintiff. The deponent further avers that it is not correct that the borrower has been dissolved as the Bank being one of the major creditors would have been well aware of the same.
  18. It is the deponent's assertion that the Bank has no contract or any agreement with Mr. Sachin Shaha as an individual but has a debenture agreement with the borrower wherein the borrower acts through officials being Mr. Sachin Shaha and the 3<sup>rd</sup> Respondent. The deponent reiterates that the borrower is in default of the repayment of the loan secured by the debenture agreement hence the lawful action by the 1<sup>st</sup> Respondent to crystallise the assets charged being the head-end control room equipment.
  19. It is further the deponent's assertion that the 1<sup>st</sup> Respondent entered into the debenture agreement with the borrower who is not a party to the suit and therefore the current suit is an abuse of the Court process.
  20. The application was also opposed by the 3<sup>rd</sup> Respondent who filed an affidavit sworn by himself on **27<sup>th</sup> May 2013** and filed in Court on **28<sup>th</sup> May 2013**. The deponent avers that he together with his wife are the shareholders of South Keyboll Television Network ("the borrower") and that no shares have been transferred to Mr. Sachin Shaha. He further avers that the head-end control equipment is still the property of the borrower and is charged to the 1<sup>st</sup> Respondent to secure repayment of money owed to the 1<sup>st</sup> Respondent.
  21. It is the deponent's assertion that there has never been any deed of settlement between himself and Mr. Sachin Shaha. He also denies the existence of any sale agreement in respect of the high-end control equipment which he reiterates is still the property of the borrower. He further denies the allegation that Mr. Sachin Shaha cleared any loan as the loan was owed by the borrower.
  22. It is the 3<sup>rd</sup> defendant's case that notwithstanding the fact that Mr. Sachin Shaha had knowledge of the existence of the debenture he proceeded to execute the sale agreement of the equipment as a seller and a purchaser. According to the deponent this manifested dishonesty on the part of Mr. Shaha.
  23. The application herein was prosecuted by way of written submissions. The Plaintiff filed its submissions on **11<sup>th</sup> July 2013** while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed theirs on **16<sup>th</sup> July 2013**. The 3<sup>rd</sup> Respondent filed his written submissions on **12<sup>th</sup> August 2013**.

### ANALYSIS

24. I have considered the application herein, the affidavits on record, as well as the submissions. From the pleadings, there seems to be a protracted tussle between Mr. Sachin Shaha and the 3<sup>rd</sup> Respondent herein. However for the purposes of this ruling I will constrain myself to what is relevant in determining whether the injunction prayers sought for herein are warranted.
25. To establish whether the Applicant is entitled to the orders it is seeking the following in my view are the issues for determination:-

- a. *Has the 1<sup>st</sup> Respondent's exercise of power of sale under the debenture arisen?*
- b. *Who is the owner/proprietor of the high-end room control equipment, the subject of attachment herein?*
- c. *Was the Notice of attachment properly served?*

26. With regard to the 1<sup>st</sup> issue, it is not in dispute that there was a debenture agreement between the 1<sup>st</sup> Respondent and South Keyboll TV network ("the borrower"). The borrower and the 1<sup>st</sup> Respondent entered into a debenture agreement dated **26<sup>th</sup> October 2010** which created a **floating charge** over all assets of the borrower to secure a loan of Kshs. 12,490,000/=. The details are to be found in clause 4 of the said Debenture agreement.

27. It is also not in dispute that the borrower is indebted to the 1<sup>st</sup> Respondent. Therefore the 1<sup>st</sup> respondent is entitled to take possession of the Company's assets as the loan has become repayable.

28. What is in dispute however is whether the equipment herein is available for attachment by the 1<sup>st</sup> Respondent in the event that the debenture herein has crystallized. The main issue for determination therefore is whether the said equipment belongs to the borrower or to the Applicant.

29. This leads us to the second issue which is to establish the owner of the equipment. It is submitted that on **26<sup>th</sup> September 2012**, Mr. Sachin Shaha entered into a settlement agreement with the 3<sup>rd</sup> respondent and the borrower, which agreement equally conveyed the equipment, subject matter herein, to Mr. Sachin vide clause 10 of the said agreement. It is further submitted that by virtue of his ownership status, Mr. Sachin transferred the equipment to the Plaintiff vide an Agreement of Sale on **27<sup>th</sup> February 2013**.

30. I have read the said clause 10 and in my understanding there is nothing to expressly show that the equipment was to be automatically conveyed to Mr. Sachin Shaha. However, I wish to say no more on the same as the said agreement is even disputed by the 3<sup>rd</sup> Respondent.

31. It is also worthy to note that in the Debenture agreement at Clause 5, it was a requirement that the borrower (SKTN) obtain consent from the Respondent before parting with or disposing of any property and assets thereby charged except by way of sale in the ordinary course of business. The proceeds from the said sale were then to be paid into the Company's account or accounts with the lender. The purported circumstances under which the equipment herein was devolved to Mr. Sachin Shaha and subsequently to the Applicant do not in the slightest way mirror the aforesaid conditions in the debenture agreement. Therefore, if there was any transfer, which is denied by the 3<sup>rd</sup> Defendant, then the same was in breach of the Debenture agreement.

32. It is the 1<sup>st</sup> Respondent's contention that the Plaintiff acquired the equipment with the full knowledge that the same had been secured by way of the debenture dated **26<sup>th</sup> October 2010**. According to the 1<sup>st</sup> Respondent, the Applicant's director, Mr. Sachin, acknowledged the existence of the debt through a letter received by the 1<sup>st</sup> Respondent on **19<sup>th</sup> March 2013**. However, it is Mr. Sachin's position that he became aware of the Debenture after the Plaintiff was served with the Proclamation Notice.

33. The question of whether the Applicant or Mr. Sachin was aware of the Debenture should not be in issue. It is plain that the purpose of registering a debenture under **Section 196** of the **Companies Act** with the Registrar of Companies is to inform the public at large of the state of the Company, so that anybody wishing to deal with it would be aware of the commitment of the company with other persons. Therefore Mr. Sachin is deemed to have known of the Debenture and if he did not bother to find out he has only himself to blame.

34. That notwithstanding, it is my considered view that the evidence on record is not sufficient to determine which of the parties herein, as at the date of filing the current suit, had proprietary rights over the equipment. It is not in dispute that the equipment initially belonged to the borrower. What is in dispute is whether the said borrower still has proprietary rights over the same.

35. This Court cannot ignore the fact that the applicant is in possession of the equipment. It is not clear how the said equipment found its way there yet the 3<sup>rd</sup> Respondent claims that it still belongs to the borrower and is charged to the 1<sup>st</sup> Respondent. It is apparent that there is need to determine the circumstances pertaining the current ownership of the equipment. The circumstances herein

- raise more questions than answers, which questions can only be answered at trial and not at this interlocutory stage.
36. The third issue is whether the 2<sup>nd</sup> Respondent acted properly as an agent of the 1<sup>st</sup> respondent. The Applicant submits that the letter from the 1<sup>st</sup> respondent purporting to issue instructions to the 2<sup>nd</sup> respondent is dated **11<sup>th</sup> March 2013** yet the proclamation notice purportedly issued to Mr. Sachin Shaha is dated **19<sup>th</sup> February 2013**. According to the applicant, it is apparent that the proclamation notice was issued without authority. Further, that the notice was issued before the appointment of the auctioneers as required by the **Auctioneers Act** and **clause 17** of the **Debenture agreement** which requires appointment of receivers to be in writing.
37. The 1<sup>st</sup> Respondent has admitted in its submissions that through a letter dated **11<sup>th</sup> March 2013** they instructed the 2<sup>nd</sup> respondent to act as its receivers and collect the equipment which was secured by the floating charge over the assets of the borrower. It is plain that the Proclamation Notice dated 19<sup>th</sup> February 2013 was prepared before the 2<sup>nd</sup> Respondent was instructed. It therefore follows that the proclamation notice was issued without authority as the second respondent had not yet been instructed.
38. The applicant has also raised claims of forgery to the effect that the name of Mr. Shaha appearing on the proclamation notice was not written by himself as he was never personally served. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent did not file any affidavit of service to controvert the said allegations or to prove how service was effected upon Mr. Shaha. Therefore, at this stage I will hold, *prima facie*, that the Applicant's claim of forgery is credible until proven otherwise.
39. It is now trite law that for an injunction to issue the Applicant must fulfil the requirements in **Giella Vs Cassman Brown [1973] E.A 358**. First that the applicant must show a prima facie case with a probability of success; secondly that the applicant would otherwise suffer irreparable injury; thirdly, that if there is any doubt the Court will decide the matter on a balance of convenience.
40. As we have observed above, the ownership of the equipment cannot be ascertained at this stage. The purported transfer of the said equipment to Mr. Sachin and consequently to the Plaintiff is a contested issue. The Applicant has also raised an issue with regard to forgery of his signature which has not been controverted at this stage but is subject to further investigation. These issues in my view can only be determined at trial. Furthermore, the Applicant has established that the service of the Proclamation Notice was irregular. In light of the foregoing, it is my considered view that the Applicant has established a *prima facie* case and given that the Plaintiff is in possession of the equipment, the balance of convenience lies in favour of the Plaintiff.
41. The upshot is that the Plaintiff's Notice of Motion dated **1<sup>st</sup> March 2013** and filed in Court on **7<sup>th</sup> March 2013** is hereby allowed. The costs of this application shall be in the cause.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 7TH DAY OF APRIL 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

No appearance for the Plaintiff

Aisi for the 1st and 2nd Defendants

Gaita for the 3rd Defendant

Teresia – Court Clerk