



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 134 of 2011**

**RANJAN JAYENDRA MALDE .....1<sup>ST</sup> PLAINTIFF**

**JAYENDRA KHIMJI RAMJI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FINA BANK.....DEFENDANT**

**RULING**

1. By a Notice of Motion dated 7<sup>th</sup> April, 2011 brought under the provisions of Order 40 Rules 1 and 2 Civil Procedure Rules, the Plaintiffs have sought orders to restrain the Defendant from advertising, selling, alienating, transferring, auctioning or in any way dealing with the property known as **THIKA MUNICIPALITY/BLOCK 9/422 (“the Charged Property”)** pending the hearing and determination of the suit. The application was argued before Hon. Njagi J on 28<sup>th</sup> July, 2011 but when the parties appeared before me on 19<sup>th</sup> March, 2013, they requested that I write the ruling on those submissions. This is the ruling.

2. The Plaintiffs’ application was supported by the Affidavit of the 1<sup>st</sup> Plaintiff dated 7<sup>th</sup> April, 2011. In it, the Plaintiffs contended that they were the registered proprietors of the Charged Property. That the relationship between the parties started when the Defendant advanced bank facilities to Khilna Enterprises Limited (“the Company”) in which the Plaintiffs are directors. That the said facilities consisted of an overdraft facility sanctioned to a limit of Kshs.25,000,000/= and letters of guarantees and indemnity sanctioned to a limit of Kshs.3,000,000/=. It was further deponed that pursuant to these bank facilities, the Plaintiffs executed a Director’s Guarantee and Indemnity for Kshs.28,000,000/= as a continuing security for payment. It was further averred that the Company accepted another overdraft facility from the defendant sanctioned to a limit of Kshs.25,000,000/= and letters of guarantees or letters of Credit sanctioned to the limit of Kshs.3,000,000/=. That the further facilities were secured by a fixed and floating debenture over the assets of the company to secure a sum of Kshs.25,000,000/=, a first legal Charge over the Charged property securing the sum of Kshs.10,000,000/= and Directors guarantee and indemnity by the Plaintiffs for Kshs.53,000,000/=.

3. It was the Plaintiffs contention that the Defendant failed in its duty to formally inform them of the default of the Company in making repayments under the banking facilities and such failure effectively discharged them from any liability under the guarantee. That further, the defendant granted the Company several indulgences resulting to alleged unauthorized material variation of the terms of the banking facilities without the Plaintiffs consent. It was thus contended that this also discharged the Plaintiffs from the liability under the Guarantees and Indemnity so executed. The Plaintiffs also contended that the

Defendant irregularly appointed a Receiver Manager over the property and assets of the company without due regard to the law. That further to this, the Defendant through their advocates purported to serve them with a defective and irregular Statutory Notice dated 20<sup>th</sup> January, 2011 showing their intention to sell the charged property through Public Auction.

4. It is the contention of the Plaintiff that the said Statutory notice stated that the Company owed the Defendant an excessive amount of Kshs.243, 555,492/= owing under the Charge. That the said sums were arbitrarily arrived at by the Defendant contrary to what the express provisions of the Charge which secured an amount of Kshs.10,000,000/=. The Plaintiffs contended that the Defendant failed to furnish them with records of account showing the amounts and interest accruing from the loan facilities. That further the Defendant acted in bad faith since it was estopped from exercising its statutory power of sale when it appointed a Receiver Manager over the company in an effort to recover the loans advanced to the Company.

5. The Defendant opposed the application through a Replying Affidavit by Christopher Maina Waruru sworn on 5<sup>th</sup> May, 2011. The Defendant contended that the Plaintiffs had not satisfied the requirements set out in **Giella -v- Cassman Brown** to warrant the granting of the injunction sought. That on 16<sup>th</sup> November, 2010 one Milan Jayendra Malde a Director of the Company filed **Milimani High Court Miscellaneous Civil Application No. 1039 of 2010** where he admitted that the company had defaulted on servicing the loan owed to the Defendant. That the said loan is the subject of this instant suit. The Defendant also contended that there had been no attempts by the Plaintiffs, the Company or any other directors of the Company to service the outstanding loan amounts. The Defendant further admitted that the averments contained in the Plaintiff's Supporting Affidavit in paragraph 8 were in fact factual and that the legal charge was only limited to Kshs.10,000,000/= but that in any event it owed a duty of disclosing the full amount owed to it by the borrower in the Statutory Notice.

6. The Defendant also denied the Plaintiffs' allegation that it varied the terms of the banking facilities or even indulging the Company on various occasions. That the Plaintiffs had always been aware of the Company indebtedness. That the Defendant was not estopped from exercising its statutory power of sale as it had lifted the receivership over the Company. The Defendant further asserted that it advanced banking facilities to the Company under the terms set out in two letters of offer dated 25<sup>th</sup> March, 2009 and 5<sup>th</sup> January, 2010 respectively. That under the said letters of offer the Company and its directors warranted and represented to the Defendant that the company had not created any encumbrance over its assets and that moreover it had disclosed everything about the existence of other liabilities. That contrary to such representations, the Defendant received a letter dated 2<sup>nd</sup> September, 2010 from Imperial Bank Limited in which the aforesaid Bank claimed to have a debenture over the Company's properties which ranked in priority over the Defendant's debenture. The Defendant contended that at the time of receiving the said letter, it had already appointed a receiver and manager of the Company, having been informed by a director of the company that the company Mr. Roshni Malde had informed the Defendant that it was unable to meet its financial obligations due to serious financial difficulties. That based on legal advice, the Defendant elected to immediately lift the proposed receivership. Consequently, the Defendant admitted that it did not file the requisite Notice with the Registrar of Companies as required under Section 103 of the Companies Act Cap 486 Laws of Kenya as it was contended that Imperial Bank Limited's debenture ranked in priority over the Defendant's Debenture and that moreover the said Bank had objected to any form of receivership being placed on the Company.

7. The Defendant also contended that the appointment of the receiver manager of the company was duly terminated on 16<sup>th</sup> October, 2010 and such a notice was issued to the Company. It was contended that the Receiver manager appointed by the Bank had acted in that capacity for about six weeks but his efforts to discharge his duties were largely frustrated by the lack of co-operation from the Company and its directors. The Defendant also averred that there were criminal charges leveled against the Plaintiffs which included, obtaining of credit under false pretenses in that the Company and its directors in collusion with others procured the company's account to be overdrawn well beyond the agreed and approved limit of Kshs.53,000,000/= as agreed in the letters of offer and without the Defendant's Consent. That in view of the foregoing facts, the Defendant contended that it was at liberty to realize its securities since it was not

disputed that the right to realize the security had accrued.

8. I have carefully considered the Application, the Supporting Affidavit and the Replying Affidavit. I have also considered the various cited authorities and the submissions made by counsel. In considering an application for an injunction, the principles are well set out in the case of **Giella v Cassman Brown (1973) EA 358** to the effect that an applicant must establish a prima facie case with a probability of success, that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss, and that if the court is in doubt, it will decide the application on the balance of convenience.

9. This being an interlocutory application care must be exercised to obviate expressing any conclusive views on issues which are for determination before the trial court. The issue of determination in this matter is whether the Plaintiffs have placed enough material before this court to warrant an interlocutory injunction. It is common ground that the Company obtained various facilities from the Defendant. That based on the letter of offer dated 25<sup>th</sup> March, 2009 the Company was advanced an aggregate sum of Kshs.28,000,000/= secured by a Guarantee and Indemnity of the Company's Directors and a legal charge over the Charged property. That further to a Letter of offer dated 5<sup>th</sup> January, 2010, the Defendant further advanced an aggregate sum of Kshs.53,000,000/= to the Company secured by a fixed and floating debenture of over the entire assets of the Company to secure a sum of Kshs.25,000,000/=, a legal Charge over the Charged Property securing a sum of Kshs.10,000,000/= and a Directors Guarantee and indemnity to secure a sum of Kshs.53,000,000/=. A letter of set off made for Kshs.4,000,000/= was also executed by the Plaintiffs to secure the prior existing securities. The parties then became bound in contract under the terms of the letters of offer. Consideration passed and became firmly rooted between the bank and the Company. The Plaintiffs and the Defendant were firmly bound by their respective commercial agreements and must be held to their bargain. (See **Morris & Company -vs- Kenya Commercial Bank (2003) 2 EA 605**,

10. Though the Guarantees and Indemnity have neither been produced nor denied by the parties at this stage, I find that the Plaintiffs by virtue of the various Directors Guarantee and Indemnity duly executed bound themselves to the effect that upon demand by the Defendant, they would pay all the sums due and owing to the Defendant on account of the default by the company, which was the principal debtor. The Plaintiffs also bound themselves to secure repayment of the sums payable by granting a first legal Charge over their immovable property to wit **THIKA MUNICIPALITY/BLOCK 9/422**, which property was the subject matter of the Charge dated 17<sup>th</sup> December, 2009. The Charge secured the repayment by the Company, of a sum not exceeding Kshs.10,000,000/= which was a portion of the principal monies secured by the Debenture over the assets of the Company. It is therefore clear that by virtue of the aforementioned Charge document, the Plaintiffs ipso facto agreed that the Charged property was a security for part of the principal debt.

11. The Plaintiffs have not denied that the Company had defaulted in servicing the loan owed to the Defendant at the time of receiving a demand for payment by the Defendant. The Plaintiffs however sought to impeach the Statutory Notice of sale dated 20<sup>th</sup> January, 2011 sent to them by the Defendant. That the said Notice demanded a whopping Kshs.243,555,492/= being the outstanding balance due from the Company. The Plaintiffs contended that the Charge created over the Charged property was only limited to Kshs.10,000,000/=. The Defendant did not dispute this fact. The Defendant, however contended that in stating that the sum due was in excess of Kshs.243million it was only disclosing the full amount owed to it by the borrower in the statutory notice. I find the Defendant's reasoning inaccurate. It is clear from the reading of paragraph D on the second page of the Charge document dated 17<sup>th</sup> December, 2009 that the charge was created as collateral security for the payment of Kshs.10,000,000/= which was the maximum principal amount and was a portion of the principal monies secured. The Charge was thus not created over the Charged Property to cover the entire principal debt but a portion thereof. It is therefore erroneous on the part of the Defendant to issue a demand for Kshs.243,555,492/84 as per the statutory notice dated 20<sup>th</sup> January, 2011. The said sum represented the entire outstanding amount due and owing by the Company to the Defendant. I therefore find that the Statutory Notice so issued by the Defendant's Advocates and dated 20<sup>th</sup> January, 2011 was defective and irregular. It sought to recover

monies not due to the Defendant under the charge document.

12. The Plaintiffs also contended that the Defendant herein is estopped from exercising its statutory power of sale as it had opted to appoint a Receiver Manager over the property and assets of the Company. That such appointment was irregular as the mandatory provisions of the law for such an appointment under the Companies Act were not complied with. The Plaintiffs submitted that such receivership had not been terminated as the Defendant's purported termination was not in compliance with the statutory provisions of the law. Learned Counsel for the Defendant, Mr. Masinde however dismissed the Plaintiffs assertions and contended that the issues of receivership should not feature in the instant case but should have been made in **Milimani High Court Miscellaneous Civil Application No. 1039 of 2010**. I have looked at the Application with regard to the aforesaid matter. It is clear that the main contention was the fact that the Receiver Manager was duly appointed by the Defendant without filing and serving on the Registrar of Companies the requisite notice pursuant to the provisions of Section 103 of the Companies Act. That the continued receivership of the said company without due compliance with the law had left the company to suffer substantial damages and consequential loss. The assertion by Mr. Masinde may be correct.

13. Be that as it may, it is important for this court to examine the issue based on the facts before it at this stage. Was the Defendant estopped from exercising its statutory power of sale due to the existence of receivership? The Defendant admitted that it had appointed a Receiver Manager. It also did not deny that it failed to adhere to the mandatory provisions of the law while making such appointment. In the same vein, it denied that the receivership was in existence as it had terminated the appointment of the receiver manager through a Notice dated 16<sup>th</sup> October, 2010. The Defendant also admitted that the Receiver Manager did not file a requisite Notice with the Registrar of Companies after it purportedly lifted receivership after the discovery of the fact that Imperial Bank Limited had a debenture over the Company's property and assets priority that ranked in priority to the Defendant's debenture. To my mind, all these come to naught when considering the Defendant's right to exercise its statutory power of sale under the charge. The Debenture under which the receiver Manager may have been appointed and the Charge are separate securities whose rights are cumulative and not exclusive. The exercise by the lender of a right under one instrument is not a bar to its exercise of its rights under the other. My view therefore is that the appointment of the Receiver manager was not the Defendant exercising its statutory power of sale over the charged property.

14. Having found that the statutory Notice of sale was defective, I need not address the other issues raised in the application. I am satisfied that the Plaintiffs have to that extent established a prima facie case with a probability of success. I need not address the other two principles of the **Giella -vs- Cassman Brown case**. But suffice it to state that no amount of damages can compensate a statutory wrong.

15. In the case of **NATIONAL BANK OF KENYA LIMITED v SHIMMERS PLAZA LIMITED [2009] eKLR** the Court of Appeal held:-

***“An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case ..... We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.”***

16. In view of the foregoing, I will allow the application and restrain the Defendant by itself or its authorized agents, servants or employees from advertising, selling, disposing or transferring or otherwise dealing with the Plaintiffs' property known as **THIKA MUNICIPALITY/BLOCK 9/422** until such time as the Defendant shall have served the Plaintiffs with a valid Statutory Notice in accordance with the law. Costs shall be in the cause.

**DATED and DELIVERED** at Nairobi this 29<sup>th</sup> day of April, 2013.

**A. MABEYA**  
**JUDGE**