REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 678 OF 2012

RICARDO (EPZ) INTERNATIONAL CO. LTD. …..……….. PLAINTIFF

VERSUS

TRANSNATIONAL BANK LTD. …………..………..… 1ST DEFENDANT

FARID SHEIKH ………………..…………..……………. 2ND DEFENDANT

DENNIS MUSYOKA ……………..…………………….... 3RD DEFENDANT

R U L I N G

1. The Application for determination before this Court is the Defendants' Notice of Motion dated 10th December 2012 seeking an interlocutory injunction restraining the Plaintiff by itself, its servants, agents and/or employees from selling, offering for sale, transferring assigning and/or in any other manner dealing with the charged assets as set out in the Schedule to a Debenture dated 28th November 2011. The Application also requested of this Court to review and set aside its Orders made on 6th of December 2012. It was brought under the provisions of **Order 40 rule 7, Order 45, rule 1** and **Order 51 rule 1** of the *Civil Procedure Rules, 2010* as well as **sections 1A, 1B, 3A, 63 (e) and 80** of the *Civil Procedure Act*. The Application was supported by the Affidavit of one **Jacquline Onsando**, the Head of Legal and Credit Administration of the 1st Defendant herein.
2. The Defendants' said Application was brought upon the following grounds:

"a) THAT there was an error apparent on the face of the record necessitating this application for review;

b) There has been discovered by the Defendants/Applicants important matters or evidence which could not be produced by the Defendants at the time the said orders were made and whose effect it is to render the debenture dated 28th November 2011 valid;

c) The production of this evidence is critical and has an impact upon the court's orders aforesaid;

d) In its ruling delivered on 6th December 2012, the Learned Judge assumed jurisdiction and ruled on matters which were not in controversy between the parties thus manifesting an error apparent on the face of the record necessitating the setting aside thereof;

e) The validity of the debenture dated 28th November, 2011 was never an issue before the Court and it was improper for the court to, therefore, assume jurisdiction and rule on it;

f) Whereas the debenture document that was produced in Court did not have certain information regarding dates which had been omitted mistakenly, the original debenture had all such information and the same has now been displayed before the Court;

g) Since the Defendants never had notice of the matters upon which the Court eventually made its ruling, they could not produce the original debenture document which had no omissions upon which the ruling was predicated;

h) There is a valid and subsisting debenture between the Plaintiff and the 1st Defendants which render the review of the court's orders aforesaid, imperative".

3. The deponent to the Supporting Affidavit complains that the Court had granted to the Plaintiff interim injunctive relief as prayed in its Notice of Motion dated 24th October 2012 based on the fact that the Debenture dated 28th November 2011 had not been registered at the Companies Registry as required by section 96 of the Companies Act. Further, that there had been no evidence of a Resolution by the Plaintiff's Board of Directors authorising the borrowing resultant upon which the Debenture had been furnished. As a consequence, the Court had found that the said Debenture was invalid. The deponent went on to say that the appointment of the 2nd and 3rd Defendants as receivers for the charged assets had followed the default on the part of the Plaintiff to make payments in accordance with the terms of the Loan Agreement as between the Plaintiff and the 1st Defendant dated 4th August 2011 as read with the Debenture document. The 1st Defendant was maintaining that the validity of the Debenture dated 28th November 2011 was never an issue before the Court and, as such, it was improper for the Court to assume jurisdiction and rule upon the fact that the Debenture was invalid. In the deponent's opinion, the Court had assumed jurisdiction and ruled on matters which were not in controversy between the parties and, as such, manifested an error apparent on the face of the record necessitating the setting aside of the Orders made on 6th December 2012.
4. Ms Onsando maintained that the Debenture document that had been produced before the Court did not contain certain information regarding dates which had been mistakenly omitted. However, the original Debenture had all such information and the same was now annexed to the Supporting Affidavit. Indeed, the deponent stated that she now exhibited the resolution of the Plaintiff's Board of Directors authorising the borrowing as well as the Plaintiff's submission of the legality and existence of the Debenture. The deponent maintained that the Debenture was validly registered at the Companies Registry and that a Certificate of the Registration of a Mortgage had been issued by the Registrar dated 14th December 2011. Ms. Onsando detailed that these important matters of evidence could not be produced by the Defendants at the time that the said Court Orders were made. The effect of the same was to render the Debenture dated 28th November 2011 valid hence the necessity of bringing it to the Court's attention. She maintained that the Defendants never had notice of the matters upon which the Court had made its Ruling and consequently could not produce the Original Debenture document which had no omissions upon which the Ruling was predicated.
5. The Court has taken notice that following upon its Orders dated 6th December 2012, the 1st Defendant took upon itself to defy such Orders which involved the removal of the 2nd and 3rd Defendants as the 1st Defendant's appointed Receivers from the Plaintiff's premises at Athi River. Rather than allowing the Plaintiff full access to its premises, the 1st Defendant through its servants and/or agents, deliberately locked up the premises which resulted in a further Application to this Court which I ruled upon on the 21st December 2012. The Orders issued by court on that day were as follows:

"(a) The 1st Defendant will immediately unlock the Plaintiff's Athi River EPZ premises today so as to allow the Plaintiff and the Interested Party United Aryan (EPZ) Co. Ltd access thereto.

(b) The Interim Orders that the Court granted to the 1st Defendant on 13 December 2012 are hereby lifted.

(c) The inter partes hearing of the 1st Defendant's Application dated 10 December 2012 will now come for hearing on 4th February 2013.

(d) The Plaintiff will replace its Undertaking in Damages dated 17 December 2012 and filed herein on 19 December 2012, with a fresh undertaking under the Seal of the Company and signed by both directors. Further the said directors Richard and Meiling Ndubai will file separate undertakings as to damages, jointly and severally. All such undertakings as to damages will be filed herein on or before 31st December 2012.

(e) Costs will be in the cause.

(f) There shall be liberty to apply".

6. As per paragraph 12 (c) of this Court's said Ruling dated 21st December 2012, the 1st Defendant's said Notice of Motion dated 10th December 2012 has now come before this Court for determination. The Plaintiff filed a Replying Affidavit in response to the said Application through its Managing Director **Richard Ndubai** sworn on 23rd May 2013. The deponent recalled the Ruling of this Court dated 6th December 2012 in which it had been found that the Debenture executed between the Plaintiff company and the 1st Defendant was invalid for various reasons enumerated thereunder. The deponent had been advised by the Plaintiff's advocates on record that the interim Orders sought by the 1st Defendant in its said Application could not issue as there had been filed by the Plaintiff an undertaking as to damages which took care of the fears raised by the 1st Defendant in its Application and would be a sufficient alternative remedy that could adequately compensate it, so that the injunctive relief sought would not be merited at all. The deponent went on to say that the Plaintiff company did not intend to sell off any of its assets whether or not the same were covered by the Debenture. The remainder of the Replying Affidavit detailed matters in relation to the law as regards an application for review. The deponent maintained that all along the 1st Defendant has been in possession of the various documentation required to support the Debenture and nothing could have stopped it from producing the same in evidence. As regards the issue of this Court's jurisdiction in relation to its findings as regards the Debenture, the deponent had been advised by the Plaintiff's advocates on record that such was an issue of law and could only be properly canvassed by way of an appeal not by way of review. He had further been advised that the Application did not meet the threshold for applications for review under **Order 45** of the *Civil Procedure Rules* and thus ought to be struck out with costs.
7. This matter came before the Court for mention on 22nd April 2013 at the request of the 1st Defendant's advocates by letter addressed to the Deputy Registrar of this Court dated 14th March 2013. Unfortunately, on the 22nd April 2013, there was no appearance for the 1st Defendant. Then on 23rd May 2013, the 1st Defendant's Notice of Motion came for hearing and was taken out of the hearing list as a result of the 1st Defendant's Advocates request that it be adjourned as they had only just been served with the Plaintiff's said Replying Affidavit and needed more time to assimilate the same. It was agreed by both counsel present that the Application would be dealt with by way of written submissions. As a result, this Court gave directions to the parties as to the filing of their written submissions in respect of the Application before Court. The 1st Defendant complied in accordance with the Court's directions, the Plaintiff did not, despite being given one the last chance to do so. As a consequence, when the matter came before this Court on 18th July 2013, there was no appearance for the Plaintiff and as a result the Court detailed that it would deliver its Ruling as regards the 1st Defendant's said Application on notice to the parties.
8. The 1st Defendant's submissions herein were filed on 12th June 2013. They commenced with the 1st Defendant quoting from the finding in the case of **<u>Nairobi City Council v Thabiti Enterprises Ltd</u> (1995 – 98) 1 EA 231** to the effect that:

"A judge has no power or jurisdiction to decide an issue which had not been pleaded unless the

pleadings were suitably amended".

Unfortunately for the 1st Defendant, it failed to produce before Court a copy of the authority quoted so it has been impossible for the Court to ascertain as to the context in which the above quotation was applied. However, the advocates for the 1st Defendant did attach to its submissions a copy of the authority being **City Council of Kampala Makindye Division LC III Council v The Village Council Pepsi Cola Zone Kansanga (2008) 2 EA 71** wherein the 1st Defendant quoted the finding of the Ugandan High Court on the Ugandan equivalent of **Order 45 rule 1** as follows:

"…. Order 46, rule 1 is not exhaustive as to the circumstances under which a court can review its decisions. The court can resort to its inherent jurisdiction on grounds of public policy and where the interests of justice so require."

Of course, this decision is not binding on this Court merely persuasive.

9. The 1st Defendant's submissions then dwelt upon the factual basis for granting its Application. It noted that the Defendants were aggrieved with this Court's decision and holding as regards the validity of the Debenture entered into between the Plaintiff and the 1st Defendant dated 28th of November 2011. It maintained that the validity of the Debenture was never pleaded as an issue for determination in the Plaintiff's Application dated 24th October 2012 for injunction. It submitted that neither was the issue of the Plaintiff's borrowing powers raised as a fact vitiating the 1st Defendant's right to exercise its power of sale reserved under the said Debenture. The 1st Defendant maintained that the competence/any purported invalidity of the Debenture was not an issue that was pleaded in the application before the Court and, as a result, the Court could not therefore base its decisions on any issues not pleaded before it. Furthermore, the 1st Defendant maintained that in its Replying Affidavit to the Plaintiff's said Application, it could not dwell or depone to matters that were not in issue or that were not pleaded before the Court. Similarly, the 1st Defendant maintained that the finding with regard to the registration or otherwise of the said Debenture at the Companies Registry touched on the validity of the same which, again, was never an issue pleaded before the Court. The Plaintiff had never raised such as an issue and that there was evidence on the face of the copy Debenture that the same had been stamped as an essential pre-requisite for registration. The 1st Defendant's submissions then continued by listing what it described as the admitted facts in the Notice of Motion dated 24th October 2012 including that the Plaintiff had sought financial facilities from the 1st Defendant and had executed a Debenture. The said Debenture was expressly acknowledged and there was no averment that the same was in any way invalid nor that the contents thereof were never explained to the Plaintiff's directors who executed the same. The Supporting Affidavit as regards the said Notice of Motion admitted that the Plaintiff had failed to meet the terms of the Debenture. It had also admitted that its inability to repay the amount advanced was not wilful but attributable to the actions of the Kenya Revenue Authority.
10. As a result of the above submissions, the 1st Defendant maintained that there was an error apparent on the face of the record necessitating its Application before Court for review. It repeated its allegations as regards the admissions of the Plaintiff as set out in paragraph 9 above. It then referred the Court to the Court of Appeal authority of **Nyamogo & Nyamogo Advocates v Kogo (2001) EA 174** as well as the case of **Muyodi v Industrial and Commercial Development Corporation & Anor. (2006) 1 EA 243**. Both of these cases confirmed and cited the provisions of the old **Order XLIV, rule 1** as to what the applicant in an application for review was obliged to show. Of course, the findings of the Courts in those cases are relevant to an application before this Court under **Order 45 rule 1**. The 1st Defendant continued with its submissions by stating that the admitted facts to which it had referred were evident and that the Defendants had no notice that the issue of the validity of the Debenture would in any way arise. It emphasised that the issue was never crystallised in the pleadings in order to require the Defendants to respond to it. As such therefore, the 1st Defendant maintained that in so far as the Court's said Ruling was predicated on such unpleaded issue, the said Ruling was without jurisdiction. The 1st Defendant submitted that any Order that arises from an issue that is not pleaded before the Court is without jurisdiction and should be treated as a nullity. It referred the Court to my learned brother **Kimondo J's** decision in

the unreported case of **Francis A. Djirackor & Anor. v Speedways Investments Ltd & Anor HCCC No. 658 of 2010**.

11. After referring, once again, to the aforementioned Ugandan High Court case of **City Council of Kampala** as to the Court resorting to its inherent jurisdiction upon a Review application before it, the 1st Defendant submitted that the Court has inherent power to allow an application for review for good cause. It referred to the volume by **Jack Jacob** on the **Reform of Civil Procedural Law and Other Essays in Civil Procedure** at page 242 in which the 1st Defendant commented as follows:

"In this light, the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. A definition somewhat to this effect may be found in the Indian Code of Civil Procedure [the equivalent of S. 3A of the Civil Procedure Act (Cap 21), Laws of Kenya], which provides:

> **'Nothing in this Code shall be deemed to limit or otherwise effect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court'."**

The 1st Defendant drew the attention of the Court that in the Plaintiff's Replying Affidavit dated 23rd May 2013, it purported to believe that the Debenture was in fact not valid and, as such, the appointment of the Receiver/Managers was also not valid. The 1st Defendant maintained that this was an afterthought and should carry no weight. Having admitted the validity of the Debenture expressly in its pleadings, the Plaintiff was now estopped from denying its validity.

12. Moving on and referring to the *locus classicus* on the subject of Review applications, the 1st Defendant referred the Court to the authority of **Nairobi City Council v Thabiti Enterprises Ltd** (supra). The 1st Defendant quoted the Court of Appeal as stating that as a general rule, a plaintiff is not entitled to relief which he has not specified in his statement of claim. It quoted from the volume of **Bullen & Leake, 12th Edition** under the heading "Nature of Pleadings" and continued as regards the case of **Sande v Kenya Cooperative Creameries Ltd (1992) LLR 314 (CAK)** as follows:

"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus served the twofold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.

In the case of *Sande v Kenya Cooperative Creameries Ltd* [1992] LLR 314 (CAK), this Court consisting of Cockar, JA as he then was, and Omolo and Tunoi JJA held as recently as 24 January 1994, that a Judge had no power or jurisdiction to decide an issue not raised before him and went on to emphasize that:

> **'In our view, the only way to raise an issue before a Judge is through the pleadings and as far as we are concerned, that has always been the legal position'."**

13. Surprisingly, the 1st Defendant went on to quote from the case of **Odd Jobs v Mubia (1970) EA 476** in which the Court set out the situation in which an issue which is not pleaded can be considered by the court as:

"(a) a court may base its decision on an unpleaded issue if it appears from the course followed at

the trial that the issue had been left to court for decision;

(b) on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it"

As regards this case, the 1st Defendant was quick to state that the same did not apply to the case herein as the validity of the Debenture was never raised and could therefore not have been decided upon. Finally, the 1st Defendant referred to the finding of **Dule Ag. J.** in the case of **Steven Rabatch v Eldoret Steel Mills Ltd (2005) eKLR** wherein he had founded that the issue at hand had not been pleaded or canvassed in evidence and, as such, could not be decided upon.

14. Under **Order 45 rule 1** of the *Civil Procedure Rules, 2010*, it is provided that:

"(1) Any person considering himself aggrieved—

a. **by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

(b) by a decree or order from which no appeal is hereby allowed, and who from the *discovery of new and important matter or evidence* which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on *account of some mistake or error apparent on the face of the record*, or *for any other sufficient reason*, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay." (Emphasis mine)**.**

Obviously, I have had cause to review my Ruling of 6th December 2012. It is the 1st Defendant's complaint that by my dwelling upon the validity of the Debenture dated 28th November 2011, I have strayed away from matters pleaded before Court and, as a result, this Court had no jurisdiction to make the Orders that it did in the said Ruling. The 1st Defendant may well have a point in this regard but should such be raised in an application for Review?

15. To the Court's way of thinking, the first prayer in the Plaintiff's Plaint dated 24th October 2012 reads that it seeks:

"A declaration that the purported appointment of the 2nd and 3rd Defendants as receiver managers is wrongful, illegal, null and void."

Similarly, at paragraphs 12 and 14 of the Supporting Affidavit to the Notice of Motion also dated 24th October 2012, the deponent, **Richard Ndubai** details firstly, that he was shocked to establish that the 1st Defendant had appointed receiver managers to take over the operations and the assets of the Plaintiff Company despite having not been served with any Notice whatsoever. Secondly, he had been advised by the Plaintiff's advocates on record (which he believed to be true) that the said appointment of the 2nd and 3rd Defendants was unlawful, illegal, null and void. In the Replying Affidavit of **Jacqueline Onsando** to the Plaintiff's said Application of 24th October 2012, the deponent details in paragraph 13 thereof that:

"….the 1st Defendant Bank proceeded to exercise its rights reserved under clause 8.1 of the Debenture dated 28th November 2011 to appoint the 2nd and 3rd Defendants to be Joint Receivers."

As a result, it is the opinion of this Court, that the Plaintiff, having declared such appointment as illegal, null and void, it had good reason to closely examine the document under which the said appointment was made, being the Debenture dated 28th November 2011. The validity or otherwise of that document had a direct bearing on whether the appointment of the 2nd and 3rd Defendants was

validly made or not.

16. In her Supporting Affidavit to the Application before Court dated 10th December 2012, the said **Jacqueline Onsando** details at paragraph 9, that the Plaintiff exhibited a Resolution of its Board of Directors authorising the borrowing. It may be that the Resolution(s) to which the deponent refers are those at pages 49 and 60 of the exhibit to the Supporting Affidavit of the said Richard Ndubai dated 24th October 2012. Those Resolutions are tacked on the end of the 1st Defendant's Letters of Offer for borrowing to the Plaintiff company. They are not Resolutions authorising the execution of the said Debenture. Indeed, I have examined the so-called Board Resolutions annexed to the said Supporting Affidavit dated 10th December 2012 as exhibit "JO-1". Again those are not, in my opinion, Resolutions to authorise the borrowing of the Plaintiff Company nor the execution of a Debenture in favour of the 1st Defendant Bank. Similarly, the heading to the Debenture document annexed to the said Supporting Affidavit of the said **Jacqueline Onsando** reveals that it was issued in pursuance of a Resolution of the Directors of the Plaintiff Company dated 1st April 2011. With due respect to the deponent of the said Affidavit, she would seem to be relying upon the letter from the Plaintiff Company dated 4th April 2011 as evidence of the Board Resolution of 1st April 2011. Such letter is not a Board Resolution as it is very obviously not under Seal and, in any event, it does not authorise the Plaintiff Company to execute a Debenture in favour of the 1st Defendant. Now that a copy of the completed Debenture document has been exhibited, along with a copy of the Certificate of the Registration of a Mortgage in relation thereto dated 14th December 2011, it may be that the remarks and observations made in my Ruling of 6th December 2012 could be in error. However, there is no doubt that the completed Debenture document as well as the Certificate of the Registration of Mortgage were in the possession of the 1st Defendant as at 24th October 2012. This begs the question as to why the 1st Defendant did not exhibit the same to the said **Jacqueline Onsando's** Replying Affidavit dated 20th November 2012. As a result, it cannot be considered to be the discovery of new and important matter or evidence as per the first requirement of **Order 45 rule 1** of the *Civil Procedure Rules, 2010*.
17. As detailed above, the 1st Defendant has submitted that the Orders arising out of my said Ruling dated 6th December 2012 should be set aside because of an error on the face of the record. It would seem that the error was that the validity of the Debenture was at no point pleaded by the Plaintiff and that no evidence was presented to Court that there was an issue with the Debenture document. As I have indicated above, although not specifically pleaded, the allegation and pleading of the Plaintiff as to the illegal, null and void appointment of the 2nd and 3rd Defendants was reason enough for this Court to dwell upon the validity of the Debenture document on an obiter basis. Parties will recall that the Application before Court to which my said Ruling related was one for interlocutory Orders by way of injunction and the Plaintiff had the onus of showing whether it had a *prima facie* case to justify the issuance of injunctive Orders. In paragraph 20 of my said Ruling, I found that that it had made out a sufficient case in that regard. I found that the Debenture pursuant to which the appointment of receivers and managers was made was **<u>probably</u>** invalid (emphasis mine). I found then, as I still believe is the case, that the Debenture was unsupported by a Resolution of the Plaintiff company authorising the borrowing and the execution of the Debenture. I also found that the Deed of Appointment of the receivers and managers dated 3rd of October 2012 was also *prima facie* invalid for that reason and for the additional reason that the signatures of the 1st Defendant's Bank's officials executing the said Deed were not attested at the moment of execution.
18. For these reasons, I find that there was no error established on the face of the record of the Ruling delivered on 6th December 2012. In that regard, I would adopt the Ruling in the **<u>Odd Jobs</u>** case above referred to as well as the authority of **<u>Francis Origo & Another v Jacob Kumali Munagala</u> [2005] eKLR**, where the Court of Appeal held:

    "From the foregoing, it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason… <u>Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal</u>. (emphasis added).**Once the appellants took the**

option of review rather than appeal they were proceeding in the wrong direction."

19. The upshot of all the above is that I dismiss the Defendants' Notice of Motion dated 10th December 2012 with costs to the Plaintiff.

DATED and delivered **at Nairobi this 11th day of December, 2013.**

J. B. HAVELOCK

JUDGE