



**MAYFAIR SERVICES AND INVESTMENT LIMITED.....**  
**.....PLAINTIFF/APPLICANT**

**VERSUS**

**PRUDENTIAL BUILDING SOCIETY (IN LIQUIDATION).....1<sup>ST</sup>**  
**DEFENDANT**

**LAWRENCE NGAMAU.....2<sup>ND</sup>**  
**DEFENDANT**

**NDUNGU GATHINJI.....3<sup>RD</sup>**  
**DEFENDANT**

**RULING**

The Plaintiff, Mayfair Services and Investments Limited, is a limited liability company, claiming to be the owner of property known as ELDORET MUNICIPALITY/BLOCK 4/69 in Eldoret.

The Plaintiff has filed Chamber Application dated 16<sup>th</sup> June 2005 brought under Order XXXIX Rules 1,2, 3&9 of the Civil Procedure rules and Section 3A, of the Civil Procedure Act with prayers for following orders:-

- 1. That the application be heard ex-parte in the first instance;**
- 2. That pending the hearing and determination of this application, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be restrained jointly and severally, by themselves, their agents, or servants from interfering with quiet enjoyment and occupation by the Plaintiff ( as well as its tenants) of all that property known as title number ELDORET MUNICIPALITY/ BLOCK 4/69 or otherwise disposing of, offering for sale or alienating in any other manner whatsoever the said property known as ELDORET MUNICIPALITY/ BLOCK 4/69 or any of the other properties, equipment, assets or stocks or any other part thereof.**
- 3. That pending the hearing and determination of the suit herein, the Defendants, by themselves, their agents or servants be restrained from acting or otherwise purporting to act as receivers/managers of the Plaintiff or any part of its property, business, and from interfering in any manner whatsoever with the Plaintiff's or it's tenants quiet possession and enjoyment of all the Plaintiff's land properties, equipments and assets.**
- 4. That the Defendants be jointly and severally restrained by themselves, their agents and/or servants from advertising, selling, disposing of, or offering for sale or alienating in any manner any of the Plaintiff's land, property, equipment and assets pending the hearing and determination of this suit.**
- 5. That pending the hearing and determination of this application the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, their agents, and/or servants be ordered to move out and/or be removed or ejected from the**

**plaintiff's properties and premises and the Plaintiff's possession of all its premises and properties be restrained.**

**6. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, their agents and/or servants be removed and ejected from the Plaintiff's premises known as Title No. ELDORET MUNICIPALITY/ BLOCK 4/69 and the Plaintiff's possession and enjoyment of its said premises, its properties and business be reinstated pending the hearing and determination of this suit.**

**7. That the costs of this application be provided for.**

The application is premised on the grounds that the First Defendant illegally appointed as joint receivers and managers the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants of the Plaintiff's property known as ELDORET MUNICIPALITY/ BLOCK 4/69. That their appointment was arbitrary and illegal. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants continue to exercise an invalid and illegitimate mandate to the detriment of the Plaintiff and its tenants. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have constituted themselves as the receivers and managers of all the assets and business of the Plaintiff. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants took possession of the Plaintiff's premises, removed the legitimate and lawful directors and seized the company seal and all vital documents and records of the Plaintiff and took control of all the property and business of the Plaintiff.

Further that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants continue incurring huge and unnecessary costs purportedly in pursuance of the receivership/management of the Plaintiff, at the expense and to the detriment of the Plaintiff. That this exercise is unnecessary wasteful and suffocation of the Plaintiff's business. That in the period of the unlawful receivership and management of the Plaintiff by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, they have demonstrated bad faith, and have been guilty of misconduct and lack of prudence.

The application is supported by a very detailed Affidavit of Wilson K. Kipkoti, director and chief executive of the Plaintiff dated 8<sup>th</sup> June 2005.

He deponed that in 1994 the Plaintiff approached the 1<sup>st</sup> Defendant( now in liquidation) and obtained a loan of kshs. 120 million to clear an existing loan owed to City Finance Ltd. As a security the Defendant purportedly created a first charge dated 7.4.1994 over the Plaintiff's property known as ELDORET MUNICIPALITY/ BLOCK 4/69. That in 2003 the 1<sup>st</sup> Defendant was placed under management of a Central Bank appointed Manager. That on the 25.7.2003 the Central Bank appointed manager purporting to act under the provisions of the legal charge paragraph 4 purportedly appointed 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to be receivers of all the properties in the title known as ELDORET MUNICIPALITY/ BLOCK 4/69. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants immediately issued a notice under section 351 (1) of the Companies Act on the 25.7.2005. That soon thereafter the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the company of heavily armed private security guards, forcibly and most embarrassingly raided and took over the Plaintiff's premises known as ELDORET MUNICIPALITY/ BLOCK 4/69 which was in the lawful possession of Hotel Sirikwa. That this disrupted the business and the Hotel was temporarily closed. That there was no notice or prior warning by the 1<sup>st</sup> Defendant or its statutory manager or anyone else that such drastic action would befall the Plaintiff. That on 28.7.2003 the Defendants forced Hotel Sirikwa to accept to share income on 50:50 basis which arrangement the hotel accepted for fear of being evicted.

He further stated the Plaintiff has over the time made efforts to repay over kshs. 94 million and dutifully remits kshs. 531,000 every month. He contends that the legal charge did not give powers to directly appoint a receiver, nor was there any valid instrument permitting the appointment of receiver or receiver manager as was done in the circumstances of this case. He deponed that unless the Court intervened the Plaintiff is at risk of losing its prime property known as ELDORET MUNICIPALITY/ BLOCK 4/69 which houses the leading hotel in North Rift region whose current value is kshs. 150,000,000.

The application is opposed. The 1<sup>st</sup> Defendant filed a detailed replying affidavit through Leah

Aida Wambete who is the Liquidation agent of the 1<sup>st</sup> Defendant appointed by Deposit Protection Fund (DPF). She deponed that the instant application was premature bad in law and incompetent. That the Plaintiff borrowed a development loan from the 1<sup>st</sup> Defendant on 7.4.1994 in the sum of kshs. 120 million. That the Plaintiff provided title number ELDORET MUNICIPALITY/ BLOCK 4/69 as security which was charged. That in 2003 the 1<sup>st</sup> Defendant suffered liquidity problems and the Central bank placed the 1<sup>st</sup> Defendant under statutory management of one Ms. Rose Detho. That the Plaintiff has not been servicing its loan account and as at 30.6.2005 a total of kshs. 2,637,858,107.83 was outstanding which continues to attract interest at the rate of 27% Per annum.

She further deponed that on the 24.7.2003 the Plaintiff's executive director proposed to the statutory manager that instead of the Defendant exercising its statutory power of sale to the Plaintiff's embarrassment the 1<sup>st</sup> Defendant appoint 2 persons experienced in management affairs to assist the Plaintiff run its affairs and pay the outstanding debt. That in keeping with this agreement the statutory manager appointed the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant also filed a Replying affidavit. The Affidavit was sworn by Lawrence Ngamau on his behalf and on behalf of the 3<sup>rd</sup> Defendant. He adopted the contents of the affidavit by Leah Ida Wambete dated 8<sup>th</sup> July 2005 filed on behalf of the 1<sup>st</sup> Defendant. he stated that their duties were strictly within the terms of the financial management agreement between the former statutory manager and Wilson K. Kipkoti ( the Plaintiff's executive director). That their duty is to ensure prudent financial management and payment of monthly rents. That they never engaged in the running of the day to day affairs of the Plaintiff or Sirikwa Hotel.

The Defendants also filed a Notice of Preliminary objection dated 10<sup>th</sup> July 2005 on the grounds that the Plaintiff has not sought leave of the Court to commence these proceedings in contravention of section 228 of the Companies Act; that the suit and the chamber summons application dated 16<sup>th</sup> June 2005 are incurably defective and ought to be struck out because the affidavit in support of the chamber summons application precedes the filing of the suit and the application. That the affidavit is argumentative in breach of the provisions of Order XVIII. That the 1<sup>st</sup> Defendant under liquidation cannot be sued but it was the Deposit Protection Fund which should have been sued. That the reliefs sought are incapable of being granted.

The Plaintiff also filed a supplementary affidavit in response to the replying affidavits of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He stated that leave of the court was obtained in High Court Miscellaneous Application No. 113 of 2005 Eldoret. That the Plaintiff denied owing the aggregate sum claimed of kshs. 2,637,858,107.83 and the said figure was arrived at irregularly. He denies that the appointment of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was mutual and they were appointed pursuant to the provisions of the Charge date 7.4.1994.

The application was first heard ex-parte and the court gave interim orders in terms of prayer 1 and 2 of the application.

The advocates for the parties also filed written submissions which were highlighted in court on the 22.4.2009.

In his submission learned counsel for the Plaintiff/Applicant Mr. Lilan stated that they have 2 immediate concerns at this interlocutory stage namely the removal of the receivers and to stop the intended sale. He argued that the instrument of appointment of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is the notice dated 25.7.2003 signed by Rose Detho and marked as **"WKK2"**. He stated that prior to the drastic action no notice or demand was served on the Plaintiff. That the charge could not be enforceable without giving statutory notice. That the statutory notice was issued much later after the commencement of these proceedings and is annexed to the Supplementary affidavit marked **"WKK16"**. Counsel further contended that the Charge was incurably defective and could not be used to appoint a receiver. That the

charge purports to vary the provisions of section 74 of the Registered Land Act which requires a notice of 3 months be given. That under section 69 of Registered Land Act variation can only be done where the chargee is Agricultural Finance Corporations (AFC) or Settlement Fund Trustees (SFT). That leave of court is required in all other cases. That the charge also offends section 110 of the Registered Land Act to the extent that it had no certificate of attestation.

Counsel further submitted that upon the appointment of the receivers the Defendants gave a notice under section 351 of the Companies Act whereas there was no floating debenture. That the Defendants gave themselves powers of receivers under the Companies Act. That on 28.7.2003 they issued another notice declaring themselves joint receivers and managers. That the Defendants were to be receivers of the land and not the business of the Plaintiff. Their manner of entry amounted to a raid. That on the basis of their misconduct the Defendants must be impeached.

Counsel further stated that there was substantial repayment of the loan and over Kshs.100 million had been repaid. That the Defendant is asking for Kshs.2.6 billion. That there are irregular entries in the account and the interest charged is unconscionable. That the Plaintiff still remits monthly payment of kshs. 500,000.

Counsel further submitted that there was no mutual agreement to appoint the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as claimed by the 1<sup>st</sup> Defendant.

Counsel submitted that they have established that the Plaintiff has a prima facie case. Counsel cited the authority of **Katherine K. Mbiti vs. Consolidated Ban Ltd Civil Case No. 109 of 2004**. In that case the court considered whether section 74 RLA with regard to statutory notice could be altered. The court noted that as far as the record was concerned there was no application to vary the provisions of section 74. That the Chargee was not Agricultural Finance Corporation or Settlement Fund Trustees. The court further held that requirements under section 74 remained applicable and the statutory notice sent out on 21.10.95 was not in accordance with provisions of the charge document.

Counsel stated that the balance of convenience tilted in favour of granting the injunction orders. In support he cited the case of **Jambo Biscuits (k) Ltd VS. Barclays Bank of Kenya & others** case no. 1833/01. In that case the court held that balance of convenience favoured restoration of the *status quo ante* the appointment of the receiver/ managers. The Court stated that the receivership would probably result in the destruction of the business and goodwill of the Plaintiff.

Counsel for the Defendants Mr. Simiyu opposed the application. He relied on the replying affidavits dated 8.7.2005 and 10.7.2005 by the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively. Counsel submitted on the Preliminary Objection dated 10.7.2005 which was to be argued together with this application.

Counsel argued that the 1<sup>st</sup> Defendant was in liquidation and no proceedings could be brought without leave of the court under section 228 of the Companies Act. He cited the case of **Bisai & Ano. VS. K.C.B (2002) 2 EA** where the court stated that in order to commence any action or proceeding against the 3<sup>rd</sup> Defendant which was in liquidation, the Plaintiffs were obliged mandatorily by the Companies Act to first obtain leave from the Court. The court further noted that the leave was to be obtained before bringing action and could not operate retrospectively.

Counsel submitted that the issue of leave was not captured in the pleadings and this was fatal omission. Counsel also argued that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were receivers appointed under paragraph 7 of the Charge and should not have been sued. He submitted that under section 79 of the RLA the parties have right to vary the charge. Counsel in support cited the case of **Lochab Brothers VS. Kenya Furfural Co Ltd & 2 others Civil Appeal No. 78 of 1982** where the Court of Appeal held that receivers were not entitled to take the objection proceedings in their own name.

Counsel further argued that the applicant seeks to restrain the Defendants in exercising its powers in

prayer 2 and 4 of the application are not supported by any grounds. That under Order 50 rule 7 it is mandatory that grounds are stated.

On the validity of the charge counsel submitted that they concede the charge had no certificate of attestation as required under section 110 of the RLA. He argued that this does not invalidate the security. He submitted that were the court inclined to hold that the charge instrument was defective then section 163 of the RLA which converts the original charge into an equitable mortgage by deposit of documents. In support of this argument counsel cited the case of **Kenya Commercial Finance Company VS Ngeny & Another.**

Counsel submitted that the Plaintiff has not established a prima facie case. He argued that money is owed to the Defendant and there is only a dispute on the amount. That inaccuracies in the accounts cannot constitute a bar against realization. That the bank was entitled to realize its security.

In reply counsel for the Plaintiff submitted that the Plaintiff sought and obtained leave and that the court ought to disallow any objection on this ground.

He argued that the grounds set out in the application are wide. He stated that it will be in the interest of justice if a party is allowed to have a freehand in fixing the amount demanded from a borrower. That once the charge is converted into an equitable mortgage then it can only be enforced through the court under Registration of Titles Act.

On the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants counsel submitted that that the Plaintiff does not recognize them as receivers and were sued as trespassers in their individual capacity.

He submitted that the Plaintiff has demonstrated that will suffer irreparable loss and may lose a prime property and is willing to pay what is reasonably due. He prayed that the application be allowed with costs.

From the volumes of the pleadings and authorities filed herein it is clear that this is a highly contested commercial matter. I sincerely thank the counsels involved for their industry and handwork in their presentation of the case. However this being an interlocutory application I will not delve deeply into the issues which will have to be tackled at the trial.

From the record it is not disputed that the Plaintiff borrowed the sum of kshs. 120 million in 1994 from the 1<sup>st</sup> Defendant now under receivership and a charge dated 7.4.1994 registered against the Plaintiff's property known as ELDORET MUNICIPALITY/ BLOCK 4/69 as security. The Plaintiff's case is that the 1<sup>st</sup> Defendant through the receiver manager appointed to manage the affairs of the 1<sup>st</sup> Defendant unlawfully and without any notice appointed the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to be receiver/managers of the Plaintiffs property and business. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are purporting to exercise powers under section 351 of the Companies Act as receivers and managers when there is no floating charge created by the charge dated 7.4.1994. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the company of heavily armed private security guards, forcibly and most embarrassingly raided and took over the Plaintiff's premises known as ELDORET MUNICIPALITY/ BLOCK 4/69 which was in the lawful possession of Hotel Sirikwa. That this disrupted the business and the hotel was temporarily closed

The Plaintiff also states that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants continue to exercise an invalid and illegitimate mandate to the detriment of the Plaintiff and its tenants. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have constituted themselves as the receivers and managers of all the assets and business of the Plaintiff. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants took possession of the Plaintiff's premises, removed the legitimate and lawful directors and seized the company seal and all vital documents and records of the Plaintiff and took control of all the property and business of the Plaintiff.

The Plaintiff denies that the charge dated 7.4.1994 is valid. The Plaintiff has attacked the provision to vary section 74 of the RLA with regard to the 3 months notice required to for the Chargee to exercise

its statutory power of sale. The Plaintiff submitted that the variation was null and void and in support relied on the authority in the case of **Katherine K. Mbiti vs. Consolidated Ban Ltd Civil Case No. 109 of 2004** cited above.

The application is brought under Order XXXIX rule 1,2,3 &9 of the Civil Procedure Rules ( now order 40).

The principles for the granting injunction orders are provided in the celebrated case of **Giella vs. Cassman Brown & Co ltd (1973) E.A.**

That the applicant must show he has a prima facie case with probability of success; interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages ; if the court is in doubt it would decide an application on balance on of convenience.

Many of the issues raised with regard to whether the charge is valid; whether a suit can be maintained against the 1<sup>st</sup> Defendant and or the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants; whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants allegedly exercising powers under section 351 of the companies Act is valid in the absence of a floating charge are matters that will be best dealt with at the trial.

Having carefully considered all the pleadings, authorities and the submission by counsel I am convinced that the Plaintiff herein has established prima facie case at this stage. I make determination that the Plaintiff was entitled to Notice as provided for under section 74 of the Registered Land Act. I have taken note that the statutory notice herein was issued on the 23.6.2005 after this suit had been filed. By the time the notice was issued the Defendant has already moved into to the Plaintiff's premises and allegedly appointed the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as receivers/managers of the Plaintiff's premises known as ELDORET MUNICIPALITY/ BLOCK 4/69.

The Defendant has tried to explain that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were appointed after mutual agreement with the Plaintiff. This position is however strongly denied by the Plaintiff who has argued that it was armed twisted and coerced to make the said decision. I also note that there is a third party Sirikwa Hotel who is a tenant caught in the middle of this tag of war whose interest are also at risk.

I am convinced that the actions of the Defendants is likely to cause the Plaintiff irreparable loss and damage.

I am not persuaded by the Defendant's argument money is owed and inaccuracies in the accounts cannot constitute a bar against realization. The court can interfere where the rates of interest are unconscionable and oppressive. The court can order for accounts to be taken to establish this. This is for the trial court to make a finding.

The Plaintiff was entitled to notice as provided for under section 74 of the Registered Land Act before all the actions complained herein were to be undertaken. No doubt that the 1<sup>st</sup> Defendants as charge has certain legal rights over the Plaintiff and the security of the Chargee that is the premises known as ELDORET MUNICIPALITY/ BLOCK 4/69 but these powers have to be exercised within the confines of the law.

I have looked at the issues raised in the preliminary objection. In deciding whether to uphold the preliminary objections the court is guided by the land mark decision of **Mukisa Biscuits Manufacturing Ltd Vs. West End Distributors Ltd (1969) E.A 696** where the court held that preliminary objection consist of point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection may dispose of the suit. The court further held that a preliminary objection would normally be argued on the assumption that all facts pleaded by the other side are correct and cannot be raised if any facts have to be ascertained or if what is sought is judicial discretion.

In the instant case the basic facts including the validity of the charge are being disputed. I am of the opinion that matters raised in the preliminary objection should have been raised in a substantive application

The Notice of Preliminary objection dated 10.7.2005 is therefore dismissed with costs.

I further make the following orders:-

- (a) The Plaintiff is granted prayers 3, 4 and 6 of the application dated 16<sup>th</sup> June 2005.
- (b) That the costs of this application shall be in the cause.

Dated and delivered at Nairobi on this 22ND DAY of AUGUST 2012.

**M. K. Ibrahim**  
**Judge**

DATED AND Delivered at Eldoret on this 26TH day of SEPTEMBER 2012.

**ABIGAIL MSHILA**  
**Judge**

In the presence of: N/A for Applicant

N/a for Respondents