



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 373 of 2009

**RIVERBANK CAPITAL MANAGEMENT LIMITED.....1ST PLAINTIFF
CREATIVE CAPITAL SOLUTIONS LIMITED2ND PLAINTIFF**

VERSUS

TRACK IT LIMITED (under receivership).....DEFENDANT

RULING

1. The plaintiffs who are also the applicants filed a suit against the defendant seeking inter alia for orders of a permanent injunction to restrain the Receiver Managers of the defendant either by themselves or by their agents, staff or employees from calling or collecting any devices installed with the defendants' customers as per the list of particulars of customers of the defendant contained on paragraph 7 of the Plaintiff. Simultaneously with the filing of the suit the plaintiff filled a chamber summons under order 39 of the Civil Procedures Rules seeking for a temporary order of injunction to restrain the Receiver Managers of the defendant Company from dealing with or calling in any of the tracking and search light devices leased out to the defendant's customers by the plaintiffs as particularized under prayer No.2 of the Chamber Summons. They also sought for mandatory orders.
2. This application is premised on the grounds that the applicant entered into several lease agreements with the defendant's customers for leasing out of tracking and search light devices and accessories. Those devices are allegedly owned by the applicants and are paid for through direct credit by the customers in an account held by the defendant but whose mandate is held by the applicant. The respondent's Company was placed under receivership on 24th April 2009 and the Receiver Managers have called all persons with assets belonging to the defendant company to give notice of the same. The respondent's bank account was also frozen.
3. It is further contended that the 1st applicant issued a guarantee in favor of the respondent to Imperial Bank Limited for the issuance of Letters of Credit for an accumulative sum of US \$615,000 to enable the respondent acquire further devices. That letter of credit has not been honored by the respondent and the 1st applicant is obliged to pay for it pursuant to the guarantee. It was a specific term of guarantee that upon payment of the amounts due on the letters of credit, by the 1st applicant the devices will be assigned to the 1st applicant. Counsel submitted that it will be in the interest of justice to

allow this application, in order to safe guard those devices which are covered in the guarantee and which do not belong to the respondent as they had not paid for the guarantee.

4. This application is also supported by an affidavit sworn by **Shanif Dewany** on 20th May 2009. That affidavit has elaborated in greater details how the 1st applicant provided a bank guarantee to the respondent and how the devices were purchased under an agreement and how the devices were leased out to third parties customers of the defendant who were supposed to pay to a bank account in the name of the respondent but whose mandate was held by the 1st applicant. The respondent issued post dated cheques for the payment of the loan which cheques had not been paid as at the time the Company was placed under receivership.

5. This application was opposed. Counsel for the respondent relied on a replying affidavit sworn by **Mary Ladindo** on 18th June 2009. According to the joint Receiver Managers of the defendant they were appointed as receivers of the respondent by **Shelina Jahangir Tejani and Narmin Jahangir Tejani** (both hereinafter called “the Debenture-holders”) on 17th April 2009 pursuant to powers contained in the debenture created by the defendant in favor of the debenture holders and dated 19th August 2008. It is contended that the sum owing to the debenture holders by the respondent together with other related companies and individuals to the debenture holders stood at US \$663,370.42. It is further contended that there was no evidence shown by the applicant that there was an agreement with the third parties.

6. Moreover the so called agreements between the plaintiffs and the defendant are not validly executed. There is no evidence to show that the applicant subsequently purchased the devices from the respondent upon invitation and there is no payment exhibited to prove there such a purchase. Moreover the Master Lease and Rental Agreement all show that the devices were leased out by the defendant and not the applicants. The agreements were also not signed by the defendant but by someone called Nadiar Shah and Nick Murage who were both employees of the defendant. In the event of default of the rental payments which rental is due to the defendant it is the defendant who would have a cause of action against its customers? Thus the defendant would be entitled to possess the devices. As regards the bank account where the customers made payment for the devices, it was held in the name of the defendant although the applicants held the mandate the account remained part of the assets of the defendant which is covered by the debenture.

7. Both parties filed written submissions in support of their respective positions. I have gone through the submissions as well as authorities cited; I will refer to some of the authorities in my analysis of the evidence. This application seeks for both temporary and mandatory injunctions. The principles upon which such orders can be made are well settled. As regards the first prayer for an interim order of injunction the plaintiff has to establish a prima facie case with a probability of success. Secondly irreparable harm which can not be compensated for in damages would arise, and if in doubt, the court will determine the matter on a balance of convenience. (See the oft cited case of **Giella vs.**

Cassman Brown & Company Limited [1973] EA 358)

8. The principles to guide the court on whether to grant a mandatory order of injunction are similarly articulated in a

long line of authorities by the Court of Appeal especially in the case of **Kenya Breweries Ltd & Another vs. Washington Okeyo C.A. Civil Appeal No.322 (Nairobi)** (unreported) at page 3 Their Lordships quoted with approval the text Vol.24 of Haslbury Laws of England 4th Edition paragraph 948 which reads as follows:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff . . . A mandatory injunction will be granted on an interlocutory application.

Also in Locabail International Finance Ltd. V. Agroexport and others [1986] 1 ALL ER 901 at page. 901 it was stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

These principles of law enunciated by these decisions have received full approval in other cases within our Courts. See the cases of; Belle Maison Limited vs Yaya Towers Limited H.C.C.C. 2225 of 1992, per Bosire, J (as he then was) and The Ripples Limited vs Kamau Mucuha H.C.C.C. No. 4522 1992 per Mwera J.”

9. The dispute in this matter as I understand it is, whether the devices listed under prayer No.2 of the Chamber Summons are assets of the respondents and therefore covered by the debenture. Secondly, whether the mandatory orders can be issued against the Receiver Managers. As regards the latter prayer, it is now a settled principle that an application seeking for a mandatory order of injunction, can only be brought to court as provided for under **Order 50** of the **Civil Procedure Rules** which is by way of a notice of motion. See the persuasive case of **Morris & Co Ltd vs. Kenya Commercial Bank & Another [2003] eKLR Vol.2** Ringera J, (as he then was) held that:

“where the Plaintiff sought both interlocutory prohibitive and mandatory injunctions it was incumbent on him to do so in a motion on notice, for under our procedural law it is established that where a mater partly falls within the scope of a summons in chambers and partly within a motion on notice, the large procedure, namely, the motion, is to be invoked.”

10. This now leaves me with the issues of whether the applicant has established a prima facie case with a probability of success. The Court of Appeal has explained what constitutes a prima facie case in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** their Lordships expressed themselves as follows:-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material

presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

11. Applying the above principles to the present case, the debenture which is created over the assets of the respondent does not give a list of the assets that are covered by the debenture. It generally describes the assets belonging to the defendant. The plaintiff has produced Agreements, Leases, Letter of Credit in respect of the devices. The Receiver Managers have challenged the authenticity of this documents especially the people who signed them on behalf of the respondent. This in my view is a triable issue that needs to be investigated for the court to establish the actual owners of the devices. If the debenture clearly spelt out the assets covered therein, by way of a schedule of assets and listed the devices, I would have had no difficulty to say they belong to the defendant. 12. The debenture is silent but generally describes the assets of the defendants thus one has to find the assets and proof they belong to the defendant. In the circumstances I find that the plaintiff has established a prima facie case and I accordingly grant prayer No.2 and 3 pending the hearing and determination of the suit. The plaintiff should give a suitable undertaking as to damages. The plaintiffs should also move expeditiously to set the matter for hearing within a period of one year failure to do so, the temporary order of injunction shall lapse. The costs of this application shall be in the cause.

RULING READ AND SIGNED ON 21ST MAY 2010 AT NAIROBI.

**M.K. KOOME
JUDGE**