



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 159 OF 2008
EURASIA INTERNATIONAL TRADING COMPANY LTD.: PLAINTIFF
VERSUS
DIAMOND TRUST BANK (K) LTD & 2 OTHERS:....DEFENDANTS
R U L I N G

On the 27th March 2008, the plaintiff herein filed a Plaint which was even dated. Simultaneously with such filing of Plaint, a chamber summons stated to be brought under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules and all enabling provisions of the Law was filed. There was also filed, on the same date, a chamber summons under High Court vacation practice and Procedure Rules made pursuant to section 10 of the Judicature Act Cap 8 of the Laws of Kenya, Section 3A of the Civil Procedure Act Cap 21 of the said Laws of Kenya and all enabling provisions of the Law. The latter chamber summons was made so as to have the Plaintiff be allowed to be heard during the court vacation while the former was for an injunction for orders in the following terms:-

1.

2. **THAT** pending the hearing and determination of this Application inter parties the 2nd and 3rd Defendants be restrained by themselves, their servants or agents or otherwise howsoever from acting and/or purporting to act as Receiver and/or Managers of the plaintiff and from interfering in any manner with the Plaintiff's quiet possession and enjoyment of the Plaintiff's business, machinery equipment, assets and all that property known as Kajiado/Kipeto/2648, Kajiado District.

3. **THAT** pending the hearing and determination of this Application inter parties, the Defendants and each of them be restrained by themselves, their agents or servants or otherwise howsoever from selling, disposing off, offering for sale or alienating in any manner whatsoever any or the plaintiff's properties, machinery, equipment, asset and all that property known as Kajiado Kipeto/2648, Kajiado District;

4. **THAT** pending the hearing and determination of this suit the 2nd and 3rd Defendants be restrained by themselves, their servants or agents or otherwise howsoever from acting and/or purporting to act as Receivers and/or Managers of the plaintiff and from, interfering in any manner with the plaintiff's quiet possession and enjoyment of the Plaintiff's properties, machinery equipment and assets of all that property known as Kajiado/Kipeto/2648 Kajiado District.

5. **THAT** pending the hearing and determination of this suit, the Defendant's and each of them be restrained by themselves, their agents or servants or otherwise howsoever from selling, disposing off, offering for sale or alienating in any manner whatsoever any of the plaintiff's properties, machinery, equipment, assets and all that property known as Kajiado/Kipeto/2648, Kajiado District.
6. **THAT** Pending the hearing and determination of this Application or until further orders of this court, the Honourable Court be pleased to issue an order of mandatory injunction compelling the Defendants jointly and/or severally to immediately and unconditionally vacate the plaintiff's business premises.
7. **THAT** the Plaintiff be a liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit and just to grant.
8. **THAT** the cost of this Application be provided for.

The Application is premised on some nine (9) grounds as hereunder:-

1. On the 25th September 2006, the plaintiff obtained a loan facility of Kshs.15, 000,000/= from the 1st Defendant which facility was secured by a charge over the property known as Kajiado/Kipeto/2648, Kajiado District and further by a floating Debenture over the assets and business of the plaintiff.
2. On the 17th day of March 2008 allegedly acting on the powers of the debenture aforesaid, the 1st Defendant unlawfully and illegally purported to appoint the 2nd and 3rd Defendants as Receivers and Managers of the plaintiff's business.
3. Consequently the 2nd and 3rd Defendants have allegedly taken over the control and management of the plaintiff's machinery, equipment, assets, properties and business of the plaintiff.
4. The purported appointment of the Receivers is illegal for want of crystallization of the Debenture, the said debenture being unregistered contrary to the mandatory provisions of the Companies Act.
5. The 1st Defendant has in any event not served any or any valid proper or any statutory notices of its intention to exercise its statutory power of sale over any of the charged properties as envisaged under section 74 of the Registered Land Act (cap 300). Further the 1st Defendant has not issued the plaintiff with any or any sufficient Notice for redemption of its indebtedness.
6. The Plaintiff's assets are in real land imminent danger of being dissipated and wasted away as a direct result of the Defendants' unlawful actions. Indeed the 2nd and 3rd Defendant's have illegally begun dismantling the plant and machinery in the premises.
7. Unless the orders sought are granted the plaintiff's business shall undoubtedly be totally and irreversibly damaged and the plaintiff's employees direct and indirect stand to be rendered unemployed with the direct result that the plaintiff shall suffer irreparable loss and damage.
8. The balance of convenience is in favour of granting the orders sought as the specialized nature of the plaintiff's business would not permit named operations in the exclusion of its key personnel.
9. The 1st Defendant is acting recklessly and in gross abuse of its fiduciary duty owed to the plaintiff by engaging in serious acts of conflict of interest as more particularly set out in the plaint.

There is filed in support of this Application a supporting Affidavit sworn by one Bart Jan Rozeboom,

described as a Director of the Plaintiff's Company. The said Affidavit is some thirty (30) paragraphs long reiterating in the main the averments in the Plaintiff and the chamber summons and adding that the plaintiff's business is a novel concept in Kenya and in Africa recycling used plastic containers thereby conserving the environment and employing many a Kenyan youth. It is averred that the Plaintiff's business was adversely affected by the 2007/2008 post election violence resulting in failure to making timely repayments and hence the Plaintiff held numerous meetings with the 1st Defendant to re-arrange a debt liquidation plan. Further the said Director of the plaintiff the deponent of the Affidavit in support states that the first Defendant has acted with malice and in bad faith and demonstrated grave acts of conflict of interest and has thereby clogged the Plaintiff's sight of redemption of both the charged property and assets subject of the debenture. The Plaintiff's case is put thus, that the loan was for 36 months hence calling it is in 1 year is acting maliciously. That the debenture was not registered and that in any event the 1st Defendant should have given the statutory notice so as to realize the landed security given if there was any debt due.

The Application is opposed. There is filed in opposition a Replying Affidavit detailing the relationships between the plaintiff and the 1st Defendant and the indebtedness of the former to the latter. Annexed to this Replying Affidavit is, among other documents, a Debenture dated 30th October, 2006 and marked as 'EH/2'. It is stamped on the 8th November 2006 and a Certificate of Registration dated 14th November, 2006 issued which is similarly attached to the supporting Affidavit. This is a Debenture created by the Plaintiff securing Kenya shillings fifteen million only. The deponent of the Affidavit in opposition states that the plaintiff breached the repayment proposals and defaulted in payment of monthly installments from October 2007. It is further stated that vide its letter of the 18th January 2008 to the 1st Defendant the Plaintiff acknowledged the default in payment and in an endeavor to regularize payments the Plaintiff issued a cheque for Kenya shillings one million which cheque upon presentation to the bank was returned unpaid with the remarks 'R/D'. There are averments that the appointment of Receivers was as under the Debenture and that the alleged malice and conflict of interest are absent on the part of the 1st Defendant. It is stated that default in payment occurred long before the post election violence and that such debenture entitled the 1st Defendant to appoint the 2nd and 3rd Defendants as it did. The Defendants therefore state that they acted within the Law and the Plaintiff's Application ought to be dismissed as lacking in merit.

The Application came to court under a certificate of urgency on the 27th March 2008, ex parte, when interim orders in terms of prayers 3 and 5 of the Application were granted on a temporary basis. On the 14th April 2008 when the same was scheduled to be heard, Mr. Ongegu for the Plaintiff/Applicant applied for an adjournment and leave to file a further Affidavit. He was given upto the 29th April 2008. On the said date Mr. Ongegu was still not ready and so the matter was rescheduled for hearing on the 06/05/2008. On the 06/05/2008 the Application was not cause-listed and it was finally heard on the 07/05/2008.

In his oral submissions Mr. Ongegu, learned counsel for the Plaintiff submitted that there was no dispute as to the plaintiff having obtained credit from the 1st Defendant. However, according to counsel, the debenture had not crystallized and further no valid notice to comply had been given and therefore the appointment of the Receivers is invalid. He further submitted that the plaintiff's Company ran into financial difficulties following the post election violence and the plaintiff entered into negotiations to accommodate the plaintiff to re-organize and regularize monthly payments. He submitted that the balance of convenience lay with the grant of the prayers sought and placed reliance on the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358**.

Learned Counsel for the Defendants Mr. Rimui was quick in his opposition to the Application. He also placed reliance on the case of **GIELLA** (supra) on the topic of prohibitory injunctions and further stated that the grant of mandatory injunctions at an interlocutory stage required a much higher standard of proof. He submitted that the debenture had indeed crystallized when a demand pursuant thereunder was issued after default in payment. He submitted that there was an acknowledged default in loan repayment and attempts at further payments had failed. The debenture was registered and a Certificate of

Registration was attached to the Replying Affidavit. He further submitted that if the business of the plaintiff was specialized that was not a ground to warrant the grant of an injunction. On the Defendants taking over the plaintiff's Company it was discovered that the latter had rent arrears and in danger of distress being levied and further documentation was found and availed to court indicating that the plaintiff's Directors had registered another company with themselves as directors in the new Company, carrying on the same business in the same premises as the Plaintiff and this was seen as an indication of an attempt to defraud the 1st Defendant as the new company was soliciting for loans using the same securities offered to the 1st Defendant herein. The plaintiff was said to have unclean hands and therefore not entitled to the grant of an injunction, an equitable remedy.

This now is the time for the court's consideration of this matter. I have perused all the documents filed herein starting with the plaint upto the Defence. I did not see on the court file any Further Affidavit filed by the Plaintiff although leave to file one was sought. I can safely summarize the Plaintiff's Application as follows:- That the appointment of the Receivers Managers was not valid as the debenture had not crystallized, that the debenture was not registered and hence the plaintiff is entitled to the grant of injunctions. I will be guided by the principles in the case of **Giella** above. To succeed the plaintiff/Applicant must:-

I. Show a prima facie case with a probability of success;

II. An injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury;

III. When the court is in doubt it will decide the application on the balance of convenience.

It is not disputed that the plaintiff made default in payment. It is argued that it was making arrangements to involve a third party into its management so as to repay the loan when the 1st Defendant appointed the 2nd and 3rd Defendants. There is a weak argument that there was no evidence of service of a demand yet it is not shown that the letter of demand attached to the Replying Affidavit was returned unreceived. On the contrary the Plaintiff acted on the demand and entered into negotiations with the 1st Defendant to reschedule monthly payments. I find that there was demand as per the loan arrangement and that the same was properly served on the Plaintiff. By default in repayment and such demand being made the debenture properly and legally crystallized as provided for in the Debenture document worded as hereunder:-

“At any time after the principal moneys hereby secured become payable either as a result of lawful demand being made by the lender or under the provisions of clause 10 hereof or any officer of the lender duly authorized in that regard may appoint in writing any person or persons whether an officer or officers of the lender or not to be a receiver or receiver and manager.....of the property and all assets hereby charged or any part thereof.” It therefore follows that the appointment of the 2nd and 3rd Defendants as Receivers Managers was legal, valid and proper and I so find.

If indeed the plaintiff's business is so specialized that only the Plaintiff could ran it, that is in our laws, not a ground to entitle the Plaintiff to a grant of an injunction as herein sought. The consequences of executing the Debenture are that the plaintiff put up its assets to be managed by a Receiver Manager if the Plaintiff defaulted in the agreed repayment schedule.

It was a strong ground in support of the Plaintiff's Application that since the Debenture was not registered then the 1st Defendant could not rely on it to appoint the 2nd and 3rd Defendants. This ground fails miserably as there is a Certificate of Registration of a mortgage (Debenture) attached to the Replying Affidavit which has not been shown to be a forgery and which was not challenged whatsoever.

The Applicant has not shown that it would suffer irreparable damage not capable of being compensated adequately by an award of damages at the hearing. I find that the 1st Defendant acted

properly in proceeding as it did. I was not urged to grant a mandatory injunction and in any event the Applicant has totally failed to make out a case that would entitle it to the grant of such a mandatory injunction at this stage as there was not shown to exist any special circumstances in the case or a stolen match. In my considered view the Applicant has failed to satisfy all the conditions for the grant of the orders sought. The Application fails in its totality and I dismiss the same with costs and discharge the temporary interim orders granted on 27th March 2008.

Orders accordingly.

DATED IN ELDORET THIS 27TH DAY OF JANUARY, 2009

P.M.MWILU

JUDGE

27/01/2009

DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2009.

J. KHAMINWA

JUDGE

IN THE PRESENCE OF:-

.....Advocate for the Plaintiff/Applicant

.....Advocate for the Defendant/Respondents