



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**CIVIL CASE 407 OF 2005**  
**NYANZA SPINNING & WEAVING MILLS .....**  
**PLAINTIFF**  
**VERSUS**  
**CREDIT BANK LTD. .... DEFENDANT**

**R U L I N G**

Application dated 23/7/2007 (Notice of Motion) the plaintiff seeks orders:

1. *Stay of execution of the orders arising out of consent lodged in court on 30/1/2007 pending application;*
2. *That pending the hearing of this application the defendants be restrained from disposing off any assets of the plaintiff at Nanyuki, such assets having been set in one of exhibits annexed to the supporting affidavit;*
3. *That this court do give directions as regards the purport and purpose of Clause No.7 and other relevant Clauses of the said consent order.*

The consent terms are contained in a document filed in this court on 30/1/2007 and dated by the parties on 23/1/2007 namely;

1. *Judgment was entered for the first defendant against the plaintiffs in the sum of Kshs.60,000,000/= with interest at 10% per annum;*
2. *The plaintiff shall pay within 30 days of the order Kshs. 500,000/= and thereafter a further payment of Kshs.1,000,000/= within 75 days of filing the order;*
3. *The amount outstanding with to be paid on 31/7/2007.*

Paragraph 7 of the consent order is set out in full herein:-

*“7. That the plaintiffs scout at their scout, for potential purchases of the machinery and equipment, provided that the sale price shall be paid through the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and provided further, that should the sale of machinery and equipment be in separate lots such sales shall be concluded on the same date and the total sale price shall be for a minimum settlement sum less Kshs.10,000,000/=.*

Also paragraph 9 of the order is relevant in this case:-

*“9. That the purposes of facilitating the sale the 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall give under their supervision the plaintiffs or their representatives access to the machinery and equipment on the premises when and as requested with prior arrangement.”*

The plaintiff's case is that they require access to the premises to enable their appointed assessor. Then there appeared in Daily Nation of 7/4/2009 an advertisement of the sale of the Nyanza Spinning & Weaving Mills. The applicant's case is that they have a right to sell the machinery and equipment in the premises. It has come to their knowledge that the premises has been vandalized and there is need to have access with their assessors to assess the extent of damage occasioned.

They have chosen the firm of McLarens Young International to carry out the valuation. The plaintiff blames the Joint Receivers and Managers (defendants 2 and 3) for failing to take care of the security of the premises so as to prevent vandalization.

A valuation made on 8.5.2002 by first defendant showed that the fixed assets valued at Kshs.219,591,350/= and including other assets totals to Kshs.298,602,979/= then. If there was no vandalization, the assets would now fetch more than is required under the consent judgment. That is why the plaintiff wish to obtain an assessment to exercise its right under Clause 7 of the consent judgment.

On the other hand the defendants are adamant. They deny liability for the vandalization and allege that the plaintiffs resisted the taking of possession by Receivers and Managers. It is admitted by Kamal Shah, that Receiver Managers locked the gates to the premises and deployed guards to protect and preserve the plaintiff's assets. After several events occurring between the parties, it was agreed to negotiate settlement as stated above and the consent was filed in court on 30/7/07.

It is admitted by defendant that the payments of Kshs.500,000/= and Kshs.1,000,000/= was paid by the plaintiffs and the defendant's advocates fees. The defendant came to hear of missing machinery from the plaintiff's premises. It was by letter dated 11/6/2007. Defendants were surprised that the issue of missing items was being raised at such a late stage and that they had had no access to the premises until August 2005.

The defendants state that the plaintiffs have visited the premises with defendant's representative 22 times. And that on 4/3/2004, the plaintiff has valued plant and machinery for Kshs.2,000,000/= for the purpose of insurance. The defendants say they have come to know through K.P. & L. Co. that the plaintiff had not been operating for a period before the appointment of Receivers and Managers. The defendants intend to persuade the court that they are not liable for any vandalizing of the factory. Then why do they refuse access to the assessors? What prejudice would defendants suffer? The defendants must have known that the premises were vandalized.

This application was filed on 23/7/07 seeking the orders stated above. Looking at the authority referred to by plaintiff: Spares & Industries Ltd. vs. Fina Bank Ltd. [2000] KLR 19, where it was held (holding 2):-

*“Whereas the court would normally not interfere with the appointment of a receiver under terms of a debenture holder, nevertheless the court will interfere where such appointment is not for the benefit of the debenture holder.”*

The plaintiff submits that the Receivers and Managers have a fiduciary duty to protect the interests of both parties. Regarding the consent Clause 7, the plaintiff submits that the Kshs.60,000,000/= to be paid by the plaintiff was to be reduced by receipts of money realized by receivers by sale of assets. The plaintiffs also quote “Cases and Materials in Company Law” L.S. Sealy – 6<sup>th</sup> Edition – Re Charnley Davies Ltd. INo.2) [1990] BCLC 760 C:

*“It was common ground that an administrator owes a duty to a company over which he is appointed to*

*take reasonable steps to obtain proper price for its assets. That is an obligation which law imposes on anyone with a power whether contractual or statutory to sell property which does not belong to him.”*

A mortgage is bound to have regard to the interests of mortgagor. For the defendants, it is submitted though not disputed by the plaintiffs that there is relationship of customer and banker. And that this dispute arose because the plaintiff defaulted in payments of a credit facility advanced by the defendant. Litigation was commenced by the plaintiffs (customer) and eventually a consent judgment was entered as stated above by which consent the plaintiff confirmed indebtedness and the appointment of Receivers and Managers.

It is admitted that only Kshs.1,500,000/= as agreed. However, before final agreed sum was due (namely 31/7/2007) the disputes as to missing plant and machinery was raised by the plaintiffs and after exchange of correspondence this application was filed by the plaintiffs. The defendant submits that the application was filed with the sole motive to avoid the consequences of their failure to pay final installment on that due date.

Furthermore, it is submitted by defendant that as provided under Clause 7 of the consent judgment the plaintiff again has visited the premises for about 22 times as shown in paragraph 25 of Replying Affidavit and that plaintiffs never furnished the list of assets or statement of affairs. And that the defendants had insured the property at the same value as plaintiff had and in the event of vandalism or loss compensation would be made.

Furthermore, the provision under which application is made is incorrect. Order 29 to this the plaintiff's counsel said it was a typing error and the same should be excused. The present application seeks stay of consent judgment not restraining the Receivers and Managers but the plaint has not been amended, quoting the case of Erick Kibet Boros & another vs. National Bank of Kenya Ltd. and another where Mullah on Code of Civil Procedure 16<sup>th</sup> Edition Volume 2, it is stated:

*“Every party should set out in his pleadings all material facts on which he relies for his claim or defence .... In the absence of pleadings the evidence if any produced by parties cannot be considered. No party should be permitted to travel beyond its pleading.”*

Defendant submits therefore that prayers in the application should not be granted not being supported by the plaint. It is also trite law that after appointment of Receivers, directors cease to have power to manage affairs of the company even instituting suits. Relying on the case of Tudor Grange Holdings Ltd. & others vs. Citi Bank N.A. 1991 All E.R. where it was held that directors cannot file suit in the name of company unless they had agreed to indemnify the company for costs.

There is no evidence here whether this has been done. The defendant has not raised the issue. It is submitted with authorities that :-

*“the person appointed as a Receiver Manager is concerned not for the benefit of company but for the benefit of the mortgagee to realize security ...”*

*“The powers of a Receiver exercised on behalf of the company are subordinated to the exercise on behalf of the debenture holder and that the Receivers primary duty is to the Debenture Holders.” - “Law of Banking Paget”, Law of “Domestic Banking”.*

However, the Receiver Manager does owe a duty of care to the company by acting in good faith and not negligently in the selling of assets. Further contention by defendant is that they have not come to court with clean hands and are not entitled to remedy. The reason being that they did not produce the statement of affairs to receiver which is statutory duty. The case of R. vs. Kesington Income Tax Consumers (1917) 1 KB 48 the court (Cozens Hardy) made a drastic statement:-

*“The court will not go to the merits of the case, but simply say we will not listen to your application because of what you have done”.*

In the case of Daniel Kamau Mugambi vs. HFCK Ltd. the court said that a person who fails to pay installments of mortgage has committed wrong and should not be assisted by court. What has to be noted is that the party may have failed because he did not have the required money. He had committed no wrong to warrant the court to refuse to assist him.

Regarding the purport of the consent judgment Order 24 Rule 6 of the Civil Procedure Code once the court is “*satisfied that the suit has been adjusted wholly or in part by any lawful agreement or compromise ...*” the court shall on application of any party order that such agreement comprise or satisfaction be recorded and enter judgment in accordance therewith.

Order 6 (2) the court on application of any party may make any further order necessary for implementation and execution of the terms of the decree. Therefore, the judgment the terms Clause 7 gives the plaintiffs the right to:-

*“scout for buyers of potential purchasers provided the price shall be paid to the Receivers and provided that the sale if in lots shall be concluded within same date and the right of access to the premises for the purposes of facilitating the sale.”*

It is clear that the plaintiff was given the right to sell the property and it was the duty of the defendants to facilitate by giving access. Therefore by rejecting the access for purpose of assessing the value of the machinery and plant by plaintiffs, defendants are breaching the provisions of a term of the consent decree. Thus delaying the implementation of the decree.

It is a long period since the request for assessment was made. Which potential purchaser would accept to enter into a purchase without seeing a valuation? It appears that the defendants are not disputing that there is a vandalization but they do not wish the extent to be disclosed by an assesment.

The plaintiffs are asking for access for assessment of machinery. The term of the decree is that the plaintiffs should pay the costs of the exercise. What prejudice will the defendants suffer? Defendants again has emphasized the conduct of the plaintiffs in filing suit to challenge appointment of receivers, orders extracted incorrectly, sitting on irregular orders for 22 months.

It is to be noted that all these things happened before the parties recorded the consent which is now judgment of court. The defendants decided to forget these complaints and enter into a consent. The defendant is now stopped from raising such complaints. Parties are now bound by the consent judgment.

Furthermore, the defendant breached the consent judgment before the date of final payment thus hindering any possible sale. This can be construed to be obstruction of implementation of the consent decree and this puts the plaintiff in a position of loss and damage.

It is the principle of equity that a party cannot benefit from its own wrongdoing. It is therefore clear the defendant delayed the right of the plaintiff to access the premises for purpose of scouting potential purchasers unlawfully. The plaintiff’s right was based on judgment of court. The application prayers now outstanding are No.3 regarding the purport of Clause 7 of consent judgment, regarding the access of the premises by the representative of plaintiff, McLarens Young International.

The court is of the view that the defendants will suffer no prejudice by the plaintiff’s agents McLarens Young International being permitted to enter and assess the assets, machinery and plant on premises within a reasonable time. Their report shall be supplied to bother parties.

Accordingly, the court orders the defendant to give such access to the plaintiff and its agents within the next 30 days of today. Parties at liberty to apply.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 29<sup>th</sup> day of June 2009.

**JOYCE N. KHAMINWA**

**JUDGE**