

GROFIN EAST AFRICA FUND (GEAF)

LLCPLAINTIFF

VERSUS

KIANJAMBA TRANSPORTERS CO. LTD..... 1ST DEFENDANT

R U L I N G

The plaintiff entered into a loan agreement with first defendant amounting to Kshs.30,000,000/=. Initial advance of Kshs.18,580,000/= was advanced to 1st defendant on 14/3/2008 pursuant to agreement. The loan was guaranteed by 2nd -5th defendants. On the same date the plaintiff filed, the plaintiff filed an application under **Order 39 (1)** and **(9) Civil Procedure Code** and **Section 3A Civil Procedure Act**.

The orders sought are temporary injunction against first defendant from selling, disposing and alienating its assets in particular, trucks and trailers registration numbers:

- **ZC 7887**
- **KBA 870 Z**
- **ZC 8014**
- **KBB 132 F**
- **ZC 7903**

pending hearing and determination of this suit. Also temporary injunction to restrain the 1st and 2nd defendants from applying for registration of any transfer of trailer No.ZC 788 pending hearing and determination of this application.

The grounds upon which the application is based are set out on the application. The applicant is owed Kshs.21,501,260/= by 1st defendant, borrowed on the security of the said assets. The applicant has come to know that the 1st respondent is in the process of selling the said assets. There are no other known assets of the 1st respondent. The application is supported by affidavit of Kenneth Onyando which shows that the parties entered into a loan agreement for Kshs.30,000,000/= secured by an all assets debenture.

A sum of Kshs.18,580,000/= was released but contrary to the terms of loan agreement the defendants have defaulted and by 21/1/2009 the arrears stood at Kshs.21,501,260/=. The 1st defendant has also defaulted in the payments of insurance premiums for the trucks and trailers. Failure to maintain insurance is a breach of the loan agreement. The applicant's effort to mitigate damages was not successful only one truck and one trailer were recovered. There is evidence that the 1st defendant intends and is planning to sell trailer ZC 788 7 to one Abdikadir Abdille.

I have perused the grounds of objection filed by the respondents and their written submissions. They say that the plaintiff has a lien over the trucks and trailers and the vehicles are registered in joint names of plaintiff and second defendant and have appointed reposessor M/S Westminster Merchants in exercise of powers under Clause No. 17.2 of the debenture and furthermore in the plaint there is only a prayer for principal amount and interest and costs.

The court has perused the documents of loan. The security by way of debenture creates a fixed charge on immoveable property and a floating charge over all moveable property including its undertaking property and assets of whatever nature, both present and future and so long as the company is carrying on

its business in the normal course of business the applicant shall not interfere. However, the applicant shall have power to take action upon default by the respondents when it can be said the charge has crystallized, the remedy of the lender is to appoint a Receiver or Receiver and Manager of the property and assets of the company as provided under Clause 17.1 and 17.2 or take possession of the assets.

It appears the applicant has attempted to exercise powers under Clause 17.2 of debenture but has not been fully successful. This is admitted by the respondents. It is also admitted that a sum of Kshs.21,501,260/= is outstanding and unpaid under the loan agreement. The provisions of **Order 39 (1)** specifies cases in which temporary injunction may be granted namely; where any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.

In view of the provisions of the debenture, the applicant may not restrain the respondent from carrying on its business in the normal course as a going concern. The circumstances are not as specified under that order. The remedy of the plaintiff lies squarely under the provisions of debenture. The court is not therefore satisfied that the applicant has demonstrated any need for granting of injunction as prayed.

The application is dismissed with costs in the cause.

DATED, SIGNED and DELIVERED at Nairobi this 19th day of October 2009.

JOYCE N. KHAMINWA

JUDGE