REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 520 of 2007

PEMA HOLDINGS LIMITED …….....…….PLAINTIFF

VERSUS

TROPICAL FARM MANAGEMENT (K) LIMITED……1ST DEFENDANT

STANDARD CHARTERED BANK (K) LIMITED …….2ND DEFENDANT

RULING

The plaintiff herein, Pema Holdings Ltd. seeks by its chamber summons dated 3rd October, 2007 the following orders;

(1) that pending the hearing and determination of this application, this Honourable court be pleased to issue an order of injunction restraining the 2nd defendant, its agents, servants and/or employees from selling, putting up for sale by public auction or private treaty and further restraining the 2nd defendant, its agents, servants and/or employees from transferring or in any other way disposing off the plaintiff's property L.R. No.4929/2 and L.R. No.4744 Makuyu.

(2) That pending the hearing and determination of this suit, this Honourable court be pleased to issue an order of injunction restraining the 2nd defendant, its agents, servants and/or employees from selling, putting up for sale by public auction or private treaty and further restraining the 2nd defendant, its agents, servants and/or employees from transferring or in any other way disposing off the plaintiff's property L.R. No.4929/2 and L.R. No.4744 Makuyu.

The application is made under Order 39 Rules 1, 2 and 9 of the Civil Procedure rules and Section 3A of the Civil Procedure Act. The grounds in support of the application is set out on the face of the application. There are two affidavits sworn by **Mr. Lawrence Nginyo Kariuki**, the plaintiff's Managing Director and **Boniface Njoroge**, the plaintiff's farm manager at the charged properties.

The 2nd defendant has in opposition to the application filed a replying affidavit of one **Mr. Paul Wanyoike**, a manager of the defendant's Group Special Assets Management.

I have perused the plaint, which is the foundation of the prayers sought by the plaintiff in the application under my determination. I have also taken into consideration the affidavits sworn in support of and in objection to the application. The Advocates for the parties made written and/or skeleton submission after which they also made oral submissions before me. I have carefully considered the said submissions and

the several authorities cited to me.

First and foremost, I reckon that I am not trying the case and I should be careful not to make definitive findings of fact and law as that is the province of the trial judge. At this stage the application should be considered on the known principles as set out in **Giella vs Cassman Brown (1973) 358**, that an applicant will not get an interlocutory injunction unless it can show;

(1) That he has a prima facie case with a probability of success.

(2) That he stands to suffer irreparable loss and damages, that cannot be compensated adequately by an award of damages.

(3) If the court is in doubt the application should be considered and decided on the balance of convenience.

The question that falls for my determination is whether the plaintiff has brought itself within the confines of the yardstick in the grant of an interlocutory injunction. In the affidavits filed on behalf of the plaintiff, it is clear that the plaintiff owns the two suit properties at Makuyu near Thika. On the said properties is a coffee farm known as Pema farm. The plaintiff purchased the charged properties on or about 30th may, 1974 with credit facilities from the 2nd defendant and a charge was created in favour of the bank over the two suit properties.

Sometimes in 1983, the 2nd defendant allegedly conceived the idea under which it would sponsor its customers who were engaged in farming to undertake farming provided that all the proceeds of sale of the cash crop were remitted to the bank and provided that the bank controlled both the customer and the manager of the farm. The plaintiff contends that by a management agreement signed between the 1st defendant then known as **East African Acceptances (Estate Management Division) Ltd** dated 4th May, 1993 the plaintiff agreed with the 1st defendant to surrender all matters to do with management of the farm to the 1st defendant. The terms of the management agreement were inter alia;

(1) That the 1st defendant would be the sole agent of the plaintiff in all coffee matters and business undertaken on the charge properties.

(2) The plaintiff would pay to the 1st defendant a management fee.

(3) The plaintiff would surrender its rights over coffee proceeds, dividends and other remunerations to the 1st defendant who would be at liberty to utilize in whichever manner he wishes.

The plaintiff also contends that it ceded control over the charge properties to the 1st defendant and did not even have right to appoint staff or other personnel in its own farm. It is alleged the 1st defendant was mandated to supervise the cultivation of coffee without being liable as a mortgagee in possession.

The plaintiff further avers that something very significant happened on or about 24th May 1996 wherein all the crop debenture previously created in favour of the 1st defendant was transferred to the 2nd defendant. The arrangement continued until 23rd April 1999 when the arrangement was terminated.

Mr. Mwangi learned counsel for the plaintiff submitted that the transfer of the debenture and continued ownership and control of the 1st defendant to the 2nd defendant meant;

(1) The 2nd defendant was the lender both in the charge and the lender in the crop debenture, which debenture was created pursuant to the management agreement.

(2) In the said arrangement, the 2nd defendant would sign an agreement to lend money to the plaintiff, the 2nd defendant would pass the money to its wholly owned subsidiary, the 2nd defendant would then appoint most if not all directors and Chief Executive Officer of the 1st defendant. The bank would then receive the proceeds of coffee sales from the 1st defendant, the proceeds would be debited into the current account opened separately and unilaterally by the 1st defendant. And if there were excess funds, it would be credited into the plaintiff overdraft and mortgage accounts with the 2nd defendant.

(3) So skewed was the arrangement that credit facilities would be granted to the plaintiff without the plaintiff actually drawing funds itself or touching or using or coming across the monies so advanced.

(4) The relationship between the defendants was such that money would be drawn in the name of the plaintiff but by the 1st defendant with the concurrence and unilateral decision of the 2nd defendant.

(5) The only thing the plaintiff would do is to execute the letter of credit or the charge or other document and all other dealings including receiving coffee payments in millions would be undertaken unilaterally between the 1st and 2nd defendants.

The plaintiff further asserts that the defendants share some directors and by virtue the transfer of the crop debenture, the defendants were both in legal and physical possession of the charge properties.

The reply of the 2nd defendant to the allegations by the plaintiff is that the plaintiff executed a management agreement with the 1st defendant dated 4th May 1983 and that the 1st defendant is a distinct legal entity and a limited liability company capable of suing and being sued in any event. It also contends that it has a valid charge document over the suit property. And that pursuant to the perfection of security document, banking facilities were granted to the plaintiff by the 2nd defendant.

There is no dispute, that the appointment of a managing agent on the farm was a mutual agreement between the plaintiff and the 1st defendant. The relationship appears to have been in place for over 25 years and nothing could have been easier than the plaintiff not to enter into such an agreement they allege that the 2nd defendant instructed them to do so. It was also incumbent upon the plaintiff to terminate and/or question the relationship at the early stages than pointing out accusing fingers when the relationship had ended.

The plaintiff contends that the bank was a mortgagee in possession but in my view a holder of a debenture is not a mortgagee in possession. And in any event the 1st defendant has no charge over the suit properties in its favour. There is ample evidence to show that the plaintiff has always been aware of the financial accommodation granted to it by the 2nd defendant. One needs to look at the annextures to the replying affidavit and the annextures to the affidavit by the plaintiff's managing director. The inference one draws upon perusal of those documents is that the plaintiff has been in active participation in its farms state of affairs including loans and overdraft extended to it by the bank.

In a letter dated 12th July, 2001, the plaintiff gave reasons why the overdraft, was above limit and confirmed that there was a debit balance of Kshs. 15 million in its account with the bank. The issue of the alleged mismanagement of the farm by the 1st defendant was never raised. Again in a letter dated 11th November, 2002 **M/S Amolo & Gachoka** advocates demanded a sum of Kshs.16,259,795/= from the plaintiff. In reply through a letter dated 30th November 2002, the plaintiff confirmed the existence of the debt and unequivocally admitted the debt outstanding. It then requested the bank due to the mutual and good relationship which existed for over 28 years for indulgence and postpone the demand. The bank acceded to the request of the plaintiff.

The 2nd defendant's Advocate **Mr. Chege** submitted that as a general rule a contract can only bind and be enforced by or against a person who is a party to the said contract. I agree that is the position between the plaintiff and 1st defendant in so far as the farm management contract is concerned. The management

contract that was made between the plaintiff and 1st defendant does not in any way interfere with the rights of the 2nd defendant as a chargee over the suit properties.

The plaintiff had put up the suit properties as a security for loan and overdrafts with a clear knowledge that should it default, the bank is empowered to realize the same to recover its money. That is exactly the position in this dispute. I am unable to see the basis under which the bank can be restrained from selling the charged properties. The plaintiff from the evidence available was consistently and constantly provided with bank statements. It knew the state of its accounts with the bank. It requested for several indulgencies which were granted and on various occasions, it acknowledged the existence of the debt, now belatedly attacked.

In the premises, I am satisfied that the plaintiff has not shown the existence of a prima facie case with a probability of success at the trial. The debt was severally acknowledged and from the evidence available, the plaintiff would not suffer any damages if the suit properties are sold in exercise of the bank's statutory power of sale.

Lastly I am not in doubt as to where the balance of convenience lie, since there is clear and uncontroverted evidence to show the bank acted in good faith. I am saying the bank acted in good faith for it was patient with the plaintiff and even suspended the loading and/or charging of interest into the plaintiff's account. In my view that is an expression of good faith that the bank is interested in the plaintiff redeeming its properties.

In conclusion the plaintiff's application is groundless and more so without merit, it is therefore dismissed with costs to the 2nd defendant. The interim order of injunction granted on 15th November 2007 is hereby discharged.

Dated, signed and delivered at Nairobi this 28th day of February, 2008.

M. A. WARSAME

JUDGE