REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Suit 38 of 2008

DEEYA HARDWARE &

WHOLESALERS LTD. …............…………………..……………. PLAINTIFF

V E R S U S

SOUTHERN CREDIT BANKING

CORPORATION LTD. …… …..........………………….......… 1ST DEFENDANT

WILFRED NYASIMI OROKO ……….............……….…… 2ND DEFENDANT

DISMAS OGWOKA NDEGE ….……………………..… 3RD DEFENDANT

R U L I N G

The court was moved by a chamber summons which was expressed as having been made pursuant to *Order 39 rules 1, 2* and *3* of the Civil Procedure Rules, together with *section 3A* of the Civil Procedure Act.

The substantive order sought against the defendants was for an injunction to restrain the 2nd and 3rd defendants from acting or purporting to act as Receivers and Managers of the plaintiff, until the said suit was heard and determined.

The plaintiff also sought orders to compel the 2nd and 3rd defendants to re-open the plaintiff's business premises in both Kakamega and Eldoret; and to restore to the plaintiff the vehicles which they had taken possession of. Those orders were sought, with a view to them taking effect even as the substantive injunction application was being canvassed. In other words, during the pendency of the application for an interlocutory injunction, the plaintiff wished to regain control of its businesses and vehicles, from the Receivers and Managers who had been appointed by the 1st Defendant.

Mr. Shitsama, learned advocate for the plaintiff, submitted that the 1st Defendant *(hereinafter cited as "the Bank")* was not entitled to appoint Receivers in the circumstances prevailing. It was his contention that the Bank had not complied with the law in the preparation and execution of the Debenture Instrument which gave rise to the appointment of the Receivers.

It was the plaintiff's further submission that the Instrument of Appointment of the Receivers was not in accordance with the law.

The plaintiff said that upon the execution of the Debenture dated 7th March 2006, the Bank was supposed to have credited to the plaintiff's account, the money stated in the Debenture. However, the Bank did not credit any money to the plaintiff's account. Therefore, the plaintiff believes that the bank had no basis for enforcing the Debenture.

Secondly, the instrument of charge dated 7th March 2006 is said to have been signed by Mr. S. K. Ombaye advocate, who had not been shown to be a director of the plaintiff.

As far as the plaintiff was concerned, it had not been shown, in the charge document, who the directors of the plaintiff were. Therefore, the plaintiff submitted that the document was not properly executed.

Meanwhile, the plaintiff also made the point that the securities exhibited by the Bank had no connection with the plaintiff, as they relate to companies other than the plaintiff.

As regards the Notice of Appointment of the Receivers, the plaintiff submitted that it had not been drawn up in accordance with the law, as it was not attested. In particular, the plaintiff pointed out, the signatures of the Bank attorneys had not been witnessed.

Furthermore, and in any event, the said Notice of Appointment of Receivers was said to have failed to comply with the provisions of section 103 of the Companies Act.

It was the understanding of the plaintiff that that action requires, as a precondition, that the Debenture instrument pursuant to which Receivers were to be appointed, be in the nature of a floating charge. The plaintiff explained that that requirement was mandatory, as debentures relate to stocks.

In this case, the Notice of Appointment of the Receivers was faulted for making reference to a "*fixed charge.*" That fact alone was, in the opinion of the plaintiff, sufficient to render the Notice invalid and thus unenforceable.

Finally, the plaintiff submits that the Notice to the Registrar of Companies, notifying him that the Receivers had been appointed was neither attested nor filed at the Companies Registry.

As far as the plaintiff was concerned, it was not sufficient to address the notice to the Registrar of Companies. The said Notice had to be filed with the Registrar, said the plaintiff.

In any event, the Bank had not demonstrated that the notice was received, as the plaintiff had conducted a search at the Companies Registry, but had failed to trace the said notice; it was therefore the plaintiff's case that the Registrar had not been notified about the appointment of the Receivers.

Furthermore, the notice was faulted for stating that Receivers had been appointed over part of the plaintiff's properties, but without specifying the particular properties.

Following the appointment of the Receiver Managers, the plaintiff complained that its activities and operations had been completely paralyzed. Therefore, the plaintiff contended that unless an injunction did issue against the Receivers, the plaintiff would suffer irreparable damage.

In answer to the application, the defendants put forward a strenuous opposition. They submitted that the court could not grant the prayer seeking to stop the Receiver Managers form acting in that capacity.

Even as I continue making a note of the issues raised by the defendants, I wish to make it clear, for the record, that in this case the 2nd and 3rd defendants were appointed as Receiver Managers. Therefore, even though there are instances in which I simply refer to them as Receivers, that should not be construed to imply that they were simply receivers.

According to the Bank, the appointment of the Receivers was in accordance with the terms of the contract between the plaintiff and the Bank. The said contract is said to be embodied in the Debentures dated 7th March 2006 and 30th January 2007, respectively.

It is the defendants' case that the terms of the contract were very explicit, and that the court therefore lacked jurisdiction to change the said terms.

As far as the defendants were concerned, the plaintiff had not denied executing those 2 debentures. Therefore, on the strength of the authority of BULK MEDICALS LIMITED V. PARAMOUNT UNIVERSAL BANK LIMITED - MILIMANI HCCC NO.249 OF 2006 (Unreported), the defendants invited me to hold that the terms of the contract could only be changed by the parties themselves. In that case, the Hon. Kasango J. expressed herself thus, at page 16 of her Ruling;

"*Having accepted that the debenture is a contract, the terms of the contract can only be changed by consent of the parties. In the absence of the such consent, this court would do wrong to interfere with that relationship.*"

I have no doubt in my mind that courts of law do not re-write the terms of contracts between parties. The responsibility of the courts is to enforce the contracts, within the law.

The defendants submitted that in this case, the plaintiff had concealed material particulars from the court. As an example of such concealment, the defendants said that whereas the plaintiff disputed owing KShs.40,259,909/80, the plaintiff did not proceed to specify the amount of money which he owed to the Bank.

To my mind, given the fact that the plaintiff has challenged the legality of the debenture instrument itself, and the Notice of Appointment of the Receivers, it would matter little whether or not it disclosed the extent of its indebtedness to the Bank, if at the end of the day, the very foundation of the security were to collapse.

Furthermore, it would be somewhat inconsistent, if the plaintiff were to specify the amounts owing to the Bank, whilst at the same time, the plaintiff had submitted that its account was not credited with the money which the Bank was to have provided to the plaintiff.

I will revert to these issues later.

The Bank meanwhile says that because, in the pleadings of the plaintiff, it had not been denied that KShs.5.0 million was extended to the plaintiff, it cannot be true that the money was not disbursed.

Having carefully perused the plaint, chambers summons application and the affidavit of Kamleskumar Rameshbhai Patel, I found that nowhere did the plaintiff expressly deny receipt of KShs.5.0 million.

The first time the issue came was when Mr. A. Shitsama, learned advocate for the plaintiff was making his submissions.

That fact notwithstanding, the defendants raised no objections to that line of submissions. Also, the defendants did not seek an adjournment, if they needed any, so that they could have had the opportunity to provide the court with facts which would counter the submissions of the plaintiff. In the circumstances, the court cannot turn a blind eye to the submissions. Instead, the court would strive to identify, from the material already before the court, whether or not, on a prima facie basis, the Bank did credit the plaintiff's account with the sum of KShs.5.0 million, after 7th March 2006.

In that regard, the defendants drew the court's attention to the statement of accounts, (annexture "WO7"). There are a total of six pages of the said statements of accounts.

According to paragraph 32 of the Replying Affidavit of WILFRED NYASIMI OROKIO, those

statements of account do demonstrate that the plaintiff was truly and justly indebted to the Bank, to the tune of KShs.27,358.723/70.

The plaintiff believes that the statements of account do not quite tell the story of the Bank. It says so because of the following facts, as extracted from the statements;

(i) Page 1 is for A/C NO.3610000621.

The account-holder is DEEYA HARDWARE

& WHOLESALERS LTD., the plaintiff

herein. The balance outstanding is

KShs.8,792,757/25, as at 20th June 2008.

(ii) Page 2 is for A/C NO.3610000620

The Account-holder is the plaintiff, and the balance outstanding is KShs.9,875,341/=, as at 30th May 2008.

(iii) Page 3 is for A/C NO.3610000622

The Account-holder is NISHANG ENTERPRISES. LTD., who are indicated as owing KShs.5,652,912/=, as at 19th June 2008.

(iv) Page 4 is for A/C NO.3610000623

The Account-holder is shown as

SAHAJANAND SUPERMARKET, which owed

KShs.1,993,959/10, as at 31st May 2008.

(v) Page 5 is for A/C NO.3610000624

The Account-holder is PATEL KAMLESHKUMAR RAMESHBHAI, who owed KShs.5,938,083/75, as at 13th June 2008.

(vi) Page 6 is for A/C NO.3610000140

The Account-holder is the plaintiff, who is shown as owing KShs.8,029,894/10, as at 13th June 2008.

It is true that 3 out of the 6 statements of account do not belong to the plaintiff. Those are the accounts of NISHANG ENTERPRISES. LTD., SAHAJANAND SUPERMARKET and KAMULESHKUMAR RAMESHBHAI PATEL.

However, even after disregarding the said 3 accounts, the balance shown as outstanding on the plaintiff's own accounts adds up to KShs.26,697,992/=, by my calculations.

Therefore, on a prima facie basis, it appears that the sums stated as outstanding, as per the Bank, would appear to find support from the final figures in the statements of the 3 accounts held by the plaintiff.

The plaintiff has denied being in arrears of any repayments due to the Bank.

From the evidence available to me, so far, it shows that on 14th November 2007, the Bank issued a notice to the plaintiff, requiring it to pay KShs.29,729,056/20.

First, on a prima facie basis, that letter shows that the Bank did give notice to the plaintiff.

But, in the same vein, it is noteworthy that the sum in respect of which notice was given, was inclusive of KShs.5,451,482/30 which was allegedly owed by Kamlesh R. Patel; and a further sum of KShs.5,140,529/= which was allegedly owed Nishang Enterprises.

In answer to the notice, the plaintiff said that it had not defaulted. However, in the same breath, the plaintiff went on to state as follows;

"We appreciate every effort your bank has done in financing us and promise that we are going to (do) everything we can to service all the loans and arrears."

Surely, it cannot be correct that the plaintiff had not defaulted, yet they were in arrears, at the same time.

In my, prima facie, opinion the plaintiff must have been in arrears as at 24th November 2007. That view stems from the explanation tendered in that letter, in which the plaintiff explained that business had dropped and that their cash flow had been affected drastically, due to the political wave that was sweeping the country at the time.

Reverting now to the issue as to whether or not the Bank did disburse the sum of KShs.5.0 million after 7th March 2006, it is noteworthy that in the letter dated 14th November 2007, the Bank had given particulars of the sums due from the plaintiff. Although, by my calculations, that amounted to KShs.19,037,044/90, the plaintiff only raised a question about KShs.2,128,674/25, in respect of the temporary overdraft and "*Term Loan 2.*"

Surely, had the Bank not disbursed the sum of KShs.5.0 million, one would have expected the plaintiff to have raised that issue, at that stage.

Having given consideration to the material before me, I find, on a prima facie basis, that it is more probable than not that the Bank did release to the plaintiff the sum of KShs.5.0 million, after 5th March 2006.

Next, I will consider the issue as to the manner in which the debenture was drawn and executed.

The plaintiff expressly stated in paragraph 4 of the plaint, that;

"*By a debenture dated 7.3.2006 the plaintiff charged all its undertaking and property and assets as more therein specifically stated, in favour of the 1st Defendant to secure financial accommodation in the sum of KShs.5,000,000/=.*"

Thus in the plaint, the issue of the legality of the debenture does not arise.

My initial view on that issue is that it was not open to the plaintiff to raise it in its submission, without having raised it in the pleadings.

In any event, having stated that it is the plaintiff who "*charged*" all its undertaking, property and assets, it is my considered view that the plaintiff cannot now assert that it had not been shown that the debenture instrument was executed by its directors.

I also find, on a prima facie basis, that Mr. K. S. Ombaye advocate did not purport to sign in his capacity as a director of the plaintiff. In my understanding, he was merely witnessing the two directors of the plaintiff executing the debenture dated 7th March 2006.

The defendants did submit that that debenture was subsequently incorporated into the supplemental debenture dated 13th January 2007.

If the submissions of the defendants in that regard are accurate, the question that then begs to be answered is why, after the debenture dated 7th March 2006 had been incorporated into the debenture dated 13th January 2007, the Bank's notice of appointment of the Receivers still made reference to the earlier debenture only.

By posing that question, I am not in any manner suggesting that by incorporation of the debenture dated 7th March 2006, into the debenture dated 30th January 2007, the former ceased to have a life of its own. That, is an issue which will remain alive, for determination at the trial.

At this stage, if the defendants' contention was right, that the debenture dated 7th March 2006 had already been overtaken by events, it would follow that by citing that debenture as a basis for the appointment of the Receivers, the Bank erred. In effect, by the Defendants' own contention, the instrument upon which the Receivers' appointment was founded, had been overtaken by events.

The defendants have pointed out that the plaintiff had not complained about the efficacy of the debenture dated 30th January 2007. That is factually correct. But then, I do not see any reason why the plaintiff should have challenged the appointment of Receivers on the basis of that particular instrument, when the Bank expressly stated that the Receivers had been appointed on the strength of the debenture dated 7th March 2006.

For that very reason, it helps the defendants not, that pursuant to *Article 13* of the Supplemental Debenture, the Bank was permitted to appoint any persons, including its own officers, as Receivers.

However, it is important to note that by Article 20 of the Debenture dated 7th March 2006, the Bank was expressly authorized to appoint;

"*any person or persons whether an officer or officers or agent or agents of the Bank or not to be the receiver or receivers and manager or joint receivers or receivers and managers of the property and assets hereby charged……"*

In effect, it was a term of the contract between the Bank and the plaintiff that the officers of the Bank could be appointed Receivers of the plaintiff's property and assets. In the light of that express provision of the contract, it does appear that the plaintiff has no basis upon which to challenge the Bank's choice of the persons it appointed as Receivers.

As regards *section 103 (1)* of the Companies Act, if any person appoints a receiver or manager, whether such appointment be pursuant to an order or any instrument, he shall, within 7 days from the date of the order or of the appointment give notice to the registrar.

Form No.222 is the prescribed format of the notice to be issued under *section 103 (1).*

According to the plaintiff, a notice under section 103 must specify that the receivers were appointed pursuant to a debenture secured by a floating charge. In my understanding, all that is mandatory is for the person appointing the receivers to describe fully the instrument under which the appointment is made. Therefore if the instrument was a debenture secured by a fixed charge, that description would suffice.

In this case, the notice of appointment of the Receivers specified that the Receivers so appointed, to be receivers and managers;

"*jointly and severally of all the property and assets charged under Clause 16, 17, 18, 19 & 20 of the said Debenture and which constitutes a fixed charge …….."*

That description would appear to be at variance with the provisions of *clause 18* of the Debenture, which expressly states the said Debenture constituted a floating charge, which would only crystallize into a fixed charge if the Bank took action to enforce the Debenture.

However, upon further reflection, it is conceivable that the description was accurate, if it is considered that the Bank had actually taken steps to enforce the Debenture, thus causing the floating charge to immediately crystallize and attach by way of a fixed charge.

On a prima facie basis, therefore, I find that the description of the Debenture as constituting a fixed charge, is not necessarily so wrong as to invalidate the appointment of the receivers.

Meanwhile, *section 103* of the Companies Act does not require the notice of appointment of receivers, to be filed at the Companies Registry. The requirement is that the notice of the appointment of receivers be given to the registrar.

In this case the Bank has made available to the court a copy of the notice which it gave to the registrar.

The plaintiff may have carried out a search at the offices of the registrar of companies. However, the plaintiff has not demonstrated to this court that such a search could yield information which was given to the registrar, as opposed to information entered onto the register of the company.

On a prima facie basis, I find no reason, be it factual or legal, to doubt that the Bank did give to the Registrar a notice of appointment of the Receivers herein.

However, if the Bank and the Receivers had failed to notify the registrar about the appointment of the receivers, that would not, of itself, invalidate the appointment. By virtue of *section 103 (3)* of the Companies Act, the default would be punished by a fine of KShs.100/= for every day during which the default continued.

As regards attestation of the signature on the notice of appointment of the receivers, it does appear that the plaintiff is mistaken. On the face of that document, it is expressly stated as follows;

"*The Common Seal of Southern Credit Banking Corporation Limited was affixed in the presence of:*

DIRECTOR …………………………. (signed)

DIRECTOR …………………………. (signed)."

It would appear that the Common Seal of the Bank was affixed in the presence of two directors. If that be the case, it is not clear what further attestation the plaintiff had in mind.

As regards the Notice to the Registrar, I am not satisfied that the plaintiff has demonstrated any significant variation from *Form No.222* in the Companies Act, that could render the said notice invalid. On the face thereof, the notice appears to largely conform to the format.

It is, of course, true that the Notice did not specify the properties over which the receivers were appointed. However, it is noteworthy that in so doing, the Bank had actually chosen one of the three options available to a Debenture-holder. Those three options were to the effect that the receivers had been appointed as receiver;

"*(1) of the whole or substantially the whole of the*

property of this Company,

(2) of part of the property of this Company

(3) of the income arising from the property or part

of the property of this Company."

I find nothing wrong in the decision by the Bank to notify the registrar that the Receivers herein were appointed over "*part of the property of this company.*"

However, that notice is inconsistent with the terms of appointment of the Receivers.

On the one hand, the Receivers were explicitly told that their appointment was over all the assets of the plaintiff that were specified in the Debenture.

A look at the Debenture indicates that the plaintiff had basically offered, as security, all its immovable properties, vehicles, buildings and fixtures, all crops growing thereon and all liens, charges, options, agreements, rights and interests over land both present and future, all plant machinery, vehicles, computers and other equipment, all spare parts, replacements and additions etc.

All stocks-in-trade, uncalled capital, goodwill, patents, trade marks, and all other property assets and rights of the company were also cited in the Debenture.

If that be the position, it would follow that the notice to the registrar was at variance with the terms of the appointment of the Receivers.

In my considered view, it would be improper to allow the Receivers to proceed to take over all the assets of the plaintiff, pursuant to the terms of their appointment, whereas the registrar had been notified that the Receivers would only be taking action in respect of part of the plaintiff's property.

In the circumstances, should I proceed to grant the orders sought?

The two substantive orders sought by the plaintiff were as follows:

"*2. <u>THAT</u> pending the hearing and final determination of this application the Defendants, their servants and/or agents be stopped and restrained from acting or purporting to act as Receivers and Managers of the plaintiff and ordered to re-open and give access for the plaintiffs premises on plot Nos. KAKAMEGA TOWN BLOCK 1/60, Plot NO. BLOCK 7/160 Ronald Ngala Street Eldoret and Plot No. BLOCK 12/183 on Eldoret-Kapsabet Road (Nanak House Eldoret) and restore to them vehicle Nos. KAT 143 U Mitsubishi Canter, KAY 901 D FAW, a trailer No.ZC 2162, KAS 294 T Scania, KAS 525 Q Scania, trailer No. ZB 8945, KAX 891 Y Toyota Hiace and KAX 256 Toyota Hiace.*

3. <u>THAT</u> pending the hearing and determination of this suit the 2nd and 3rd defendant be stopped and restrained from acting or purporting to act as Receivers and Managers of this plaintiff."

On 1st July 2008, after the parties had concluded their submissions on the application, the court reserved its ruling for 16th September 2008.

Meanwhile, in appreciation of the fact that the ruling would not be delivered for about two months, the court urged the parties to arrive at an arrangement that would keep the Receivers in place, but at the same time ensure that the businesses of the plaintiff were running. The intention, as explained to the parties, was that the security of the Bank should be secure, whilst at the same time the plaintiff was able to carry on business, as it is only through the proceeds earned from the business that the Bank's debt would be paid off.

Following a brief meeting, the parties agreed that the business would re-open, and would be run jointly by the Receivers and the plaintiff's agents. Also, the repossessed vehicles were to be released, solely for use in running the business.

To my mind, the terms of that consent order constituted the determination of prayer (2) in the application before me. Therefore, all that now remained for determination by me, at this stage, is prayer (3), above.

Meanwhile, I have already made prima facie findings, in the following terms;

(a) The debenture dated 7th March 2006 is valid.

(b) The Bank did disburse money to the plaintiff after the Debenture was executed.

(c) The plaintiff was servicing the facilities, but had fallen into arrears, which fact the plaintiff did acknowledge.

(d) The Receiver and Managers were duly appointed and a notice of their appointment was given to the registrar.

(e) The appointment was over all the properties of the plaintiff, but the registrar was notified that the appointment was over only part of the plaintiff's property.

As the Debenture was valid, and as it was a term of the

said debenture that the Bank could appoint Receivers over the plaintiff if the plaintiff defaulted in its obligations under the Debenture; and as the plaintiff had acknowledged being in arrears, the Bank could not be restrained permanently, by injunction, from appointing a receiver.

In effect, the plaintiff has failed to establish a prima facie with a probability of success.

Secondly, the plaintiff had made a claim for general damages for loss of business and other damages. Therefore, it can only be presumed that the plaintiff has acknowledged that the losses that it is incurring due to the actions of the Defendants can be compensated in damages.

In the circumstances, the plaintiff has failed to meet the test laid down in GIELA Vs CASSMAN BROWN & CO. LTD. [1973] E.A. 358. Those tests were, firstly, the applicant must show a prima facie case with a probability of success; secondly, an interlocutory injunction would not normally be granted unless the applicant might suffer irreparable injury. Thirdly, the court, if in doubt, must decide the application on a balance of convenience.

I am aware that in the case of JAMBO BISCUITS (K) LTD. Vs. BARCLAYS BANK OF KENYA & OTHERS [2003] 2 E.A. 443, Hon. Ringera J. (as he then was), made the following observation, at page 451;

"*As regards whether the company would suffer irreparable loss and injury unless the injunctions sought are granted, I have no doubt that it would. The receivership would most probably result in the complete destruction of the business and good will of the company. From the evidence placed before me, it is already apparent within a month after the appointment of the receiver, the factory had come to almost a complete standstill. And I think it is a notorious fact, of which judicial notice may be taken, that receiverships in this country have tended to give the kiss of death to many a business. There is nothing in the stars or in the evidence before me to indicate that this receivership would be any different.*"

To my mind, receivers in Kenya ought to demonstrate that they can achieve the twin goals of paying-off the debts owed to the debenture-holders or to creditors, whilst at the same time sustaining the business over which the receiver was pointed. Unless that is done, it is more probable than not that if an application for an interlocutory injunction had to be determined on a balance of convenience, the courts would restrain the receivers before they could give a kiss of death to the business.

In this case, the Receivers are already in place. By being asked to restrain them from acting as Receivers, this court is being actually requested to terminate their appointments and to remove them. It would

appear that the plaintiff is seeking a mandatory injunction, couched in negative terms.

In the case of ESSO KENYA LIMITED V. MARK MAKWATA OKIYA, CIVIL APPEAL NO.69 OF 1991 (At Kisumu), Masime J.A. said;

"*The principle underlying the issue of injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgment in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory.*"

In the same case, A. B. Shah J.A. noted that;

"*if the possession was taken lawfully by the landlord I would have had no hesitation in saying that an application for restrictive injunction cannot invite mandatory orders.*"

I have deemed it necessary to point out that legal position because whereas the plaintiff herein had worded prayer (2) in such manner as incorporated an element of a mandatory injunction, the prayer for an interlocutory injunction pending the hearing and determination of the suit was only worded in the manner of a restrictive injunction. By so doing, the plaintiff was taking a risk, that no mandatory injunction might be ordered.

However, I am alive to the words of Masime J.A. (above-cited), which imply that if possession had not been obtained lawfully, an application for a restrictive injunction could invite mandatory orders, but only if the normal conditions for the making of a mandatory injunction were met by the applicant.

Hancox J.A. (as he then was) expressed himself thus in KIBIY ARAP YEGO Vs. EMILY & ANOTHER, CIVIL APPEAL NO. 73 OF 1985;

"*As was stated in THOMPSON V. PARK [1944]2 ALL E.R. 477, a litigant cannot wrongfully and illegally bring about a state of affairs and then apply to court to preserve that state of affairs as the status quo by way of an injunction.*"

In the light of that legal position, had this court come to the conclusion that the receivers had been appointed irregularly, I may well have contemplated giving a mandatory order, even though the application before me was for a restrictive injunction.

Having notified the registrar that the receivers had been appointed over only part of the plaintiff's property, the Bank cannot have the receivers carry out their work in the manner set out in their terms of the appointment. Until and unless the Defendants remedy the position, so that the terms for the appointment of the Receivers is consistent with the notice to the registrar, the receivers are restrained from carrying on their functions as receivers and managers over the property of the plaintiff.

This order is limited in its scope as it arises from an issue not addressed directly by any of the parties before me. However, it is an issue which the court could not ignore, once it came to my attention, at the stage when I was writing this ruling.

Finally, it is ordered that the costs of the application be in the cause. That is the order that commends itself to me , as the plaintiff basically failed to persuade the court on the grounds upon which it founded the application, but, nonetheless it did get a temporary reprieve. Therefore, to my mind, it would be in the interest of justice to allow the party or parties who is finally successful in the substantive suit, to also be awarded the costs of this interlocutory application.

Dated, Signed and Delivered, at Kakamega, this 16th day of September, 2008

FRED A. OCHIENG

J U D G E