



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 335 of 2008**

**PRINTING INDUSTRIES LIMITED.....1<sup>ST</sup> PLAINTIFF**

**MULTIPLE INDUSTRIES LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**BANK OF BARODA KENYA LIMITED.....DEFENDANT**

**RULING**

Before me are two applications. One application was filed in the present suit by the plaintiffs. The plaintiffs sought an order of injunction pursuant to the provisions of Order XXXIX Rules 1 & 2 of the Civil Procedure Rules and Section 3A and 63(e) of the Civil Procedure Act. The plaintiffs sought to restrain the defendant whether by itself or its duly appointed agents from transferring, leasing, alienating, disposing or otherwise whatsoever interfering with all that property known as LR No.209/6857 Nairobi (*hereinafter referred to as the suit property*) pending the hearing and determination of the suit. The plaintiff further sought a temporary injunction to restrain the defendant whether by itself or its duly appointed servants or agents from appointing a receiver to assume management of the plaintiffs' assets. The plaintiffs further sought an order of mandatory injunction to compel the defendant to release the securities and documents of title in respect of the suit property. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Kirit Dave, Horatius Da Gama Rose and Allan Kosgey. The application is opposed. R. Ravi swore a replying affidavit in opposition to the application.

The other application was filed by Ashif Kassam and Azim Virjee (*hereinafter referred to as the receivers*) against Horatius Da Gama Rose, Rommel Da Gama Rose, Kirit Kumar Hariprasad Dave, A. A. M. Awori (*hereinafter referred to as the directors of the 1<sup>st</sup> plaintiff*) and Printing Industries Limited. Ashif Kassam and Azim Virjee were appointed as receivers and managers of the 1<sup>st</sup> plaintiff by the defendant. The two made an application in Nairobi HC Misc. Cause No. 456 of 2008 under the provisions of Section 348 of the Companies Act, Rule 9(p) of the Companies (High Court) Rules and Rule 5(2) of the Companies (Winding Up) Rules. The applicants sought to restrain the directors of the 1<sup>st</sup> plaintiff from interfering with their work, rights, exercise of statutory duties under Sections 351 - 355 of the Companies Act and the functions of the said receivers over the 1<sup>st</sup> plaintiff or otherwise in anyway whatsoever and howsoever denying the said receivers entry, access and possession of the 1<sup>st</sup> plaintiff's business offices. The receivers further sought an order of the court to compel the directors of the 1<sup>st</sup> plaintiff to hand over all the books of accounts and other documents necessary for the running of the 1<sup>st</sup>

plaintiff as a business concern.

The receivers further sought an order of the court to compel the directors of the 1<sup>st</sup> plaintiff to return to the premises of the 1<sup>st</sup> plaintiff the goods that they had unlawfully removed from the 1<sup>st</sup> plaintiff's premises. The grounds in support of the application are on the face of the application. The application is opposed. Kirit Dave swore a replying affidavit in opposition to the application. The 1<sup>st</sup> plaintiff and its directors raised a preliminary objection to the receivers' application. They contended that the debenture dated 9<sup>th</sup> November 2004 pursuant to which the defendant had appointed the receivers was invalid, ineffectual and a nullity as it did not comply with the mandatory requirements of Section 96 of the Companies Act.

Mr. Kosgey for the plaintiffs and the directors of the 1<sup>st</sup> plaintiff and Mr. Murugara for the defendant and the receivers agreed to make submissions in respect of the two applications simultaneously. Mr. Kosgey submitted that the debentures upon which the defendant is relying on to appoint the receivers was invalid since the same were not registered within forty two (42) days as contemplated by Section 96 (2) (f) of the Companies Act. He explained that where a charge is not registered with the Registrar of Companies within forty two (42), days such charge is void and not voidable. He submitted that the charge in question was dated 9<sup>th</sup> November 2004. The certificate issued by the Registrar of Companies was dated 31<sup>st</sup> December 2004. The period between the two days was fifty one (51) days.

Mr. Kosgey submitted that Section 100 of the Companies Act required the endorsement of every certificate issued on every debenture. The date endorsed on the document is 31<sup>st</sup> December 2005 yet the Certificate of Registration indicates that it was issued 31<sup>st</sup> December 2004. He argued that the certificate of registration predated the date of presentation of the charge and the debenture. It was his submission that the discrepancy in dates was prima facie proof of fraud. As regards the debenture, he submitted that the date of registration was 21<sup>st</sup> November 2004. The debenture was dated 9<sup>th</sup> November 2004. The debenture was presented for registration on 31<sup>st</sup> December 2004. He maintained that the debenture was presented for registration after fifty two (52) days which was beyond the forty two (42) days contemplated by Section 96 of the Companies Act.

He relied on the Court of Appeal decision of Ibis Aviation Limited vs. Equatorial Commercial Bank & Anor CA Civil Application No. NAI 257 of 1999 (Nairobi) (unreported) where the Court of Appeal granted an injunction when it was established that the charge was registered beyond the period contemplated by Section 96 of the Companies Act. He submitted that Section 96 of the Companies Act declares any instrument not registered within the requisite forty two (42) days period as void. He urged the court to adopt the definition of what constitutes a void course of action by Lord Denning in Macfoy vs. United Africa Co. Ltd [1961] 3All ER 1169 at 1172.

He submitted that the defendant had charged unlawful penalties and interest on the plaintiffs' accounts. He maintained that the defendant breached the provisions of Section 39 of the Central Bank of Kenya Act and Section 44 of the Banking Act. He reiterated that the defendant had sought to exercise its statutory power in an oppressive manner and therefore should be restrained by means of a temporary injunction. He submitted that the plaintiffs had established a prima facie case having proved the fact that the defendant had used questionable documents to appoint receivers. He explained that the plaintiffs would suffer irreparable harm if the receivers are allowed to take control of the plaintiffs' business in view of the history of receiverships in the country which inevitably has led to the death of such businesses placed under receivership. He urged the court to allow the application with costs and dismiss the application filed by the receivers to be granted access to the business premises of the plaintiffs.

The application is opposed. Mr. Murugara for the defendant and the receivers relied on the affidavit sworn by R. Ravi in opposition to the application. He submitted that the debenture and the instrument of charge were properly registered at the company's registry. He explained that once the certificate of registration has been issued by the Registrar of Companies, it was not available for the plaintiffs to challenge the same. He maintained that Section 99 of the Companies Act afforded defence to the defendant as it provided that once a certificate of registration has been issued, it is conclusive evidence

that the security documents were properly presented and accepted for registration. He submitted that the plaintiffs were confusing the issue of presentation of the charge and the debenture to the registrar of Companies and the fact of its registration by the same Registrar.

He reiterated that any error in presentation of the documents to the Registrar of Companies was cured by Section 99 of Companies Act. He relied on the case of Mackenzie (Kenya) Ltd vs. Pharmico Limited [1977] KLR 270 where Simpson J (*as he was then*) held that once a debenture or a charge was registered and a certificate of registration issued, Section 99 of the Companies Act confirmed such registration as conclusive proof that the requirements regarding registration had been complied with. He further submitted that it was apparent that the plaintiffs were seeking to obtain an injunction on account of a dispute as to the amount owed in view of their assertion that the defendant had charged unlawful interest and other charges. He maintained that a dispute as to accounts was not a good ground for the grant of an order of injunction.

He submitted that any party aggrieved by the way the accounts were being maintained had a recourse to seek compensation by way of damages. He reiterated that the court could not restrain the receivers from taking over the plaintiffs' business premises since the receivers had already been appointed by the defendant after the deed of appointment was registered. He submitted that the directors of the 1<sup>st</sup> plaintiff had interfered with the work of the receivers by preventing them from having access to the business premises of the 1<sup>st</sup> plaintiff and further by refusing to hand over the books of accounts of the 1<sup>st</sup> plaintiff. He urged the court to exercise its powers under Section 348 of the Companies Act and grant the receivers the prayers sought in their application. He submitted that the plaintiffs had neither established a prima facie case nor proved that they would suffer any irreparable damage to enable this court grant them the injunction sought. He urged the court to dismiss the plaintiffs' application for injunction and conversely allow the receivers application as prayed in their application.

I have carefully considered the rival arguments made by the counsel for the parties to these applications. I have also considered the pleadings filed by each party in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established a case to entitle this court grant it the injunction sought. Another issue for determination is whether the receivers established a case to enable this court to invoke its powers under Section 348 of the Companies Act. The principles to be considered by this court in determining whether or not to grant the order of injunction sought are well settled. In Giella vs Cassman Brown [1973] EA 358 at page 360 Spry VP held that:

*"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)"*

Certain facts are more or less not disputed in this application. It is apparent that the charge and the debenture were registered beyond the forty two (42) days provided by Section 96 of the Companies Act, the charge is dated 9<sup>th</sup> November 2004 but was presented for registration on 31<sup>st</sup> December 2004. Similarly, the debenture is dated 9<sup>th</sup> November 2004 but was presented for registration on 31<sup>st</sup> December 2004. It is therefore clear that the two instruments were presented for registration beyond the forty two (42) days contemplated by Section 96 of the Companies Act. The said section states that where such instrument is presented for registration outside the specified period of forty two (42) days, then such an instrument shall be void. There is a proviso to the said section which states that:

*"...but without prejudice to any contract or obligation for payment of the money thereby secured, and when a charge becomes void under this section the money secured thereby shall immediately become payable"*.

Whether such an instrument is void for all purposes has been judicially considered by the court of appeal in the case of Ibis Aviation Ltd vs. Equatorial Commercial Bank Ltd & Anor. CA Civil Application No.

NAI 257 of 1999 (unreported). The court of appeal granted an injunction pending the hearing of the appeal when it was established that a debenture was registered outside the forty two (42) day period contemplated under Section 96 of the Companies Act. In that case, the Court of Appeal held that the applicant had established an arguable appeal to entitle the said court to grant the temporary injunction sought. Mr. Murugara relied on the case of Mackenzie (Kenya) Ltd vs. Pharmico Limited [1977] KLR 270 in support of his argument that even where it is established that they charge or debenture had been registered outside the forty two (42) day period, once a certificate of registration has been issued pursuant to the provisions of Section 99 of the Companies Act, such certificate shall be conclusive evidence that the requirements of the part as to registration had been complied with.

I have evaluated the opposing positions presented to me in regard to the interpretation that has been given to Section 96 and 99 of the Companies Act. I am of the view that the provisions of Section 96 of the Companies Act are clear. A debenture or a charge may not be presented for registration after the period of forty two (42) days specified in the said section has expired. A person who finds himself in such a situation is required to seek extension of time of the period that he is required to present such an instrument in an application to the High Court pursuant to Section 102 of the Companies Act. I do not subscribe to the argument present on behalf of the defendant by Mr. Murugara that the issuance of a certificate of registration under Section 99 of the Companies Act by the registrar of companies cured the defects in the charge or debenture. Section 99 of the Companies Act provides that;

*“The registrar shall give a certificate under his hand of the registration of any charge registered in pursuance of and within the period allowed under this part, stating that the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of this part as to registration have been complied with.”*

My interpretation of Section 99 is that the issuance of a certificate of registration by the registrar shall be conclusive evidence that the requirement of the part of the Companies Act as regard registration has been complied with provided the registration was made “...pursuant of and within the period allowed under this part.” It is evident that a registration made outside the period contemplated by the part (in this case Section 96 of the Companies Act) is not conclusive evidence that the requirements of the part as regard registration had been complied with.

Mr. Kosgey for the plaintiffs urged the court to find the said charge and debenture void on account of the fact that the said instruments were presented for registration outside the forty two (42) days period. I am not prepared to reach such a drastic conclusion without the benefit of evidence being adduced during the trial. However, the fact that it has been established by the plaintiffs that the said instruments of charge and debenture are documents which on their faces are challengeable, I hold that the plaintiffs have established a prima facie case to entitle this court grant them the temporary injunction sought. The granting of the temporary injunction herein does not imply that the plaintiffs have been absolved from their obligation to pay the money that is the subject of the charge and debenture.

I think an issue which will have to be resolved during the hearing of the case is whether, if the charge and the debenture are found to be void, the plaintiffs would be entitled to repay the amount that was advanced to them by the defendant together with interest and other charged. In the premises, although it is trite that a dispute over accounts cannot form a basis for the grant of an injunction, in the circumstances of this case, since there is probability that the charge and the debenture may be declared void, thereby affecting the amount that the plaintiffs would be required to repay the defendant, that is another issue that has persuaded this court to find that the plaintiffs established a prima facie case.

I will therefore grant the plaintiffs’ application in terms of prayer 2 and 3 of the application dated 20<sup>th</sup> June 2008 pending the hearing and determination of the suit. The receivers’ application dated 20<sup>th</sup> June 2008 against the directors of the 1<sup>st</sup> plaintiff seeking to invoke this court’s jurisdiction under Section 348 of the Companies Act is hereby dismissed. This is due to the fact that the debenture which the said receivers were appointed by the defendant has been impeached. The costs shall be in the cause.

DATED at NAIROBI this 15<sup>th</sup> day of OCTOBER 2008.

**L. KIMARU**

**JUDGE**