



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 697 of 2005

SONALUX LIMITED.....1ST PLAINTIFF

AFRICAN RETAIL TRADER (K) LTD (In Receivership)2ND PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT

ADRIAN SPENCER DEARING2ND DEFENDANT

JOHN STANLEY WARD.....3RD DEFENDANT

RULING

The Plaintiffs have brought the present action challenging the 1st Defendants act of appointment of 2nd and 3rd Defendants as receiver managers by the power donated by a debenture. The 1st Plaintiff had given its property L.R. NO. 209/601 as security for the 2nd Plaintiff's indebtedness to the 1st defendant. In that regard a charge was executed. In the present action the Plaintiffs also sought to restrain the defendants from selling the aforesated property in exercise of the statutory power of sale.

The plaintiffs have filed an interlocutory chamber summons application dated 19th December 2005. Prayers 1 to 4 sought interim orders pending the determination of the interlocutory application. The prayers which are subject of this ruling are follows:

- 1. That the Defendants be restrained by themselves, their agents or servants from acting and or purporting to act as Receiver/Managers of the Plaintiff and interfering in any manner with the Plaintiff's quite possession and enjoyment of all the plaintiffs' land properties, machinery, equipment, and assets pending the hearing and full determination of this suit.**
- 2. That the defendants be restrained by themselves, their agents or servants from advertising, selling, disposing off, offering for sale or alienating in any manner whatsoever any of the Plaintiffs' land, properties, machinery, equipment, assets or stock or any part therefore pending hearing and final determination of this suit.**
- 3. That the second and third defendants and or their agents or servants be ejected and removed from the Plaintiff's premises and the Plaintiffs possession of all the properties be restrained pending the hearing and determination of this suit.**

4. That the second and third defendants be ordered to deliver the statements of account, forthwith, since the date of appointment to date.

5. That defendants be restrained from advertising selling, disposing off, offering for sale by private treaty or public auction or alternating in any manner whatsoever any plaintiffs' Land, Properties, Machinery, Equipment Assets or Stocks or any part thereof pending hearing and determination of this suit under Section 52 of Indian Transfer of Property ACT.

The application is premised on grounds amongst which is the following:-

(i) The 1st Defendant has illegally and unlawfully and without justifiable cause appointed the 2nd and 3rd Defendants as receivers/managers of the second plaintiff.

To support this ground the director of the 2nd Plaintiff deponed in the affidavit in support of the application that the 2nd Plaintiff had an overdraft facility with the 1st defendant for a maximum, limit of kshs 200 million. This was secured by debt book and debenture instrument. The 2nd Plaintiff paid its debts to the 1st Defendant as and when they were due and maintained the overdraft within the approved limits. That the plaintiffs made various complaints by letters, of the wrongly debit or increment of interest rates which complaint did not receive response from the 1st defendant. That the 1st defendant made demand by their letter dated 11.2.2005 demanding repayment of kshs 200, 538, 356. 55. That on that same day of demand the 1st defendant appointed 2nd and 3rd defendant as receiver/managers. That appointment the deponent described it as being Mala fides which had the ulterior motive of the 1st Defendant intention to sell the 1st Plaintiff's charged property. That the charged instrument did not include the house on that property.

The other ground is that;

(ii) The 2nd and 3rd Defendant have moved into and taken possession of the premises of 2nd Plaintiff as the appointed receiver/ managers and as a consequence the 2nd Plaintiffs business has deteriorated.

In support of that ground the deponent stated that the receiver/managers had put the plaintiff's assets, equipment, machinery, stock and the whole business at risk as they intended to sell the charged property by private treaty for less than the market value.

The deponent further stated that the receiver/managers had failed to give account of what had been received on behalf of the plaintiffs.

In a further affidavit of the deponent he stated that after the appointment of the receiver manager the 2nd Plaintiff's directors did not have meaningful involvement with the 2nd Plaintiff Company and the directors who remained therein only remained to ensure the 2nd Plaintiff's business was continuing as usual and to give confidence to staff members. That the receiver/managers deceived the said directors by leading them to believe that they intended to continue running the 2nd Plaintiff's business but eventually sold the business at an under sale.

The deponent further alleged that the charge instrument over property L.R. No. 209/601, was invalid for lack of consideration since it was charged with the intention that it was to secure a further loan by the 1st defendant to the 1st Plaintiff of kshs 67 million which was never dispersed.

In reply to the application 1st Defendant set out in the affidavit the various terms of the debenture one of those terms being all monies, obligation and liabilities secured were immediately to become due and payable. That after such demand the 1st Defendant could appoint any person to be receiver over any or all charged property. That the charge over 1st Plaintiff's property L.R. No. 209/601 was to secure the 2nd plaintiff's indebtedness to the 1st Defendant. The 1st Defendant denied that the 2nd Plaintiff paid the

loans when due but that they had a poor record of repayments. That there were meetings in the year 2004 where the problems facing the 2nd Plaintiff's business were discussed. That after appointing the receiver/managers in accordance with the provisions of the debenture the said receiver/managers sold rights over various hire purchase agreements and assets belonging to the 2nd plaintiff.

The 2nd Defendant swore an affidavit in response to the Plaintiffs' application. He confirmed that he together with his co-receiver/manger worked very closely with directors of 2nd Plaintiff and to that end he annexed copies of correspondence, memos and minutes of meeting. That in one such meeting with those directors it was agreed that it would be most acceptable if the 2nd Plaintiff business was sold. In this regard that the directors of the 2nd plaintiff assisted to identify potential buyers of the business. That after meeting and considering the various parties who had sworn an interest to purchase the business only one company showed an interest and had capacity to so purchase. The deponent concluded by saying that they together with the 3rd Defendant had discharged their duties properly and were intending to file a receipt and payments with Registrar of Companies when they complete one year of their receivership.

The parties relied on many authorities and although the court has considered them I do not intend to quote all in this ruling.

The plaintiffs have argued that the 1st defendant is prevented from selling the charged property by virtue of section 52 TPA. That section provide: -

“During the active prosecution in any court having authority in British India, or established beyond the limits of British India by the Governor-General in council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or to otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.”

The plaintiff's relied on the case **HCCC No. 2603 of 1995 METHI AND SWANI FARMERS CO-OP SOCIETY LTD – V – THE CO-OP BANK OF KENYA LTD AND ANOTHER**. The Plaintiff sought injunction to stop sale of this property which was charged to the defendants. The plaintiffs in that case relied on Section 52 TPA and the court had the following to say therein: -

“Section 52 TPA has an injunction affecting all the parties to the suit.so whether or not I grant injunction, section 52 TPA does itself prohibit dealing in property in dispute in Civil Proceedings.”

The Plaintiffs' stand in the present application is that the charge instrument is invalid for lack of consideration. In support of that argument the plaintiffs relied on the case of **C.A. NO. 14 of 2005 MAPIS INVESTMENT (K) LTD – AND – KENYA RAILWAYS CORPORATION** where the respondent to the appeal raised a ground that the contract between the parties was illegal. The court of Appeal quoted with approval a passage of the case **SCOTT – V – BROWN, DOERING MCNAB & CO (3) [1892] 2 QB 724** at page 728:-

“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality it matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality the court ought not to assist him.”

In support of the plaintiff's prayer for mandatory injunction for the removal of receiver/managers the Plaintiffs relied on two cases. The first is the judgment of TUNOI J.A., in the case of **C.A. NO. 51 OF 2000 FINA BANK LTD V SPARES & INDUSTRIES LTD** as follows:

“The issue of receivership is an emotive one and I understand why the respondent had to resort to litigation. It destroys the business.”

The second case is **HCCC NO. 1833 OF 2001 JAMBO BISCUIT (K) LTD V – BARCLAYS BANK OF KENYA LTD** as follows:-

“And I think it is a notorious fact of which judicial notice may be taken that receivership in this country have tendered to give the Kiss of death to many business.”

The defence relied on the case **PETER KIMONYE – V – BARCLAYS BANK OF KENYA HCCC NO. 403 OF 2004** where it was held: -

“It has been held in many cases that the court will not normally grant an injunction to restrain a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage.”

Defendants also relied on the case **DESAI AND OTHERS – V – FINA BANK LTD [2001] LLR 2690 (CCK)** where the court responded to the argument relating to interest rates as follows: -

“Thus in litigated cases, the courts have starting with the case of PELICAN investment Ltd and another – V – National Bank of Kenya (Civil Case NO. 570 of 1998) consistently held, and quite correctly if I may say so, that courts will not interfere on matters of interest charged arising from contracts.”

The above summarizes the arguments presented by the parties in respect of the plaintiff’s interlocutory application for injunction. It ought to be noted that indeed the application is interlocutory and in making any finding in this ruling I ought to be cautious not to interfere with the discretion of the trial judge who shall receive evidence in respect of the issues raised in the present application.

The plaintiffs alleged that they made payment towards the loan when the same were due. In making that statement the Plaintiffs did not claim to have fully repaid the amount due to the 1st defendant. Indeed what seems to be the plaintiffs main complaint is the allegation of wrong application of interest rate. Clause No. 2 of the Debenture stated in respect of application of interest to the plaintiffs’ indebtedness: -

“the Company shall pay, interest,at the rates and upon terms from time to time agreed with the bank or, if not so agreed, at such rate or rates (not exceeding any maximum permitted by law and subject to a minimum rate of six per cent per annum over the base rate of the bank from time to time as the Bank may in its absolute discretion, determine with power for the bank to charge different rates for different accounts.”

The plaintiffs in claiming that the 1st defendant applied the wrong interest rate failed to show what was wrong with that applied interest rate taking into account the aforesaid clause. The burden of proof was upon the plaintiffs to so prove the wrong application but they failed to discharge that burden.

Having in mind that the plaintiff did not state that they were not indebted to the 1st defendant then the plaintiff’s argument that the appointment of receiver/manger on a prima facie basis must fail. The debenture provided by virtue of clause 16 that on demand being made the 1st defendant was entitled to appoint the receiver/managers. That clause does not provide the period of time that ought to expire before receivers are appointed after demand. That clause simply provides that such appointment shall be after the Bank has made demand for payment.

On the issue of the charge instrument being void for lack of consideration I respond by saying that clause 2 of the charge provided that the consideration was advances to be made to the 2nd plaintiff and also the 1st defendants refrain from making demand of immediate payment of the debt owed by the 2nd Defendant. I am of the view on prima facie basis that those two provide sufficient consideration.

The 2nd and 3rd Defendant confirmed that they were intending to file the record of receipts and payments, made on behalf of the 2nd Plaintiff with the Registrar of Companies within the year of receivership. The Plaintiff had raised as one of the ground for injunction to be the said failure to file these returns. I am of the view on a prima facie basis that such failure cannot be reason to move this court to grant injunction as sought by the Plaintiffs.

I have in totality examined the Plaintiffs application and the affidavit evidence and I find that the plaintiffs have failed to satisfy the first test in the case of **GIELLA V CASSMAN BROUWN [1973] EA 358**. The Plaintiffs have failed to show a prima facie case with probability of success. The second test on irreparable loss the plaintiffs will suffer, this one too plaintiffs have failed to satisfy. The issues raised by the plaintiffs clearly is quantifiable and if quantifiable it cannot be said to be of irreparable loss. I find that I am not in doubt in respect of those two tests and accordingly I do not have to consider the third test of that case, that is where the balance of convenience lies.

I do need to consider the ground raised by the plaintiffs in respect of section 52 TPA. I am of the considered view that once the power of sale has arisen a party cannot hide behind the provisions of that section and seek to stop sale of a charged property. It cannot have been the intention of the Legislature to have sections of any statute that contradicts each other. The TPA recognizes that once a demand is made as provided by section 69 A of TPA a chargee may proceed with the sale of a charged property. If that be so, then section 52 cannot stop that right by providing an injunction against that sale. I reject the Plaintiffs reliance on Section 52 in that regard.

The end result in that the plaintiff's application by chamber summons dated 19th December 2005 is dismissed with costs to the defendants.

Dated and delivered this 29th day of January 2007.

MARY KASANGO

JUDGE