



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

Civil Case 1267 of 2001

HUDSON ENTERPRISES LIMITED.....
PLAINTIFF

VERSUS

KENYA COLD STORAGE (FOODS) LIMITED..... 1ST
DEFENDANT

SKYVIEW INVESTMENTS LIMITED

(under purported Receivership)..... 2ND
DEFENDANT

DIAMOND JAMAL t/a SAMVIR REGISTRARS3RD
DEFENDANT

ZUL H. ALIBBHAI t/a

EQUATORIAL SECRETARIES & REGISTRARS 4TH
DEFENDANT

KASSAM-LAKHA SAMVIR ABDULLA (SUED AS A FIRM)5TH
DEFENDANT

AKBAR KURJI 6TH
DEFENDANT

AZIM VERJEE 7TH
DEFENDANT

DIAMOND JAMAL 8TH
DEFENDANT

SHAMSHERALI KARIM KURJI 9TH
DEFENDANT

SADRUDIN KARIM KURJI 10TH

DEFENDANT

**NARASIMHALU SANTHANAM 11TH
DEFENDANT**

**PADMANABHAN RAMA IYER 12TH
DEFENDANT**

**SOUTHERN CREDIT BANKING CORPORATION LIMITED13TH
DEFENDANT**

**NASHIR NATHOO 14TH
DEFENDANT**

**MEHBOOB SHARIFF 15TH
DEFENDANT**

**WILFRED NYASIMI OROKO 16TH
DEFENDANT**

**SAMUEL WANJOHI MUNDIA 17TH
DEFENDANT**

RULING

Before me is an application by the Plaintiff by way of Notice of Motion dated 24.2.2005. There are two primary prayers remaining for determination. These are that an injunction be issued restraining the 16th and 17th defendants by themselves their agents from selling or attempting to sell or part with any of the assets of the 2nd defendant and the 13th defendant from causing or allowing such sale to take place and that the appointment of the 16th and 17th defendants under and by virtue of the debenture dated 10/7/2001 be set aside. The principal grounds for the application are as follows:-

(a) That the 2nd defendant entered into the said debenture fraudulently in order to deprive the plaintiff of its investment in the 2nd defendant.

(b) That by an agreement dated 29.8.2001 between Southern Credit Banking Corporation Ltd. (the 13th defendant) and Bullion Bank Ltd., the two agreed to merge and to trade under the name Bullion Bank Ltd. consequent upon which an application was made to the High Court for inter alia transfer of all property rights and powers of the 13th defendant to Bullion Bank Ltd. and for the dissolution of the 13th defendant which ceased to exist.

(c) That by a Certificate of Change of Name issued by the Registrar of Companies on 1.2.2002, Bullion bank changed its name to Southern Credit Banking Corporation Ltd.

(d) That the purported appointment of the 14th and 15th defendants on 15.1.2002 as Receivers and Managers of the 2nd defendant was irregular, unlawful, null and void as the 13th defendant had no legal existence then and the purported appointment of the 16th and 17th defendants as joint Receivers and Managers in place of the 14th and 15th defendants is irregular, unlawful and null and void.

(c) That the said debenture was never properly and legally transferred to Bullion Bank Ltd. which bank changed to southern Credit Banking Corporation Ltd. w.e.f. 1.2.2002 and consequently the 13th defendant had no legal rights to enforce the said debenture or claim any monies under the

debenture.

(d) That the alleged loan to the 2nd defendant and the said debenture are consequently fraudulent in that any monies received by the 2nd defendant as a loan were never intended to be and were not in fact not used for the benefit of the 2nd defendant and were infact withdrawn and used by the 6th, 9th and 10th defendants and or their companies or for the benefit of businesses.

(e) That the 2nd defendant had ceased business operations as of April 2000 and did not need or require any monies for the purposes of business and its name was used as the borrower by the said 6th, 9th and 10th defendants with the knowledge, assistance and active participation of the 11th and 12th defendants all of whom acted with interest to defraud the plaintiff of its investment in the 2nd defendant.

(f) That the said debenture was created without consideration or alternatively was for past consideration and was merely entered into to defraud the plaintiff of its investment aforesaid.

(g) That the 6th, 9th, 10th, 11th, 12th, 13th, 14th and 15th defendants conspired and combined among themselves to which conspiracy the 16th and 17th defendants have become parties to defraud the plaintiff of its investment in the 2nd defendant to the extent of the monies allegedly due under the alleged debenture in favour of the 13th defendant.

The application is supported by affidavits sworn by Rosemary Elizabeth Marr and James Michael Spittal both directors of the plaintiff. The application is opposed on the basis of a replying affidavit sworn on 5.6.2002 by one Wilfred Nyasimi Oroko the 13th defendant's Legal Officer. He swore the affidavit on behalf of the 13th defendant and with the authority of the 14th and 15th defendants.

The application was canvassed before me at length on various dates by Mr. Nagpal, Learned Counsel for the plaintiff and Mr. Ougo, Learned Counsel for the thirteenth, fourteenth, fifteenth, sixteenth and seventeenth defendants. The principal issues debated before me would appear to be as follows:-

- 1. The Legal competence of the 2nd defendant to seek and be granted financial facilities from the 13th defendant.**
- 2. The validity of the debenture entered into between the 2nd defendant and the 13th defendant over the assets of the 2nd defendant.**
- 3. Whether or not the transactions between the 2nd defendant and its directors, and the 13th defendants and its directors are tainted with fraud.**
- 4. The validity of the Replying Affidavit of Wilfred Nyasimi Oroko sworn on 5.6.2002 in response to the plaintiff's Application.**

5. Generally, whether the orders sought could be issued as

prayed.

I will consider this application in the light of the principles applicable to the grant of an interlocutory injunction which were laid down in the precedent setting case of **Giella vs. Cassman Brown & Company Ltd. & Another [1973] EA 358**. The principles are as follows: First, the applicant must show a **prima facie** case with a probability of success at the trial but if the court is in doubt it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages.

The plaintiff's case in a nutshell is as follows: In 1995 it entered into a joint venture agreement (hereinafter "**the agreement**") with the 1st and 2nd defendants to carry on the business of the 2nd defendant with the plaintiff and the 1st defendant being equal shareholders of the 2nd defendant. A declaration of Trust was executed to the effect that the 1st defendant was holding 500 shares in the 2nd defendant in trust for the plaintiff. A representative of the plaintiff was to be appointed a director of the 2nd defendant and subscription for 499 shares of Shs.100/= each in the 2nd defendant was to be made available to the plaintiff. Pursuant to the same agreement certain things would only be done with the consent of the plaintiff. These included creating any fixed or floating charge over the properties or assets of the 2nd defendant, borrowing in excess of USD 100,000 and holding a shareholders or purporting to transact any business at a meeting unless there were present duly authorized representatives or proxies for each shareholder.

Pursuant to the said agreement, the plaintiff made various payments including payments for the purchase of machinery for the 2nd defendant and payments for the said shares in the 2nd defendant. The said agreement was not honoured and the defendants have committed various acts of fraud against the plaintiff as a result of which the plaintiff has suffered loss. The alleged acts of fraud and particulars of loss are set out in the further re-amended plaint and the affidavits of the said James Michael Spittal and Rosemary Elizabeth Marr. The 13th, 14th, 15th, 16th and 17th defendants are alleged to be parties to an alleged huge conspiracy to defraud the plaintiff. In the premises, the debenture pursuant to which the 13th defendant appointed the 14th, 15th, 16th and 17th defendants is alleged to be unenforceable. It is also further contended by the plaintiff that the alleged debenture was created without consideration or that the consideration was a past consideration and further that at the time of the creation of the debenture the 2nd defendant had ceased to exist and was not trading.

The gist of the case for the 13th, 14th, 15th, 16th and 17th defendants is that the 2nd defendant obtained financial accommodation from the 13th defendant and secured the same inter alia by a debenture over the 2nd defendants' properties and assets. The 2nd defendant defaulted in the repayment of the financial facility and pursuant to the said debenture the 13th defendant appointed the 14th, 15th, 16th and 17th defendants as Receivers and Managers of the 2nd defendant at the times stated in the pleadings. They contend that, there was no fraud or conspiracy in the granting of the financial facility and in the subsequent appointment of the Receivers and Managers. In their view the debenture over the properties and assets of the 2nd defendant was for good consideration. In any event the defendants contend the plaintiff lacks locus standi to challenge the said debenture and the appointment of the Receivers and Managers. In the premises the defendants contend that the orders sought by the plaintiff should not be granted.

I will first consider the objection raised against the replying affidavit of Wilfred Nyasimi Oroko sworn on 5th June 2002. The objection is multi pronged and in the plaintiff's view the replying affidavit is of no evidentiary value at all. If I understood counsel for the plaintiff correctly, his arguments against the replying affidavit were that the said Wilfred Nyasimi Oroko as the Legal Officer of the 13th defendant was not a banker and could not depone to matters relating to the 13th defendant without disclosing the sources of his knowledge or information and grounds for his belief. Oroko should further have indicated

the matters that were based on knowledge information or on perusal of the documents. In support of these objections several authorities were cited some of which I will refer to in this ruling. **In Bombay Flour Mill vs. Chunibhai M. Patel – [1962] E. A. 803**, the predecessor of the present Court of Appeal held that an affidavit in which the deponent's means of knowledge or sources of information and belief were not stated was incompetent and could not support an application for leave to appear and defend a suit. The same decision had been made in the case of **A.N. Phakay vs. World Trade Agencies Ltd. [XV EACA] 1** and in that of **Noormohamed Janmohamed vs. Kassamali Verji [20 EACA 8]**. In **Assanand & Sons vs. EA Music Stores [1959] EA 364** the same court found to be deficient an affidavit which did not set out the deponents means of knowledge or belief and also did not distinguish between matters stated on information and belief and matters deposed to from knowledge. That was also the decision in the case of **Standard Goods Corporation Ltd. vs. Harchand Nathu & Co. [XVII EACA 99]**.

Counsel for the 13th, 14th, 15th, 16th and 17th defendants in response to the objection raised against the replying affidavit argued that the objection was not valid and was for rejection. He placed reliance upon the decision of the Court of Appeal in **Pattni v. Ali and Others [2005] 1 EA 339** for the proposition that there is no obligation on the deponent of an affidavit to distinguish what he swears to on knowledge, and what on information and belief as the court would itself examine the affidavit and determine from a clear reading of it which averments emanate from what source. The court also held that there is no prohibition against an advocate who of his knowledge can prove some facts, to state them in an affidavit on behalf of his client.

The 13th defendant is a corporate body and cannot itself swear an affidavit. It however has capacity to authorize one of its officers to swear an affidavit on its behalf. Mr. Wilfred Nyasimi Oroko in the replying affidavit aforesaid has deponed that the 13th defendant authorized him to swear the affidavit on its behalf. He is its Legal Officer and there can be no question that he could not be authorized to swear the replying affidavit on its behalf. Indeed no such challenge is made. Mr. Oroko has sworn the replying affidavit as an authorized officer of the 13th defendant in this case. He has also sworn that the 14th and 15th defendants have authorized him to swear the replying affidavit on their behalf. Although counsel for the plaintiff took objection to the latter averment, no basis of the objection was made nor did he cite any authority to buttress his objection. I am not aware of any authority on the proposition. I however, see no prohibition for a deponent swearing an affidavit on the authority of another or others.

With regard to the objection made on the failure of Mr. Oroko to distinguish facts or matters deponed on knowledge and those on information or belief, the short answer is given in the decision of the Court of Appeal in the case of **Pattni vs. Ali and others** (supra) in which the court held that there is no obligation on the deponent of an affidavit to make such distinction. The case of **Standard Goods vs. Harakchand Mathu & Co** (supra) upon which counsel for the plaintiff relied for the plaintiff's objection was discredited. The Learned Judges of the Court of Appeal specifically held that the court could itself examine the affidavit and determine from a clear reading of the affidavit which averments emanate from what source. As the court further observed, the trend since 1963 has been to entertain equitable principles in considering affidavits and the court will look at the substance rather than the formal contents of an affidavit. On the authority of the decision in the **Pattni vs. Ali & Other case** and in line with the principles that have guided the courts since 1963, the replying affidavit of Wilfred Nyasimi Oroko aforesaid cannot be said to be fatally defective. Indeed in my view, it would withstand more scrutiny than the affidavit that the Court of Appeal was considering in the said **Pattni vs. Ali** case (supra). Mr. Oroko swears that he is fully conversant with the facts deposed to in the affidavit and can positively swear thereto. He could only be in that position as an officer of the 13th defendant. So as in the **Pattni vs. Ali** case the bulk of the averments in the Mr. Oroko's affidavit are derived from personal knowledge acquired by him as the Legal Officer of the 13th defendant. He has deposed to the financial facility granted by the 13th defendant to the 2nd defendant which facility was secured by a debenture and directors' guarantees. In my view as the Legal Officer of the 13th defendant he is the best qualified to depone to those facts. Indeed the depositions in paragraphs 3, 4, 5, 7 and 9 relate to facts and matters that could be derived from knowledge acquired by Mr. Oroko as the Legal Officer of the 13th defendant. Paragraph 6 is self-explanatory. The facts therein are derived from books held by the 13th defendant to which Mr. Oroko

obviously had access as its Legal Officer. Paragraph 8 contains a denial of the allegation of fraud and which officer could be in a better position to depone to such a fact than the Legal expert of the 13th defendant? It is clear therefore from my own examination of Mr. Oroko's affidavit that a determination of which averments emanate from what source is possible and I find no portions of the affidavit that should be rejected.

Turning back to the plaintiff's application for injunction as already stated above the application is predicated upon allegations of fraud and conspiracy against all the defendants. Yet the 16th and 17th defendants have filed no response at all. Their Counsel relied upon the replying affidavit of Wilfred Nyasimi Oroko which affidavit was sworn on 5th June 2002 long before the 16th and 17th defendants became parties to this suit. I am afraid, Mr. Oroko's said affidavit is not an answer to the allegations made against the 16th and 17th defendants. Yet the said defendants are the Receivers and Managers appointed by the 13th defendant pursuant to the debenture dated 19.7.2001 which debenture is challenged by the plaintiff. I remind myself that despite the period taken to canvass this matter, the same is still at the interlocutory stage and I am not called upon to decide with finality on the facts or the law, especially as all I have is affidavit evidence and the submissions made thereon by counsel (see *Shitakha -vs- Mwamodo & 4 others* [1986] KLR 445). On a prima facie basis however, the following has emerged. The impugned debenture pursuant to which the 14th to 17th defendants were appointed is dated 19.7.2001. But Mr. Oroko deponed in the replying affidavit aforesaid at paragraph 3 that the 13th defendant granted to the 2nd defendant an overdraft facility of Kshs.13,500,000/= on 4.12.2001. The overdraft was therefore granted more than 5 months from the date of the debenture. Mr. Oroko's deposition is however, contradicted by his own documents including his own letter dated 15.10.2001 in which the 13th defendant threatened Legal proceedings against the 2nd defendant unless the latter regularized the operation of the overdraft. That letter indicated that as at 30.9.2001, the outstanding amount on the overdraft account stood at Kshs.16,287,257.05. How could a demand to regularize the overdraft account be made even before the overdraft was granted? The plaintiff's complaint that the debenture is not enforceable as it was created without consideration or on a past consideration may not be altogether unfounded.

The plaintiff has further complained that by an agreement dated 29.8.2001, the 13th defendant and Bullion Bank Ltd. merged and agreed to trade under the name of Bullion Bank Ltd. and all the property rights and powers of the 13th defendant were transferred to Bullion Bank Ltd. I have perused the order of the court in H.C. Misc. Cause No.191 of 1999. Paragraph 5 of that order was as follows:-

“5 That the transferor company do within fourteen days after the date of this order cause a certified copy of this order to be delivered to the Registrar of Company for registration and on such copy being so delivered, the transferor company shall be dissolved and the Registrar of Companies shall place all documents relating to the transferor company and registered under him on the file kept by him in relation to the transferee company and the files relating to the said two companies be consolidated accordingly.”

That order appears to have been given on 25.10.2001 and issued on 13.12.2001. Prima facie it would appear that by the time the 13th defendant granted the said overdraft to the 2nd defendant on 4.12.2001 it had been “dissolved”. There was however a change of name from Bullion Bank Limited to Southern Credit Banking Corporation Limited on 1.2.2002. Did the mere change of name validate the overdraft? Did it also operate as a transfer of the debenture?

In the light of the above, I am of the persuasion that the plaintiff has shown on a prima facie basis that the validity of the said debenture may be questionable.

The plaintiff has further complained that the 2nd defendant ceased trading by April 2000 and did not require funds. The replying affidavit of Oroko aforesaid does not deal with that complaint at all. The 13th to 17th defendants do not therefore challenge that complaint.

The plaintiff's complaints in my view buttress its allegations of fraud. As to whether it will finally succeed to prove the same at the trial is another matter all together. At this stage however, I am persuaded that the plaintiff has a prima facie case with a probability of success. It has shown that the debenture which is the foundation of the appointment of the 14th to 17th defendants by the 13th defendant may not be valid.

On whether the injury the plaintiff is likely to suffer if the injunction is not granted could be adequately compensated in damages, the plaintiff states that the 2nd defendant is not in business. Its investment cannot therefore be recovered from income generated by the 2nd defendant. Its only hope to make any recovery against the 2nd defendant if it succeeds can only remain alive if the injunction is granted. I agree.

In spite of the fact that the plaintiff's claim is quantifiable, in view of my above findings particularly on the allegations of fraud and the validity of the debenture, I hold that the plaintiff has crossed the 2nd hurdle set in the **Giella vs. Cassman Brown & Co. Ltd. (supra)**.

On balance of convenience, I find that the same tilts in favour of granting the injunction because unless the same is granted and it turns out at the trial that the debenture is invalid and that the defendants are guilty of fraud, the defendants would in effect benefit from their own wrong. The court cannot countenance such a result. It is indeed for that reason the all the cases relied upon by the 13th to 17th defendants are distinguishable from the present case. In **Ibrahim –vs – Sheikh Bros Investment Ltd [1973] EA 118**, the Court of Appeal allowed an appeal against an order of injunction restraining the Landlord from collecting rent. No fraud was alleged and the Lower Court had specifically found that damages would be adequate remedy for the respondent. In **Mureithi –vs- City Council of Nairobi [1981] KLR 332** again no fraud was alleged and the validity of the documents of title was not challenged as in this case.

With regard to the prayer that the appointment of the 14th to 17th defendants be set aside, I am afraid, I am not persuaded on the material before me at this stage that I should grant that order. There are allegations that the 2nd defendant has ceased to trade. Those allegations distinguish this case from the case of **Fina Bank Limited – vs – Spares and Industries [2000] 1 EA 52** which involved a company which was in business and which company had itself created the debenture. Besides the company was making regular payments of the loan and what was in contention were arrears due to high interest rates charged by the appellant. That case clearly stands on its own and does not in any way significantly advance the plaintiff's case. In the premises, I decline to grant that prayer.

In the end, I allow the plaintiff's Amended Notice of Motion amended on 24.2.2005 in terms of prayer 3 thereof until determination of this suit. The injunction granted is conditional upon the plaintiff filing an undertaking under its seal as to damages. Such undertaking to be fortified by a similar undertaking by one of its directors. The undertakings to be filed within the next 14 days.

Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 15th DAY OF FEBRUARY 2007.

Signed

F. AZANGALALA

JUDGE

15/2/2007

Read in the presence of :- Ougo for the 13th to the 17th defendants and Othieno Ms holding brief for Nagpal for the plaintiff.

Signed

F. AZANGALALA

JUDGE

15/2/2007