REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 485 of 2006

RASHIDA RAJABALI GANJIJEE & KHADIJA NAJMUDIN GANJIJEE

Executive of the Will of NAJMDIN JIWAJI GANIJEE.....PLAINTIFFS

VERSUS

HARVEEN GADHOKE .....1ST DEFENDANT

DENIEL MUTISYA NDONYE.....2ND DEFENDANT

GANIJEE GLASS MART LIMITED (In receivership)..... 3rd DEFENDANT

COMMERCIAL BANK OF AFRICA LIMITED.....4TH DFENDANT

RULING

The Plaintiffs herein have filed this suit against the defendants named vide their plaint dated 11th May 2006 and filed he same date. The key averments relevant to this ruling are those averred in paragraph 5,6,7,8,9,10 and 11. The salient features of the same are that the plaintiffs are the executors the will of **NAJIMUDIN JIWAJI GANIJEE** who was and still is the registered owner of land parcel No.209/7972, 12464, 209/136/238 all situated within Nairobi.

· The 3rd defendant Ganijee Glass Mart Limited (in receivership) I was and is still a tenant. The said properties were leased out on or about 1.3.1999 and tenancy was still subsisting when the 3rd defendant was placed under receivership by first American Bank the Predecessor of the 4th Defendant.

· As at the time of Receivership there was outstanding rent as particularized in paragraph 6 of the plaint, which had led the deceased to distrain for rent arrears on the goods of the 3rd defendant to satisfy rent arrears of 201,004,000.00.

· The distraint orders were issued by the Chief Magistrate at Milimani. They were issued to one **Stephen Nyamu Mbijiwe** t/a Lifeline Traders to break into the premises of the 3rd defendant and seize the said goods.

· That the 3rd defendant had challenged the said orders through Judicial Review in High COURT MISC. CAUSE NO.745/04 and obtained stay of the distraint orders but did not set aside the said distraint orders.

· As at the time the Plaintiffs come to Court in this current proceedings the 1st and 2nd defendants on eth contractions of 4th defendant had advertised the said property for sale on 2nd and 4th May 2006 in the local Dailies.

· The applicants were worried that the sale might go ahead, take place and have the property disposed off before Misc. Cause No.745/04 is determined.

· If the sale goes ahead the deceased's estate owned 275,570.000 as rent arrears will suffer irreparable loss.

In consequence thereof the plaintiffs sought orders that the 3rd defendants assets are not available for sale by the defendants until the final determination of the suit, a prohibitory injunction restraining the defendants whether by themselves, their servants or agents, contractors or employees from advertising for sale, selling, disposing, alienating and or in any other manner whatsoever or dealing with the assets proclaimed for attachment by the plaintiffs in distraint of rental arrears, and order of eviction against Ganijee Glass mart Limited (In receivership from the properties mentioned in prayer 15 (c) of the plaint) and order directed at the 1st, 2nd and 3rd defendants to deposit the outstanding rent arrears of Kshs 275,570.000.00 which continue to accrue at Kshs 3,242.000/= in court, costs of the suit, interests on (d) and (e) above at prevailing commercial rates. Any other or further relief that this court may deem to grant.

The plaint is accompanied by an application by way of chamber summons dated 11.5.2006 and filed the same date seeking restraint orders against the defendants/respondents whether by themselves, their servants or agents contractors or employees from further advertising for sale, securing, depositing, alienating and/or in any other manner whatsoever of dealing with the assets proclaimed for attachment by the plaintiffs and those advertised in the local dailies on 2nd and 4th May 2006 for sale by them pending firstly the hearing of the application inter parties and then thereafter pending the hearing and determination of the suit and that costs be provided for.

The grounds in support are set out in the grounds of the body of the application, supporting affidavits, annextures thereto, supplementary affidavits, annextures thereto oral submissions court and legal authorities relied on. Starting with the supporting affidavit the major grounds put forward there in are basically a reiteration of the averments in the plaint namely:-

1. That the Plaintiffs are the executors of a will of the deceased who owned the suit property subject of these proceedings.

2. That the said deceased had let out the said properties to the 3rd defendant which is a company in receivership which company failed to pay rent whose arrears have now accumulated to a colossal amount as at the time of filing of these proceedings being in excess of 275 million.

4. That the said owner prior to his death had obtained orders to distrain for rent in respect to the said premises. The said orders had been issued by Milimani Chief Magistrate's court.

5. That before the said orders were executed the 3rd defendant in conjunction with the first receiver manager moved to court and filed Misc.application No.745/04 in the High Court at Nairobi seeking judicial review of the orders issued by the Chief Magistrates court at Milimani. In the said proceedings the applicants obtained leave to file those proceedings, which leave was to operate as stay of the Chief Magistrate orders but were not to operate to lift the attachment.

6. Along the lines the Receiver managers changed and the incoming receiver mangers who are the first and 2nd defendants herein have advertised the same properties for sale.

7. The applicants have become aggrieved by the said advertisement for sale because if allowed to go through then it will jeopardize the outcome of the proceedings in the judicial review proceedings in Nairobi High Court Misc. Application no 745/04 as well as the interests of the landlord and render them nugatory.

8. That in view of the aforesaid matters injunctive orders should issue in terms of the orders prayed.

This court has also had occasion to examine the documents relied upon by the applicant when the matter was first filed in court which were annexed to the supporting affidavit. Annexture RRG1 is the will dated 21st day of December, 2004, RRG2 are the restraint orders dated 27.4.04 each in respect of distrain for rent on each of the properties subject of these proceedings. They are indicated to have been signed by one S.Mbijiwe whose signature was faint. These are followed by RRG 3,4 and 5 which are authority issued by the Chief Magistrates Court Milimani to the Auctioneers named therein to distrain for rent due in the amount specified and on the premises specified. It is to be noted that the case number of the Chief Magistrates, Court case from which the orders emanated has not been indicated on these documents, in the supporting affidavit or in the Counsels oral submissions in Court. The order granted in High Court Misc.app.745/04 annexed as RRG6 does not also mention the case number of the chief or Senior Resident Magistrate's Court whose orders were being sought to be quashed. Order 2 of the said order was to stay the orders/letters dated 18th May 2004 authorizing one Stephen Nyamu M. Mbijiwe to distrain for rent on the suit premises. RRG 7 are the advertisement for sale in the local Dailies dated 2nd and 4th May respectfully for sale of the said property. It is these advertisements which prompted the filing of this suit. Annexture RRG8 is a communication from the plaintiffs counsel warning those who had advertised the properties for sale on behalf of the receivers that the property advertised for sale is subject to distraint for rent orders. It is to be noted that the letter does not mention the case number in which the restraint orders were issued but names the judicial review Misc. cause number. The titles to the properties were not exhibited in the first instance.

The second portion of documentation in support of the application is that found is the supplementary supporting affidavit as well as annextures thereto which are a response to the defendants replying affidavit. The major contention in the supplementary affidavit is that it confirms the suit properties are property of the executors of the will of the owners of the property who was a landlord to the 3rd defendant through whom the 1st and second defendant claim title as receiver managers, the titles of the properties are not annexed lease Agreements as evidence that the said properties had been leased by the said landlord to the 3rd defendant are exhibited, they maintained that all the suits introduced by the defence are irrelevant to the issues subject of the inquiry herein and are merely meant to confuse the issues herein. They contend the issue of Res judicata does not apply here as the issues between the parties as presented herein have never been adjudicated and ruled upon in any other proceedings. They deny suppressing facts and maintain that the aim of the defence is to confuse the issues before Court. They maintain that a colossal amount of rent is owed to the deceased's estate and if the sale is allowed to go through the estate of the deceased will suffer irreparably and this will also be in contempt of the court orders in HC Misc.appliation 745/04. Their claim of indebtedness has not been denied by the 3rd defendant.

Turning to the annextures annexed to the supplementary affidavit Annexture RRG 1 is authority to swear. RRG2 in a plaint in Nairobi Milimani Commercial Courts civil Case No.1821 of 1999. There are three plaintiffs versus one defendant. The first plaintiff is the 3rd defendant herein while the 3rd plaintiff is the deceased herein. The second plaintiff is indicated as Pan Africa Glass Industries Ltd while the sole defendant was first American Bank of Kenya

Its importance to these proceedings is that LR. No. 12464 one of the suit properties mentioned in paragraphs 5 of he plaint herein as being part of the property owned by the deceased's estate is indicated in paragraph 4 of the said plaint in HCCC 1821 of 1999 to have been sold and transferred to Glass East Africa Limited with effect from 30th June 1999. Paragraph 6 of the plaint reads that "the first plaintiff company which is the 3rd defendant in the current proceedings was one of two companies owned jointly by the 3rd Plaintiff Najimudin and one Mohsinali Jinajee Ganijee (Mohsinali) who had incorporated the

said companies with his brother jointly."

Some of the releifs sought in the said proceedings as per paragraph 73(1) of the plaint that the attested mortgage and charge and or charges were not attested as by law provided or at all and are void and the third plaintiff prays for a declaration that the said documents are void and for an order and or orders and direction as appropriate that the registers be rectified by deletion of entries made in respect there of, an order or orders that the defendant be restrained from selling or otherwise disposing of the property of the first plaintiff and the immoveable properties of the third Plaintiff pending the determination of the suit, orders that the appointment of the receivers and manager be stayed and or in the alternative be vacated.

The defendant in that suit counter claimed for an order for specific performance requiring the 1st and 3rd Plaintiffs who are the current plaintiffs and 3rd defendant to execute mortgage transfer documents in respect of property mentioned in paragraph 80 of the defence and counter claim namely:-

(i) L.R.209/1221/5

(ii) L.R.209/6991

(iii) L.R.12464

(iv) L.R.No.209/7972

The Mortgage transfer was to be executed in favor of the said defendant. L.R. Nos 209/7972, 12464 mentioned in that suit 1821/1999 are two of the three properties mentioned in paragraphs 5 of the plaint subject of this ruling.

In paragraph 1 of the said plaint in 1821/99, the 3rd plaintiff therein who is represented by the Plaintiffs herein had complained that the defendants therein had coerced him into agreeing to sell a certain property to reduce the 1st and 2nd Plaintiffs alleged indebtedness to the defendant therein. The defendant in that suit responded vide paragraph 71(a) to the effect that the said sale was done with the full knowledge, consent and concurrence of the 3rd plaintiff.

The judgment to this case is dated 16.5.03 annexed to the replying affidavit as annexture H.G.4. After due consideration of the evidence Mwera J at pg 10 of the judgment made findings to the effect that (i) That the plaintiffs in whatever way they acted were the defendants' in customers who were offered banking and credit facilities starting way back on 14.10.94.

(ii) At the initial stage two properties were charged for 50 million but parties went on restructuring the facilities, letters of offer and securities up to 1998 when it was realized that while the 1st and 2nd plaintiffs owed the bank up to Kshs 108,994,369.16, Ganijee Brothers ltd owed the bank Kshs 179,894,206.60.

(iii) The Court was not satisfied that the defendant pushed or instigated the plaintiffs to carry out the separation of those two debtors by restructuring their share holding and directorships. All these was done voluntarily by passing due resolutions, transferring and registering share holding. Since the defendant was the creditor its consent was properly sought in the whole exercise but it was not shown that this was a forced assignment.

(iv) On 9.6.98 the Plaintiffs and whoever was concerned separated leading to total control of the first plaintiff being left in the hands of the 3rd Plaintiff and his sons Ijaz as (P.W.1) and Shiraz. Legal work was done by Salim Dhanji Advocates to effectuate the purpose and intent of the letter of 17.7.98. Notification of change of directors of the 1st Plaintiff was effected. Resolutions were passed accepting the terms of the letter of offer of 17.7.98 by both the 1st and 2nd Plaintiffs. The notification of change was signed by the 3rd Plaintiff and one of his sons Ijaz. On that basis the court made findings that when the1st and 2nd Plaintiff accepted the letters of offer, it was all valid. It was a valid and enforceable contract

binding the signatories thereto in its entirety. There was no question of giving afresh loan but only that the overdraft totaling shs 196 million had been restructured involving the 1st Plaintiffs, the 2nd Plaintiff and the three associate companies which themselves owed a total sum of shs 86,437,253.65 to the defendant. But which debt the 1st Plaintiffs (Ganijee Glass mart Ltd) assumed voluntarily in consideration of the accommodation the defendant was giving. The defendant was restructuring the debt and the repayment which definitely had accrued and there had been considerable difficult in servicing it.

(v) Before the suit was filed the 3rd Plaintiff sold some of his own property in Westlands Nairobi for some 20 million and on due instructions the defendant applied some of the proceeds to the account of the 1st Plaintiff after crediting the account of Ganijee Brothers Ltd first. Both sides seemed agreed that this sale was by consent of both.

(vi) A party may dispute interest on a debt but that cannot be a basis of injecting a creditor who has properly started on the way to exercise the right he has to get his debt paid.

(vii) At no time was it shown to this court that the plaintiffs were coerced and by misrepresentation of fact or use of tricks made to sign the letter of offer. It was sent to them on 17.7.98, they studied it and consulted about it agreed with what it contained and then signed on 31.7.98. The Plaintiffs are bound and they should honour that letter.

(viii) The debenture of 16.1.99 and the charges/mortgages of 18.1.99 were all securities in the subject transaction. They formed the basis on which the plaintiffs restructured their overdraft facility of shs 196 million. Lateness in time and any alteration to accord with the time they were ready does not invalidate them. If that were to be, then the court would be allowing the plaintiffs unjustified and unfair advantage and benefit in the circumstances. If they were not signed in time, it is equitable that because there were competent directors to do so, they should as well do so now.

(ix) The defendant was justified in appointing the receiver because there was a valid agreement for some financial facility between the parties on terms agreed. The Plaintiffs defaulted in performing their end of the bargain which was to regularly and fully pay what they owed. As at 30.6.99 the last date of the facility quite a substantial sum was owed. It was demanded. It was not paid. Indulgence of three months was granted. The Plaintiffs did nothing to rectify the account. On 29.9.99 the defendant moved to realize the security. By appointing receivers and getting them in place, it was entitled to do so. In the circumstances an injunction could not get into the way or that this court should send the receivers away.

(x) It is understandable that the Plaintiffs should fight this hard for their big business and assets but on the other hand the defendant bank cannot be denied relief on account of a bargain the plaintiffs have broken and the defendant money is at considerable risk of loss. One wonders even whether it will ever repay itself because the court was told that there have accrued high expenses in insurance, security etc as well as wastage.

(xi) The Plaintiffs suit is dismissed with costs while the counterclaim succeeds.

Annexture HG5 shows that an application was filed in this same file dated 17th December, 2003 brought by way of a chamber summons under order XXI rules 56 and 57 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provision of the law. The application was an objection proceedings initiated by Afab Establishment Ltd objecting to the attachment over property it claimed were its assets and secondly that the proclamation was unlawful. The supporting affidavit had been sworn by one Shiraz Nasimudin. The main argument was that the goods proclaimed belonged to the objector. In the course of the proceedings it transpired that the Receiver Manager had with effect from 29th September, 1999 been in possession of all the assets secured by the Debenture and that pursuant to the powers vested upon the Receiver Manager, the assets were advertised for Auction or sale by public auction to mitigate the daily storage charges. At page 5 of the ruling M.J.A. Emukule J. made findings that the Receiver Managers are entitled to advertise and sell the property comprised in the Debenture.

(2) The objector has no legal basis for approaching this court where a receiver manager is exercising a statutory power of a court decree.

(3) The Receivers were thus within their powers to offer the property for sale.

(4) The objection proceedings were an abuse of the due process of the court and the same was dismissed with costs on 17.3.2004.

In HG6 an application dated 6.6.2003 for stay of execution of the Judgment of Mwera J. delivered on 16.5.2003 pending appeal was made. In addition the application sought an injunction to restrain the defendants whether by itself or agent or otherwise from selling the assets of the first plaintiff whether by auctioneer or otherwise on 11th and 12th June 2003. Upon hearing, both sides J.G. Nyamu J. dismissed the application because it had not been presented promptly. 21 days delay was held to be unreasonable

(b) Security offered for the due performance of the decree was what had been taken possession of by the Receiver Manager and that was rejected.

(c) The defendant respondent was in a sound financial position to meet the decree should the appeal succeed.

In HG 7 the defendant applied to the honourable court to be allowed to execute the decree before taxation. The application by way of Notice of Motion is dated 25.6.2003. In granting the order sought Mohamed Ibrahim J. made the following findings at page 6-7 of the ruling "*I would understand the decree holders desire to execute forthwith. The first Plaintiff company is under receivership. The Plaintiffs were in are able to provide securities to justify the orders for Stay pending appeal. The defendants have a right to be anxious and apprehensive that a postponed execution pending taxation of their bill of costs would cause undue delay. The decretal sums continue to accumulate while the assets of the company naturally would continue to depreciate.*

There is no stay pending appeal. No prejudice can be suffered by the plaintiffs in an early execution of the decree as far as the law is concerned. Any postponement of payment as taxation of costs could only prejudice the Applicant. Considering the amount involved, the Applicant is entitled to go for it now. What is the use of taxation where there is doubt that the decretal sum will be satisfied at all."

The orders were granted on the 5th day of November, 2003.

In the same file of 1821 of 1999 an application was filed by the plaintiff to review the judgment of Mwera J. whereby Mwera J had held on 16.5.2003 that the Receivers appointed by the defendant were validity appointed. Objections raised to that application. After listening to the parties and a revist to relevant authorities on the subject the learned judge dismissed the Preliminary objection and ordered parties to proceed to fix the application for review.

High Court Civil Suit No.222 of 1999 has also featured prominently in the arguments of both sides. It had seven plaintiffs and three defendants. The plaintiffs listed are:-

1. AFAB Establishment Ltd

2. Gancon Ltd

3. Chem Tech Products Ltd

4. Instrumentation and Allied Electronics Limited

5. Glass East Africa Limited

6. Mines of Africa Ltd.

The defendants are listed as

1. Najmudin Jiwaji Ganijee

2. Andrew Douglas Gregory

3. Abdul Zaghir Sheikh

The averments relevant to this ruling are paragraphs 4 and 5 of the plaint. It is to the effect that the first defendant in that case who is represented by the current Plaintiffs was the owner of land parcel number 12464 while the Plaintiffs were tenants on the said premises. The 2nd and 3rd defendants were allegedly acting as Receiver and manager of Ganijee Glass Mart Ltd had raided the premises and impounded their various properties and had either sold them or were in the process of selling them and had displaced the Plaintiffs from the premises. In consequence thereof the Plaintiffs sought restraint orders in terms of temporary injunction, and mandatory injunctions against the 2nd and 3ad defendants as circumstances of the case permit and the return of all the properties that the 2nd and 3rd defendants had removed from the premises. They also sought special damages with interest and costs, general damages as well as any relief that this court may deem fit to grant.

The defence has not been annexed by either party. From the content of the ruling herein marked as HG8, it appears there was an interim application on this matter whose prayers are set out at page 1 of the ruling. After hearing all parties concerned, perusing numerous affidavits and reviewing the law A. Visram J made the following observations at page 7 of the ruling line 17 from the bottom of the page. "*Although the issue of tenancy was hotly contested a consideration of all the material placed before me and my visit to the suit premises did not prima facie establish any such tenancies. It was stated that some of these tenancies were made orally. The first defendant also purported to admit the existence of the tenancies but the material to support that assertion was very shaky that I am minded to agree with Mr. Regeru that this was a fabrication to defeat the claims of the joint Receivers and Managers. When I visited the suit premises, there was no evidence of such tenancies. For companies which argued to be of substance, I was surprised that they did not have paper business sign boards. All there was were make shift computer-generated pieces of paper and which were identical in respect of all of the plaintiffs.*

Further most of the property if not all found at the suit premises have the marks showing that it was the property of the debtors under the debenture. I did not see any stock belonging to the plaintiffs at the suit premises even the evidence on the rents paid was contradictory raising suspicion whether any such tenancies exist". On that account the plaintiff's application was dismissed on 4.12.2001 with costs.

Though the pleadings are not exhibited there is a ruling in a case NAIROBI/MILIMANI COMMERCIAL COUART CASE NO.752 OF 2003. The Plaintiff therein is **GANIJEE GALSS MART LTD** in **RECEIVERSHIP VERSUS FIRST AMERICAN BANK OF KENYA LIMITED, ANDREW DOUGLASS GREGORY AND ABDUL SHEIKH.** The result is that the suit as well the interlocutory application was struck out on the basis of estoppel and res judicata because the issues in dispute in this matter namely the validity of the debenture held by the defendants had been substantially dealt with in **NAIROBI MILIMANI COMMERCIAL COURTS CASE NO.1821 OF 1999.**

There is on record a memorandum of appeal and a record of appeal to the Court of Appeal.

Next on the record is Nairobi HCCC MISC. APPL. NO.831 OF 2003. Facts gleaned from the ruling show that the Respondents one Ijaz Hussein Ganijee had made a written statement to the Kenya Police alleging that managers had stolen a number of items from the debtor companies' premises. The police had approached the Receivers and mangers to record statements in response to that filed by Ijaz Hussein Ganijee. The Respondents filed no papers in response to the application. Neither did they appear at the hearing.

After going over all the documentations filed I Lenaola Ag. Judge made findings at page 4 of the ruling that the matters forming the subject of the complaint to the police were substantially the same as the

matters litigated upon in HCCC No.1821/1999 and HCCC 2222/99

(2) That the debtor companies were not happy with the appointment of the Receiver Managers and went to Court to challenge the appointment but he court ruled against them. Then they resorted to police with allegations that the applicants were mere looters, tress passers who had no legal right to enter the debtor company's premises.

(3) It is the learned judges opinion that parties cannot use the criminal process to settle scores in the civil arena.

(4) Quoting with approval his own decision in CHRISTOPHER KIRAGU NGIBUINI VERSUS ATTORNEY GENERAL AND 2 OTHERS H.C. CRIMINAL APP.NO.231/2001 reiterated that where a plaintiff un a civil suit also uses the criminal process to secure an in due advantage over the Defendant, then the court ought not to countenance such a move and allow that plaintiff to do so.

(5) In the learned judges opinion it is not proper for a party to litigate on an issue finalize the same and quickly institute or purport to file charges, elsewhere to reopen the matter.

(6) That in the proceedings before the learned judge all matters pertaining to the appointment of the Receiver/Managers, their powers of entry and control of the assets of the debtor companies were litigated upon. To attempt to raise them again in later proceedings, whatever the nature of these proceedings is clearly improper.

On the basis of the foregoing findings the learned judge found merit in the application dated 3.8.2003 and allowed it.

There is also High Court Milimani Commercial Courts Civil Case No.755 of 2003. The parties are AFAB ESTABLISHMENT LIMITED VERSUS ANDREW DOUGLAS GREGOARY AND ABDUL ZAHIR SHEIKH sued jointly as the Receiver Manager of Ganijee Glass Mart Ltd in Receivership as first defendant and First American Bank of (K) Ltd as Second defendant. The key averments relevant to the application are that Ganijee Glass Mart Ltd in Receivership has its business premises situated at LR.No. 12464 along enterprise Road within Industrial Area Nairobi. That the Plaintiff was a tenant on the said property having possession and occupation of a portion of the said property. That the first defendant were without any colour of right interfered with and or denied the Plaintiffs employees, agents, customers, contractors and visitors un inhibited and unhindered ingress and engress upon the said property. That the defendants have made it impossible for the Plaintiff to carry out its business and the Plaintiff has to all intents and purposes been evicted from its said premises. That the first defendants have purported to act in exercise of powers vested in them as Receiver/Managers of Ganijee Glass Mart Limited (In Receivership) one of the tenants on the said property upon appointment by the second Defendant.

That by a decree issued on 5th September, 2003 in HCCC 1821 OF 1999 the legal charge in respect of the said plot number 12464 was declared in valid hence the first defendants are deemed to be trespassers in the aforesaid property and have no right to hinder the plaintiff in any manner. That by a letter dated 17th July, 1998 the second defendant unlawfully, illegally and fraudulently without consent of the Plaintiff in writing by way of narration and/or undertaking purportedly transferred the indebtedness of the Plaintiff to the account of Ganijee Glass mart Limited account in contravention of the law and stipulations in the debenture in favour of the second defendant to secure certain financial accommodation. That the legal charge purportedly executed supplemental to the Debenture is void and therefore the sale of the property situated at Westlands within Nairobi Municipality by the second defendant purportedly in redemption of the indebtedness of the Plaintiff to the second defendant is also null and void. That by the aforesaid conduct the defendants have acted contrary to sound banking and lending practices and have illegally sold the Plaintiffs property to the plaintiff's detriment.

In consequence thereof among others the plaintiff sought a permanent injunction restraining the first defendants and their servants or agents from detaining, converting, offering for sale, selling or howsoever so interfering with integrity of the plaintiffs properties assets, stocks, goods, machinery, records,

documents or equipment or the plaintiffs quiet and peaceable enjoyment of its tenancy on L.R. No.12464, Enterprise Road.

· A mandatory injunction compelling the first defendants to grant the plaintiffs officers, employees, agents, customers, contractors and visitors unhindered and in hindrances, ingress and engress upon their premise on L.R. no.124664 Enterprises Road Nairobi.

· A declaration that the said letter of 17th July, 1998 is null and void on the basis that it was executed unlawfully, illegally and fraudulently on the part of the plaintiff.

· A permanent injunction allowing the plaintiffs reinstatement at their premises on plot Number 12464 in view of the fact that the first defendants are not the owners of the afore said property LR.NO.12464 .

· Special damages as pleaded with interest, costs of the suit such further or other relief as this court may deem just and expedient to give.

· The defendants defence in these proceedings was that issues raised had been raised on premises previous more particularly HCCC No.2222/1999 and were therefore Res Judicata. That the Plaintiff has no locus standi to bring this action.

A subsequent ruling in the matter shows that the plaintiff filed an interim application seeking to restrain the defendants from selling or disposing off properties mentioned therein. A perusal of the said ruling shows that both counsels were involved in the argument therein. After reviewing the facts and the case law, L.N. Njagi J. drew up three issues namely:-

(a) Whether the applicants disclosed the existence of HCCC.No.2222/1999 or whether they were guilty of non disclosure.

(b) Whether the matters raised herein are concluded by issues of estoppel and res judicata.

(c) Whether the applicants are entitled to the orders prayed.

The defendants in HCCC 755/03 raised preliminary objections to the effect that.

(a) The Plaintiff willfully concealed from the court the existence of HCCC no.2222 of 1999 seeking similar or identical orders.

(b) The Plaintiff willfully concealed from the Court the fact that the Plaintiff had made an application seeking similar and or identical orders and that the application was dismissed with costs.

(c) Due to the concealment aforesaid the plaintiff obtained and ex-parte order which ought to be discharged forthwith and the application dismissed without considering the merits.

The findings of the learned Judge are found at page 25 of the ruling and these are:-

“The application before the court is so similar to that in HCCC NO.2222 of 1999, that the points therein are concluded by both the doctrine of the issue of estoppel and res judicata, the interlocutory orders granted on 27th November, 2003 and in addition, fainted by concealment of the existence of civil suit No.2222/1999. For those reasons the ex parte injunction granted on 27th November, 2003 is hereby discharged and the application by chamber summons dated 27th November, 2003 is struck out……. This suit be and is hereby stayed pending the hearing and determination of HCCC 2222/1999. The ruling was dated and delivered at Nairobi . This 2nd day of June 2004.”

Other documentations in the applicants supplementary affidavit relate to the decree issued in HCCC 1821/1999 whose findings are already captured in this ruling, copies of application and supporting

affidavits whose contents were considered and ruled upon in the various rulings already considered in this ruling.

Turning to the Respondents submissions on the application counsel for the defendant /respondent stressed the following points.

1. A landlord does not have a title superior to that of Receiver manager duly appointed in accordance with the provisions of the debenture by the debenture holder.

2. They contend that the orders in the judicial review proceedings did not stay the action of the Receiver Manager.

3. They contend the proceedings are tainted with fraud because:-

(i) There is no letter demanding the alleged rent from the alleged tenants which has been exhibited herein.

(ii) There was an attempt to throw out the Banks Counterclaim in HCCC NO.1821/1999 which did not succeed.

(iii) In the same case of HCCC 1821/1999 a company called Afab Ltd filed objection proceedings to the Receiver Managers right to take possession and sell of goods which was thrown out.

4. There is no prima facie case established because the landlord's right did not accrue before those of the Receiver Manager which accrued earlier in time.

5. The applicant's claim to rental value cannot be perfected because similar issue arose in HCCC NO.2222/1999 and were dismissed at an interlocutory stage.

(i) The leases relied upon are not registered

(ii) The leases relied upon are suspect as they are signed by the same parties.

(iii) Every time a suit is filed it is accompanied by an interim application which have all along been trying to prevent the Receiver Managers from selling the properties and thus prevent the orders issued in various court cases from taking effect.

7. The applicants are guilty of nondisclosure as they failed to disclose that there has been previous litigation in numerous cases over the same subject matter and the courts have all along ruled against them where none disclosure has been established like in this case the granted orders should be discharged.

7. That all the litigations affecting the subject matter herein have all been cemented on the family structure making them privy to each others litigation making it impossible for any of them to fail to know litigation affecting the others litigation.

8. On the issue of damages the receiver manager are acting on behalf of a bank which has been found in previous proceedings to be financially able to pay substantial amount of damages has not been shown to be unable to meet the same presently

9. It is their stand that the guarantee given by the applicants as security of 300,000.00 which was provided out of time cannot secure the amount that the Respondents are seeking to recover herein.

10. They also contend that the balance of convenience is not in the applicants favour for the reasons given.

On the basis of the foregoing counsel for the Respondents urged the court to dismiss the interim

application with costs to them and discharge the injunction orders granted in error herein.

In response to that application counsel for the applicant reiterated his earlier submissions and then stressed the following points.

(1). There has been no demonstration to show that A Receiver Manager enjoys superior rights or claim over those of landlord.

(2). There is no need for the applicant to exhibit a demand for rent to prove his claim as their averments that rent of the magnitude shown is due to them has not been controverted.

(3). Res judicata does not apply as there is nothing to show that the goods subject of these proceeding are the same goods subject of the previous suits relied upon by them to prove Res Judicata.

(4). There is nothing to show that parties who have been shown to have been litigating herein have been privy to each others litigations as some litigations have been undertaken by or on behalf of companies which are separate legal entitles from human beings.

(5) Not all cases relied upon by the Respondent in opposition to the application are binding on this court. Further none of their deals with distress for rent like in them matter hence most them are distinguishable.

(6). They maintain that no material facts were withheld from the court as what was withheld by the applicants was not relevant to them.

(7). As regards lease agreements they content that failure to disclose who drew the said agreements does not invalidate them neither does it render them of being incapable of being used in evidence.

ii. Lack of payment of stamp duty does not make them invalid as the court has a discretion to use them as evidence subject to payment of stamp duty as directed by the court in its discretion.

iii Lack of registration does not invalidate them as they are still regarded as valid agreements between the parties both under the IT PA and the RTA

iv Failure to obtain consent from the commissioner of Lands for the rental agreements is an after thought and it should be ignored as it was not deponed to in the replying affidavit.

(8). They maintain they have established a prima facie case with a probability of success and are entitled to the orders being sought herein. They concede that the undertaking is of a lasser amount but this was due to the fact that no specific amount was specified by the Court.

(9) As for damages being adequate compensation, the respondents have not demonstrated that they are capable of paying the Plaintiffs what is being claimed by the applicants. They further maintain that they came to court with a grievance and it matters not that other related matters have already been before court applicants were not involved in those other matters. All they are interested in is that goods sought to be protected are subject of judicial review proceedings and so they cannot be sold.

On the law both Counsels referred to legal authorities relied upon. Few are reflected here. In HILL AND REDMANS Law of landlord and tenant by MICHAEL BARNES B.A. AND GEORGE DERBY LONDON BUTTERWORTHS PAGE 454 paragraph 325 which states "*Effects of appointment by Court*" where a receiver appointed by the court is in possession of the premises, the rights of the landlord are not affected except that before distraining he must in all cases apply to the court for leave to do so. If a landlord has detrained before a receiver is appointed he need not apply for leave to proceed with the distress and if he does apply he will not be allowed the costs of the application"

Reliance was also placed on the land mark case of **GIELLA VERSUS CASSMAN BROWN & CO. LTD (1973) E.A. 358.** Holding iv, v and vi are relevant to this case and they state.

"(iv) An Applicant must show a prima facie case with a probability of success.

(v) Injunction not normally granted unless the applicant might otherwise suffer irreparable injury.

(vi) When the court is in doubt, it will decide the application on the balance of convenience."

In HALISBURYS LAWS OF ENGLAND VOLUME 12 PAGE 98 paragraph 148. It is stated: "*Receivers appointed by the Court*". A receiver appointed by the Court may distrain for one years rent without the sanctions of the court, but if the rent is in arrears for more than a year the leave of the court should be obtained, at any rate in a case where the letting is not in the receivers name and the tenant has not attuned to him, when there has been no letting by the receiver and no atonement to him the restraint should be in the name not of the proved but of the person beneficially entitled". In the case of HUNTER VERSUS CHIEF CONSTABLE OF WEST MIDLANDS AND ANTOEHR [1981] 3 A E.R.127.

In this case an accused person alleged in a criminal trial that he was assaulted by police officers to procure confession. Assault not proved accused convicted. Accused commenced civil proceedings against police claiming damages for assault. The purpose of the civil proceedings was to prove that confession on which accused convicted was procured by force. An issue arose whether civil action was an abuse of process of court. **LORD DIPLOCK at page 733** paragraph b stated "*The abuse of process which the instant case exemplifies is the initiation of proceedings against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made"* At page 734 paragraph (a) " *think it would be a scandal to the administration of justice if, the same question having been disposed of by one case the litigant were to be permitted by changing the form of the proceedings to set up the same case again."* It was held *inter alia* that the initiation of proceedings a Court of justice for the purposes of meeting a collateral attack on a final decision adverse to the intending plaintiff reached by a court of competent jurisdiction in previous proceedings in which the plaintiff had a full opportunity of contesting the matter was as a matter of public policy an abuse of the process of the court.

In the case of **TRUST BANK VERSUS PARTWAY STORES (1993) Ltd [2001] 1 E.A. 296** one of the questions for determination was whether an unstamped grant is admissible in evidence. It was held *inter alia* that where a guarantee had not been stamped, it was not admissible in evidence by virtue of section 19 of the Stamp Duty Act.

In the case of **NORTH WEST WATER LTD VERSUS BINNLE AND PARTNERS CAFIRM, [1990] 3 A E.R.547.** A plant designed by a consultant engineer and built by contractors for water authority exploded killing visitors. Victims or personal representatives brought action against the water authority, contractors and consultant engineers. Consultant engineers were held to be solely to blame. Water authority brought action against consultant engineers for negligence and breach of contract. Issue arose whether consultant engineer estopped from denying negligence.

It was held inter alia that where an issue had for all practical purposes been decided in a court of competent jurisdiction the court would not allow that issue to be raised in separate proceedings between different parties arising out of identical facts and depend on the same evidence, since not only was the party seeking to litigate the issue prevented from doing so by issue of estoppel but it would also be an abuse of process to allow the issue to be relitigated that since the issue of negligence had already been determined against the consultant engineers in the first action, they were estopped from denying negligence and further it would be an abuse of process if they were to be permitted to deny negligence.

In **SHIRIKHANU AMIRALISHARIF VERSUS ALIBHAI SHARIF AND SEVEN OTHERS MILIMANI** High Court Civil Case No.660/2004 F.A. AZANGALALA J. at page 5 of the ruling paragraph 2 made findings that "*it is settled law that if an interlocutory injunction has been obtained by means of mis- representation or concealment of material facts, the same will on the application of the party aggrieved be discharged*". At page 7 of the ruling while quoting with approval from the case of **KING VERSUS THE GENERAL COMMISSIONER** for **the purposes of the Income Tax Acts for the District of Kensington (l917) K.B. 486** observed "*If on the arguments showing against a rule nisi*

the court comes to the conclusion that the rule was granted upon an affidavit which was not candid and did not fairly state the facts but stated them in such a way as to mislead and deceived the court there is power inherent in the Court in order to protect itself and prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the merits."

On Res judicata, A. Visram J.in AFAB ESTABLISHMENTS LTD AND 6 OTHERS VERSUS N. JMUDIN JIWAJ GANIJEE AND 2 OTHERS Nairobi HCCC 2222/1999 at page 5 of the ruling paragraph 2 line 5 it is observed "*Although the Act refers to the word "suit" there was no argument that the principle of res judicata also applies to a fresh application in the same suit"*. At page 6 line 2 from the top it is stated " *Res Judicata looks at not only the form but also land more so at the substance, at the real issues raised earlier"*.

On non disclosure P.Kihara KariukiJ in MUIGAI AND OTHERS VERSUS JOHN WAINAINA AND OTHERS Nairobi HCCC 346 of 2002 at page 2 of the ruling paragraph 3 the learned Judge made findings that the defendants having failed to discharge their paramount duty to make a full and fair disclosure of all material facts pertaining to their application (R.V. KENSINGTON INCOME TAX COMMISSIONERS PRINCES EDMOND DE POLIGNAC [1917] 86 LJ.KB 257) the defendants are not entitled to the discretionary injunction sought.

On the courts assessment of the facts herein it is clear that in order for the Plaintiff/Applicants in this interim applications to succeed for the grant of the orders sought in their favour, they have to bring themselves within the principles governing the granting of such interim orders. The principles are none other than those established by the landmark case of **GIELLA VERSUS CASSMAN BROWN CO. LTD (1973) E.A.358** namely:-

(a) proof that there is a prima facie case with a probability of success.

(b) That damages will not be an adequate compensation should they loose what they are seeking to protect in other words there is a likelihood of suffering irreparable harm.

(c) That in the absence of facts justifying the grant of the relief sought on the basis of principle (a) and (b) above nonetheless the balance of convenience tilts in their favour and they should get the relief on that account.

This court has taken the above three principles as well as the other principles of law set out in the cases cited herein and considered them in the light of the totality of the arguments advanced by either side and arrived at the conclusion that in order to succeed the applicants have satisfy the following issues that have arisen herein in the cause of the argument namely:-

(1) That they are the rightful claimants herein in other words they have locus standi before the court.

(2) Since they are seeking to protect their lien over the distrained goods on account of outstanding rents, they have to show that there is lawful and valid distress for rent which was levied in pursuance of a valid distress order issued by a Court of competent jurisdiction.

(3) That the protection order still exists

(4) That documentation forming the basis for the distress is proper.

(5.) That this cause does not offend the doctrines of Res Judicata

(6).That the application is not tainted with the doctrine of non-disclosure.

(7). Since the move herein is to assert the rights of the applicants in respect of the said goods over those of the Receiver manager, that there is justification for this court to protect the rights of the applicants herein in priority over those of the Receiver Manager.

On locus standi the applicants have described themselves as Executors of the will of one Najmudin Jiwaj Ganijee who died on 3rd May 2006. They have annexed RRG 1, a copy of the last will of the deceased, which indicates who the executors of the will are. There is no contest on this and so the applicants have locus standi to file the matter.

As regards Distress for rent section 3(1) of Cap.293 Laws of Kenya is very clear on this. It states 3(1) "*subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrears and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in similar case"*

From the above it is clear that the prerequisites for distress is that the rent or rent service must be in arrears and this must be based on a grant, lease, demise or contract. As submitted by the Respondents Counsel in order to prove this the applicants have to show that there was a demand note for the rent in arrears in view of the colossal amount involved. The demand must be on the basis of a grant, lease, demise or contract. No demand for rent arrears has been exhibited. There are alleged lease document relied upon which this court will turn to later on. In the absence of exhibition of such a document there is nothing to show that there was rent in arrears owing to the deceased from any tenant.

Section 3(1) Cap 293 Laws of Kenya has to be read together with Section 18 of the same Act. Section 18 (i) requires that the person authorized to levy distress is a court bailiff who does so under authority of a bailiff certificate issued by the relevant authority under the Act. A perusal of the annextures herein do not show that there was any valid or lawful distress levied by an authorized court bailiff. In the absence of such proof an alleged distress cannot be protected. A perusal of RRG3 and 4 indicates that as at the time the deceased moved to Milimani Court he was moving to distain goods of a tenant Ganijee Glassmart (Ltd) that was already in receivership. Having acknowledged existence of receivership, the rent demand is expected to have been served on the Receiver Manager. None has been exhibited.

This brings the court to the issuance of the distress order. These are annexed as RRG3, 4 and 5. The three documents are just headed "*in the Chief Magistrates Court at Milimani Commercial Court"*. No case number is given. There is a signature on the three documents but no name. In the absence of indication of a case number of the case file in which the said orders were issued, the authenticity and the genuiness of the orders issued is questionable. There is no way this can be counter checked and confirmed. These alleged orders later on became a subject of judicial review proceedings in Nairobi Misc. HCCC 745/2004. The applicant exhibited the resultant order as RRG6. The Respondent annexed the entire documentation as regards the said judicial review application marked as HG 14 running from 108 – 131 (hand paginated). This court took time to scrutinize them. Nowhere is the case number in which the distress orders were issued given. This court has no doubt that this fact escaped the scrutiny of the court which issued those orders. In the absence of revelation of a case number from which the distress orders were issued, doubt exists as to the existence of such proceedings and this gives rise to the likelihood of the resultant orders of stay pending hearing being orders granted in vain. As matters stand now it is the view of this Court that those orders were granted in vain under a mistaken belief that there existed valid orders capable of being quashed in the absence of any orders capable of being quashed the stay orders are operating in a vacuum and cannot afford protection of any proprietary rights in favour of any body. Protection for the applicants rights as regards this protective order is commented on the averments in paragraph 7 and 8 of the plaint. A careful reading of those two paragraphs does not reveal the case number of the court case from which these distress orders were issued. This court does not understand why the case number for the judicial review in which the protective orders was given is mentioned but not the case number of the court case in which the grieving orders were issued. This fortifies this courts suspicion that those orders do not exist and the stay order in the judicial review proceedings was granted in vain.

Right to seek protection for rents due goes hand in hand with the title to proprietorship as title owner and/or as lessor. Paragraph 5 and 6 of the plaint show that the applicants are the owners as well as landlord while Ganijee Glassmart ltd is the tenant. In order for this claim to be protected ownership of title and lease is inevitable. No title or lease agreement was exhibited to the first supporting affidavits. Neither were they exhibited to the supplementary affidavit. These have been annexed to the replying

affidavit as annexture HG12. A perusal of title no.L.R.12464 shows that the grant had been made to Najmudin Jiwaj Ganijee and Mohsinali Ganijee. At entry No.11 vide presentation number 382 of 10.2.99 the ½ un divided share of Mohsinali Jiwajee Ganijee was transferred to Najmudin. On the same date of 10.2.99 vide presentation 393 charge to First American Bank of Kenya with other lands was made. As for title No.LR.209/7972 a perusal of the title reveals that the grant was made to Faziea BBAS Jiwajee Ganijee, Najimudin Jiwaj Ganjiee Mohsinaii Jiwajee Ganijee and Kalimuddin Jiwaji Ganijee all trading as Ganijee Glass mart on 12.5.76 ¼ undivided share of Fazlea Bbas was transferred to the other three. On 27.10.1979 the undivided share of Kalimudin Jiwaji Ganijee was transferred to the other two owners on 10.2.99 at entry No.19 the half undivided share of Mohsinali Jiwajee was transferred to Jijmudin Jiwaj Ganijee with other lands vide presentation No.20 of the same date of 10.2.1999 the title was charged to First American Bank of Kenya Ltd.

Existence of entries in annexture HG12 and 13 disprove the averments in paragraph 5 of the plaint that the deceased is still the sole registered proprietor of the property mentioned therein. Those rights are subject to the rights of the1st American Bank Ltd. The deceased's rights are subject to the rights of the Bank. No title document has been exhibited for land title No.209/136/238. Paragraph 81 of the plaint and paragraph 71(a) of the defence and counter claim in **HCCC 1821/1999** confirm that the property had been sold way back before that case had been filed and that is why no title was exhibited. On the basis of the foregoing absolute ownership of the suit property by the estate of the deceased represented by the plaintiffs herein has not been exhibited.

Turning to the leases paragraph 5,6 of the plaint are relevant. The averment in paragraphs 5 of the plaint is that the properties were leased to the 3rd defendant on or about 1st March 1999. Paragraph 6 shows that all the three were leased to the 3rd defendant and a colossal amount in respect of each property as outstanding rent. The lease documents are not annexed to the supporting affidavit but to the further supporting affidavit as RRG7, 8 and 9. RRG8 relates to LR.NO. 209/79 72, RR98 to L.R.12464, RRG9 to LR.209/136/238. These documents have come under attack by the Respondents Counsel on the grounds that they are suspect and evidence of possible fraud because:-

1) They are signed in the same manner and by the same parties and witnessed by the same witnesses.

2) They do not indicate who drew them in accordance with the Advocates Act Cap.16 Laws of Kenya.

3). They are not registered as required by the R.T.A. Cap.282 Laws of Kenya and registration of documents Act Cap 285 Law of Kenya.

4). Neither has any stamp duty been paid for the same.

It is further argued that on the basis of the foregoing the said documents are invalid and of no evidential value. In response to this Counsel for the applicants responded that stating who drew the instrument is not necessary and failure to pay stamp duty do not invalid the documents as those activities could be ordered to be done later on.

To resolve the foregoing argument the court has to turn to the law to determine the evidential value of the said lease documents, Section 35(1) of the Advocates Act Cap.16 Laws of Kenya states "*Every person who draws or prepares or causes to be drawn or prepaid, any document or instrument referred to in Section 34(1) shall at the same time endorse or cause to be endorsed thereon law, his name and address, or the name one and address, of the firm of which he is a partner and any person ommitting so to do shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or a fine not exceeding five hundred shillings in the case of an Advocate"*

Section 35(2) authorizes the Registrar, the Registrar of Titles, the Principal Registrar of the Governments lands, the Registrar – General, the Registrar of companies and any other Registering authority to refuse to accept or recognize a document not endorsed in accordance with Section 35(1) of the Act. Annexture RRG 7,8 and 9 are instruments of lease. They do not comply with Section 35 (1) of Cap.16 Laws of Kenya and on that account they are incapable of being registered and if they are in

capable of being registered then definitely they are of no evidential value.

The Titles subject of these proceedings are governed by the Registration of Titles Act cap.281 Laws of Kenya. Section 40 of the said Act provides "*When any land is intended to be leased for any term exceeding twelve months, the proprietor ……. Shall execute a lease in form H in the first schedule and every such instrument, shall for description of the land intended to be dealt with refer to the grant or certificate of title of the land or shall give such other description as may be necessary to identify the land provided that no lease for the period above specified shall be valid unless registered*".

The agreements indicate that formal leases were to be executed in due cause and the lease agreements were to cover leases of 5 years and three months.

Since RRG 7,8 and 9 do not qualify to be leases under the registration of titles Act Cap.281 Laws of Kenya they are not covered by the proviso to section 40 of the said Act. However since they purported to confer a right of an interest in land they fall under the registration of Documents Act Cap.285 Laws of Kenya. Section 4 of the said Act provides "*All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature, and Vakallas shall be registered as herein after prescribed"*. The definition of immovable property in section 2 thereof includes land. Provisal 4(vi) exempts any lease or licence of land for any term not exceeding one year from registration. Section 18 of the same Act makes provisions for consequences of non-registration of the said documents. It states "*A document the Registration of which is compulsory under this Act shall not unless duly registered be received in evidence in any transaction affecting the property to which the document relates except with the consent of the court upon such terms and conditions as the court may impose, provided that nothing in this Act shall make any document in admissible in any criminal proceedings"*

Further the said documents are required to meet the requirements in Section 19(1) of the Stamp Duty Act which states 19(1) "Subject to the provisions of sub section(3) of this section and to the provisions of Section 20 and 21 no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever except:-

(a). In criminal proceedings and

(b). In Civil proceedings by a collector to recover stamp duty unless, it is duly stamped".

Applying the cited provisions of the Advocates Act Cap 16 Laws of Kenya, Registration of Titles Act Cap.281 Laws of Kenya. Registration of documents Act Cap.285 Laws of Kenya and the stamp duty Act Cap.480 Laws of Kenya, this Court finds that the documents exhibited by the applicants exhibits RRG 7, 8 and 9 as proof of tenancy do not have any evidential value because

(1) They are not endorsed by the drawer of the instruments under Section 35 (1) of Cap.16.

2). They are not registered in accordance with Section 4 and 18 of Cap.285.

3). No stamp duty has been paid for them in accordance with Section 19 of Cap.480 Laws of Kenya and yet they are not exempted from stamp duty payable under the said act.

4). Further they do not support the colossal amount of money shown to be due in paragraph 6 of the Plaint. This is so because the agreements themselves just talk of commercial rent prevailing in the area. No document has been exhibited to show the commercial rate available in the area chargeable from 1999 to prove or justify the figures quoted. In this regard nothing has been exhibited to show that the Plaintiffs estate is owed money of such a magnitude that warrants to be protected.

The next issue to be disposed off is one dealing with Res Judicata. This arose from the submission of the Respondents counsel to the effect that issues herein have been adjudicated upon in other forums and

applicants have all along lost and these proceedings is therefore an abuse of the due process of the law. Case law has already been cited on this subject and I will not repeat here. The mother of the doctrine is section 7 of the Civil Procedure Act which states "*no court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue is a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title, in a court competent to any such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by Court."*

In order for this doctrine to apply it has to be shown that the subject matter has some relation to each other in the said proceedings. The subject matter herein is the ownership and the benefits to be derived from the properties averred to in paragraph 5 of the plaint. The subject matter herein as far as the plaintiffs are concerned is rents accruing from the leases in respect of the suit properties which rental values are to be considered to be due for the benefit of the estate of the deceased who is represented by the plaintiffs. This is to be in opposition to the rights of the Receivers Managers. When this relationship is looked at in the light of the background information on litigation on the subject set out herein earlier on in this ruling, the following factors emerge and are not disputed or should not be disputed.

i) In Milimani HCCC Commercial Court case No.1821 of 1999, the plaintiff whose estate is represented herein and the3rd defendant were the plaintiffs, sued the 1st American Bank whose Receivers are the same ones litigating herein. The plaint and judgment is annexed to the applicants further affidavit as RRG2. Herein the court confirmed the claim of the Receiver Managers and disallowed the claim of the plaintiff whose estate is represented herein and the 3rd defendant, meant to be the beneficiary of the stay order in the judicial review proceedings in Misc. ApplNo.745 of 2004.

ii). In HCCC 2222 of 1999 where the deceased whose estate is represented herein was sued by alleged tenants over the same subject property, the court ruled that the alleged tenancies were a fabrication and a ploy calculated to defeat and frustrates the rights of the Receiver Managers.

iii). In Milimani HCCC. COMMERCIAL CASE NO.755/2003 where a 3rd party sued the 3rd defendants and the Receiver Managers over the same subject property challenging the action of the Receiver Manager over the same subject property, the court terminated the proceedings at an interlocutory stage because the issues involved had been adjudicated upon in HCCC 1821/1999. The judgment in HCCC 1821/1999 annexed to the replying affidavit as HG 4 discusses the same properties described in the title documents HG 12 AND 13 which properties are averred to in paragraph 5 of the current plaint. All interlocutory applications in HCCC 1821/99, 2222/1999, 752/2003, 755 of 2003 all ended up in favour of the Receiver Managers. All these go to show that the title of the Receiver managers over the dispute properties as well as other properties taken possession of by the Receiver Managers in pursuance of their crystallization of their duties under the relevant creating instruments in well founded. The ruling in HCCC 2222/1999 has laid down the principle that Res Judicata though mentions only suit in Section 7 Civil Procedure Act it also applies to interlocutory applications like the one subject of these proceedings.

Linked to Res judicata is the doctrine of non-disclosure. The Respondents complaints on this is that a perusal of the plaint as well as the initial supporting affidavit and annextures failed to disclose that there has been litigation over the same subject matter and judgments as well as rulings handed down in favour of the Respondents. It is their stand that this non-disclosure dis-entitles the applicants the reliefs sought.

In response to Res Judicata and non-disclosure the applicants counsel in the further affidavit and submissions alleged that these cases were not relevant. The Courts findings on this is that the litigation outlined above all go to show that litigation subject of these proceedings have been either wholly or substantially the same as those herein. As regards none-disclosure this is evident from the documentation relied upon by applicant which failed to disclose the following among others:-

1.) Various litigation processes in the cases mentioned herein.

2.) Failed to disclose that two of the title documents mentioned in paragraph 5 of the plaint are encumbered by the charges in favour of the Receiver Manager.

3.) Failed to disclose that no valid leases exist in support of their claim to rent nor that they have no documents to support the figure of rent claimed. Neither did they disclose that all the purported lease agreements have not been registered neither has stamp duty been paid for them in accordance with the relevant law. Also failed to disclose that they do not have supportive documentation to support the amount of rent sought to be protected.

4.) Failed to disclosure the close relationship between the various litigants in the cases cited herein especially that of the deceased represented by the applicants/plaintiffs herein and the 3rd defendant herein which is the beneficiary of the stay order in the judicial proceedings application on the basis of which the actions was brought.

5.) Failed to disclose that the case number in which the distress for rent orders were allegedly issued was not given in the documentation relied upon by them.

The last issue to be disposed off is whose rights are to have priority over the others. Those of the alleged landlord or those of the Receiver Managers. The applicants counsel has submitted that Section 345 –453 of the Company's Act Cap.486 laws of Kenya does not say that rights of Receiver Mangers rank in priority over those of the landlord. Indeed a perusal of those Sections do not indicate whose right were superior to the other. However in view of the existence of the various judgments and rulings delivered in favour of the Receiver Managers is a clear indication that the rights of the Receiver Managers is cemented on firm grounds as opposed to those of the applicants tainted with Res Judicata and non-disclosure.

In conclusion it is the finding of this court that applicants have not succeeded in satisfying the principles governing the granting of injunctive reliefs as here under stated. A prima facie case with a probability of success has not been established because:-

(a) No document has been exhibited to show that rents to the tune of amounts stated were demanded from the tenants before setting in motion the process of distress for rent in order to satisfy the ingredient for distress for rent which require that before such an action is undertaken there must be rent due in arrears.

2. The case number of the case file in which the distress orders were granted has not been given making the granting of those orders either suspect or non existent.

3. In the absence of disclosure of the case file number in which the distress orders were made and its failure to disclose the same in the application for judicial review proceedings in Misc.App.HCCC.745/2004, there was nothing that those proceedings could quash hence the stay orders in HCCC Misc. Application 745/2004 were granted in vain and are of no value.

4. There is no document exhibited to show that the person to whom the order was addressed was a licensed court bailiff in accordance with the requirement, of the relevant Act.

5. The lease agreements exhibited which are alleged to be the basis for rent due which is sought to be protected are valueless pieces of paper which cannot be used to confer any right or title in the form of a lien over rental value as they infringe mandatory provisions of law due their failure to qualify as registered leases, though they are registerable documents they are not registered under the registration of documents Act Cap 285 Laws of Kenya. Neither do they comply with the requirements, of section 19 of the stamp duty Act cap.480 Laws of Kenya. Therefore they are not enforceable.

6. The title documents on the basis of which the claim in respect of a lien over rents due is based are encumbered to the principal of the Receiver Managers who have a first claim over that rental value.

7. The doctrine of Res judicata applies here as the issue has been litigated severally between either the same or parties claiming through the current claimants which litigation has always ended in favour of the Receiver Managers.

8. The applicants are guilty of non-disclosure on matters specified earlier on in this ruling and so they have disentitled themselves to the reliefs sought.

As for irreparable loss none can arise in favour of the applicants in the absence of proof of existence of the rental values alleged to be due to them and proof of entitlement which has been ousted.

As for the balance of convenience this tilts in favour of the Receiver Managers since there are valid orders in rulings and judgments issued in favour of the Receiver managers over the same subject matter or substantially the same issued by courts of competent jurisdiction.

For the reasons given the application dated 11.2.006 and filed the same date be and is hereby dismissed with costs to the Respondents. The interim orders issued herein on 12.5.2006 in respect of the said interim application be and are hereby ordered to be discharged forthwith.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF MAY 2007.

R. NAMBUYE

JUDGE