REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT 177 & 178 OF 2005

HILLCREST SCHOOL LIMITED …….…..……..… PLAINTIFF

VERSUS

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

KIERAN DAY ……....…..……2ND DEFENDANT

SANDEEP KHAPRE……....…….....……..3RD DEFENDANT

SCHOLASTICA LIMITED…….....……...……...……4TH DEFENDANT

RULING

I have before me two applications in HCCC No.177 and HCCC No.178 of 2005 by Hillcrest Secondary School Limited (hereinafter called "HSSL") and Hilcrest School Limited (hereinafter called "HSL" respectively) against Barclays Bank of Kenya Limited, Kieran Day, Sandeep Khapre and Scholastica Limited (hereinafter called "1st, 2nd, 3rd and 4th defendants"). The two applications were consolidated for hearing as they sought similar orders of the court against the said defendants.

The applicants primarily sought the following prayers:

1) That the defendants by themselves, servants or agents or advocates or auctioneers or any of them or otherwise be restrained by a temporary order of injunction from doing the following acts or any of them that is to say from interfering with the plaintiffs' rights of possession, advertising for sale disposing of, selling by public auction or otherwise however at any other time or completing any conveyance or transfer of any sale concluded by auction or private treaty leasing letting to and/or interest in all those parcels of land known as LR Nos.12207, 2259/68, 209/5390 and 3586/1 Nairobi pending the hearing and determination of this suit and this order be noted in the respective register of the said parcels at the Lands Office.

2) That the 2nd and 3rd defendants be restrained by themselves their agents or servants or otherwise howsoever from continuing to act or purporting to act as Receivers and/or Managers of the plaintiff and from interfering in any manner with the plaintiffs' quiet possession and enjoyment of all its land, bank

accounts, properties, machinery, equipment, assets and general day to day running/management of the plaintiff's bank accounts do revert to the plaintiffs pending the hearing and determination of this suit.

3) That an order be made under Section 52 of the Indian Transfer of Property **(Amendment)** Act 1959 that during the pendency of this suit that all further registration or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in all those parcels of land known as L.R Nos.12207, 2259/68, 209/5390 and 3586/1 Nairobi with any land registry, government department, and all other registering authorities be prohibited.

The main grounds for the application as expressed on the face of the applications are as follows:-

1) That the charges are null and void and of no effect and not binding on or enforceable against the plaintiffs because they infringe the mandatory requirements of Section 69 of the I.T.P.A.

2) That the charges are null and void for noncompliance with the provisions of Section 46 of the Registration of Titles Act which requires an R.T.A. charge to be in form J (1) and (J (2) of the first schedule of the Act.

3) Further to 2 above, the Registration of Titles Act does not provide for or give a statutory power of sale which is a power borrowed from the I.T.P.A. The R.T.A. charge envisaged by Section 100A of the I.T.P.A. is charged bearing a fixed interest rate, fixed repayment period and a fixed installment plan unlike charges herein which do not have fixed interest rates and fixed repayment periods.

4) That the charges are defective for want of attestation and non-compliance with the provisions of the I.T.P.A. in that

(a) The charges are witnessed by one witness contrary to the provisions of Section 59 of I.T.P.A.

(b) James Githaiya Advocates did not hold a practicing Certificate in the year 2000 and 2001 and was not an advocate within the meaning of Section 9 of the Advocates Act. Consequently, the purported certificate in the charge is null and void.

(c) The charges in any event failed to meet the attestation requirements of the Law of Contract Act Cap 23 Laws of Kenya.

(d) The plaintiffs' stand to suffer grave and irreparable loss and damage.

(e) The 1st defendant is unlawfully using the threat of sale of the suit properties to exert pressure on the plaintiffs to pay unjustified sums that are not due under the contract between the parties and thereby clogging the plaintiffs' equity of redemption.

(f) The 1st defendant has by its conduct disentitled itself to any recourse under the charge as security. The same is null and void and not binding on the plaintiff.

(g) The 1st defendant has been charging exorbitant, oppressive, illegal and non contractual interest rates and other charges and penalties on the principal debtors' account.

(h) No power of sale has accrued to the defendant under the terms of the instrument sought to be relied upon as entitling the defendant to dispose of the plaintiffs' property.

(i) That by the purported sale agreement dated 23.3.2005, the 1st, 2nd and 3rd defendants have agreed to sell the suit properties as well as plant and machinery erected and being thereon to the 4th defendant.

(j) That the sale agreement is contingent upon the consent of the Minister for Finance under the provisions of Cap. 504 Laws of Kenya which consent has neither been applied for not obtained.

(k) That the purported sale agreement was entered into fraudulently and collusively and the bidding process was completely flawed discriminatory and conducted contrary to prudent business practice.

(l) The purchase price is far below the market and forced sale values given by the defendants' own valuers.

(m) No evidence has been produced that a deposit was ever paid.

(n) That the purported appointment of Receivers was made mala fide and for improper and ulterior motives as there was no evidence of mismanagement by directors.

(o) No valid demand was ever served upon the plaintiff prior to the appointment of receivers. A demand for payment of KShs.544,504,871.70 was a consolidated demand from both HSL and HSSL.

(p) The defendant cannot have legal recourse under the debenture as security.

(q) The purported debenture was security for KShs.93,000,000.00 as at 20.12.2000 which could not have quadrupled in less than 3 years thereby reflecting an interest rate of more than 200% p.a.

(r) To the plaintiffs' knowledge, no deed of appointment of receivers has even been executed, issued, stopped and/or registered nor was any such deed executed under Clause 15 of the impugned debenture.

(s) None of the events contemplated by Clause 14 or 15 of the impugned debenture had arisen so as to give the power to appoint Receivers.

(t) The 2nd and 3rd defendant are accountants by profession without any prior experience of running an academic institution and are ill suited to act as Receivers.

(u) The documents purporting to appoint the 2nd and 3rd defendants as Receivers are incurably defective, null and void and of no legal effect.

(v) The Receivers have to date not forwarded any amounts recovered to the 1st defendant yet the plaintiff is a strong commercial entity.

(w) That at paragraph 23.2 of the sale agreement the defendants have allegedly sold one of the plaintiff's properties being L.R. No.209/1393/1 registered in the name of HSL and which property is not part of the assets charged to the 1st defendant.

(x) That the defendants have clearly admitted in the said paragraph that the property is not charged to the bank and for this reason they have no right and/or authority to sell the said property meaning that the defendants have no right whatsoever to interfere with the said property and their said action is fraudulent and a trespass on private property.

(z) The defendants have further purported to transfer the said property to the 4th defendant for no consideration.

The applications are supported by affidavits sworn by one Susan Mwamto a director of the plaintiff companies.

The affidavits elaborate the above grounds. The applications are opposed and there are various affidavits sworn by one Alfonse Kisilu, the 1st defendant's Head of Corporate Recoveries, the 2nd defendant and one Terence Childs a Director of the 4th defendant. All the deponents were cross-examined on their affidavits at great length. On the conclusion of the cross-examination, the advocates for the parties agreed to and did file written submissions in support of the positions taken by their clients in the said affidavits. The submissions have been quite extensive and numerous authorities cited.

I have considered the applications, the affidavits filed both for and in opposition to the application, the written and oral submissions made and the authorities relied upon. Having done so, I take the following view of this matter. These applications have taken about two years to be concluded. Yet they were for inter alia the interlocutory relief of injunction which in my view should be a quick equitable remedy to protect the legal rights of a party to a suit where those rights are threatened with violation by the unlawful or wrongful acts of another pending the hearing and determination of the main suit. Time should therefore be of the essence. It may be appropriate now for parties and their legal advisors to consider the merits and demerits of canvassing an interlocutory application for nearly two years instead of fast tracking the hearing and determination of the suit.

At the interlocutory stage, the court does not indeed is enjoined not to determine with conclusiveness the rights and duties of the parties. At that stage the applicant should show that he/she/it has a prima facie case with a probability of success at the trial. The applicant must also show that he/she/it would suffer an irreparable injury which would not be adequately compensated by way of damages. Where the court is in doubt the application is to be considered on a balance of convenience. Those principles were set out in the rule making case of **Giella – vs – Cassman Brown & Co. Ltd [1973] E.A. 358**. I am bound to consider the plaintiff's applications on the basis of those principles.

The plaintiffs' bases for their applications are multiburrelled. Their first volley is against the charges. They contend that the same are null and void for various reasons including a charge that they do not comply with the provisions of Section 69 of I.T.P.A. Several complaints are made under this charge. There is the contention that James Gathaiya Advocate who attested the signatures and issued the certificates in the charges that the provisions of the said Section 69 had been explained to the chargors did not hold a practicing certificate at the time of the issue of the certificates. For that proposition the plaintiffs have sought reliance on various cases including the case of **Obura vs Koome [2000] LLR 3251 (CAK).**

In that case the Court of Appeal held that an Advocate who did not hold a current practicing certificate was not qualified to act as an Advocate. Consequently, a memorandum of appeal signed by such an advocate was incompetent and was struck out. The plaintiffs accordingly argue that the attestation by the unqualified advocate and the certificate he issued in the charges are null and void. In the premises, there has been contravention of Section 69. This argument is made by the plaintiffs despite the plain admission of Ms Susan Mwamto aforesaid that the said James Gathaiya acted for the plaintiffs. Susan Mwamto herself is an advocate of the High Court of Kenya. The plaintiffs themselves executed the charges before the said Gathaiya. The 1st defendant did not recommend him to the plaintiffs. Indeed the plaintiffs do not allege that Gathaiya also acted for the 1st defendant in the transaction. Indeed, during her oral testimony in court the said Susan Mwamto did not allege that the plaintiffs did not understand the effect of executing the charges. How could the 1st defendant ascertain that Gathaiya was not qualified to attest the execution of the charges by the chargors or issue the Certificates therein? There is no doubt that the plaintiffs took benefit of the charges. As was stated in **Sparling – vs – Brereton [1566] LR 2 EQ 64** at page 67.

"**It would be most mischievous indeed, if persons without any power of informing themselves on the subject should be held liable for the consequences of any irregularity in the qualification of their solicitor. As against third parties the acts of such a person acting as solicitor are valid and binding upon the client on whose behalf they are done".**

I cited this passage with approval in **Anjanaben Anil Shah – vs – Alabe Bank Limited: HCCC NO.574 of 2005.** As I said earlier in this ruling, I am not trying this case and therefore, I am not required to make definitive findings of fact or Law at this stage. However, on a prima facie basis I am of the view that the plaintiffs cannot avoid the charges on the basis that they executed the same before James Gathaiya an Advocate who is alleged to have not held a practicing certificate.

Related to the above complaint is the charge made by the plaintiffs that the 1st defendant as chargees did not execute the charges and for that reason, the charges are invalid. The plaintiffs' argued that the

charges were contracts relating to land and had to be executed by the 1st defendant for them to be valid. I understood the plaintiffs' position to be that the 1st defendant had obligations under the charges that could only attach if the 1st defendant executed the charges. It is however, not alleged that the 1st defendant seeks to avoid the charges. That cannot be because they are the same documents the 1st defendant is enforcing.

It is common ground that the charges were created under the R.T.A. There is no requirement under that act for execution of a charge by the chargee. The provisions of Section 46 (1) of the said Act are clear and the interpretation given the section by the plaintiffs is with respect erroneous.

Another related complaint made by the plaintiffs is that the charges are null and void and unenforceable because they do not comply with the provisions of Section 46 of the RTA with regard to form. The section requires that the charge be in form J(1) and J(2) of the First Schedule of the RTA. In my view that challenge is not serious as on my reading of the charges impugned, they substantially conform with the prescribed forms. In my view, it was on that basis that the Registrar of Titles accepted them for registration. I agree with counsel for the first defendant that even if the charges were to be found wanting on form, that alone would not go to the root of the charges and render them invalid. Indeed such a result is expressly prohibited by Section 72 of the Interpretation and General Provisions Act Cap (2) Laws of Kenya which is in the following terms:-

"**Save as otherwise expressly provided, wherever a form is prescribed by a written Law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document or which is not calculated to mislead."**

The plaintiffs have also challenged the charges on the basis that the chargors' signatures were attested by one witness. They contend that that contravened Section 59 of the I.T.P.A. I am not persuaded that that is the correct position in Law. Firstly Section 58 of the RTA was complied with by the 1st defendant. Secondly, there is no dispute that the charge was created under the R.T.A. and consequently the said section applied. It is not also disputed by the plaintiffs that the charges comply with the provisions of the R.T.A. Thirdly, the position seems to have been settled by the decision of the Privy Counsel in **Central Buck and Tile Works Limited & Others – vs – Premchand Raichand Limited & Another [1966] E.A. 154.** Their Lordships observed as follows:-

"…**It seems to their Lordships that the requirement of Section 59 is inconsistent with the requirements of Section 58 for Section 58 states by necessary implication that no attesting witness is required if executed by a company in accordance with the Articles while Section 59 says two witnesses are required. Accordingly Section 58 overrides S.59 by virtue of Section 1(2)."**

In the premises, the challenge made by the plaintiffs that the charges are invalid for failing to comply with Section 59 of I.T.P.A. is without merit.

The plaintiffs have also challenged, the notices or demands served on them on several grounds the main ones being that there was no certainty with regard to the sums claimed by the 1st defendant; that the interest rates charged were illegal; that the amounts demanded were excessive. To buttress their arguments the plaintiffs placed reliance upon several cases including the case of **Samaki Industries –vs- Bullion Bank: HCCC No, 481 of 1999 (UR).** In that case Hayanga J in granting an injunction specifically found that the respondent bank was acting out of contractual terms. It was "***claiming money which is not due from the charge/mortgage (sic) but from a own fictitious contract*".**

It would appear also that the Learned Judge was considering an interlocutory temporary injunction. Those facts distinguish that case from the facts in the case at hand. At this stage, I am unable to hold that the contracts between the plaintiffs and the 1st defendant are fictitious. I am also considering reliefs that include orders of mandatory injunctions as the Receivers are already in place.

The material availed to the court disclose that the plaintiffs were indeed indebted to the 1st defendant. The 1st defendant readily admits an initial error on the amount it demanded from the plaintiffs. The error indeed involved a large sum of money. That error alone in my view would not invalidate the demands made of the plaintiffs. The plaintiffs do not allege that they tendered what they thought was the correct sum due from them.

The plaintiffs have also argued that the 1st defendant applied illegal interest rates to their respective loan accounts. They say so because, the sums demanded of them were more than double the principal loans advanced which was contrary to the Induplum Rule or the Central Bank of Kenya **(Amendment)** Act No.4, of 2001 the "**Donde Act."** To buttress that argument reliance was placed upon a decision of Shields J in **Pop in (Kenya) Ltd – vs – Habib Bank Ltd and that of Ochieng J Karmali – vs – C.F.C**. In the former, Justice Shields found "**it hard to see how the amount for which the security was given can be substantially increased by interest which has been capitalized and upon which interest is charged."** Notwithstanding that finding, the Learned Judge declined to grant the injunction sought by the company. With regard to the relief sought by the company against the Receiver, the Learned Judge found that "**Likewise the receiver even if he is ultimately turned into a trespasser, has done all the damage he could do to the plaintiffs company's business and it is now too late to stop him doing further destruction of the business."**

The actions of the Receiver in the case Justice Shields was considering are no where near the actions complained about in the case at hand. Yet the Learned Judge declined to remove the receiver.

With regard to arguments urged by the plaintiffs regarding the "**Donde Act"** the 1st defendant has responded as follows. In its view, Kenya Gazette Notice No.1458 of 1990 and Legal Notice No.1458 of 1990 were suspended by Gazette Notice No.1617 of 2.4.90 which was itself revoked by Gazette Notice No.3348 of 23.1.91. The 1st defendant further argued that the effect of the revocation was that there was no longer any limit as to the rate of interest prescribed by the Central Bank of Kenya. In the premises, according to the 1st defendant, when the plaintiffs borrowed their loans from the 1st defendant on 7.12.2000 there was no restriction as to the rate of interest chargeable on any lending by a bank. The 1st defendant further contended that at the material time the Central Bank no longer had the power to regulate interest by virtue of Section 17 of the Central Bank **(Amendment)** Act No.9 of 1996. According to the 1st defendant, when it lent to the plaintiffs the respective loans, on 7.12.2000 there was no restriction as to the interest rate which the 1st defendant could charge as along as it was within the trade usage and the plaintiffs had acquiesced in the practice of the bank. Reliance was placed on the case of **Harilal & co. and Another –vs- The Standard Bank Limited [1967] EA 512.**

In my view, the 1st defendant is on firmer ground in supporting its position on the terms of the contract between it and the plaintiffs rather than on a trade usage. With regard to interest, the 1st defendant exhibited its letters of offer to the plaintiffs as "**AK1".** The rate of interest agreed was 2% per annum above the Base Rate and in the event of default, the agreed default interest was 13.25% p.a. over the Base Rate. The plaintiffs have not demonstrated on a prima facie basis that the 1st defendant contravened those contractual rates.

The 1st defendant has also maintained that by 6.12.2000 the plaintiffs were indebted to it in the following sums respectively, KShs.95,165,298.00 and KShs.135,349,199.35 and that the plaintiffs accepted the same by letters exhibited in annexture "**AK1".** Those letters are dated 6.12.2000. The plaintiffs accepted the offers by their letters dated 7.12.2000.

In view of the plaintiffs acceptance of their indebtedness as stated, their argument that the "**Donde Act"** applied is clearly erroneous as it came into force on 1.1.2001. Related to that complaint is the challenge made by the plaintiffs that there was failure to comply with Section 44 of the Banking Act with respect to increase of rate of banking or other charges except with the prior approval of the Minister. The plaintiffs have interpreted that provision to mean that the 1st defendant could only increase interest rate with prior approval of the Minister. With all due respect, interest is not mentioned in the section. The

plaintiffs have not demonstrated in any manner whatsoever, the excess sums involved even if the said Section were applicable.

The plaintiffs have challenged the validity of the sale agreement made between the 1st defendant through the 2nd and 3rd defendant to the 4th defendant of the suit properties. They contended that the 2nd and 3rd defendants could not sell the loose assets of the plaintiffs, the goodwill in the business and the suit properties in one document and simultaneously because different security documents governed the said properties. The defendants' response was that the charge documents allowed that to happen.

The plaintiffs further challenged the sale on the basis that there were irregularities in the bidding process. In their view, the same was not transparent and created room for dishonest deals. The defendants do not agree. Their views are that the property was given the widest possible publicity by advertisement in the media and the best price was obtained.

The plaintiffs further contended that the sale was irregular because it was not severable and thereby discouraged better bids for individual assets included in the sale and made the redemption process difficult. The defendants disagree. In their view, there were no impediments in the way of the plaintiffs to make their bids whether for all the properties or individual aspects of the same. The plaintiffs according to the defendants were given an opportunity to bid and could have even used nominees. They did not.

The plaintiffs further challenged the price accepted by the 2nd and 3rd defendants from the 4th defendant. They contended that the same was below not only the market value of the properties but was far below their forced sale value; even on the basis of the defendants' own valuation of the properties. The defendants contend that they acted in utmost good faith and obtained the price that the market offered.

The plaintiffs further challenged the said sale on the ground that it included LR No.209/1393/1 Normandie Court, Raph Bunche Road registered in the name of HSL. Yet that property was not charged to the 1st defendant at all and it appeared as if the same had been given away as a gift to the 4th defendant.

The 4th defendant argued that there was no evidence adduced by the plaintiffs to show that the properties were sold at a throw-away price. In its view, the fact that the value of the property was alleged to be low could not in itself be a ground for impugning the sale transaction at all. As far as it is concerned it lawfully purchased the properties in question and by that time the plaintiffs equity of redemption had been extinguished. The 4th defendant's position is that it is an innocent and bonafide purchaser for value without notice. In any event according to all the defendants, the plaintiffs' remedy is in damages.

The sale agreement between the joint receivers (the 2nd and 3rd defendants) and the 4th defendant has caused me anxious moments. The agreement has been exhibited as "**AK 16"** in the Replying affidavit of Mr. Afornse Kisilu. It is dated 23.3.2005 and is stated to be between the plaintiffs, the 1st defendant and the 4th defendant. It describes the properties on sale as Land and other assets. In schedule 5 the landed properties sold are described. LR No.209/1393/1 is not included. In the body of the agreement however under the sub-heading "Further Assurance", that title is introduced. Paragraph 23.2 begins as follows:-

"**It is the parties intention that in addition to the properties, the flat (situated on Normandie Court, Ralph Bunche Road LR No.209/1393/1) also be sold to the Purchaser for no additional consideration, since the initial offer made by the Purchaser to the vendors (based on information provided by Hilcrest) had assumed that such property was included within the sale."**

The 1st defendant defended the inclusion of LR. No.209/1393/1 in the sale agreement on the ground that it had in its possession a Power of Attorney in its favour. That power of Attorney was not availed to the court. In the absence of any basis in Law to dispose of that title, the plaintiffs' challenge is not altogether without basis.

I agree with the plaintiffs that the 1st defendant was attempting to transfer a property which had not been charged to it. It did not have authority to do so. On this ground the plaintiffs' have shown a prima facie case that the sale agreement may be successfully challenged at the trial.

I have also perused the sub-heading "**Conditions Precedent to Completion."**

Paragraph 5.1.1 reads as follows:-

"**5.1. Notwithstanding any provision of this Agreement, it is hereby agreed that the completion of the sale and purchase of the Assets by the Purchaser shall be subject to and conditional upon the satisfaction of the following conditions precedent namely:**

"**5.1.1 The Minister of Finance having issued an order authorizing the sale and purchase of the Assets by the Purchaser as contemplated in this Agreement pursuant to the provisions of the Restrictive Trade Practices, Monopolies and Price Control Act (Cap 504) and for purposes thereof, the parties shall each provide information, documents and assistance as may reasonably be required to procure such authorizing order and shall unless otherwise agreed in writing make the appropriate applications jointly within 7 days from the date hereof."**

The defendants admit that no authorization has been sought or obtained within the appointed period or at all. The Agreement is therefore liable to be challenged by reason of want of the Minister's authorization.

There is also no dispute that the price for the Landed properties was below the forced sale value of the properties. In **Mbuthia –vs- Jimba Credit Ltd C.A. No.111 of 1986** Platt JA observed as follows:-

"**In these circumstances, the question for the trial court would be whether the plaintiff could show that the defendant exercised his powers in a fraudulent way. He could rely on the price alone if he thought that at as little over half the true value, it was evidence in itself of fraud. It would be a matter of evidence whether the sale price of KShs.200,000.00 was in fact a little over half of the true value of KShs.375,000.00 as recently valued by the valuer relied upon by the plaintiff. There was a dispute of fact to be resolved."**

In the words of Platt J.A., the plaintiffs in this case at the trial will be entitled to rely on the price offered by the 4th defendant and accepted by the 1st, 2nd and 3rd defendants to show that the 1st defendant was probably exercising its power of sale in a fraudulent manner.

The upshot of my consideration of the plaintiffs' applications is that whereas no prima facie case with a probability of success has been established in terms of prayer 2A, 4 and 5, I am satisfied that such a case has been shown with respect to part of prayer 6 and that damages will not be an adequate remedy. Accordingly, an order shall issue that pending the hearing and determination of this suit all further registration or change of registration in the ownership leasing allotment in all those parcels of land known as LR Nos.209/5390, 3586/1, 12207 and 2259/68 Nairobi with any Land Registry, government department be and is hereby prohibited.

The plaintiffs shall file an undertaking as to damages under their seals within the next 7 days.

Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

KINGARA for plaintiff in HCCC No.178/06.

KINGARA holding brief for **WAWERU** in HCCC NO.177/06.

Odera holding brief for Ougo for the 1st defendant, Ojiambo for the 2nd and 3rd defendant and Majanja for the 4th defendant.

F. AZANGALALA

JUDGE

26/9/07