



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Winding Up Cause 30 of 1999**

**IN THE MATTER OF CONSUMER HIRE PURCHASE LIMITED (IN LIQUIDATION)**

**AND**

**IN THE MATTER OF THE COMPANIES ACT**

**(CAP 486 LAWS OF KENYA)**

**R U L I N G**

By a Chamber Summons dated 7<sup>th</sup> June 2004, filed on 8<sup>th</sup> June 2004, the Official Receiver has come to this court under Section 3A of the Civil Procedure Act, Sections 345, 352, 353, 354 and 355 of the Companies Act, and the Winding Up rules, seeking orders as follows: -

1. That Mr. Subramanian, Mr. Rajni Shah, and Mr. Ohanga liquidators of the above Company having been appointed by the court vide Court Order dated 16<sup>th</sup> August 1999 do report to court and produce accounts of the said Company during the period of their liquidation of Consumer Hire Purchase Limited.
2. That Krishnamurthy Kumar the Receiver and Manager appointed by Fidelity Commercial Bank Limited on the 29<sup>th</sup> March 2000 following Court Order dated 21<sup>st</sup> March 2000 do report to court and comply with the requirements of section 353 (1) Companies Act and provide the prescribed accounts.
3. That Mr. Shabbir Bhaga being a Receiver and Manager appointed by the Fidelity Commercial Bank Limited do report to court and comply with the requirements of Section 353 (1) of the Companies Act and provide the prescribed accounts.
4. That Mr. J. O. Nyawara appointed as Receiver and Manager by Fidelity Commercial Bank Limited on the 25<sup>th</sup> June 2001 do submit to court a report on his dealings with said Company as provided for by Section 353 (1) of the Companies Act and provide the prescribed accounts up to the 30<sup>th</sup> September 2003 when he ceased to act Receiver and Manager.
5. That the court do declare that Fidelity Commercial Bank Limited has acted in contravention of Section 345 of the Companies Act Cap 486 in its dealings with Consumer Hire Purchase Limited.
6. That all the persons who are (sic) named above as having participated in the following in the liquidation and/or Receivership of Consumer Hire Purchase be subjected to Public Examination on their accounts and reports to court.

7. That there be liberty to apply for further orders.
8. That the costs of this application be provided for.

The main ground upon which the application is brought is that the Liquidation and Receivership of Consumer Hire Purchase Limited (hereinafter referred to as the “The Company”) has been tainted by the gross violations of the provisions of the Companies Act.

An affidavit sworn by Tabitha Mwaniki, a State Counsel in the office of the Official Receiver, sets out the background to the application as follows: -

By a court order dated 14<sup>th</sup> May 1999, issued in Bankruptcy Cause Number 14 of 1999, the Official Receiver was appointed to manage the estate of Mehboob Mughal. Mughal was Director of the Company, and also a shareholder of the Company holding 70% shares. The Company had obtained loan facilities from Fidelity Commercial Bank Limited (hereinafter referred to as Debenture-Holder), on the security of a Debenture dated 25<sup>th</sup> July 1995, and 1<sup>st</sup> July 1996. The Company defaulted in the repayment of the loan. In exercise of its powers under the debenture, the Debenture-Holder appointed Kennedy Mogire and Subramanam Kanan as joint Receiver-Managers of the Company. This was resisted by the Company which denied the Receiver-Managers access to the Company leading to protracted court battles. In the meantime Pushinder Singh Mann, a Creditor of the Company petitioned this court in Winding Up Cause Number 30 of 1999 for a Winding Up Order against the Company.

On the 16<sup>th</sup> August 1999 the court granted the petition and appointed Mr. Subramaniam and Mr. Rajni Shah as Liquidators of the Company. The Liquidators took over the running of the Company. On the 4<sup>th</sup> November 1999, the Liquidators were given a statement of the affairs of the Company duly prepared by the Directors of the Company under Section 236 of the Companies Act.

On the 8<sup>th</sup> February 2000 the court granted orders in Winding Up Cause Number 30 of 1999 clarifying that the appointment of the Liquidators did not displace the appointment of the joint Receiver-Managers (whose appointment had been confirmed by the court in High Court Miscellaneous Civil Case Number 123 of 1999 (O.S.)). The court further ordered that the joint Receiver-Managers be accorded full access to the Company, and be allowed to carry out their functions as joint Receiver-Managers, and to hold the Books of Accounts, provided that the Liquidators also has reasonable access.

The court further directed that the Receiver-Managers having been appointed before the joint Liquidators, they had priority over the property and assets of the Company, and that the Liquidation was only subject and consequent to the receivership and could not therefore rank *pari-pasu* or in priority with the Receivership.

Pursuant to the orders made by the court on 18<sup>th</sup> February 2000, Rajni Shah a Liquidator of the Company, handed over the affairs of the Company to Mr. Krishnamurthy Kumar, who was appointed a Receiver Manager of the Company by the Debenture Holder vide an appointment deed dated 29<sup>th</sup> March 2000. The Official Receiver wrote to the said Receiver- Manager on 13<sup>th</sup> February 2004, seeking to have him account for his activities during his tenure as Receiver Manager. K. Kumar responded that although He took over from the Liquidator Rajni Shah and received the necessary records, He was frustrated by the Debenture-Holder, who assumed direct management of the Company by directing officers who were supposed to work under the Receiver-Manager’s guidance. K. Kumar, maintained that He had no control over the activities of the Company and was not therefore in a position to file statutory returns. He maintained that the bank had removed him from being a Receiver-Manager.

In its efforts to establish the affairs of the Company, the Official Receiver wrote to all the Receiver-Managers and Liquidators who had been involved in the affairs of the Company. There were only two notable responses. The first response was from Ranji Shah who confirmed having handed over to K. Kumar. The second response was from Nyawara O. J. who indicated that He was appointed Receiver-Manager of the Company on 25<sup>th</sup> June 2001 to replace Shabbir Bhaga. He explained that his efforts to

enquire about the property, books and assets of the Company bore no fruits and therefore He terminated his tenure on the 30<sup>th</sup> September 2003. He claimed that He had nothing to handover when He terminated his tenure.

The Official Receiver thereafter wrote to the Debenture-Holder seeking a statement of the full status of the Company. The Debenture-Holder responded that they had lifted the Receivership on the Company as at the time the last Receiver, Nyawara O. J. filed his final returns. The Debenture-Holder maintained that it was not holding any assets of the Company except for some of the Company's files. The Debenture-Holder further contended that the debt in their Books still remained outstanding and expressed an intention to pursue the guarantor Mehboob Mughal through the Official Receiver.

A replying affidavit sworn by Philip Muoka, a Legal Officer of the Debenture-Holder, explained that although the Debenture-Holder wanted to appoint Mr. Ohanga as Receiver-Manager, He never took up the position. He explained further that Mr. K. Kumar was appointed as Receiver-Manager, but the Debenture-Holder was forced to replace him after He declined to undertake his statutory obligations. The Bank thereafter appointed Mr. Nyawara. It was maintained that the Company was a mere shell when Mr. Nyawara took it over. The Debenture-Holder denied having interfered with the receivership, or having purported to act as Receivers.

Rajni Shah swore an affidavit in which He confirmed having been appointed a joint Liquidator of the Company, and having managed the affairs of the Company until He handed over to the Receiver Manager Mr. K. Kumar pursuant to the Court Order issued on 8<sup>th</sup> February 2000. He maintained that He fully accounted to the said Receiver-Manager. Mr. Krishnamurthy Kumar also swore a replying affidavit in which He maintained that although He was appointed as Receiver-Manager, differences arose between him and the Debenture-Holder which led to the termination of his appointment. He explained that the joint Liquidators who were managing the Company before He took over, did not provide him with any statement of affairs despite repeated requests. He exhibited a copy of the status account report as at 29<sup>th</sup> September 2000 and another as at 29<sup>th</sup> October 2001.

Mr. Ohanga also swore a replying affidavit in which He contended that He has never been appointed as a Receiver-Manager of the Company. He explained that a suggestion had been made that He be appointed as Receiver-Manager but certain conflict of interest arose and the Debenture-Holder settled for K. Kumar as the Receiver-Manager. He maintained that He was not directly involved in running the affairs of the Company.

I have carefully considered the application, the affidavit in support and in reply as well as the submissions made by counsels. I am satisfied that the Official Receiver has the right to demand the enforcement of the duties of the Receiver/Manager of a Company under receivership. The Official Receiver has also the right to demand the public examination of any officer or person where there is reasonable grounds to suspect fraud or gross violations of the provisions of the Companies Act, during the management of a Company placed under receivership.

In this case it is evident that the Company was under the control of Receiver-Managers from 1999 to 2004. The Debenture-Holder maintains that nothing was collected within that period. It is therefore important that the Receiver-Managers be examined as to their management of the affairs of the Company.

It is evident from the affidavit of Tabitha Mwaniki and the annexures thereto, that Rajni Shah and Subremanian Kanan were initially appointed joint Liquidators of the Company but that Rajni Shah handed over to Mr. Kumar. Although Mr. K. Kumar has denied this in his affidavit, I find that Rajni Shah did actually hand over to K. Kumar and that is why K. Kumar was able to prepare the status account reports for the Company. I am satisfied that Rajni Shah and Subramanian K. the liquidators appointed by the court on 16<sup>th</sup> August 1999, only managed the affairs of the Company for about 6 months after which they handed over to the Receiver-Manager. I find it unnecessary to order the public examination of the liquidators as they have provided all the necessary information. I find that Krishnamurthy Kumar, Shabbir Bhaga and J. O. Nyawara each managed the affairs of the Company as Receiver Manager at

different times. It is necessary to have all these persons produce the accounts of the Company relevant to their period of management of the Company and that they be publicly examined so that the court can satisfy itself as to the state of the affairs of the Company during such period and compliance with all the necessary provisions of the law.

Although it is evident that Mathew Ohanga was never formally appointed as a Receiver Manager, He was an employee of the Debenture Holder, who appears to have had a hand in the coordination of the affairs of the Company. It is necessary that He be examined as to the extent of his participation.

Accordingly, I do grant prayer numbers (2), (3), (4), and (6) of the Chamber Summons. I further order that Mathew Ohanga shall also appear in court for public examination. Determination of prayer (5) and (8) of the Chamber Summons shall await the outcome of the public examination.

Those shall be the orders of this court.

*Dated, signed and delivered this 31<sup>st</sup> day of October 2007.*

**H. M. OKWENGU**

**JUDGE**