



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

**Civil Suit 411 of 2007**

**KELLY PETROLEUM LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**EAST AFRICAN BUILDING SOCIETY**

**BANK LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**P.V.R. RAO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

By a Chamber Summons dated 13<sup>th</sup> August 2007, filed on the same date, Kelly Petroleum Limited the applicant herein, seeks *inter alia*, an order of interlocutory injunction, restraining East African Building Society Bank Limited, and P.V.R. Rao (Receiver Manager of Plaintiff's Petroleum business on LR NO.209/8872), hereinafter referred to as 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively, from selling by private treaty or advertising for sale, or in any manner whatsoever disposing of applicant's interest in LR NO.10823/54 and LR NO.209/8872, pending the hearing and determination of a suit, which the applicant filed against the two respondents on the same day. In that suit the applicant seeks judgment against the two respondents for: -

- (a) A declaration that the appointment of the 2<sup>nd</sup> Defendant as a receiver over the plaintiff's petroleum business was unlawful.**
- (b) An order that the defendants do provide full accounts of all money transactions between the plaintiff and the 1<sup>st</sup> Defendant, from the commencement of the guarantee and loan facilities.**
- (c) An order that the defendants to provide a full account of all the trading and transactions that the 2<sup>nd</sup> Defendant has carried out as Receiver Manager of the Plaintiff's petroleum business since 7<sup>th</sup> February 2003.**
- (d) A permanent injunction restraining the defendants from disposing of the plaintiff's interest in LR NO.10823/54 – IR NO.75763 and LR NO.209/8872 – 1.R. NO.59627.**
- (e) A permanent injunction restraining the 2<sup>nd</sup> Defendant from continuing to occupy, run and or control or in any other way manage and or control the plaintiff's petroleum business and depot.**
- (f) Damages on account of lost business.**

**(g) Costs of this suit.**

**(h) Such other and further reliefs that this court may deem just and expedient to grant.**

The application is supported by an affidavit sworn by Susan W. Muritu, a director of the applicant's company. In the supporting affidavit, Susan W. Muritu avers that the plaintiff's company and the 1<sup>st</sup> respondent, entered into an agreement pursuant to which, the 1<sup>st</sup> respondent gave the plaintiff guarantee and loan facilities amounting Kshs. thirty seven million; that in consideration of the guarantee and loan facility, the applicant provided security by way of a Debenture for Kshs. thirty seven million over all the plaintiff's immovable property, its machinery, stocks, shares and other assets, as well as legal charge over LR NO.10823/54 and LR NO.209/8872.

The applicant contend that on or about 7<sup>th</sup> February 2003, the 1<sup>st</sup> respondent, contrary to the agreed terms and without any prior notice or warning, appointed the 2<sup>nd</sup> respondent as Receiver/Manager over the applicant's petroleum business. The 2<sup>nd</sup> respondent immediately took over the applicant's business which included petrol worth over Kshs. six million.

The applicant demanded an explanation from the 1<sup>st</sup> respondent for its actions; a comprehensive account and inventory of all assets of the Plaintiff at the time of the take over, and a detailed report of all the trading and transactions carried out by the 2<sup>nd</sup> respondent as Receiver Manager from 7<sup>th</sup> February 2003. The 1<sup>st</sup> and 2<sup>nd</sup> respondents, however, have to date failed to provide any explanation or the information required. In particular the applicant is suspicious about the fate of its two assets LR 209/8872 and LR 10823/54, as efforts to carry out a search of the title at the Lands Registry have been futile the file being said to be missing.

In a replying affidavit sworn by Kibet Chebii, a legal officer of the 1<sup>st</sup> respondent, it was conceded that the 1<sup>st</sup> respondent did grant financial facilities of Kshs. thirty seven million to the applicant, in return for which the applicant charged his properties LR NO.10823/54 Thika and LR NO.209/8872 Nairobi to the 1<sup>st</sup> respondent, in addition to creating a Debenture over its assets in favour of the 1<sup>st</sup> respondent. Copies of the applicant's Statement of Accounts with the 1<sup>st</sup> respondent upto and including 30<sup>th</sup> July 2007, were exhibited showing that the applicant had a total debit balance of Kshs.54,892,699.30 on its three accounts.

It was further averred, that the applicant failed to pay the principal or interest due, as a result of which the 1<sup>st</sup> respondent served the applicant and its directors with statutory notices in respect of the secured property LR 209/8872 and LR 10823/54. The 1<sup>st</sup> respondent also issued demand letters to the applicant and its directors for repayment of the loans. A letter dated 15<sup>th</sup> January 2003, from the plaintiff responding to the said demand was exhibited.

It was maintained that the 1<sup>st</sup> respondent in exercise of its statutory power of sale, has already sold LR NO.10823/54 and LR NO.209/8872. The 1<sup>st</sup> respondent also placed the plaintiff's company in receivership, and appointed the 2<sup>nd</sup> respondent as Receiver Manager on 7<sup>th</sup> February 2003.

Mr. Ongoya who argued the application on behalf of the applicant, maintained that the appointment of the Receiver Manager was unlawful, as the applicant was at the material time servicing the financial facility. Mr. Ongoya also contended that the failure by the 1<sup>st</sup> respondent to give notice to the applicant also rendered the appointment of the Receiver unlawful, and further that the failure by the 1<sup>st</sup> respondent to give a detailed and comprehensive account to the applicant, was a fetter on the applicant's equity of redemption. Finally, Mr. Ongoya submitted that the failure by the 1<sup>st</sup> respondent to serve a statutory notice on the applicant, rendered any attempt to exercise the statutory power of sale unlawful. It was submitted that the applicant had established a *prima facie* case, and sufficient grounds for reasonable apprehension that it was likely to suffer unless the respondents are restrained.

Mr. Kipkorir who appeared for the respondents, maintained that the applicant had conceded obtaining the financial facility from the 1<sup>st</sup> respondent on the security of its two properties and the Debenture, and that the 1<sup>st</sup> respondent had demonstrated that there was money due and owing on the account, and that appropriate statutory notices had been served. It was submitted that the applicant had not established any *prima facie* case, and that in any case the properties LR NO. 209/8872 and LR NO. 10823/54 had already been disposed of. In this regard Mr. Kipkorir relied on **HCCC (Milimani) NO.304 of 2001, David Ngugi Mbutia vs Kenya Commercial Bank Limited & Another** where Ringera J. dismissing an application for an interlocutory injunction, ruled that a party who is aggrieved by the exercise of a mortgagee's statutory power of sale under ITPA, where either no case had arisen to authorise the sale, or due statutory has not been served, is only entitled to the remedy of damages.

**Court of Appeal Civil Appeal No. 56 of 1997 J. M. Mwakio vs Kenya Commercial Bank Limited** was also relied upon by Mr. Kipkorir for the proposition that the applicant's loss if any arose out of operation of the contract of mortgage, freely executed by him and the respondent, and that no consequence that flows out of the enforcement of law, can be said to cause injustice.

Other cases relied upon by Mr. Kipkorir were: -

- **J. L. Lavuna & Others vs Civil Servants Housing Company Limited & Another, Nairobi C. A. Nai. 14 of 195.**
- **Habib Bank A G Zurich vs Pop In Kenya Limited & Others Nairobi Civil Application No.147 of 1998.**

Mr. Kipkorir therefore, urged the court to dismiss the application.

Having considered the application, the affidavit in support and in reply, the contending arguments of counsels, and the authorities cited, I find that it is common ground that financial facility of Kshs. thirty seven million was granted to the applicant by the 1<sup>st</sup> respondent on the security of a Debenture over the applicant's assets, and legal charge over the applicant's two properties known as LR 10823/54, and LR NO.209/8872. It is also not disputed that the 1<sup>st</sup> respondent appointed the 2<sup>nd</sup> respondent as Receiver Manager on the 7<sup>th</sup> February 2003, ostensibly in pursuance of the Debenture.

Issues which arise are as follows: -

- ***whether there was any money due and owing from the applicant to the 1<sup>st</sup> respondent in respect of the financial facility and if so whether the 1<sup>st</sup> respondent did make any appropriate demand in accordance with the Debenture;***
- ***whether the 1<sup>st</sup> respondent did serve a valid statutory notice on the applicant in respect of the legal charge;***
- ***whether the 1<sup>st</sup> respondent has exercised its statutory power of sale over LR 10823/54 and LR NO.209/8872;***
- ***whether the applicant has suffered any loss and if so whether same cannot be adequately compensated by an award of damages;***
- ***whether the applicant has established a prima facie case,***
- ***whether an interlocutory injunction can issue to the applicant in the terms sought.***

Contrary to the averments of the applicant's director that the 1<sup>st</sup> respondent appointed the 2<sup>nd</sup> respondent as Receiver Manager without any prior notice or warning, it is evident from annexure KC - 9

to the replying affidavit, that the applicant was actually given a letter of demand and notice, that unless payment was made, the 1<sup>st</sup> respondent intended to take all necessary steps available to it under the law. This letter of demand was acknowledged by the applicant in its response which has been annexed to the replying affidavit as Annexure KC – 13. Although the letter of demand did not explicitly talk of appointment of the Receiver/Manager, that was clearly an option open to the 1<sup>st</sup> respondent under the debenture-agreement. The applicant was not therefore candid in contending that there was no notice of demand or prior notice or warning before the appointment of 2<sup>nd</sup> respondent as Receiver/Manager.

The applicant has not specifically denied owing any money to the 1<sup>st</sup> respondent. Indeed in its letter exhibited as KC – 13, the applicant acknowledges that it owns some money to the 1<sup>st</sup> respondent, but claimed it needed time to “**Confirm the figures advised then organize themselves to settle the amount of the claim.**” In my considered view, the actual amount notwithstanding, there was an implicit admission by the applicant, that there were monies due and owing to the 1<sup>st</sup> respondent, in respect of the financial facility. Moreover, the contention that the applicant was servicing the loan has not been substantiated. Under these circumstances appropriate demand having been made for payment, and payment not having been made, the appointment of the Receiver/Manager, *prima facie* appears to have been proper.

As regards the legal charges, although the 1<sup>st</sup> respondent exhibited copies of statutory notices which were allegedly sent to the applicant, no copy of the certificate of posting has been exhibited, such that proof of service of the notice is lacking.

Nevertheless, the 1<sup>st</sup> respondent maintained that it has already disposed off the two properties in exercise of its statutory powers of sale. Copies of the agreement of sale have been exhibited. Assuming therefore, that the property has been sold albeit irregularly, I am of the view that under Section 69B of the Indian Transfer of Property Act, it is clear that the applicant’s remedy lies only in damages. Indeed this was the position taken by the Court of Appeal in the case of *Priscilla Grant v Kenya Commercial Finance Company Limited & 2 Others, Civil Application No. Nai. 227 of 1995*, which was followed by Ringera J. in the case of *David Nguji Mbuthia (supra)*.

Arising, from the above, I come to the conclusion that there is *prima facie* evidence, that there is money due and owing from the applicant to the 1<sup>st</sup> respondent in respect of the financial facility, and that the 1<sup>st</sup> respondent has appointed the 2<sup>nd</sup> respondent as Receiver/Manager pursuant to the Debenture, and that any loss suffered by the applicant as a result of the irregular exercise of the 1<sup>st</sup> respondent’s statutory power of sale, is recoverable by way of damages.

The applicant has not therefore satisfied the conditions upon which an order of interlocutory injunction can issue. His application to restrain the 1<sup>st</sup> respondent from exercising its powers under the Debenture or the legal charges must therefore fail.

Accordingly, the application dated 13<sup>th</sup> March 2007, is dismissed.

Orders accordingly.

**Dated, signed and delivered this 26<sup>th</sup> day of October 2007.**

**H. M. OKWENGU**

**JUDGE**