



REPUBLIC OF KENYA

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

CIVIL CASE 249 OF 2006

BULK MEDICALS LIMITEDPLAINTIFF

VERSUS

PARAMOUNT UNIVERSAL BANK LTD.

HARVEEN GADHOKE

DANIEL M. NDONYEDEFENDANTS

RULING

I have before me a Notice of Motion lodged by the plaintiff for two primary orders apart from costs:-

1. That Receivership placed on the plaintiff company be lifted.

2. That Leave be granted to the plaintiff to amend its plaint in terms of the draft amended plaint.

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

1. That pursuant to the debenture dated 18.9.1997 and the supplementary debenture dated 29.1.1998 the 1st defendant placed the plaintiff under receivership sometime in the year 2006.

2. That the alleged debt, the subject matter of the receivership is fully recovered.

3. That the defendants on or about 27.3.2007 entered into an agreement for sale of all assets which are the subject matter of the debentures aforesaid and have confirmed in writing that no operations are currently going on at the plaintiff company's premises.

4. That it is only fair and just that the defendants do return the plaintiff company to its directors to try and jump start its operations as it is their only source of income.

5. That the plaintiff proposes to amend the plaint in terms of the attached amended plaint to bring on board the new developments that have arisen since institution of this suit to assist the court effectively determine the matter.

There is an affidavit in support of the application sworn by one Hitan

C. Majerdia the plaintiff's Managing Director. The application is opposed and there is a replying affidavit sworn by Harveen Gachuke the 2nd defendant.

He has sworn the affidavit on his own behalf and that of the co-defendants.

The application was canvassed before on 24.10.2007 by Mr. Simiyu, Learned Counsel for the plaintiff and Mr. Ngatia, Learned Counsel for the defendants. Both Counsel took me through the affidavits and reiterated the positions taken by their clients in their respective affidavits.

I have considered the application, the affidavits, the submissions of Counsel and the authorities cited. The defendants contend that the assets in the plaintiffs premises were sold and the sale proceeds were utilized in part payment of the debt due to the 1st defendant leaving the plaintiff's indebtedness with the 1st defendant at Kshs.8,376,771.34 as at 31.8.2007 and which sum continues to attract interest until payment in full. The defendants further contend that there are other trade debtors of the plaintiff who owe the plaintiff in excess of Kshs.5.3 million and whom the defendants are pursuing for payment. According to the defendants the plaintiff owes other creditors a sum of about 93 million and therefore the plaintiff's contention that its directors can jump start the plaintiff's operations is unrealistic. The defendants' contentions are contained in their replying affidavit aforesaid. The plaintiff did not file a subsequent affidavit to rebut the defendants' averments.

Given the position stated by the defendants and which position I have no reason to doubt, no case has been made out for an order lifting the Receivership. There are other reasons for declining the order to lift the Receivership. In its application dated 30.10.2006 the plaintiff sought *inter alia* an order of temporary, injunction restraining the 2nd and 3rd defendants from acting as Receivers/Managers pending the hearing of an intended Appeal. In the alternative the plaintiffs asked the court to issue a temporary injunction compelling the 2nd and 3rd defendants to move out of the plaintiffs business premises pending the hearing and determination of the appeal.

That application was heard by Ochieng, J. who in a reserved ruling dismissed the same on a Preliminary Objection on the ground that the plaintiffs had lodged another application in the Court of Appeal seeking a temporary injunction pending the hearing and determination of its appeal. The plaintiff did not just make one application. There were others and the latest in line would appear to be the one filed and dated 28.3.2007. In that application the plaintiff seeks *inter alia* enlargement of time to comply with conditions of injunction set by the Court of Appeal.

In my view, the plaintiffs application is a veiled attempt to obtain what it could not obtain in its earlier applications for injunction. Its field of battle is now in the Court of Appeal. The application for an order lifting the Receivership is accordingly without merit and is dismissed.

With regard to the prayer for leave to amend the plaint, I am afraid during the active prosecution of the appeal pending before the Court of Appeal, adding a party to the pleadings will not serve the interests of justice as orders may be made that would affect the intended additional party without it being heard. That would offend against the well know maxim that a party should not be condemned unheard.

In the premises I decline to grant the prayer for leave to amend at the moment without prejudice to the right of the plaintiff to move the court appropriately on the conclusion of its appeal.

In that regard I will grant the plaintiff liberty to apply.

For now however, the entire application is dismissed with costs. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of November 2007.

F. AZANGALALA

JUDGE

Read in the presence of Simiyu for the plaintiff and Ngati for the defendant.

F. AZANGALALA

JUDGE

28/11/07