REPUBLIC OF KENYA

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

Civil Case 113 of 2007

KING'ORANI INVESTMENTS CO. LTD…….....……PLAINTIFF

VERSUS

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

ADRIAN SPENCER DEARING…….....……2ND DEFENDANT

RULING

The application is the Notice of Motion dated 1st March, 2007. It is expressed to be brought under Order L rule 1, Order XXXIX rule 1, 2 & 3 of Civil Procedure Rules and Section 3A of Civil Procedure Act. Mr. Kingara for the Applicant sought prayers 4 and 5 which seeks the following orders.

4. Pending the hearing and final determination of the suit, the second Defendant be restrained by himself, his agents or servants or otherwise howsoever from acting and/or purporting to act as the Receiver and/or Manager of the Plaintiff and from interfering in any manner with the Plaintiff's quiet possession and enjoyment of all the Plaintiffs land, properties, machinery, equipment, assets or stock or any part thereof.

5. Pending the hearing and final determination of the suit, the Defendants and each of them be restrained by themselves, their agents or servants or otherwise howsoever from selling, disposing off, offering for sale or alienating in any manner whatsoever any of the Plaintiff's land, properties, machinery, equipment, assets or stock or any part thereof and/or interfering with all the existing suits and or litigation initiated by the Plaintiff and/or involving it.

There are fourteen grounds for this application cited on the face of the application as follows:

i) The first Defendant has unlawfully and illegally purported to appoint the Second Defendant as Receiver and Manager of the Plaintiff.

ii) The Plaintiff has neither duly executed nor authorized the execution of any valid and/or legally enforceable debentures in favour of the 1st Defendant.

iii) Notwithstanding this, the second Defendant is attempting to move into and take possession of the assets of the Plaintiff as purported Receivers and Managers of the Plaintiff.

iv) The **Plaintiff's business as a result of the acts of the Defendant aforesaid are likely to close down and Plaintiff suffer irreparable loss and damage.**

v) The Second Defendant has placed advertisements in the press notifying all the sundry of the purported receivership.

vi) The Plaintiff's assets in real and imminent danger of being dissipated and wasted away completely due to the unlawful actions of the Defendants.

vii) The purported appointment of receivers is a grave abuse of Civil Process in that the first Defendant has not such power. The purported debentures having been issued to guarantee a debt to a third party STONI ATHI LIMITED which debt was fully paid.

viii) By a letter dated 23rd February 2006 addressed to the Plaintiffs' agent the second Defendants is attempting to take over the Plaintiff's rent collections and to try and obtain possible purchasers of some of its assets and by a letter dated 16th February 2007 he has stated that he might interfere with certain cases filed in court and/or pending therein.

ix) That if the appointment of the Second Defendant as Receiver and Manager is permitted to take effect, the operations of the Plaintiff will suffer irreparable loss, damage and injury.

x) That in all the circumstances, the First Defendant is acting capriciously, fraudulently and recklessly and has treated the plaintiff oppressively out of bad faith and malice.

xi) Unless the orders sought herein are granted, the Plaintiff's business will be completely and irretrievably destroyed.

xii) The Plaintiff therefore stands to suffer irreparable loss and injury unless the orders prayed for herein are granted.

xiii) The plaintiff has a prima facie case with very high probability of success against the Defendants herein as detailed in the plaint filed herewith.

xiv) The Plaintiff will comply with such orders and/or undertakings as may be imposed by the Court.

There is also an affidavit sworn by **JAMES ABIAM**

MUGOYA ISABIRYE the Director of the Plaintiff **KINGORAN INVESTMENTS LIMITED**, with annexures thereto, dated 1st March, 2007 in support of the application. Same Director filed a further affidavit on 26th March, 2007.

The application was opposed. There is a replying affidavit sworn by **JOHN KAMIRI**, a Relationship Manager with the 1st Defendant, Kenya Commercial Bank Limited dated 6th March, 2007.

The Advocates for the parties, Mr. Kingara for the Plaintiff, and Mr. Gichuhi for the Respondents agreed by consent to put in written submissions and to later highlight them in court. Each Counsel filed their respective written submissions. The submissions were finally highlighted on the 30th July, 2007. It is not disputed that the Plaintiff herein, Kingorani Investments Limited created three debentures in favour of the 1st Defendant, the Kenya Commercial Bank, hereinafter referred to as the Bank. What is disputed is whether the debentures were to secure the debt of Stoni Athi Limited alone, as the Plaintiff contends, or both Stoni Athi Limited and Mugoya Construction and Engineering Company debts, (hereinafter referred to as Mugoya), as the Defendant contends. Once the issue of the nature of security created is resolved the rest of the issues will be determined easily.

The Plaintiff's Advocate, Mr. Kingara had two sides of arguments. Counsel submitted that the Plaintiff Company did not have a Board of Directors, which was the only body that could create a debenture. The other side of Mr. Kingara's argument was that the debenture created by the Plaintiff, in favour of the

Bank secured debts by Stoni Athi Limited alone. Counsel relies on the debenture documents at pages 25 to 44 and 57 to 71 respectively of the Plaintiff's documents. Counsel submitted that at Page 53 of the application under title "**Securities held",** the Debenture was for Kshs.470 million over the assets of Kingorani. Counsel submitted that same were created as securities for the debts of Stoni Athi Limited.

Mr. Gichuhi for the Defendants opposed the application and his opponents arguments. Counsel submitted that the Plaintiff created supplemental Debentures in favour of the Bank, in addition to those issued by Mugoya. Counsel stated that these Debentures were executed on 10th April, 1997 as evidenced in pages 24 to 44 of the Plaintiff's exhibit, the second on 11th December, 1997 to secure Kshs.470 million as evidenced in pages 58 to 71 of the Plaintiff's exhibits, and the Guarantee and indemnity was executed on 7th August, 1997 to secure Kshs.1,657,000,000/= as evidenced at pages 45 to 50 of the Plaintiff's exhibit. In the latter guarantee, Mr. Gichuhi submitted, the Plaintiff guaranteed repayment for Kshs.1.657 billion to the bank which in turn afforded various banking facilities to Mugoya.

In regard to the issue whether the Debentures signed by the Plaintiff Company in favour of the Bank was to secure the debts of Stoni Athi Limited and Mugoya, the documents speak for themselves.

The Debenture dated 10th April, 1997 is found at pages 25 to 44 of the Plaintiff's exhibits. At page 26 it is provided that the Debenture is

"SUPPLEMENTAL TO

(a) A Debenture issued by Mugoya Construction and Engineering Limited in favour of KCFC for Kenya shillings four hundred and seventy million(470,000,000/=)"

(b) ….

The words "**Supplemental to"** are very clear. The Debenture was issued "**in addition to"** an earlier or earlier ones issued by Mugoya. To make it even more clearer, at page 30 of the same Debenture under clause 4 of same, the Plaintiff, inter alia, covenanted with the Bank that upon execution of the said Debenture, it would procure Mugoya to execute and deliver a first charge in favour of the Bank, over the immovable properties specified for the purpose of extending the charge therein created to such properties. The Plaintiff also covenanted with the Bank that it would deposit with the Bank, the title deeds of all immovable properties during the continuance of the security.

From the provisions in this Debenture, it is clear that it was an additional Debenture issued supplemental to those issued by Mugoya.

The Guarantee at page 45 of the Plaintiff's documents is the Guarantee and indemnity. It clearly shows, at page 45 of the document, that the Principal borrower was Mugoya and that the Guarantor was the Plaintiff Company. The Plaintiff Company clearly provided a Guarantee to the Bank for Mugoya's debt limited to the sum of Kshs.1,657,000,000/= clauses 1(a),(f),(h) and (1) of the Guarantee provides:

"Clause 1(a) The Company shall pay and satisfy to the Bank on demand by the Bank all sums of money which are now or at any time shall be owing to the Bank anywhere on any account whatsoever whether from the Customer solely or from the Customer jointly with any other person or persons or from any firm in which the customer may be a partner including the amount of notes or bills discounted or paid and other loans credits and advances made to or for the accommodation of either the Customer solely or jointly or any such firm as aforesaid or for any moneys for which either the Customer solely or jointly or any such firm may be or become liable as surety or for any moneys or other facilities guaranteed by the Bank for and on behalf and at the request of the Customer solely or jointly or any such firm or in any other ways whatsoever together within all cases aforesaid all interest (at such rate or rates as may from time to time be charged to or payable by the Customer under the arrangements from time to time in force between the Customer and the Bank) discount and other bankers' charges including legal charges."

"***Clause (f) The Company agrees that in respect of its liability hereunder the Bank shall have a lien on all securities belonging to the Company and now or hereafter held by the Bank whether in safe custody or otherwise howsoever and also on all moneys now or hereafter standing to the Company's credit with the Bank."***

"***Clause(h) The Bank my at any time and without notice to the Company debit any one or more of the Company's accounts with the Bank with any sum or any part thereof which may become due to the Bank under this guarantee and set off any sum due to the Company from the Bank against the Company's liability hereunder."***

"Clause (i) This Guarantee shall be in addition to and shall not in any way be prejudiced or affected by any collateral or other security now or hereafter held by the Bank for all or any part of the moneys and liabilities hereby guaranteed nor shall such collateral or other security or any lien to which the Bank may be otherwise entitled or the liability of any person or persons not parties hereto for all or any part of the moneys and liabilities hereby secured be in anywise prejudiced or affected by this present guarantee; and the Bank shall have full power at it's discretion to give time for payment to or to make any other arrangement with any such other person or persons without prejudice to this present Guarantee or any liability hereunder; and all moneys received by the Bank from the Company or the Customer or any person or persons liable to pay the same may be applied by the Bank at its sole discretion to any account or item of account or to any transaction to which the same may be applicable; and nothing herein contained shall operate to merge or extinguish the Company's liability under any bill of exchange accepted or endorsed by or on behalf of the Company or the customer of which the Bank is the drawer or holder in due course and this Guarantee shall not prejudice the Bank's rights or remedies under any such bill or bills."

These clauses spell out what the parties contracted. The Plaintiff bound itself to satisfy to the Bank on demand, all sums of money owing to the Bank whether from the Plaintiff alone or from the Plaintiff and any other person. The parties also covenanted that the Bank shall have a lien on all securities belonging to the Company then or acquired thereafter and all money's standing to the Company's credit with the Bank. The Bank had power under the Guarantee, without notice, to debit the Plaintiff's accounts with it with any sum due to the Bank under the Guarantee, and to set off any sum due to the Plaintiff from the Bank against the Plaintiff's liability. The parties also covenanted that the Guarantee shall be in addition to and shall not be prejudiced or affected by any collateral or other security held by the Bank for all or any part of the Moneys and Liabilities guaranteed.

The Debenture at page 58 to 71 of the Plaintiff's document was supplemental to an earlier security of 470,000,000/= to the Bank. This latter one created a Debenture to secure Kshs.50 million in favour of the Bank for the debt of Stoni Athi Limited.

Having considered the Debenture documents, and the Guarantee and indemnity documents produced before me, I find that the Plaintiff created Debentures, to secure the debts of both Stoni Athi Limited and Mugoya. There is no dispute that the Plaintiff was discharged of it's liability in regard to Stoni Athi Limited debt. However the Plaintiff's liability to the Bank over the debts of Mugoya still subsists. Having come to this conclusion, I reject Mr. Kingara's submission that no Debenture was created by the Plaintiff over Mugoya's debt, in favour of the Bank. I find to the contrary that two of Debentures and Guarantees created by the Plaintiff in favour of the Bank secured Mugoya's debts.

Mr. Kingara argued that the Debentures were not valid because the Plaintiff Company had only one Director who had no capacity to create same. Counsel relied on Section 178A of Companies Act which provides that each Company must have a duly qualified Company Secretary. He also relies on Regulation 113 Table A of First Schedule to Companies Act which provides that a Company seal can only be used by the authority of the Directors or a Committee of the Directors and further that every seal affixed by a company shall be signed by a Director and counter signed by a Secretary or second Director or a person appointed by the Directors for that purpose. Counsel also relied on the case of **SOUTH LONDON GREYHOUND RACECOURSES LTD. VS WALLE [1930] ALLER 496** where it was held that where a seal was affixed to a share certificate without the authority of the Company, the certificate was a

forgery and the Company was not estopped from denying its validity.

Mr. Kingara argued that since the Plaintiff Company had only one Director, he could not create a debenture and neither could he affix seals on documents on behalf of the Company.

Mr. Gichuhi relied on Section 34(1) of the Companies Act and submitted that a contract made between private persons in writing, signed by the parties to be charged therewith, may be made on behalf of the Company if signed by a person authorized by it.

Mr. Gichuhi continued to submit that under Section 34(2) of same Act a contract made according to the Section shall be effectual in law and shall bind the Company and all parties thereto, as the subsection clearly provides. Section 34(1) and (2) of the Companies Act provides:

"***34(1) Contracts on behalf of a company may be made as follows:***

(a) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on the parties to be charged therewith, may be made on behalf of the company in writing signed by any persons acting under its authority, express or implied;

(b) a contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the Company by any person acing under its authority, express or implied.

34(2) A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto."

Mr. Gichuhi also relied on clause 3 (XXVI) of the Plaintiff's Memorandum of Association which provided the Plaintiff's objectives as including giving guarantee in relation to mortgages, loans, instruments and securities and generally to guarantee or become sureties for the performance of any contracts and obligations of the Company or third party. Mr. Gichuhi submitted in light of the Plaintiff's Memorandum of Association it had the capacity to create the debentures in question.

In answer to the issue of the single Director not having the capacity to seal documents on behalf of the Plaintiff, Mr. Gichuhi relied on two cases **LALCHAND SHAH VS I & M BANK C. A. NO. 165 OF 2000 (NAIROBI) (UR)** at page 7 of the authority where **Shah JA** observed:

"***if a document which is ex-facie totally valid and properly attested, a party to be charged therewith cannot simply get away from it by stating that an advocate did not attest it…it would be very simple for any chargor to postpone an auction sale by simply saying that the charge is not properly attested. If such a state of affairs was allowed to be taken cognizance of there would be no end to the chargors streaming to Courts to stop an auction sale on that ground."***

Mr. Gichuhi also relied on **TCB LTD VS GRAY [1986] 1 ALLER 587** where **Sir Nicolas Browne-Wilkinson, V-C,** held

"***Where a person executed a deed by stating that it had been 'signed, sealed and delivered' but without infact sealing it and another person relied on the deed to his detriment the person executing the deed was estopped from denying that it was sealed"***

I have considered submissions by both Counsels on this issue of the validity of the debentures. It is instructive that the Plaintiff challenges the Debentures executed in 1997, 10 years ago, at this late hour in the day. It is also instructive that the very first time the Plaintiff is challenging the Debentures and Guarantees in this case was when it filed its plaint on 1st March 2007. Mr. Kingara invoked the rule of "Constructive Notice" saying that the Plaintiff's documents were public documents available to the Bank, and that the Bank was expected to have taken note of the requirements in the Plaintiff's Memorandum

and Articles of Association, and especially of the number of Company Directors required, and, that no one Director could bind the Company. Counsel also invoked the rule in the TURGUAND CASE (ROYAL BRITISH BAN VS TURQUAND [1856] 6E X B 327) This and other cases cited by the Plaintiff's Advocate are merely persuasive.

The Companies Act, Section 34 which provides that a validly drawn and executed Contract is binding on the parties thereto, and section 99 which provides that once the Registrar has issued certificates of registration in respect of documents e.g. Debentures, charges, in which the amount secured is stated, the same is conclusive evidence that the requirements pertaining to the registration has been met; both provisions are clear that the debentures herein having been validly executed and registered are binding on the plaintiff company.

The case cited of **LALCHAND F. SHAH** supra, a Court of Appeal decision binding on this court, clearly discourages courts from allowing chargors to escape liability on allegations that the debentures or charge documents were not properly executed. That case is in all forms with the instant case. The Plaintiff Company challenges the signatures of its own officials saying they lacked capacity to bind it in the Debentures executed by them. It is noted that no malpractice is alleged against the Bank. That allegation that the Plaintiff's officials who signed the Debentures had no capacity to do so, is escapist and cannot but be rejected as an attempt to escape liability, 10 years after the documents were executed and the Plaintiff had enjoyed the Bank's facility thereunder.

Mr. Kamiri in the replying affidavit, paragraphs 12 to 14 deponed that the Plaintiff acknowledged Mugoya's debt and allowed its property to be sold in order to reduce Mugoya's debt to the Bank. That averment was unconverted. I find that the Plaintiff is estopped from denying the validity of the Debenture since it admitted its liability to the Bank over Mugoya's debt under the same Debenture.

The Plaintiff's advocate submitted that the Bank could not enforce the Debenture because it crystallized once before, and that a Debenture crystallizes only once. Counsel relied on the **Law of Receivers and Administrators of Companies** by **Sir Gavin Lightman** and **others, Sweet and Maxwell 2000.**

At paragraph 3 -062 (f) (i) **Crystallization**, the authors state:

"***Floating of charges are founded on contract. As such, the circumstances in which a charge may cease to "float" and become attached to specific property are also primarily a question of contract".***

This statement is quite correct. The terms of the agreement between the parties should be the guiding principle of whether crystallization could happen more than once. I have set out various clauses of the Guarantee to show that the Debentures were in favour of the Bank for both Mugoya and Stoni Athi Limited with the Bank having right to demand payment for liability at any time they became due of either or both Companies from the Plaintiff. The issue of crystallization is a red herring since it is clear the Plaintiff was still liable to the Bank for Mugoya's debt which was still outstanding and over which the Bank had demanded payment.

Mr. Gichuhi submitted that the Plaintiff issued Supplemental Debentures over and above those of Mugoya, securing both Stoni Athi and Mugoya. That, even though the Plaintiff was discharged from Stoni Athi Limited liability, it was still bound to that of Mugoya. Counsel referred to Mr. King'ara's authority "**The Law of Receivers of companies'** by **Sir Gavin Lightman & others, S & M 1994**. Paragraph 4 – 10 at page 87, where the authors state that where the making of a demand is a condition precedent to the appointment of a Receiver, the right to make an appointment must have accrued before the Receiver accepts the appointment. They also state that a Debenture may enable an appointment to be made at any time, on the happening of a specified event or on the occasion of default by the Company. Mr. Gichuhi submitted that crystallization in this case was happening for the first time in respect of Mugoya and that the Bank had the right to do so.

I agree with Mr. Gichuhi. The Bank had the sole discretion under the debenture, clause 1, to indulge the Plaintiff or to appoint a Receiver and Manager under the same agreement. All Mr. Kingara is saying is

that since the Debenture was invalid, by virtue of wrong execution and lack of proper sealing, then the Bank cannot invoke it. In **MRAO LTD V FAST AMERICAN BANK & OTHERS CA NO.39 OF 2002 (NAI, UR) Kwach, JA** observed:

"***I listened to the submissions of Mr. Wasuna, for the appellant and he seemed to place a great deal of emphasis on the allegation that the securities were invalid for one reason or another. And that because of that, his client is under no obligation to repay the debt. At no point in the course of argument did Mr. Wasuna indicate to the court when this alleged invalidity first came to the knowledge of the appellant. The appellant took a large amount of money on the strength of these securities. It has not paid back even a single cent. When first American asked for payment the appellant rushed to a court of equity and in effect told the Judge, it is true I took the money, I have not paid it back but First American is precluded from realizing its security because both the charge and Debenture are invalid. And for good measure the appellant adds that if First American is minded to recover the debt it can file a suit in the normal way for recovery as money had received…"***

The appeal was dismissed.

This case is in all fours with the instant one and all it means is that a debtor, who has executed debentures, charges and so on, and obtained moneys, cannot be allowed to escape liability on allegations the documents so executed were invalid.

I have looked at the documents in the instant case and I see no evidence to suggest that they are invalid. There is nothing wrong with the Debentures and since the Bank has made a demand for payment which has not been honoured, the Debenture have crystallized, and the Bank has a right to appoint a Receiver and Manager as it has done. I find no merit in Mr. King'ara's submission on this point and I therefore reject it accordingly.

The plaintiff seeks Mandatory and Prohibitive injunctions in this interlocutory application. The principles **IN GIELLA V CASSMAN BROWN [1973] EA 349** apply. The Plaintiff must show that it has a ***prima facie*** case with a probability of success.

Mr. King'ara relied on the submission that the Bank had no Debenture in its favour, issued by the Plaintiff herein and, that the Plaintiff did not owe the Bank any money. I have already found that from the various clauses in the various Debentures and Guarantees in this case, the Plaintiff did issue Debentures to the Bank's favour and that the Debentures were valid and binding on the Plaintiff. The Bank had a right to exercise power granted to it under the said Debentures, since the Debentures were not spent.

Mr. Gichuhi submitted that there were several facts which disentitled the Plaintiff from the injunctions sought. Counsel submitted that the Plaintiff acknowledged the debt and even went ahead to dispose its property in a bid to reduce the liability of Mugoya to the Bank. Counsel submitted that the second fact against the Plaintiff was the fact that James Mugoya, the common Director in both the Plaintiff and Mugoya Companies embarked on wanton acts of destruction and stripping of the properties charged in favour of the Bank. Counsel submitted that the said Director had stripped the Plaintiff Company of the moveable assets, plant, machinery and fixtures at the Embakasi Complex. Mr. Gichuhi relied further on an order by **Azangalala J**, in **MILIMANI HCCC NO.42 OF 2007,** requiring the same Director to return all the Plaintiff's assets. Counsel submitted that the order was given in favour of the Bank and the 2nd Defendant/Respondent herein and that it is yet to be complied with. Mr. King'ara in response submitted that the failure of a third party to comply with the court order should not be visited on the Plaintiff/Applicant herein.

Mr. Gichuhi also relied on the criminal charges against the Plaintiff's Director and submitted that he was a fugitive, refusing to face the law until a warrant of arrest was issued against him. Counsel urged the Court to find that the Court of Equity cannot aid a lawbreaker.

Mr. King'ara submitted that quite apart from the Director not being the Applicant herein, the said

Director had not been found guilty and so was innocent until such time the court shall rule otherwise.

I have considered all these submissions in regard to the issue whether the relief's sought are merited. I note that the affidavit sworn in support of this application was sworn by **JAMES ABIAM MUGOYA ISABIYE**. This is the same person who signed the Debentures now being challenged as being invalid, together with various other documents including the **ACCEPTANCE** of the **terms** and **conditions** given by the Bank for the Debentures. This is the same person who enjoyed the facility from the Bank, which is proved by the fact that he features in all the written transactions between the Plaintiff, Mugoya, Stoni Athi Ltd and the Bank. The court cannot be asked to close its eyes or to put up a veil in order not to see him. The Bank has sufficiently demonstrated that he has come to a Court of Equity but has not done Equity. Even if we ignore all else, the attempt to disown the Debentures on grounds they are invalid is proof of the Plaintiff's poor attitude towards its obligation to the Bank and the debt owed and this cannot be allowed.

In regard to whether the plaintiff has demonstrated that it will suffer irreparable damages, the Plaintiff's advocate relies on submissions that if the defendants are allowed to continue with the receivership the Plaintiff Company will be stripped of all its valuable assets and may be left bare.

Mr. Gichuhi on the other hand submits that what the Plaintiff was doing was to dispute the amounts due which was not sufficient for injunction to be issued. He relied on **HABIB BANK V POP IN (K) LTD [1989] LLR1** where the Court of Appeal reiterated that a court should not grant an injunction merely because the amount due is in dispute. Mr. Gichuhi also relied on the case of **MADHUPAPER INTERNATIONAL LTD V PADDY KERR & OTHERS CIVIL APPEAL NAIROBI 116 OF 1985** where the Justices of Appeal held:

"***It is correct law that a debenture holder which has this right is under no duty to refrain from exercising its rights because doing so might cause loss to the company or its unsecured creditors…so there could not be any duty to refrain because the company is bent on building up other business which the debenture holder is sure is doomed to failure from the outset".***

I agree with this argument. A bank cannot be stopped from appointing a Receiver and Manager to take over the assets of the company secured under the Debenture merely because the take over may result in selling off all or a substantial part of the assets of the company. It is precisely what a Receiver Manager does, to manage the business or sell the assets to recover the debt. That is what the parties agreed under the Debenture and one of them cannot be heard to say it will suffer loss in the execution of the agreement it signed.

I find that the Plaintiff has not proved that it will suffer any loss or damage or that the loss or damage will not be compensatable by an ward of damages.

The final consideration was whether on a balance of convenience the injunctions sought should be granted. I do not wish to dwell on this point much because I believe I have said enough which also covers this point. The undisputed fact that the Plaintiff's Director stripped the Plaintiff Company of certain assets, and the added fact that despite a court order, none of the assets have been returned, is sufficient to deny the Plaintiff the application. In addition to this, it is admitted that the Plaintiff has an obligation to the Bank from which it has not been discharged. There is more than sufficient proof that the Plaintiff secured Mugoya's liability to the Bank in the Supplemental Debentures herein, those Debentures have now crystallized and nothing has been adduced to justify this Court to stop the Bank from exercising its right therein.

Having come to this conclusion, for reasons advanced in this ruling I dismiss prayer 4 and prayer 5, decline to injunct the 1st and 2nd Defendant as prayed. The Plaintiff will pay costs of the application to the Defendant.

Dated at Nairobi this 8th day of November, 2007.

LESIIT J

JUDGE

Read, signed and delivered in the presence of:

Mr. Kingara for Applicant

Mr. Gichuki for Respondent

LESIIT J

JUDGE

Kingara: I pray for 21 days stay to enable me make a formal application.

LESIIT J

JUDGE

Mr. Gichuki: No objection to stay.

LESIIT J

JUDGE

COURT: The application for stay for 21 says granted.

LESIIT J

JUDGE