



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

**Civil Case 1721 of 1999**

**SIRAJ ENTERPRISES LIMITED .....1<sup>ST</sup>  
PLAINTIFF**

**HUSSEIN A. AWALE .....2<sup>ND</sup>  
PLAINTIFF**

**VERSUS**

**BULLEYS TANNERIES LIMITED (IN RECEIVERSHIP) .....  
DEFENDANT**

**R U L I N G**

The Plaintiffs herein claimed the following main reliefs by plaint dated 23rd November, 1999:

“(a) Orders that the Defendant by its employees, servants and/or agents be and is hereby permanently restrained from selling, utilizing or in any way parting with possession of the Plaintiffs’ stock being 311,923 pieces of wet blue goatskins, 9352 crust goatskins, the bulk of which consist of duly tanned 60,482 Grade TR pieces, 73,477 Grade IV pieces, 118,089 Grade V pieces and 35,862 Grade VI pieces of goatskins and 39,044 wet blue sheepskins.

(b) Orders that the Defendant by its employees, servants and agents be and are hereby compelled to release to the Plaintiffs their entire stock, being 311,923 pieces of wet blue goatskins, 9352 crust goatskins, the bulk of which consist of duly tanned 60,482 Grade TR pieces, 73,477 Grade IV pieces, 118,089 Grade V pieces, and 35,862 Grade VI pieces and 39,044 wet blue sheepskins forthwith.

(c) In the alternative, the Defendant do pay to the Plaintiffs Kshs.44,051,954/= being the market value of the said stock.

(d) .....

(e) .....

(f) .....

Together with the plaint the Plaintiff filed chamber summons dated 23<sup>rd</sup> November, 1999 seeking three main orders:

“1. ....

2. That the Defendant by its employees, servants and or agents, be and are hereby restrained from selling, utilizing, disposing off or in any way parting with possession of the Plaintiff's stock, being 311,923 pieces of wet blue goatskins, 9352 crust goatskins consisting of duly tanned 60,482 pieces of Grade TR, 73,477 Grade IV pieces, 118,089 Grade V pieces, and 35,862 Grade VI pieces and 39,044 wet blue sheepskins to any third party pending the hearing and determination of this suit.

3. That the Plaintiffs' stock being 311,923 pieces of wet blue goatskins, 9,352 crust goatskins consisting of duly tanned 60,482 pieces of Grade TR, 73,477 Grade IV pieces, 118,089 Grade V pieces, and 35,862 Grade VI pieces and 39,044 wet blue sheepskins be secured in a warehouse pending the hearing and determination of this suit.

4. That the Defendant by its employees, servants and or employees, be and is hereby compelled to release to the Plaintiffs their entire stock being 311,923 pieces of wet blue goatskins, 9,352 crust goatskins the bulk of which consist of duly tanned 60,482 Grade TR pieces, 73,477 Grade IV pieces, 118,089 Grade V pieces, 35,862 Grade VI pieces and 39,044 wet blue sheepskins forthwith.

5. ....”

That application was heard by Gacheche, Commissioner of Assize (as she then was). By a ruling dated and delivered on 21<sup>st</sup> December, 1999 she granted prayer No. 4 of the application. From representations made before me, that order of 21<sup>st</sup> December, 1999 was not complied with by the Defendant, or only partially complied with.

In the event, the Defendant was placed under receivership by a secured creditor. The Plaintiffs then filed chamber summons dated 19<sup>th</sup> December, 2005 seeking the main order:

“1. That this Honourable Court to direct the Defendant to furnish security in the sum of Kshs.43,000,000.00 plus costs and interest in cash and to produce and place the same at the disposal of this Honourable Court within fourteen (14) days pending the hearing and determination of this suit.

2. ....

3. ....”

This main prayer is made under Order 38 rules 5 and 12 of the Civil Procedure Rules (the Rules). Prayer No. 2 is in the alternative and it seeks injunction under Order 39 rules 1 (b), 2, 2A (1) and 9 of the Rules. Sections 3A and 63 (c) and (e) of the Civil Procedure Act (the Act) are also quoted.

The application is made upon the main ground that the Defendant is disposing of all its assets, especially LR. NO. 4953/11/26, plants, machinery and motor vehicles, and that this will defeat the Plaintiffs' claims. There is an affidavit sworn by the 2<sup>nd</sup> Plaintiff in support of the application.

The Defendant has opposed the application as set out in the replying affidavit sworn by one WACHIRA NDERITU, the Receiver/Manager of the Defendant. The main grounds of opposition are that the Plaintiffs are unsecured creditors, and that their claim ranks lower than the claim of the secured creditor that placed the Defendant under receivership; that the Receiver/Manager is entitled under the debenture by which he was appointed and also under the Companies Act to dispose of the assets of the Defendant in order to pay creditors, such payment to be in order of priority, the first category being that of secured creditors, and all other debts including the Plaintiffs' claim to rank in *pari passu* and to be paid from the amounts, if any, left after payment of the secured creditors; that the Plaintiffs' claim being a liquidated one, the injunction sought cannot be granted; and that in any event no proper basis has been laid for any of the orders sought. There is a supplementary affidavit filed by the Plaintiffs in answer to the replying affidavit.

I have read the three affidavits pertaining to this application. I have also given due consideration to

the submissions of the learned counsels appearing, including the two cases cited. Under rule 5 of Order 38, a plaintiff seeking an order of security must satisfy the court by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property, or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court. No such intent on the part of the Defendant herein has been proved by the Plaintiffs. What emerges is that the Receiver/Manager of the Defendant is disposing of the Defendant's property in order to pay the secured creditor, and is acting within the mandate granted by the debenture instrument by which he was appointed. It is apparent that if the Defendant had not been placed under receivership the Plaintiffs would not have brought the present application. They would have been content to wait until the suit is fully heard and judgement rendered. In fact, hearing of the suit commenced sometime back. At any rate the Plaintiffs did not even try to fully enforce the order granted to them against the Defendant on 21<sup>st</sup> December, 1999. Had they fully enforced that order they would have been able to recover a very substantial portion of their claim. But they waited for 6 years until the Defendant was placed under receivership by a secured creditor.

The Defendant was no doubt placed under receivership because it was unable to pay the secured creditor. An order for it to deposit a security of Ksh.43,000,000.00 would not only be probably in vain but would also prejudice the secured creditor who is not a party to these proceedings. The Plaintiffs have put forward the claim that the Defendant was placed under receivership in order to defeat their claim. But there is no evidence to substantiate that claim. The Plaintiffs have never challenged the appointment of the Receiver/Manager or the debenture under which he was appointed in any proceedings. Indeed they recognized him and forwarded their claim in this suit to him. The prayer for an order for security must therefore fail.

Regarding the prayer for temporary injunction, it is not the property of the Defendant that is in dispute in this suit (paragraph (a) of rule 1 of Order 39 refers). What is in dispute is the Plaintiffs' stock of goatskins and sheepskins forwarded to the Defendant for processing (or its market value of Ksh.44,051,954.00), and the 2<sup>nd</sup> Plaintiff's claim of Ksh.2,099,322.95 (being his retirement benefits). Nor is there evidence that the Defendant has threatened or intends to remove or dispose of the property in circumstances affording reasonable probability that the Plaintiffs will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit (paragraph (b) of rule 1 of Order 39 refers).

The act of being placed in receivership does not establish any such threat or intent as it is not an act committed by the Defendant. It did not place itself under receivership.

Can an injunction be granted under rule 2 of Order 39? Under that rule, in any suit for restraining the Defendant from committing a breach of contract or an injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgement, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract, or relating to the same property or right. Indeed the Plaintiffs' suit seeks to restrain the Defendant from committing a breach of contract, the breach alleged being the Defendant's failure to return to the Plaintiffs their stock of goatskins and sheepskins. Here I must again point out that the Plaintiffs obtained 6 years ago a mandatory injunction against the Defendant for return of that stock to them. They did not enforce that mandatory injunction. When the Defendant was placed under receivership, the Plaintiffs were jolted awake. But can the event of the Defendant being placed under receivership be said to constitute an act of committing the breach of contract complained of in the suit? Certainly not. The Defendant did not place itself under receivership. That was done by secured creditor.

Section 63, paragraphs (c) and (e), of the Act were also invoked.

Under those paragraphs the court may grant, where it is so prescribed, a temporary injunction or make such other interlocutory orders as may appear to the court to be just and convenient in order to prevent the ends of justice from being defeated. In the circumstances of the present case a temporary injunction or an order of security would not be in the interests of justice as they would greatly prejudice the secured

creditor who placed the Defendant under receivership. That creditor is not a party to this suit.

Finally, Section 3A of the Act was invoked. It of course saves the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is trite law that this provision will not be available where there are other relevant and specific provisions of the law dealing with the issue at hand. The present application was made under other relevant and specific provisions of the law, as already seen above.

For all the above reasons I find no merit in this application and I must refuse it. It is hereby dismissed with costs to the Defendant. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MAY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED ON THE 19<sup>TH</sup> DAY OF MAY, 2006.