



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

Civil Suit 648 of 2003

PHARMACEUTICAL PRODUCTS LIMITED.....PLAINTIFF

VERSUS

MIDDLE EAST BANK (K) LIMITED.....1ST DEFENDANT

P.V.R. RAO.....2ND DEFENDANT

K.V.S.K. SASTRY3RD DEFENDANT

R U L I N G

The plaintiff by its chamber summons dated 13th October 2003 seeks a mandatory injunction to restrain the 2nd and 3rd defendant from continuing to act as receiver managers of the plaintiff's company and to restrain them from selling or disposing of the plaintiff's assets.

The plaintiff does not deny that loan facilities were granted to it by the 1st defendant which facilities are secured by three debentures. The plaintiff accepts that at least kshs 81, 100, 000 was so advanced and states that so far kshs 96 million has been paid to the 1st defendant.

The plaintiff argued that the 1st defendant had been charging interest “**over the agreed limits without plaintiff's consent.**”

The plaintiff further states that “**in an attempt to forestall the collapse of the plaintiff company and also ensure it met its obligations to 1st defendant, the plaintiff in the year 2002 approached PTA bank for re financing.**” That the plaintiff also sought other strategic partners.

That whilst the plaintiff was seeking investors and other financing the 2nd and 3rd defendants attended the plaintiff's premises, served the general manager with a demand notice and proceeded to announce that they were, henceforth, joint receiver managers. That they proceeded to sack guards and the general managers.

The plaintiff submitted that the appointment of 2nd and 3rd defendants as joint receiver managers was premature because the amount claimed by the 1st defendant included interest, which the 1st defendant was levying which interest was not allowed under the debentures.

The plaintiff also submitted that the appointment of receiver managers was actuated by bad faith because it interfered with plaintiff's attempts to get refinancing and because the defendant, since that appointment had refused to engage the plaintiff and its officers in further negotiations in regard to the outstanding loans.

Plaintiff's counsel in support of the application submitted that the deed of appointment which appointed 2nd and 3rd defendants was not executed by the 1st defendant. The counsel for the defendants did subsequently to those submissions provide the original deed of appointment both for perusal by the plaintiff and the court. As result the court was satisfied that the deed was correctly executed and hence the plaintiff's argument in this regard will not be considered any further.

Plaintiff relied on the following cases.

HCC NO. 1833 OF 2001 JAMBO BISCUIT (K) LTD – V – BARCLAYS BANK OF KENYA LTD & OTHERS;

Where the court made the following statement:

“And I think it is notorious fact of which judicial notice may be taken that receiverships in this country have tended to give the kiss of death to many a business.”

HCCC NO 1395 OF 2000 ANNA WANGUI PAUL – V – VICTORIA COMMERCIAL BANK LTD.

In this case an objection was raised on the basis of Rule 9 of the Oaths and Statutory Declaration Rules on the manner that annexures to an affidavit were marked on a blank separate sheet of paper. The court rejected the objection and stated

“.....the green papers alleged to be the documents exhibited are not that. They are merely covers for those documents. If a cover is duly marked and identified, the documents or material covered is surely thereby marked and identified.”

The plaintiff relied on this authority to counter the defence argument against its exhibits so marked.

Defence opposed the plaintiff's application. Defence pointed out that the plaintiff does not deny being indebted to the defendant and further stated that the plaintiff had failed to state what, in its view, was the correct rate of interest chargeable. Defence in opposition to that line of argument referred to clause 2 of the debenture dated 27th July 1995 between the plaintiff and the 1st defendant, which clause provided for variation in interest rates at the sole discretion of the 1st defendant.

The defendant's replying affidavit deponed that the plaintiff's business continued to operate even after the receivership was put into place. This fact was denied by the plaintiff.

The celebrated case of GIELLA V CASSMAN BROWN & CO LTD [1973] EA 358 provides the principles to guide this court in consideration of the plaintiff's application. The court also will not grant an interlocutory mandatory injunction unless the plaintiff has shown special circumstances; see KENYA BREWERIES LTD – V – OKEYO [2002] I EA 109.

I have examined the evidence presented before me and the submissions by the plaintiff. I find that the plaintiff has not shown a prima facie case with a probability of success. The plaintiff accepts its debt to the defendant but claims wrong interest was charged to the account. In that regard the defendant successfully proved to the court that variation, at the sole discretion of the 1st defendant, was provided in the debenture executed by the plaintiff.

The plaintiff further argued that the demand was not sent out until the arrival of the receiver managers. I find that annexed to the plaintiff's affidavit were many demands frequently sent to the

plaintiff by the 1st defendant, but even if those demands are not valid I find that the plaintiff did not sufficiently prove, on affidavit evidence, that that demand was given to it, with the arrival of the receiver managers. They therefore has failed to show a prima facie case with a probability of success.

On the other hand the plaintiff's application was filed on 13th October 2003, whilst the receiver managers were appointed on or about 20th August 2003. An injunction application and more particularly a mandatory injunction seeks to give a party presenting it, a quick and sharp relief. The plaintiffs allegation that the receiver's action would run down the company surely falls on deaf ears when one considers that the plaintiff, and it is on record, dragged their feet, by adjourning the matter, in the prosecution of the application. That alone can dis-entitle a party to injunctive orders.

All in all the plaintiff's application is not merited and accordingly that chamber summons dated 12th October 2003 is hereby dismissed with costs to the defendants.

MARY KASANGO

JUDGE

Dated and delivered this 9th June 2006.

MARY KASANGO

JUDGE