



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

**Civil Case 1821 of 1999**

**GANIJEE GLASS MART LIMITED.....1<sup>ST</sup> PLAINTIFF**

**PAN AFRICAN GLASS INDUSTRIES LIMITED.....2<sup>ND</sup> PLAINTIFF**

**NAJMUDIN JIWAJI GANIJEE.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**FIRST AMERICAN BANK OF KENYA LTD.....DEFENDANT**

**AND**

**AFAB ESTABLISHMENT LTD.....OBJECTOR**

**RULING**

The plaintiffs have brought this application by way of a Notice of Motion dated 6<sup>th</sup> October 2005, which is expressed to have been brought pursuant to the following statutory provisions:-

- (a) Order 44 rule 1
- (b) Order 50 rule 2
- (c) Order 21 rule 22
- (d) Order 39;

all of the Civil Procedure Rules, and (e) Sections 3A and 80 of the Civil Procedure Act.

Through this application the plaintiffs hope to obtain the following orders from this court;

**“2. THAT an interim injunction do issue restraining the Receivers herein either by themselves or through their agents from disposing off, selling or in anyway alienating all stocks and assets held in the premises of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs until conclusion of this application or until further orders of the court.**

**3. THAT an interim injunction do issue restraining the defendant through its agents, receivers, officers or directors from managing or in any way interfering with the management of the 1<sup>st</sup> and**

**2<sup>nd</sup> plaintiffs until the conclusion of this application or until further orders of the court.**

**4. THAT either by themselves or through their agents, directors, officers or receivers from disposing off, selling or in any way alienating all those properties known as *Mombasa/Block XVIII/316, Kilifi/Maueni/836, Kilifi/Maneni 316, Kilifi/Maneni/3 "A"/209, L.R. No. 209/1221/5, L.R. No. 209/6991, L.R. No. 209/12464 and L.R. No. 209/136/238* which is not even charged until the conclusion of this application or until orders of the court.**

**5. THAT the judgement and the decree of the Court be reviewed and set aside and the Receivership of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs be removed forthwith unconditionally.**

**6. THAT all the documents of title in the hands of the defendant namely, *Mombasa/Block XVII/316, Kilifi Mavenni/836, Kilifi/Mavueni 3 "A"/209, L.R. No. 209/1221/5, L.R. No. 209/6991, L.R. No. 12464 and L.R. No. 209/7972 and L.R. No. 209/136/238* which is not even charged be released to the applicants unconditionally as the case may be.**

**7. THAT the Honourable Court do order stay of execution.”**

All those reliefs are grounded upon the fact that the applicants had, since the judgement dated 16<sup>th</sup> May 2003, become aware that the security documents herein were invalid, as they were prepared by persons who were unqualified to do so, at the material time. In particular, the plaintiffs laid emphasis on the debenture dated 16<sup>th</sup> January 1999, as that was the basis upon which the defendant appointed receivers over the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs. As far as the plaintiffs were concerned, the debenture was void as it had been prepared by an unqualified person. That fact was said to have become known to the plaintiffs after the court had delivered its judgement.

The plaintiffs say that they did make inquiries about the firm of Salim Dhanji & Company Advocates, as regards their practicing certificates in the year 1999. The reason for the said inquiries was that the debenture herein is dated 16<sup>th</sup> January 1999, at a time when the advocates in that firm did not have practicing certificates.

It is common ground that the advocates practicing as such in Salim Dhanji & Company did not hold valid practicing certificates as at 16<sup>th</sup> January 1999. At best, if the said advocates were to be believed, they had paid for their practicing certificates as at 13<sup>th</sup> January 1999. However, they did not have the said certificates by 16<sup>th</sup> January 1999.

The Secretary of the Law Society of Kenya has provided his opinion on the issue, by saying that following the payment for the practicing certificates, the advocates were practicing validly, as the validity of their practicing certificates would be backdated to the beginning of January 1999.

In the case of **KENYA POWER & LIGHTING COMPANY LIMITED V CHRIS MAHINDA T/A NYERI TRADE CENTRE, CIVIL APPEAL NO. 148 of 2004**, the Court of Appeal had occasion to deal with a matter in which one of the issues was:

**“whether a practicing certificate for which a fee has been paid in advance but which has not been issued, for whatever reason, by the Registrar of the High Court can be described as being ‘in force.’”**

Having noted that that issue needed to be addressed first, the Court of Appeal then proceeded to deal with it thus:

**“Practising Certificates are dealt with in Part VII of the Advocates Act, from which it is clear that the issue of practising certificates is the responsibility of the Registrar of the High Court and not of the Law Society. The Practising Certificate for the year 2004 exhibited to the advocate’s affidavit**

**in support of the application is dated 22<sup>nd</sup> September 2004 and signed by the Registrar of the High Court. In that Certificate the Registrar certifies that the advocate ‘is duly enrolled as an Advocate and is entitled to practice as such Advocate’**

**We consider that it cannot be validly argued that prior to the date of issue of that Certificate, the advocate had in force a practising certificate.”**

And, in the case of **OBURA V KOOME [2001] 1 E.A. 175**, the Court of Appeal unanimously struck out an appeal which had been signed by an advocate who did not hold a valid practicing certificate. The reason why the appeal was struck out was that it was incompetent.

In this case, the plaintiffs have taken up the issue of the validity of the debenture. The question that may then arise is whether a debenture was one of the documents which could only be valid if prepared by a qualified person. To my mind the answer is best provided by the following words of the Hon. Ringera J. in **JAMBO BISCUITS (K) LIMITED V BARCLAYS BANK OF KENYA LIMITED & 2 OTHERS, HCCC NO. 1833 of 2001**, at page 10:

**“A debenture is one of the documents or instruments which must be drawn or prepared by a qualified person (refer to Section 34 (1) (e) of the Advocates Act as read together with the third scale of the first schedule of the Advocates Remuneration Order).”**

From the foregoing, it is evident that if I should come to the conclusion that as at the time when the debenture was prepared or drawn, the persons who drew it did not hold valid practising certificates, the debenture would be invalid. In that regard, the plaintiffs have pointed out that the debenture is dated 16<sup>th</sup> January 1999, and also that the said debenture was registered on 10<sup>th</sup> February 1999.

On the other hand, it is not in dispute that the advocates at Salim Dhanji & Company were only issued with their practising certificates on 4<sup>th</sup> March 1999. Does that render the debenture invalid?

The respondent’s answer is a very categorical, ‘No’. The basis for that answer stems from the submission that the debenture was not, in any event prepared in 1999, as alleged by the plaintiff.

By the affidavit of Patrick Maina Mwangi, the respondents have drawn the court’s attention to the 1<sup>st</sup> plaintiff’s Amended Complaint in **HCCC No. 752/03**. At paragraph 6 of the said Amended Complaint, the 1<sup>st</sup> plaintiff herein, (who was the sole plaintiff in that case), asserted as follows:-

**“The Plaintiff and Pan African Industries Limited (a limited liability company incorporated in the Republic of Kenya), executed a debenture in the month of September 1998, in favour of the first Defendant herein pursuant to the consideration mentioned in the said debenture and delivered the same to the First Defendant.”**

The first defendant in that suit is the sole defendant herein. And, from my understanding, there is no dispute at all that the debenture cited in that suit is the very same one as in the present suit.

It is noteworthy how the 1<sup>st</sup> plaintiff herein explained the manner in which the date 16<sup>th</sup> January 1999 came to be endorsed onto the debenture.

At paragraph 8 of the Complaint in **HCCC No. 752 of 2003**, the 1<sup>st</sup> plaintiff herein asserted as follows:-

**“The First Defendant without the consent of the plaintiff and the said Pan African Glass Industries Limited wrongfully and unlawfully altered the date on the said debenture and inserted a date on the said debenture to read 16<sup>th</sup> January 1999, so that the said date can be taken as the date on which the said debenture was signed by the Plaintiff and the said Pan African Glass Industries Limited and submitted the said debenture with the said altered date for registration to the**

**Companies Registry on or around 10<sup>th</sup> February 1999 and the same was registered on 10<sup>th</sup> February 1999 by the Registrar of the Companies Registry.”**

From the foregoing pleading, it would appear that the plaintiffs have all along been aware that the debenture was prepared or drawn by September 1998, because as at that month they had already executed it.

At any rate, the defendant has exhibited a letter dated 14<sup>th</sup> September 1998, through which it was forwarding the debenture to the 1<sup>st</sup> plaintiff herein, for execution. Therefore, the debenture must have been already drawn by 14<sup>th</sup> September 1998.

Indeed the 1<sup>st</sup> plaintiff herein did reiterate, in its Reply To Defence dated 9<sup>th</sup> December 2003, in HCCC No. 752 of 2003, that the debenture was made in September 1998.

Given those assertions by the 1<sup>st</sup> plaintiff, I hold that the plaintiffs ought not to be allowed to resile from their previous averments. Surely, the plaintiffs well know when they executed the debenture. They have expressly said, in the past, that they executed it in September 1998. Those averments were made nearer the date when the debenture was executed, as compared to now. Also the date of September 1998, as the date when the debenture had already been drawn, is further supported by the 1<sup>st</sup> Defendant's letter to the 1<sup>st</sup> Plaintiff, dated 14<sup>th</sup> September 1998.

Whilst I am aware that the provisions of Order 6 rule 6 of the Civil Procedure Rules impose a bar on departure from pleading within the same suit, I find that even if a party were to depart from his pleading in a subsequent suit, he would be duty-bound to justify the said departure. I cannot see any justification for barring a party from raising inconsistent pleadings of fact in one suit, but then allowing him to raise such inconsistencies in subsequent suits.

In this case, the plaintiffs now submit that the Hon. Mwera J. did already determine the fact that the debenture is dated 16<sup>th</sup> January 1999. Of course, that is correct.

However, at no time was the learned judge asked to determine the date when the debenture was drawn or prepared. Therefore, by making a finding to the effect that the debenture was dated 16<sup>th</sup> January 1999, the learned judge cannot be said to have also determined the date when the debenture was drawn.

On the basis of the evidence before me, I hold that the debenture was prepared or drawn on or before 14<sup>th</sup> September 1998. And I also hold that as at that date, the advocates practising as such with the firm of Salim Dhanji & Company Advocates had valid practising certificates, as has been certified by the Registrar of the High Court. Therefore, even if the advocates did not hold valid practising certificates as at 16<sup>th</sup> January 1999, that fact would not invalidate the debenture.

For those reasons, I decline the plaintiff's application to review and set aside the receivership of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs.

Meanwhile, as the plaintiffs did not make any submissions geared towards the award of either an injunction or stay of execution, the said prayers are deemed as having been abandoned. So also the prayer for the release of the various title documents. Accordingly, the application is also dismissed in relation to those other prayers.

In conclusion, I find no merit in the application dated 6<sup>th</sup> October 2005. It is therefore dismissed with costs.

Dated and Delivered at Nairobi this 10th day of July 2006.

**FRED A. OCHIENG**

**JUDGE**