REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (

MILIMANI COMMERCIAL COURTS)
Civil Suit 249 of 2006

BULK MEDICALS LIMITED…….……
PLAINTIFF

VERSUS

PARAMOUNT UNIVERSAL BANK LTD…….…….1ST DEFENDANT

HARVEEN GADHOKE…….……2ND DEFENDANT

DANIEL M. NDONYE…….…….3RD DEFENDANT

R U L I N G

The relationship between the Plaintiff and the 1st Defendant is one of a banker and a customer. The Plaintiff enjoyed some facilities granted by the 1st Defendant and on the alleged default of repayment the 1st Defendant appointed the 2nd and 3rd Defendants as Receiver/Managers. As a consequence of that appointment the Plaintiff filed a notice of motion dated 15th May, 2006. The Plaintiff seeks the following orders:-

· **That this honourable court be pleased to issue a temporary order of injunction restraining the 2nd and 3rd defendants/respondents whether by themselves, their servants, agents, employees or otherwise howsoever, or as agents of the 1st Defendants/Respondent from taking over the control, running or management of the Plaintiff/Applicant herein on any of its assets, business operations, bank accounts pending the hearing and determination of this application.**

· **That this honourable court be pleased to issue a temporary injunction order to restrain the Defendants/Respondents by themselves, their agents or servants from selling, disposing off, offering for sale or alienating in any manner whatsoever any of the plaintiff's land, properties, machinery, equipment, assets stock or any part thereof pending hearing and determination of this application.**

· **That the 2nd and 3rd Defendants/Respondents whether by their agents, servants, employees or otherwise howsoever be restrained from entering the Plaintiff/Applicants premises and properties and a mandatory injunction do issue compelling them to reinstate the Plaintiff in possession of all its properties.**

· **That the 2nd and 3rd Defendant be restrained by way of an injunction, whether by themselves, their agents servants employees and or otherwise howsoever from acting and/or purporting to act as Receivers and/or Managers of the Plaintiff and from interfering in any manner with the**

Plaintiff's quiet possession and enjoyment of all the plaintiff's land, properties, machinery, equipment assets and stock, pending the hearing and final determination of this suit.

· **That the Defendants be restrained by themselves, their agents servants, employees 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, pending the hearing and determination of this suit.**

· **That the 2nd and 3rd Defendants/Respondents and their agents, employees, servants or otherwise howsoever, be restrained from taking over the plaintiff's business and if thereon, a mandatory injunction do issue compelling them out of all the Plaintiff's premises and properties and the Plaintiff's possession of all its premises and properties be reinstated pending hearing and determination of this suit.**

· **That in the alternative and without prejudice to the foregoing, a specific period injunction do issue for 18 months restraining the Defendants' from interfering with the Plaintiff's business, assets and stock pending full settlement of any sums if any found due upon taking accounts.**

· **That the Plaintiff be at liberty to apply for such further or other orders and/or directions as this honourable court may deem fit and just to grant.**

· **That the costs of this application be provided for.**

The Plaintiff's application was supported by an affidavit sworn by the Managing Director and dated 15th May, 2006. The deponent stated that the Plaintiff company was incorporated seventeen years ago. That it was authorized by the memorandum of Association to carry out the following business amongst others:-

"***To carry on the business of wholesale and retail, chemist, druggist, dry-salter, oil and colour men importers, exporters and manufacturers of an dealers in pharmaceutical chemicals, medical, industrial and other preparations and articles……, dealers in chemicals, surgical and scientific apparatus and materials."***

He further stated that for the last 17 years he has been running the company and as a result had gained a wealth of knowledge of the said industry. His company has been competing with other companies in the industry like Glaxo Smithkline, Howse & Mcgeorge amongst others. He stated that the plaintiff began his relationship with the 1st Defendant in 1996. That relationship by 1997 had progressed to a level that the plaintiff was able to request for banking facility in order to obtain more liquid and be responsive to the customers needs. On 8th August, 1997 the 1st Defendant issued the Plaintiff with a letter of offer. The purpose of the letter of offer was to enable the Plaintiff obtain a confirmed letter of credit to suppliers totaling USD 124,520. The deponent stated that on 3rd August, 1996 the Plaintiff applied for a regular overdraft limit of Kshs.5 million and a loan of credit limited to Kshs.20 million. He deponed that the facility was later availed by a letter of offer dated 19th August, 1998. He then drew the attention to the letter of offer which showed that the 1st Defendant held a fixed deposit of Kshs.9,994,100.00. He stated that it was agreed that a differential of 10% would be maintained between the rate of interest applied to the fixed deposit and the rate of interest applied to the overdraft. He said that the bank at that time failed to reveal to the Plaintiff that the maximum chargeable under the law was 19%. On 18th September, 1997 he stated that the 1st Defendant sent copies of debentures for execution. He annexed the copies of those debentures to his affidavit and then stated that his best knowledge the said debentures did not indicate the drawer. That subsequently in 1998 the 1st Defendant presented a supplementary debenture for execution. There was no indication also on this supplementary debenture who the drawer was. He stated that his advocate has advised him that in the absence of the drawers name on the said debentures the same are fatally defective and were null and void. Accordingly he stated that those debentures did not have the power to appoint a receiver. During the period between 1997 and the year 2000 the Plaintiff kept meeting various demands which were made by the 1st Defendant and in total repaid Kshs.20 million. That

however towards the end of that period the deponent stated that it became clear that the 1st Defendant was manipulating the Plaintiff's accounts and had failed to keep within the agreed differential rate. As a consequence of that the deponent requested the 1st Defendant to consider reducing its interest rate. The 1st Defendant failed to take notice of that request and on 19th October, 2000 the 1st Defendant threatened to return all the Plaintiff's cheque unpaid unless they agreed to the statement of account as had been forwarded to them. That at that period the debenture had been upstamped to the limit of Kshs.20 million and the bank had a lien over the fixed deposit of Kshs.10 million and had also insisted that the Plaintiff would only bank at the 1st Defendant's bank. The deponent therefore stated that there was no legitimate reason why the Plaintiff's cheque should have been returned unpaid. On 5th April, 2001 the deponent stated that the 1st Defendant's managing director summoned him to the 1st Defendant's offices and informed the deponent that the Plaintiff was indebted to the bank for Kshs.18,606,000.00 according to the 1st Defendant's books. That they would call their security unless the Plaintiff agreed to renew the overdraft facility by first accepting the balance and thereafter converting the same to a loan repayable at the rate of Kshs.1 million per month. That as a result of the threats and duress and without the benefit of having advise of counsel the deponent agreed to the arrangement. The following day a letter was sent by 1st Defendant which letter the deponent had executed and returned to the 1st Defendant. The content of that letter which was dated 6th April, 2001 written by the 1st Defendant addressed to the Plaintiff's Managing Director reads as follows:-

"**We refer to the meeting held in the offices of our Managing Director, Mr. Ayaz Merali yesterday when the following was agreed upon:-**

"***1. That the existing overdraft of Kshs.18,000,000/= to be converted to a loan repayable at Kshs.1,000,000/= p[er month commencing on 30th April, 2001. We are currently holding post dated cheques amounting to Kshs.3,150,000/= lodged with us by you.***

The proceeds of these cheques will be credited to offset the existing overdraft of Kshs.606,000/= and the remaining balance to an account.

Your are required to deposit with us 24 (twenty four) post dated cheques covering the monthly installments of Kshs.1,000,000/=.

2. That you will make payment and/or give us post dated cheques to meet the acceptances on due dates including interest, expenses charges against L/C on PBL/125/2000 and PBL/126/2000 amounting to about US$.60,000/=.

3. That we shall furnish a Bank Guarantee to Bank of Communications, China for US$.49,060/= in consideration of releasing the collection documents under our reference IFBC/134/2000 to you provided you deposit with us a cheque of US dollars 49,060/= which will be paid on due date.

You will also deposit with us the sale proceeds of this consignment and build the funds equivalent to US$.49,060/= within 90 days of the date of release of the documents in question so that the cheque of US$49,060 could be given back to you

4. That we have granted the following limits to meet your business requirements:-

(i) Overdraft: Kshs.500,000/=

(ii) Letters of credit both on sight and D/A basis (upto 120 days):

Kshs.5,000,000/=

5. That we shall charge interest on both overdraft and loan accounts @ 28% per annum on reducing

balance basis with immediate effect.

Please ensure that arrangements agreed to are strictly adhered to.

Please stamp, sign and send us a copy of this letter in acceptance of the foregoing."

The deponent stated that he is advised by his counsel that in view of that renewed facility that transaction came under the Central Bank of Kenya (Amendment) Act No., 4 of 2001 which is popularly called "Donde Act". This Act places a ceiling on the rate of interest chargeable. That despite the aforesaid the 1st Defendant has continued to charge compound interest and this is despite the fact that the Plaintiff has deposited Kshs.30,355,448.95. Despite that payment the account is still showing a debt balance of Kshs.17 million. The Plaintiff in January, 2002 instructed the interest rate advisory centre (IRAC) to recalculate and analyze the Plaintiff's account with the 1st Defendant. The report showed that the amount of Kshs.18,606,000/= that the Plaintiff was coerced to acknowledge was an exaggerated amount. A final report by IRAC was annexed to the affidavit of the deponent. On 11th May, 2006 the 1st Defendant sent the 2nd and 3rd Defendants to the Plaintiff's office to serve the Plaintiff with a notice of appointment of receivers as well as a letter instructing the Plaintiff that the said receivers had taken over the management of the company. The deponent stated that he objected to the said taking over on the grounds that the Plaintiff had not been given notice and it was at this time that the receivers showed the deponents a faxed copy of the notice which was written on the same day that the notice was sent by the receivers. The said notice as stated gave the plaintiff no time to pay because it was written after the banking hours and in any case that the receiver had notified the banks that the Plaintiff was being placed under receivership. He deponed that the receivers and himself have been co-existing at the company and that they had been no movement of funds for merchandise as a consequent of the receivership and the Plaintiff was in danger of losing lucrative contracts, that further from the receivers conduct it was clear that they had no knowledge of the products that the Plaintiff sells and they would therefore have a difficulty in dealing with the customers that the Plaintiff supplies to. He therefore concluded that the Plaintiff stands to lose his business, credit worthiness, goodwill and reputation that it has built over the 17 years if the activities of the receivers were not checked by the issuance of the orders sought in the application. As the matter progressed the parties herein filed further affidavits. The Plaintiff filed a supplementary affidavit dated 23rd May, 2006. That affidavit sought to correct a mistake in paragraph 8 of the previous affidavit and further stated that the deponent had been informed by the Plaintiff's employees that subsequent to the filing of the suit the receiver/managers had collected cheques totaling Kshs. 5,580,768.75 as at 22nd May, 2006. That the total and outstanding debt as at 22nd May, 2006 was Kshs.39,104,370.74. The same deponent again swore a further affidavit dated 22nd June, 2006. He deponed that the total cash that had been collected by the receiver was Kshs.8,548,329.90 in cash and cheques. He stated that since the receiver took over they had so far made sales of Kshs.8,075,200.46 and this added to the collection stated before brought total amount to Kshs.16,625,530.36. This he said it was equivalent to the purported debt and on that basis he requested that the court would issue a mandatory injunction as prayed in the application. The advocate in submission in support of the Plaintiff's application stated. That the Plaintiff was placed under receivership when there was no powers to appoint receivers and when indeed the Plaintiff was not indebted to the 1st Defendant. The basis of making that submission was that the debentures failed to indicate who the drawer was in contravention with Section 34 and 35 of the Advocates Act. In this regard he relied on the case of **Jambo Biscuits (K) Ltd vs Barclays Bank of Kenya HCCC No. 1833 of 2001**. That case decided that a debenture is one of the documents that should be drawn by a qualified person as required by Section 34 and 35 of the Advocates Act. Counsel therefore concluded by saying that there was no enforceable debenture which the 1st Defendant could rely on to appoint the 2nd and 3rd Defendants. Counsel referred to the 1st Defendant's replying affidavit which annexed the debenture together with the top page which indicated that the debenture was drawn by an advocate Salim Dhaji. He stated that it is possible that that page was added to be debenture subsequently after the filing of this suit. He drew the court's attention to the fact that that first page did not have a page number. He further stated that the Plaintiff was not the usual applicants who come to court seeking injunction when they had failed to pay their loan. In this regard he relied on the report of IRAC which showed that the Plaintiff was not indebted to the 1st Defendant. He stated that the Plaintiff was coerced

into accepting indebtedness to the 1st Defendant when the 1st Defendant threatened not to honour the Plaintiff's cheques. Plaintiff's counsel relied on the case of **Kenya Bankers Association vs Minister for Finance and the Hon. A.G. HC Misc. Appl. No. 908 of 2001** which he said indicated, in respect of civil jurisdiction, the operative date when Section 39 of the Banking Act would come into effect. Counsel then moved on to the issue of notice of appointment of receivers and stated that even if there was a valid debenture and even if the Plaintiff was indebted to the 1st Defendant the 1st Defendant had failed to give the requisite notice to the Plaintiff before appointing the receivers. He therefore concluded that that appointment is unlawful, invalid and void. He state that it is trite law that notice is necessary before the appointment of a receiver. He stated that the Plaintiff was not even aware that the receivers were due to come onto the Plaintiff's premises. Counsel relied on the case of this court **HCCC No. 1155 of 2002 Anspar Beverages Ltd vs Development Bank of Kenya Ltd. And 5 others** and the case of **Manchester Outfitters vs Standard Chartered Financial Service** where he said that they established and that a party had a right to question the appointment of a receiver. He said that the notice which was given to the Plaintiff's managing director by the receivers when they arrived at the Plaintiff's premises was unreasonable. Accordingly he said that the Plaintiff had proved a prima facie case for the granting of an injunction. He said that the Plaintiff was fearful that the receivers will sell the Plaintiff's assets on disputed figures and accordingly the balance of convenience tilted in favour of the Plaintiff obtaining injunction orders. He further stated that the presence of the receivers was making the plaintiff loose credibility and contracts. Plaintiff's counsel relied on the case of **Nyaga vs Housing Finance Corporation of Kenya C.A. No. 134 of 1987** and also the case of **Kenya Commercial finance Company Ltd vs Ngeny & another (2002) 1 KLR** where he stated that the courts held that where statutory power was being exercised oppressively the courts can step in. He quoted the following from the latter case.

"***The court will not interfere where parties have contracted on arms-length basis. However by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions. In this case the rate of interest at 20% pa is not unconscionable or oppressive."***

Plaintiff's counsel said that the Plaintiff Company is the kind of company that ought to be saved from being under receivership because there had not been any evidence of mismanagement. Counsel in regard to its contention that the Plaintiff does not owe any money to the 1st Defendant relied on the case of **Fina Bank vs Spare & Industries C.A. No. 51 of 2000** where the court removed the receiver manager. He similarly sought that the receiver/manager will be removed from the Plaintiff's premises. Plaintiff's counsel submitted that the court being a court of equity it ought not to allow oppression to one party but should grant relief where there is research oppression. The relief that the Plaintiff is entitled to is with regards to the penalty charges. He said that the court can waive those penalties.

The application was opposed. The 1st Defendant through its general manager swore an affidavit dated 17th May, 2006. He began by saying that the Plaintiff had suppressed and failed to disclose the following material:-

"(i) That the Plaintiff has habitually presented to the 1st Defendant cheques, which when presented for payment, were rejected for a variety of reasons including insufficiency of funds in the Plaintiff's accounts. I annex hereto a bundle of letters I have written and received from the Plaintiff since the year 2000 regarding the subject of dis-honoured cheques.

(i) That the Plaintiff voluntarily admitted the debt owed to the 1st Defendant and made numerous promises to liquidate the debt but has failed to do so.

(ii) That on 19th March, 2002, the 1st Defendant served the Plaintiff with a formal demand letter calling for payment of the sum of Kshs.21,392,599.04 then outstanding in favour of the Plaintiff. The Plaintiff was advised that the 1st Defendant would take all legal measures necessary to recover the outstanding amount.

(iii) That on 26th March, 2002, the Plaintiff responded to the 1st Defendant's demand letter through the firm of Macharia Njeru Advocates and stated that the Plaintiff was ready to repay the debt owed to the 1st Defendant but disputed the amount owed.

(iv) That on 28th March, 2002, the 1st Defendant responded to M/S Macharia Njeru Advocates and informed the said advocates that the Plaintiff's debt to the 1st Defendant was not in dispute since the Plaintiff had admitted the debt and provided the 1st Defendnat with post dated cheques to the value of Kshs. 25 million. M/s Macharia Njeru Advocates did not respond to the 1st Defendant on receipt of this letter.

(v) That the Plaintiff has never alleged in its correspondence with the 1st Defendant, that it was coerced or under duress to execute any documents. On the contrary, the Plaintiff expressed its pleasure when it created the supplementary debenture dated 29th January, 1998.

(vi) That in its letters to the 1st Defendant, the Plaintiff's most frequently cited reason for reduction of interest rates is the fact that some banks charge lower rates that the 1st Defendant and the economic conditions in the country are not favourable. The allegations that the 1st Defendant has overcharged the Plaintiff or levied punitive interest rates only arise when the 1st Defendant requests the Plaintiff to repay the debt owed to the 1st Defendant.

(vii) That the debentures dated 18th September, 1997 and 29th January, 1998 were drawn by M/s Salim Dhanji and company advocates, a fact that is known to Mr. Hitann Majevdia. Mr. Majevdia has however mischievously omitted the cover pages of the debentures where the said information is fully set out.

(viii) That the aforesaid debentures were duly and voluntarily executed by the Plaintiff's directors where after they were successfully presented for registration at the Registry of Companies."

The deponent further stated that on the advise of his counsel he was of the view that the debentures were valid and enforceable. He was surprised by the Plaintiff's averments that the Board of Directors of the Plaintiff had not authorized the financial transaction between itself and the Plaintiff and referred to paragraph 11(a) of the debenture which indicated that the necessary authority had been given by the directors of the Plaintiff. That the Plaintiff had been in breach and continues to be in breach of the debentures. In regard to the facility that was converted the deponent stated that the Defendants letter dated 6th April, 2001 was in response to the Plaintiff's plea for the restructuring or converting to a loan the outstanding amount. He stated that the Central Bank of Kenya (Amendment) Act 2000 had no relevance to these proceedings and had only been invoked with an attempt by the Plaintiff to mislead this court. That it was the Plaintiff who continually pleaded with the 1st Defendant to continue granting it facilities on the strength of the securities the 1st Defendant was holding., For that reason he stated that the Plaintiff is estopped from denying such representations. In addition he stated that the Plaintiff issued many cheques in favour of the 1st Defendant with many cheques which were dishonoured upon presentation and that the Plaintiff issued the 1st Defendant with a promissory note dated 7th August, 1997 for missing to pay the 1st Defendant the sum of Kshs.25 million. That in view of the Plaintiff's blatant breach of contractual obligations the 1st Defendant by a notice dated 10th May, 2006 appointed the 2nd and 3rd Defendants as joint receiver/managers of the plaintiff. He thereafter stated that the notice of appointment was drawn and stamp duty was paid and thereafter the notice of appointment of the receiver/manager was filed at the company's registry under Section 103 of the Companies Act. He deponed that the Plaintiff is truly indebted to the 1st Defendant in the Kshs.17,793,004.65 as at 9th May, 2006. he annexed the Plaintiff's statements of account to prove the same. He denied that the operations of the Plaintiff's company had been interrupted by the receiver/managers and he confirmed that the operations were continuing and that no employee had been laid off. He concluded by saying that the 1st

Defendant is a stable and profitable financial institution capable of meeting any damages that the court may deem necessary in the likely event the Plaintiff's suit does succeed. The same deponent swore a further affidavit dated 28th May, 2006. He deponed that the debenture executed by the Plaintiff provided for minimum interest at 32% and reserved a right of the 1st Defendant varying the rate of interest. That the 1st Defendant was compelled on the basis of the letter of offer to pay the letters of credit when they fell due notwithstanding the fact that the Plaintiff did not have sufficient funds in its account. That on 5th April, 2001 the Plaintiff was indebted to the Defendant at Kshs. 18,606,000/= and it was agreed at the request of the Plaintiff to convert Kshs.18 million to a loan repayable at the rate of Kshs.1 million per month commencing on 30th April, 2001. The balance of Kshs.606,000/= was to be retained in the overdraft account. He stated that he had opportunity to study the report of IRAC and he had the following to say:-

(a) The report is based on a base rates plus a margin of 4%. The facility that was offered to the Plaintiff is not founded upon a base rate plus a margin.

(b) The value dates in the report are inaccurate.

(c) There are credit entries in the report which are not in the bank statements. Such audit entries erroneously reduce the debt due and owning.

The deponent further denied that an amount in excess of Kshs. 30 million had been paid by the Plaintiff as alleged. The 3rd Defendant one of the receiver/managers also swore an affidavit dated 25th May, 2006. He stated that on taking on the operations of the Plaintiff he came to realize that the Plaintiff was operating from rented premises which are situated at West Vision House, Factories Street, Industrial Area. That the Managing Director of the plaintiff had for a large extent kept away from the Plaintiff company after the receiver/managers were appointed and moved in but on 18th May, 2006 the managing director came to the company's premises and stated that the landlord was likely to levy distress for rent areas since January 2004. That he also discovered that the Plaintiff had many insurance covers with Kenindia Assurance Company Limited which cover the period of 30th September, 2005 to 30th September, 2006. he had been unable to trace the Plaintiff's audited accounts and on making enquiry was told by the accountant that the last audited accounts were in the year 2004. He stated that the Plaintiff's account records are not well maintained thereby making it difficulty to find reliable information. He however was able to ascertain due to lack of raw materials the Plaintiff's main product had been out of stock. He was able also to find that numerous other products were also out of stock. He found out that the Plaintiff had been unable to clear from the port raw materials worth USD 38,778.52. He said that the employees of the Plaintiff have even after the receivership continued to offer their services to the company. He ascertained that the Plaintiff had six prime machineries which had been purchased on hire-purchase. The debtors list was for the amount of Kshs.38 million approximately. The company owes an approximate amount of 12 million to various creditors. He was of the view in view of that information it was crucial for the company to continue production and sale of products. The 2nd Defendant filed in court the receivers statement which statement revealed amongst other things that the plaintiff was indebted to various financial institutions for Kshs.92,893,538.20. In support of the Defendants' case defence counsel orally submitted to the court. He began by stating that once it is demonstrated that the Plaintiff was indebted to the 1st Defendant the court had no right to interfere with the receivership. He stated that the debentures did not have any other option incase of a default but the appointment of receiver/manager. Defence counsel referred to prayer No. 8 of the Plaintiff's application and stated that there was no prayer for the accounts to be taken. That the evidence submitted before court was in favour of injunction application. He also submitted that the evidence in support of a prohibitory injunction is not the same evidence that will be received in support of a mandatory injunction. In this regard he referred the court to the case of **Morris & Company Ltd vs Kenya Commercial Bank Ltd & Others (2003) E.A. 605**. He also submitted that when a party is shown that its conduct was not proper when applying for an injunction such a finding would be enough to disentitle that party to orders of injunction. For this contention he relied on the case of **Mrao Limited vs First American Bank of Kenya Limited – Civil Appeal No. 39 of 2002** (unreported). Defence counsel drew the attention of the court to a letter dated

20th January, 1998 from the 1st Defendant addressed to the Plaintiff. He stated that this letter clearly showed that it was brought to the plaintiff's attention that there was an advocate who drew the debenture. He also referred to the Plaintiff's bank statements annexed to the Plaintiff's application where there was a clear indication that there was a debit of Kshs.80,260/= being payment to the firm of Salim Dhanji Advocates as legal fees. He castigated the Plaintiff for stating that he was unaware of the advocate who drew the debenture since these two documents were in the possession of the Plaintiff. He also faulted the Plaintiff for having filed the present application seeking ***ex parte*** orders when its counsel had previously been informed by the 1st Defendant's counsel that he was ready to attend any court case at a short notice. Defence counsel stated that the plaintiff issued numerous cheques that were dishonoured. He referred the court to the bank statements of the Plaintiff which showed that the Plaintiff's account was overdrawn and that the plaintiff's fixed deposit was utilized to reduce the Plaintiff's debt. In respect of the 2nd fixed deposit 1st defendant's counsel took the court through the statements which showed that the cheque was deposited but that the same was dishonoured and consequently was debited from the Plaintiff's account. In respect of the Plaintiff's contention that the board of directors had not authorized the transactions, 1st Defendant's counsel submitted that the plaintiff's company had two directors and that both directors had executed the debenture. He confirmed that the debentures did comply with section 34 and 35 of the Advocates Act. He blamed the Plaintiff's counsel for having presented to the court what he called illegitimate authorities upon which injunctions had been granted and he urged the court to ignore their principles. He stated that the debenture provided a specific rate of interest and accordingly the Plaintiff's authority in this matter did not have a bearing. He blamed the report of IRAC for having presented the wrong interest and the wrong base rate. He stated that they had used what they themselves had perceived to be the base rate. He therefore requested the court to take notice of the 1st Defendant's replying affidavit which showed that the calculation by IRAC was mistaken. He submitted that the plaintiff had manipulated figures in bringing the present application. He submitted that this court cannot rewrite the parties contract and in this regard referred the court to the case of **National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No. 95 of 1999**. He requested the court to make a finding as was made in this case as follows:-

"***This meant that specified bank and financial institutions were at liberty to negotiate interest rates with their borrowers. Negotiated interest rates are what found their way into loan and guarantee agreements such as the ones in issue in this application."***

The 1st Defendant submitted that the plaintiff had failed to show a prima facie case with a probability of success and relied on the holding of the case of **Maithya vs Housing Finance Co. of Kenya and another (2003) 1 EA 133 (CCK)** where he stated that the Judge had found that a prima facie case had not been made out because the securities given by the applicant were given on a commercial consideration. He said that trade and commercial relations require certain obligations. He then relied on the holding of the case as follows:-

"***<u>Held</u> – The plaintiff/applicant had not established a prima facie case with a probability of success. The penalty interest and default charges were covered by the charge or in the alternative these charges could be implied by custom and trade usage.***

The securities are valued before lending and loss of the properties by sale is clearly contemplated by the parties even before the security is formalized. Damages would therefore be an adequate remedy.

The balance of convenience tilts in favour of the lender since it is in a position to repay should the borrower succeed at trial whereas the borrower's security continues to be eaten away by the mounting redemption money and may prove insufficient.

Those who come to equity must do equity. Failure to service the loan or to pay the lender or pay into court what had been admitted took the Applicant outside the realm of exercise of the court's jurisdiction.

Application dismissed, injunction denied."

In respect of the Plaintiff's argument that it had not been given independent legal advise 1st Defendant's counsel responded by saying that the Plaintiff had accepted that the debenture had been forwarded for signature and it was the responsibility of the plaintiff to ensure that it obtained whatever advise it required. He referred to the case of **Joseph Okoth Waudi vs National Bank of Kenya Limited, HCCC No. 77 of 2004** where he said that the court of Appeal refused to order an injunction on the basis that the documents thereof had been executed voluntarily.

Having considered the affidavits on record the submissions of counsels and the numerous authorities that were cited before me I am of the view that in reaching a decision on the Plaintiff's application the same presents two broad areas. The first is in relation to the debenture the question is whether it can be faulted for failing to comply with Section 34 and 35 of the Advocates Act and whether failure to serve notice of appointment of receivers under its powers invalidated the debenture. The second issue is whether the Plaintiff at the time of appointment of receivers was indebted to the 1st Defendant. In respect of the section 34 and 35 of the Advocates Act on a prima facie basis I find that the 1st Defendant has shown that the debenture was drawn by a qualified person by attaching a page showing the drawer and perhaps much more by showing that Salim Dhanji advocate was paid legal fees in respect of that execution. I therefore reject the Plaintiff's contention that the debenture must fail on that ground. The 1st Defendant also has shown that the Plaintiff was given notice of the appointment of receiver. Again on a ***prima facie*** basis at this interlocutory stage I find that the Plaintiff has not proved sufficiently that proper notice was not given for that appointment. It is after all not un usual to find a party such as the Plaintiff who seeks to obtain injunctive orders to deny service over vital documents. With respect to whether or not the Plaintiff is indebted to the 1st Defendant I am of the view that the affidavit of Ayaz Anwarali Merali sworn on 28th May, 2006 sufficiently dented the Plaintiff's arguments. The report prepared by IRAC obviously did not take into account that the parties that is the Plaintiff and the 1st Defendant had entered into a contractual relationship whereby the executed debenture which essentially bound them. Parties are indeed at liberty to freely enter into contractual relationship and they are also at liberty to have such terms that are agreeable to them. The Plaintiff therefore having executed the debenture cannot legally walk away from it whether by citing Sections in the Banking Act or otherwise. I am of the view that the Plaintiff has failed on a ***prima facie*** basis to prove that on this basis it is entitled to the far reaching orders of injunction that it seeks and when one considers that the granting mandatory injunction the plaintiff would need to prove an exceptional or a straight forward case. This was not the case here. I am guided by the case of **Mrao Limited vs First American Bank of Kenya Limited – Civil Appeal No. 39 of 2002** (unreported) particularly the following portion

"……***a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement or a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."***

The finding of this court is that the Plaintiff has not proved a ***prima facie*** case to the standards stated herein before. There were other periphery arguments that were presented by counsels indeed this matter when it was argued before me took a considerable amount of time but I am of the view that the salient points that this court ought to consider are the ones that have been innumerated above. The issue whether another bank was willing to give a guarantee to the Plaintiff in this case for the amount owed to the 1st Defendant as a condition to have the receivers removed from the Plaintiff's premises is not an issue that this court can consider. Having accepted that the debenture is a contract the terms of that contract can only be changed by consent of the parties. In the absence of such consent this court would do wrong to interfere with that relationship. The issue of whether or not the receiver/managers are authorized under the Pharmacy and Poison Act is of no consequence for indeed if they are breaching such a law there are authorities who mandated to superintend over its compliance. It therefore will not be an issue to be considered by this court. Having considered the evidence and submissions I am of the view that the Plaintiff is not entitled to the prayers in the application and having no doubt in regards to that fact that the Plaintiff has not proved the prima facie case I need not consider where the convenience lies. The orders of this court therefore are that the Plaintiff's application dated 15th May, 2006 is hereby dismissed with costs to the Defendants.

MARY KASANGO

JUDGE

Dated and delivered this 27th day of October 2006.

MARY KASANGO

JUDGE