REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 335 of 2000

JOSEPH ODINGO AGOLA ……..…….....…...…..…… PLAINTIFF

VERSUS

KENYA INDUSTRIAL ESTATES LTD …...…...……...…1ST DEFENDANT

RECEIVER MANAGER TECHNOPRESS LTD …..... 2ND DEFENDANT

JUDGMENT

The plaintiff instituted this suit against the Kenya Industrial Estates Limited, the 1st defendant, and Receiver Manager Technopress (K) Ltd, the 2nd defendant respectively. The plaintiff states that the suit is brought in his capacity as a director and principal shareholder of Technopress (K) Ltd under receivership.

Simultaneously with the filing of the plaint the plaintiff sought for interim orders of injunction to restrain the defendants from selling the machineries or properties of Technopress (K) Ltd. The said application was apparently opposed by the defendants and after interparties hearing, the court held that the plaintiff has no *locai standi* to institute the application and the application was dismissed with costs.

Apparently the defendants did not file any defence and it would appear that the plaintiff requested for judgment and the matter proceeded for hearing by way of formal proof.

During the hearing of this matter, the plaintiff gave evidence and gave the details of how he was the shareholder of the 2nd defendant's company which borrowed a sum of Kshs.1,445,000/- from the 1st defendant. An agreement in this regard was entered into between the 1st defendant and the 2nd defendant on *25th June 1987*. The loan was to be repaid at a monthly sum of Kshs.31,000/- for a period of seventy two (72) months but the 2nd defendant was allowed twelve months (12) moratorium period. This agreement was followed by a debenture of the same date in which the following machineries being the assets of the 2nd defendant as per schedule "D" of the agreement were charged as security for the loan advances.

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The plaintiff testified that he paid the loan advanced and completed payment in 1995 when he had paid a total of Kshs.2,811,571/75. It was a specific term of the loan agreement that upon successful payment of the loan he would be entitled to a discharge of the assets of the company but that notwithstanding, on *17th March 1993*, the 1st defendant appointed Naomi Mwitiki as Receiver Manager pursuant to the debenture dated *25th June 1987* and the powers contained in the said instrument of debenture.

As at that time, the plaintiff contended that he had paid a sum of Kshs.1,398,571/75 and according to the agreement he was supposed to complete the payment by 1994 thus the 1st defendant's power would not have crystallized until 1994 and the 1st defendant irregularly appointed a receiver in 1993.

The plaintiff further testified that he continued with the payments towards the loan account even after the receiver manager was appointed. He made a further payment of Kshs.1 Million and despite the appointment of the receiver, she did not take over the management of the company. The plaintiff continued to run the company until 19th December 1999 when the receiver manager closed the business and ever since the plaintiff has not had access to the 2nd defendant's premises. The 1st defendant sold the machinery that were secured by the debenture. The plaintiff further contended that as at the time the machineries were sold by the 1st defendant, his company the 2nd defendant was not owing any money to the 1st defendant.

According to the plaintiff, the 1st defendant failed to furnish him with a statement of account of the loan amount owing and even after the sale of the machinery which he claimed should be paid to him. The plaintiff said he had valued the machinery in 1994 and the value was Kshs.5,996,500/- according to a valuation report. He therefore sought for damages for the loss of business and an order lifting the receivership so that he could resume the management of his business.

This was the plaintiff's evidence in support of his case which was not controverted as the defendant did not file a defence. I have considered the statement of claim as contained in the plaint, unfortunately the prayers sought in the plaint are completely at variance with the evidence by the plaintiff. The prayers in the plaint are as follows;

a) An injunction restraining the defendants by themselves and or agents from inviting bids for machinery and or properties, movable and immovable owned by Technopress (K) Ltd in receivership with an order of account of the outstanding loan from the date of advancement to-date and an order lifting the receivership since the loan is fully paid.

b) Costs of the suit.

The plaintiff stated in his evidence that the machinery was sold as per the advertisement carried out in the East African Standard of *5th July 2000*. He did not amend the plaint to reflect the prayers he is now seeking that is damages for the loss of machinery and business as stated in evidence. Counsel for the plaintiff urged this court in their written submissions to find that the plaintiff proved his case against the 1st defendant that the loan agreement provided that the same should have been repaid within the period of seven (7) years and the appointment of the receiver was made before the expiration of seven (7) years is therefore unlawful. Counsel put forward the decision in the case of Kahagi VS Kencity Clothing Ltd [1982] KLR where it was held (o*biter*)

"If the defendant had paid the judgment debt after appointment of the receiver to avoid a sale of the attached property, the plaintiff would have been entitled to the money as a debt owing from the defendant while in objector bank's interest as the debenture holder would be a fixed charge over the goods, such a charge being redeemable by the defendant."

I have considered the above authority against the facts of this case and along the documents that were produced by the plaintiff. The plaintiff said that he had cleared the loan in 1995 but the statement of loan account which he produced as evidence shows that there is a balance of the principal loan which is cancelled with a pen. This cancellation is not explained. Moreover, the conditions set out in the loan agreement and the debenture provides that a receiver can be appointed by the 1st defendant if the 2nd defendant defaulted in loan repayment. The plaintiff deliberately avoided telling the court whether he had defaulted in loan repayment or whether he had complied with the terms of loan agreement and the conditions of the loan as set out in the agreement. Although the loan was to be repaid in 1994 and the plaintiff says he paid in 1995, it is not clear in his evidence whether he adhered to the payment schedules.

I am in this regard not satisfied that the plaintiff has established his case to the required standards for the following reasons.

1. The evidence is not supported by the plaint. A party is bound by their pleadings and it is trite law that a party cannot be granted the orders that are not prayed for.

2. The plaintiff's case is supported by the documents he produced, the statement of loan account shows there was a balance of loan in July 1995. This amount is erased with a pen and there is no explanation by the plaintiff who did not produce the payments receipts to support his contention that he paid the loan during the time when the receiver was appointed.

3. The plaintiff was not candid in his evidence, he did not disclose whether he was in arrears of the loan and whether he adhered to the terms and conditions of the loan agreement and the debenture.

Lastly, the issue of *locai standi* by the plaintiff was not resolved. The plaintiff stated that he was a shareholder of the 2nd defendant's company and he proceeded to sue the receiver of the 2nd defendant's company. The 2nd defendant is a limited liability company and it was the party to the loan agreement and the debenture not the plaintiff. This issue was raised in the interlocutory application and I am afraid it has not been resolved but for other reasons stated above, I need not go into details about this issue.

The upshot of the above analysis is that I dismiss the plaintiff's suit as lacking in merits and being bad in law. I make no orders as to costs.

It is so ordered.

Judgment read and signed on 8th December 2006.

MARTHA KOOME

JUDGE