REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE 153 OF 2005

MUSIMBA INVESTMENT LTD……PLAINTIFF

VERSUS

ISMAIL MAWJI……..…….1ST DEFENDANT

FIDELITY COMMERCIAL BANK LTD……..……2ND DEFENDANT

R U L I N G

On 22nd March 2005, the Plaintiff filed suit against the two Defendants. Simultaneously with the suit, the Plaintiff filed a Chamber Summons, seeking an injunction. The particulars of the substantive orders sought by the application are as follows:-

"2. **THAT there be a restraining order against the 1st and the 2nd Defendant either by themselves, their agents and/or assigns from receiving and or taking over the Plaintiff's offices and business in whatever form except those directly related to the equipment in the fixed debenture namely:-**

Visiotics Golf Simulator Model V 8 situated at Royal Golf Club in Nairobi pending the hearing and determination of this application.

3. THAT there be a restraining order against the 1st and 2nd Defendants either by themselves, their agents and/or assigns from receiving and or taking over the Plaintiff's offices and business in whatever form except those directly related to the equipment in the fixed debenture namely: Visiotics Golf Simulator Model V8 situated at Royal Golf Club in Nairobi pending the hearing and determination of the suit herein."

Prayer 2, above, was granted by the court, and remained in force during the hearing and determination of this application. Therefore, the Plaintiff was essentially asking for prayer 3, above.

Why does the Plaintiff wish the court to restrain the Defendants from taking over its offices and business?

It is the Plaintiff's case that it executed a Debenture in favour of the 2nd Defendant, to secure a loan of Kshs. 3,300,000/=, which sum the said 2nd Defendant had advanced to the Plaintiff. At paragraph 5 of the Plaint, it is asserted as follows, by the Plaintiff:-

"**That the Debenture incorporated the terms and conditions of the letter of offer as part of the terms of the Debenture and also acknowledged that the fixed Debenture was upon one machine**

described as *Visiotics Golf Simulator Model V8* which is valued at approximately Kshs. 5,000,000/="

The Plaintiff concedes that it did default in the repayments for the loan. Indeed, in the "supporting affidavit" of Mr. Patrick Musimba, he readily admits that the Plaintiff was in arrears for six months.

Due to the ongoing default in the payment of monthly instalments, the 2nd Defendant is said to have invoked the provisions of the Debenture, and thus appointed the 1st Defendant as a Receiver.

The Plaintiff says that, in principle, it recognises the 2nd Defendant's entitlement to appoint a Receiver, as it did. And the Plaintiff also acknowledges that the 2nd Defendant did duly notify the Registrar of Companies that the 1st Defendant's appointment (as a Receiver) was only in relation to the one Visiotics Golf Simulator.

In the light of the foregoing, the Plaintiff submits that the 1st Defendant's responsibility should be limited to the one Visiotics Golf Simulator. If that were done, the Plaintiff says that it would recognise the Defendants rights to so act. However, the Plaintiff fears that the 1st Defendant, in his capacity as the Receiver, will take over not only the Plaintiff's offices, but its business as well. The said fear is said to be founded upon the recent actions of the 1st Defendant, who has attempted to forcibly enter into the Plaintiff's offices at Pan Africa House, Kenyatta Avenue Nairobi. The 1st Defendant is also said to have demanded access to all information stored in the Plaintiff's computers, computer diskettes, files and banking information. In the light of those demands, the Plaintiff fears that the 1st Defendant intends to take over the running of the Plaintiff's entire business.

If the Defendants were not restrained; if they took over the Plaintiff's offices and business, the Plaintiff fears that its business would be disrupted. Furthermore, such a takeover would cause the Plaintiff to have an unnecessary management expense, and also adversely affect its goodwill. And, as far as the Plaintiff is concerned, the loss of goodwill cannot be compensated in damages.

It was submitted by the Plaintiff that the value of the Visiotics Golf Simulator was sufficient to cover the loan arrears. Therefore, not only was it the only asset over which the debenture was applicable, but it was also sufficient security for the loan which the 2nd Defendant gave to the Plaintiff. The value of the simulator was said to be Kshs. 5,000,000/=, in the estimation of the Plaintiff; whereas the loan arrears amounted to Kshs. 3,300,000/=.

In effect, the Plaintiff contends that there is no justification for the Defendants taking over its offices or business, as the simulator was sufficient security to the 2nd Defendant.

For those reasons, the Plaintiff feels that it is entitled to the injunctive relief sought. Furthermore, the Plaintiff contends that the 2nd Defendant could not be permitted to direct the Receiver to take over any other assets of the Plaintiff as the Notice issued to the Registrar of Companies clearly indicated that the Receiver was only being appointed in respect of the one Visiotics Golf Simulator Model V8.

The provisions of Sections 103 and 352 of the Companies Act were invoked by the Plaintiff, to support the contention that even if the 2nd Defendant were entitled (in principle) to appoint receivers over the assets of the Plaintiff, the said Defendant had limited itself to the Visiotics Golf Simulator only, by virtue of the Notice which was given to the Registrar of Companies.

Faced with these submissions, Miss Onyango, Advocate for the Defendants pointed out that the Plaintiff had been less than candid. She indicated that the Plaintiff had, by citing only the Debenture dated 30th September 2003, misled the court. That Debenture had been discharged by the parties thereto, and a new Debenture executed.

When confronted with that submission, the Plaintiff conceded that in paragraph 4 of the Plaint, the

only Debenture cited is the one dated 30th September 2003. However, it also submitted that in paragraphs 6 and 9 of the Plaint it was clear that the suit was founded on the existing Debenture.

First and foremost, if the Plaintiff was relying on the Debenture dated 10th June 2004, (or the existing debenture, as it now says), there should have been no difficulty in stating the position clearly and expressly.

The Debenture dated 30th September 2003 was discharged on 10th June 2004. A copy of the registered "**Receipt and Discharge of Debenture**" is annexed to the affidavit of Mr. Phillip Muoka, the legal officer of the 2nd Defendant.

In the light of the fact that the Debenture cited by the Plaintiff had been discharged, it would appear that the very foundation of the suit may be non-existent if the court were to go by the averments in paragraph 4 of the Plaint. But, as the Plaintiff has submitted that in paragraphs 6 and 9 of the Plaint, it made reference to the existing Debenture, I need to give consideration to the said two paragraphs. I will therefore set out the contents of the two paragraphs verbatim, as follows:-

"6. **That arising from default on the part of the Plaintiff the 2nd Defendant appointed the 1st Defendant a Receiver under a Deed of Appointment to manage the property described in the fixed Debenture namely Golf Simulator by the letter dated 11.3.2005 and Notice of Appointment of Receiver dated 27.2.2005 under the Companies Act filed in the relevant Registry on 11.3.2005.**

9. The appointment of the 1st Defendant as a Receiver by the 2nd Defendant was in respect of the said *Golf Simulator* machine only and any attempt to receive any other asset or business of the Plaintiff company is irregular and will occasion great damage to the company's goodwill, which is irreparable."

A close look at the averments above cited reveals that neither of them makes any reference to "**the existing debenture**". Therefore, I do hold and find that the Plaintiff's suit herein is founded upon a non-existent debenture, which had been discharged. Therefore, the Plaintiff cannot now make a turn-around, and seek to build a case on the Debenture dated 10th June 2004. The two documents are materially different. The old document, which was discharged contained a total of twenty-eight pages, whilst the existing debenture has thirty-three pages. Secondly, the old debenture listed, in its schedule, a single **Visiotics Golf Simulator Model V8**, as the item which was the subject of the debenture. In contrast, the Debenture dated 10th June 2004 has no schedule; instead it declares that the security would be "**by way of a floating charge (over)**

all the Undertaking and assets of the Company whatsoever, wherever situate, whether moveable, immoveable, present or future (including, without limitation) its uncalled capital for the time being and all the undertaking and assets of the Company referred to above which are, for any reason, not validly charged or assigned to Clause 5.1 to Clause 5.7 (inclusive) of this Debenture."

In so far as the discharged debenture dated 30th September 2003, and the existing Debenture dated 10th June 2004**,** are materially different , I hold that the Plaintiff's claim, as drafted, cannot be supported by the evidence at present available to the court. In effect, the Plaintiff has failed to prove a prima facie case with a probability of success. That being the position, the Plaintiff must be deemed to have failed to meet the first and most fundamental test for the award of an interim injunction.

However, before concluding this Ruling, it is incumbent upon me to make one or two observations.

Pursuant to the provisions of Section 103 of the Companies Act, the person who appoints a Receiver or Manager of the property of a company is required to give notice of such appointment to the Registrar of Companies, within seven days. The said notice is to be given whether the appointment of the Receiver or Manager was pursuant to an order of the court or under powers contained in any instrument, in respect

of which the appointment is made.

The requisite notice is to be issued in accordance with Form No. 222. In that Form, the person making the appointment is required to indicate if the Receiver (or manager) was being appointed over the "**whole or substantially the whole of property of this**

Company, (or over) part of the property of this Company, (or over) the income arising from the property or part of the property of this Company."

Therefore to my mind, the Debenture-Holder may well limit the properties over which he is appointing a Receiver or Manager. In this case, I find that the 2nd Defendant did not limit the properties to only the Visiotics Golf Simulator. But, at the same time, the 2nd Defendant appears to have deleted all the three options set out in Form No. 222, with the result that it is no longer clear whether or not the 1st Defendant had been appointed over all, or some of the Plaintiff's properties, or alternatively if the 1st Defendant was only to receive rent from all or some of the Plaintiff's property.

The situation is further confounded by the 1st Defendant who issued a Notice of his appointment, as is required, by way of Form No. 233. In the said Notice, the 1st Defendant expressly stated that his appointment was in respect of

"**ONE VISIOTICS GOLF STIMULATOR (sic!) (DESCRIPTIONS IN THE DEBENTURE.)"**

On the one hand, the 2nd Defendant has not specified over what properties he has appointed the receiver; on the other hand, the 1st Defendant has issued a Notice limiting his said appointment to the Visiotics Golf Stimulator (sic!). Now, whilst, I would be prepared to overlook the error in the Notice issued by the Receiver, (as being a typographical mistake), I cannot, however, state with any degree of certainty that although the Receiver had limited his appointment, he could nonetheless proceed to take possession of the other assets of the Plaintiff.

In the final analysis, I find no merit in the application, for the reasons given earlier. Therefore, it is dismissed with costs. However, for the reasons cited at the tail-end of this Ruling, I trust that the Defendants will take appropriate steps to regularise the Notices issued in Forms 222 and 233, respectively.

Dated and Delivered at Nairobi, this 28th day of September 2005.

FRED A. OCHIENG

JUDGE