



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 706 OF 2003

INDIGO GARMENTS (E P Z) LTD

(IN RECEIVERSHIP)..... PLAINTIFF

VERSUS

APEX APPARELS (E P Z) LTD DEFENDANT

RULING

This Ruling is in respect of the Defendant's application by way of Notice of Motion dated 28th November, 2003. The application is made under Section 401 of the Companies Act (Cap 486) and Order XXV Rule 1 of the Civil Procedure Rules.

Section 3A of the Civil Procedure Act Cap 21 is also invoked but in my view wrongly. The applicant is the defendant and by the said Notice of Motion seeks the following orders inter alia:-

- 2. That the Plaintiff herein through its receiver/manager do furnish sufficient security for the costs of the defendant in this suit.***
- 3. That there be a stay of all proceedings herein pending the furnishing of security for the costs of the defendant in this suit.***
- 4. That costs of the application be provided for.***

The Applicant relies on the grounds set out in the body of the chamber summons and on the affidavit of one Rajesh Nathan annexed to the said application. The grounds in a nut shell are:-

- (a) That the Plaintiff is under receivership due to its inability to fulfill its financial obligations.***
- (b) That the receiver is likely to sell the Plaintiffs assets and the plaintiff may be liquidated and cease to exist.***
- (c) That the Plaintiff's limited business currently is to enable it pay its creditors and depositors.***
- (d) That the Plaintiffs assets are insufficient to meet its obligations to its creditors and depositors.***
- (e) That the Plaintiff will have no assets against which the defendant can proceed to recover its costs should the suit be dismissed.***

The Plaintiff Company through the Receiver/Manager Kieran Day on 15th December, 2003 filed a Replying affidavit. Its advocates on the same day filed Grounds of Opposition in response to the defendant's application aforesaid. On 19th December, 2003 on behalf of the defendant the said Rajesh Nathan filled a supplementary affidavit. Mr Nyakundi instructed by the firm of Harit Sheth Advocates appeared for the Defendant and Ms Malik instructed by the firm of Kaplan & Stratton Advocates appeared for the Plaintiff.

It is common ground that the Plaintiff is in receivership and Kieran Day is one of the Receivers appointed by Akiba Bank Limited as holders of a debenture dated 25th November, 1999.

Mr Nyakundi Counsel for the defendant argued that the main reason for the defendant's application is that the plaintiff will not pay the defendant's costs if the plaintiff's suit is eventually dismissed. He says so because the plaintiff company is under receivership and is therefore not able to meet its financial obligations. The circumstances to be considered are as follows:-

- 1. Whether or not the plaintiff's claim is bona fide and not a sham**
- 2. Whether or not there is an admission that any sums are due**
- 3. Whether or not the application for security is being used to defeat the Plaintiff's genuine claim**
- 4. Whether or not the plaintiff's want of means has been brought about by an act or conduct of the defendant.**
- 5. Whether or not the application has been brought expeditiously.**

I was referred to the English case of *Sir Lindsay Parkinson & Co Ltd vs Triplan Ltd (1973) 2 ALL ER 273*. This case indeed correctly stated some of the circumstances to be taken into account in deciding whether or not an order for security for costs should be made.

The defendant's counsel argued that the Plaintiff's suit is a sham and is unlikely to succeed. In support of this argument he said that the Plaintiff prays for return of its machinery and equipment leased by itself on 10th September, 2003. The basis of the Plaintiff's claim for return of the machinery and equipment is a debenture dated 25th November, 1999. The debenture according to the defendant's counsel was not registered neither was form 214 under the companies Act filed. The defendant accordingly had no notice of the same as a search made at the Companies registry did not disclose the same.

It is further argued that the defendant leased the machinery and equipment from the Plaintiff for a specific period of 10 years with effect from 10th September, 2003.

The defendant, it is further argued, gave valuable consideration by paying USD 180,000. Accordingly in the opinion of the defendants the Plaintiff's suit is unlikely to succeed.

It was also argued that because the Plaintiff Company is in receivership it will not be able to pay the defendant's costs in the event that the suit is dismissed. The defendant seeks to show that as the Plaintiff together with others has been sued in Nairobi HCCC No 801 of 2003 for inter alia Kshs.93,467,333.60 it is evident that it will not be able to pay its costs in the event that the suit is dismissed. It is however agreed that this suit has not been decided.

The Defendant's counsel also referred to the case of **PURE SPIRIT COMPANY VS FOWLER (1890) 25 QBDP 235** where it was held that -

“the fact that the company was in liquidation showed, in the absence of evidence to the contrary that there was reason to believe that if the defendant should be successful in his defence the assets of the company would be insufficient to pay his costs, and therefore the defendant was entitled to security for costs under the Companies Act.”

It was also argued for the defendant that the estimated costs are enormous. In its view costs would be upwards of Kshs.2,800,000/=. Security for Kshs.3,000,000/= was sought. Defendant's counsel relied on the unreported case of ***D J LOWE & CO LTD VS BANQUE INDOSUEZ Mombasa HCCC No 35 of 1997***. Judge P N Waki as he then was granted to the defendant a limited order for security for the defendant's costs even though the company was not in liquidation.

I was urged to be persuaded by the decision in this case and order security for the defendant's costs.

Ms Malik in her reply relied on the grounds of opposition filed on 10th December, 2003 and the Replying affidavit of Kieran Day aforesaid. She emphasized that the Plaintiff company is not in liquidation but in receivership and this suit is for realisation of its assets allegedly with the defendant. She agreed with Mr Nyakundi on the circumstances to be considered in deciding the question whether or not to order security for the defendant's costs. Ms Malik also agreed that under Section 401 of the Companies Act and Order 25 Rule 1 of our Civil Procedure Rules the court's power to order security for the defendant's costs in discretionary.

According to the Plaintiff its claim is bona fide and not a sham as submitted by the defendant's counsel. The plaintiff claims inter alia:

"1. A mandatory injunction requiring the defendant to deliver up possession of the machinery particularized in the agreement dated 10th September, 2003.

2. A declaration that the agreement dated 10th September, 2003 between the Plaintiff and the defendant is null and void."

Ms Malik maintains that the Plaintiff has a reasonable cause of action. A receiver has been lawfully appointed by the debenture holder. The debenture has been registered and form 214 filed contrary to the position taken by the defendant.

According to Ms Malik once the debenture is registered and form 214 filed it is immaterial that a search made by the defendants did not disclose the same. The defendant is deemed to have had constructive notice of the same. In any event from the affidavits filed in these proceedings and other documents relied upon by the defendant, the defendant was aware of the debenture.

As the defendant company was aware of the debenture they should not have entered into the lease agreement dated 10th September, 2003 according to the Plaintiff's counsel. The Plaintiff is therefore entitled to challenge the said agreement. The receiver has been properly appointed by the debenture holder and his duties include recovery of company property or goods in the possession of another. The receiver has identified the property and states that it is in the possession of the defendant by fraudulent means because the alleged lease agreement dated 10th September, 2003 was entered into just 13 days before the appointment of the receiver and after the plaintiff had received a notice of demand from the debenture holders, M/s Akiba Bank Limited.

It is further argued for the Plaintiff that my brother Mr Justice Ringera allowed the Plaintiff's application for an interim injunction against the defendant after being satisfied that a prima facie case with a probability of success had been made out by the Plaintiff. It can now not be argued that the Plaintiff's claim is a sham. Ms Malik further argued that the defendant's application for security for its costs is oppressive and intended to stifle the Plaintiff's genuine claim.

The defendant's costs according to the Plaintiff are already secured. They are costs of realisation. The receiver in paying out any returns received settles as a matter of priority the costs of realization which would include the defendant's costs should it eventually succeed in the suit. Counsel fortified this argument by reference to ***KERR ON THE LAW AND PRACTICE AS TO RECEIVERS AND ADMINISTRATORS 17th Edition page 370***. Reference was also made to ***In re GLYNCORRWNG COLLIERY COMPANY LTD, RAILWAY DEBENTURE AND GENERAL TRUST COMPANY LTD VS THE COMPANY (1926) Ch. 951*** where the costs of realization were given first priority.

Ms Malik submitted that the defendants admit that the Plaintiff continues to trade. Rajesh Nathan said so in his affidavit sworn on 20th November, 2003. He further swore that at the Plaintiff's premises he saw 500 machines and a task force of 600 employees. The defendant can now not deny that the plaintiff has assets against which it can proceed in the event that the suit is decided in its favour. Ms Malik like Mr Nyakundi relied on the English case of *Sir Lindsey Parkinson & Co Ltd vs Triplan Ltd* aforesaid in her submission that the defendant's application for security for costs is being used oppressively and is intended to stifle the Plaintiff's genuine claim.

Ms Malik also submitted that the estimated costs of Kshs.2,800,000/= are exaggerated and not in accordance with the Advocates Remuneration Order. She said so because the Plaintiff's claim has not been quantified. The value of the machinery is not disclosed nor is the value of the Debenture. The debenture is not in any event the subject matter of the main suit. The Plaintiff does not claim damages special or general. There is therefore no basis for the security sought of Kshs.3,000,000/=.

In a brief reply Mr Nyakundi for the defendant maintained that as the plaintiff is in receivership it is not able to meet its financial obligations and has not demonstrated that any sums would be paid to satisfy the defendant's costs in the event of its success in the suit. In his view the *In re Glyncoirring Colliery Company* case does not give priority to the defendant's costs. In reference to the *Sir Lindsay* case, Mr Nyakundi maintained that all that it said was that the power of the court on security for defendant's costs is discretionary and not mandatory.

In my ruling I must emphasize that the *Sir Lindsay* case did not deal with all the circumstances to be considered whenever the question of security for the defendant's costs arises in respect of a company. It is also not authority for stating that all the circumstances given therein must be proved before an order for security for costs will be made.

The Plaintiff in this case claims a mandatory injunction requiring the defendant to deliver up possession of machinery and for a declaration that the Agreement of 10th September, 2003 between the Plaintiff and the defendant is null and void. There is no dispute that the said machinery belong to the Plaintiff. What is in dispute is the validity of the Lease Agreement in respect of the said machinery between the plaintiff and the defendant. Fraud is alleged in the making of the said lease agreement particulars whereof are given at paragraph 11 of the Plaint. It does appear that the debenture holder would have a claim over the said machinery under the provisions of the Debenture dated 25th November, 1999. Under the said Debenture the property offered as security includes "Future Property."

The debenture holder has appointed a receiver whose duty inter alia includes recovery of company property or goods in possession of another. I have seen a copy of form No 214 and it clearly refers to the debenture dated 25th November, 1999. I have also seen a copy of the said debenture. If a search made by the defendant failed to disclose the debenture and the said form No 214, this in itself would not affect the validity of the debenture. On the authority of *WILSON VS KELLAND (1910) Ch. Vol. 11 page 306*, I hold that the defendant had constructive notice of the said debenture. In any event the defendant knew about the said debenture and from the documents relied upon in these proceedings the defendant was aware of the existence of the debenture. I can at this stage say that the Plaintiff has a bona fide claim. The bona fides of the defendant in filing this application are not beyond question. The Plaintiff filed this suit on 11th November, 2003. It, at the same time filed a chamber summons for an interim injunction and other reliefs. A restraining interlocutory order was issued on 11th November, 2003 and the chamber summons was fixed for inter-partes hearing on 25th November, 2003. On 20th November, 2003 the defendant filed a replying affidavit of one Dee-Pak Bhojwani and one Rajesh Nathan. On 21st November, 2003 a defence was delivered and a Notice of Preliminary Objection filed. On 25th November, 2003 the inter-partes hearing was adjourned as Counsel for the defendant was away in Uganda. The same was fixed for hearing on 1st December, 2003. Before this date the defendant then filed the present application. Come 1st December, 2003 it was ordered inter-alia that the defendant's present application be fixed for hearing on priority basis. On the same date however the Plaintiff's application of 11th November, 2003 was fixed for hearing on 15th December, 2003. Come this date an adjournment was ordered on the defendant's application. Once again it is the Plaintiff's counsel who fixed their application of 11th November, 2003 for hearing on 29th December, 2003. However on 29th December, 2003 the court

declined to hear the matter as the vacation rules had not been followed in fixing the matter for hearing.

From the record, it is clear that the Plaintiff's application of 11th November, 2003 could have been heard interpartes on 25th November, 2003 had the defendant's counsel not travelled to Uganda. There was then no application for security for the defendant's costs. The application was filed a mere 2 days before the Plaintiff's application was due for hearing on 1st December, 2003. There is no reason why the defendant did not file the present application on being served with summons to Enter Appearance and the Plaintiff's application which service was effected on 14th November, 2003. The defendant at the time knew that the Plaintiff is in receivership. There were no fresh facts that come to the knowledge of the defendant on 28th November, 2003. In the circumstances I hold that the defendant has not brought its application for security for its costs expeditiously. The application appears to have been filed in an attempt to avoid the Plaintiff's application of 11th November, 2003.

The above notwithstanding I cannot conclude this ruling without a comment on the Plaintiff's alleged want of arrears. It is clear that the Plaintiff is not in liquidation.

It is in receivership. On the defendant's filed documents it is clear that the Plaintiff is in business. It has 500 machines and has a work force of about 600 workers. It also has other machines besides the ones forming the subject of this suit. In my view receivership may suggest financial difficulty but it is not conclusive evidence of want of means as liquidation is. The Plaintiff therefore has substantial assets in the form of machinery and other equipment against which the defendant will proceed in the event of success.

In the event that the Plaintiff's assets are sold by the Receiver, on the authorities available the defendant's costs rank first in priority over other creditors and liabilities. The defendant's costs should he succeed are therefore secure. See *In re Glyncorrwng Colliery Company Ltd Railway Debenture & General Trust Company Ltd vs The Company aforesaid*. See also *Kerr on the Law and Practice as to Receivers and Administrators 17th Edition page 370* aforesaid.

The English case of *Pure Spirit Company vs Fowler* already referred to earlier ordered security for the defendant's costs. The Plaintiff Company was in liquidation. The Judge also found as a fact that the assets of the company were insufficient to pay the defendant's costs. The Plaintiff in this case is not in liquidation and I have found as a fact that it is in business and has assets against which the defendant may proceed if it is successful in the suit.

I was referred to the Ruling of P N Waki J. as he then was in *Mombasa HCCC No 35 of 1997 D J Lowe & Co Ltd vs Banque Indosuez (Unreported)*. P N Waki J. as he then was granted a limited order of security for the defendant's costs even though the plaintiff company was not in liquidation.

This case is distinguishable from the present one because the defendant therein had already been awarded costs in an unsuccessful appeal and in five interlocutory applications. The Plaintiff had also failed to comply with a court order to deposit Kshs.500,000/= towards the costs of an auction sale or provide a banker's or insurance bond for the same. The facts in the present case are very different. In the circumstances of this case, I find that an order that the Plaintiff company gives security for the defendant's costs should it succeed in its defence is not appropriate. In the result the defendant's application dated 28th November, 2003 is hereby dismissed with costs.

Delivered at Nairobi this 30th day of January, 2004.

F. AZANGALALA

JUDGE

30.1.2004