



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 8 OF 2004

KENYA HOTELS LIMITED.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD & ANOTHER RESPONDENTS

RULING

The plaintiff, Kenya Hotels Limited, a limited liability company, claiming to be the registered proprietor and beneficial owner of 2 properties situated at Lake Naivasha and on which stands “the Lake Naivasha, Country Club” filed this application under certificate of urgency on 14th January, 2004. The application is by way of Notice of Motion under *inter alia*, order 39, rules 1, 2, and 3 of the Civil Procedure Rules and order L Rule 1.

The defendants are the Kenya Commercial Bank Limited and a receiver/ manager appointed by the Bank, Mr Christopher Mwangi chege.

The plaintiff seeks the following orders in the motion:

1. That for reasons to be recorded and on grounds to be recorded and on ground set out in the certificate of urgency, service of this application be dispensed with and be certified urgent and be heard *ex parte* in the first instance for purposes of prayers 2, 3, and 4 herein.
2. That an urgent date be set for the hearing of this application *inter partes*.
3. That the Honourable Court be pleased to issue a temporary interlocutory injunction order restraining the first and second defendants and/or their employees and/ or agents an/or assigns and/or anybody from:-
 - (a) Attempting in any manner whatsoever to sell, dispose, transfer, charge, pledge, lease or by other means whatsoever deal adversely with any assets, funds and business of the plaintiff/applicant.
 - (b) Dealing in any adverse manner whatsoever with the assets, funds and or business carried on the plaintiff’s property.
 - (c) Interfering with in any way with the officers employees servants or agents of the plaintiff/ applicant.
 - (d) Interfering with in any way with tenants of the plaintiff/applicant.

4. That the Honourable Court be pleased to issue an interlocutory mandatory injunction compelling the removal of the first and second defendants and/or employees and/or agents and/or anybody interfering with the suit premises from the plaintiff's property known as land reference number 6291/1 and 6901 situated at Lake Naivasha, its business operations, offices, equipment and movables at the Lake Naivasha Country Club until the determination of this application *inter-partes*.

5. That the Honourable Court be pleased to issue an interlocutory mandatory injunction to compel the first defendant's directors and officials and the second defendant and/or their employees an/or agents and/or assigns and/or anybody to return possession of the plaintiffs property known as land reference number 6291/1 and 6901 situated at lake Naivasha Country Club until the determination of this suit or further order of this honourable court.

6. That the Honourable Court be pleased to issue an interlocutory injunction to restrain the first and second defendants from trespassing or continuing to trespass upon the plaintiff's property known as land reference number 6291/1 and 6901 situated at Lake Naivasha, the business operations, offices, equipment and movables at the Lake Naivasha Country and from interfering in any manner with the plaintiff's quiet possession and enjoyment of the same until the determination of this suit or further order of this honourable court.

7. That the Honourable Court be pleased to issue a mandatory injunction to compel the first and second defendants do render true and proper complete accounts of their receipt, payments and all the profits relating to the said Lake Naivasha Country club and to account for the same and pay over to the plaintiff all sums of money properly payable to the plaintiff for the period from 2nd October 2003 until the delivery of possession of the suit property to the plaintiff.

8. That the plaintiff be at liberty to apply for and the Honourable Court be pleased to grant and any further orders and directions as may be just and expeditious disposal of the application and suit herein.

9. That the costs of and occasioned by this application be provided for.

The applicant initially appeared before me on 14.01.04 under Certificate of Urgency and on *ex parte* basis. Upon hearing the applicant's counsel Mr Ochieng Oduol, in part, and for reasons which are on record, I adjourned the application and summoned the 2 defendants to appear before me on 19th January, 2004 by themselves or through their advocates and produce in court the following:-

(a) The original debenture, legal charge or other instruments that purportedly gave the power to appoint a receiver/manager over the property and assets of the plaintiff.

(b) The original copy or certified copy of the deed of appointment of the receiver and manager

(c) Copy of the notification to the Registrar of Companies of the appointment of receiver/manager.

The Court made the said order, which appears unusual in the middle of an *ex parte* application for mandatory injunctions as one of the grounds set up by the applicant and allegations was that the first defendant had unlawfully and illegally purported to appoint the second defendant as receiver and manager of the plaintiff and that as a consequence the second defendant had moved into and taken possession of the plaintiff's aforesaid 2 properties. The plaintiff claimed that there were no encumbrances in favour of the first defendant Bank over the plaintiff's assets or properties situated at lake Naivasha in Naivasha.

It was the Court's view at the time that to save judicial time and to avoid possible drastic measures with serious implications, it was necessary to have sight of the said documents. For the appointment of a receiver/ manager by a debenture-holder or chargee, such legal instruments would usually be necessary.

As a result, the first and second defendants did appoint advocates to represent them on 19th January, 2004 and Mr Amollo and Mr Arwa of the firm of Rachier & Company Advocates attended court on the said date.

The said counsels at the outset made it clear that the first defendant did not hold any debenture over the assets of the plaintiff and there is no deed of appointment of a receiver over the assets of a company called Kenya Hotels Limited. They said that there was a deed of appointment over the assets and undertakings of a company called Block Management Limited which is in control of the Hotel premises and business by virtue of a management agreement. However, the defendants through the said counsels made elaborate passionate and persuasive arguments for the adjournment of the *ex parte* application and for the defendants to be allowed to file their responses formally and the application heard *inter partes*. The application for adjournment was opposed by the plaintiffs. For reasons on record, I allowed the adjournment and fixed the matter for *inter partes* hearing on 30th January, 2004 at 11 am. I allowed the defendants to file their respective responses and grounds of opposition.

The matter therefore came back before me on 30th January, 2004 for *inter partes* hearing. I ruled that the previous submissions and arguments of both counsels be taken into account and be part of the *inter partes* hearing of the application in order to save judicial time.

The plaintiff contended that it had shown that it is the owner of the suit properties. That the Court had given an opportunity to the the defendants to produce evidence of the legal basis of the entry into the suit premises. That the replying affidavit did not disclose any debenture, legal charge or instrument entitling the defendants to enter the property. That under section 96 of the Companies Act, any legal charge and other encumbrance was required to be registered. That there was no such instrument in existence and therefore the defendants had not legal basis to enter the suit premises or take control of it and the basis therein. The plaintiff charged that the defendants acts amounted to trespass in law and a violation of the plaintiff's rights under section 75 of the Constitution.

The plaintiff claims that the said acts of the defendants have occasioned the plaintiff irreparable loss and damage which can not be compensated by damage. The plaintiff argues that the entry was forceful in effect and there was no acquiescence as alleged. They say that they were entitled to comply with the Receiver, that is the Second defendant when faced with the Deed of Appointment.

In its grounds in support of the application, the plaintiff claims that the second defendant is depleting and wasting the plaintiff's property and there is real and imminent danger of the Lake Naivasha club collapsing entirely which would cause severe irreparable loss and damage. That the plaintiff intends to enter into agreements for the year 2004 and organize with tour Operators who organize the visits of the Lake Naivasha Club but is unable to do so because it is being kept out of its property. That if the plaintiff fails to enter into the agreements with the tour operators for the year 2004 it will suffer irreparable loss and damage as it will have lost the opportunity of accommodating tourists in the coming season.

The plaintiff claims that it is entitled to the mandatory injunctions as the current *status quo* was obtained and created illegally. That the defendants have carried out illegal acts to attain the current *status quo* and therefore the case merits the grant of mandatory injunctions.

The plaintiff prayed for the orders except orders 4 as the application was being heard *inter partes*.

The defendants who by now had filed a detailed replying affidavit sworn by the 2nd defendant on 22nd January, 2003, strongly opposed the plaintiff's application. The defendants claimed that the 2nd defendant had never been appointed as a receiver over the assets of the plaintiff and never moved in such capacity into the suit properties. The defendants deny that they moved into the premises forcefully. The defendants assert that the 2nd defendant moved into the premises to manage the premises and the business therein.

The defendants position is that by a Debenture dated 6th December, 1994 and registered on 15th December 1994 between a company called Block Hotels Ltd and the 1st defendant Bank together with a supplemental debenture dated 28th June, 1995, 11th July, 1996 and 2nd March, 1998, the said Block Hotels Ltd (referred to as BHL) created a floating charge over all of its assets, properties, business, goodwill undertaking and book debts as security for a loan of Kshs 287,000,000/- advanced to it by the Bank. The said debentures and supplemental debentures are annexed as exhibits.

The defendants further state that BHL subsequently changed its name to Block Management Limited (hereinafter referred to as BML). That the said BML failed to repay the debt and consequently it was appointed a receiver and manager for all properties, assets, business and undertakings of BML on 2nd October 2003 in exercise of powers vested in the Bank's debenture. That upon appointment the 2nd defendant established from the records of BML that at the time of its placement under receivership, it was managing 8 hotels known as Block Group of Hotels including the plaintiff's hotel known as Lake Naivasha Country Club. That the 2nd defendant in carrying out his duties as receiver of BML established that BML was owed substantial sums of money by the plaintiff. That it was his duty to recover all the debts and follow all the assets, undertakings, business and other interests of BML in whatever circumstances.

The 2nd defendant argued that it was established from the records of BML that there was a management agreement between BML and the plaintiff and although the initial management agreement between the 2 parties had expired, the same had been continued by mutual consent. That BML was managing the club without executing a fresh agreement. The defendant claims that the unwritten agreement was similar in terms to the initial agreement except that in case the agreement was terminated for any reasons or cause the plaintiff had to give BML a written notice indicating intention to terminate the contract and thereafter appoint an auditor who would then assess the amounts due to BML in the form of management fees, working capital and fixed assets investments in accordance with provisions of paragraphs 5 (a), (b) and (c) and 9d) of the initial agreement.

The second defendant on this basis asserts that upon his appointment and in exercise of the powers and duties vested in him under the debentures and the Laws of Kenya, he was under legal duty to discharge BML' obligations under the aforesaid management agreement and to continue running the Lake Naivasha Country Club in the hope of generating sufficient funds to repay what was due to BML before his appointment as receiver over BML and also to generate income BML in the form of management fees, as well as to generate profits for the plaintiffs in furtherance of the objectives of the management contract between the plaintiff and BML.

The second defendant claims that he has established from the records of BML that it was entitled to various amounts in terms of working capital and management fees respectively. The defendants produced a statement of the alleged working capital from 1992-2003. Mr Arwa for the defendants submitted that the amount shown to be due is Kshs 603,288,000/-.

The defendants concluded by stating that their taking over and managing the club was not forceful or illegal and at no time were the constitutional rights of the plaintiff infringed or that there was trespass. To the contrary, they alleged that the plaintiff through its director Mr Somaia supported and encouraged them to take over when some third parties through other suits tried to remove the defendants.

The defendants see the actions of the plaintiff in bringing this suit and application as a strategy to avoid payment of the amounts due to BML in form of management fees and working capital and investments. The defendants declare that they are willing to move out of the premises of the plaintiff at any time, on condition that the plaintiffs serves notice of termination of the management agreement, undertake to engage an auditor to establish the amounts due to the 2nd defendant and BML in terms of the management fees, working capital and investments injected into Lake Naivasha Country Club.

The plaintiff's counsel responded. It is pertinent to point out that during the initial *ex parte* hearing of the application which is now part of these proceedings, the plaintiff had conceded to the existence of the management agreement which was entered into in 1992. However, it contended that the said agreement had expired by effluxion of time on 31.7.2000 but BML continued to manage the Hotel for and on behalf of the plaintiff on the basis of some understanding. The plaintiff in answer, disputed that the BML was owed the sum of Kshs 603,288,000/-. It claimed that the defendant's statement showed shs 603,288/- only and in any case such a liability did not entitle the 2nd defendant to move into the Hotel. Mr Ochieng Oduol pointed out that clause 4 of the management agreement which stated that the appointment of the receiver over the assets of BML was an event which terminated the management agreement.

Having heard both sides and having considered the application, supporting affidavit, supplementary affidavit, replying affidavit and the above submissions of the parties' respective counsels, it is time for the court to make its decision.

When considering the application, I must be guided by the three principles set out and established in the case of *Giella-vs- Cassman Brown Limited* (1973) EA 358. First the applicant must make out a *prima facie* with probability of success at the trial. Secondly, that normally an injunction will not be granted unless it can be shown that the applicant is likely to suffer irreparable injury which cannot be adequately be compensated in damages and thirdly, that if the court is in doubt it should decide on a balance of convenience. These are necessary ingredients for the grant of an interlocutory injunction whether it is of a restraining nature or compulsive or mandatory nature. The standard of proof are however different. While the said three principles are the guiding principles, the court as a court of equity may also look at all circumstances including the conduct of the parties.

The first question, therefore, is whether the plaintiff has made out a *prima facie* case with a probability of success. This Court finds that the plaintiff has shown that it is the owner of the 2 properties herein known as LR No 6292/1 and 6901 and the business carried thereon known as the Lake Naivasha Country Club. It has not been directly established whether the said ownership is legal by registration or beneficial or both. This is a matter to be proven at the trial. However, the defendants do not dispute the averment in the plaint, deponements in the affidavit and submissions as to this fact.

Secondly, the defendants have conceded that it has no debenture, legal charge or other legal instrument over the assets of the plaintiff company. The 1st defendant has denied that it ever appointed a receiver over the assets of the plaintiff. The 2nd defendant denies that he moved or entered the suit premises and took control of hotel business as a Receiver and Manager. The defendants do not make any claim against the plaintiff as a debtor, obligant or customer of the 1st defendant Bank. The plaintiff is not a borrower or customer for the purposes of this application. There is no allegation that there is a banker-customer relationship between them.

What brings the plaintiff and defendant together and to lock horns or be at loggerheads is the relationship between the plaintiff and the BML and the management of the hotel business by virtue of an alleged management agreement and/or agreements.

I hold that the defendants have established and/or made out on a *prima facie* basis that Kenya Commercial Bank Limited, the first defendant has a floating charge over the assets, properties, business, goodwill undertaking and book debts of BML by virtue of several debentures duly registered. The amounts outstanding appears to be substantial. As a result of nonpayment, the 1st defendant appointed the 2nd defendant as a receiver and manager of BML. The Deed of Appointment and the debentures are not disputed by the plaintiff. The plaintiff's stand is that these relationships and legal instruments have nothing to do with it.

There is no dispute between the plaintiff and the defendants that there is a legal relationship between the plaintiff and BML. That BML had a management agreement dated 30th June, 1992 with the plaintiff to manage the Lake Naivasha Country Club for consideration. The management agreement describes the plaintiff as the owner and that it is duly and properly registered as the sole beneficial owner of the hotel. The agreement commenced on 1st July, 1992 and expired on 31st July, 2000. Both the plaintiff and the defendants agree that despite the said expiry the BML continued to manage the plaintiff's hotel business. Both parties refer to some mutual consents or arrangements. Neither of the parties produced any written agreement, document, letter, note or memorandum to show such mutual consents or understandings or the exact terms and conditions of the continuation of the management of the hotel by BML.

But it is an agreed fact that when the 2nd defendant was appointed as receiver of BML, BML was in custody, control and possession of the plaintiffs hotel premises and business. It was managing the hotel.

In my view some of the principle and substantive issues which will have to be determined at the trial are:

1. What were the terms and conditions of the mutual consents arrangements or understandings under which BML continued to manage the hotel from 31.7.2000.
2. Were the terms and conditions in the expired management agreement to apply to the continued management relationship?
3. Or were the said terms and conditions to be implied thereto whether wholly, partially or otherwise?
4. Did the deed of appointment of a receiver over the assets etc of BML confer any legal rights and/or powers for the Receiver to take over the management of the plaintiff's hotel and premises?
5. Does the plaintiff owe any management fees or working capital and/or investments to BML. If so, how much it?
6. If the plaintiffs owes such monies, is the BML's receiver in law entitled to take control and management of the plaintiff's properties and hotel business
7. Did the appointment of a receiver over the assets of the BML have the effect of terminating the management agreement (if its terms continued to apply) or any management by mutual consents, arrangements or undertakings?

For the determination of the aforesaid questions, the trial will have to take place and heard on merits. This Court today, is reluctant and ought not make positive or final findings on the questions of fact or law which will determine the suit finally.

For the purposes of this application, I take notice that the 2nd defendant came on the scene upon his appointment as receiver on 2nd October, 2003. He could not and cannot of his own knowledge know of the terms of any unwritten agreement or oral agreement continuing the management of the hotel by BML. While he has deponed that he established the existence of such unwritten agreement, he did not prove it or produce any evidence to support the said statement. If he established from the records of BML then there was nothing stopping him from replicating the same before the court. Even better, there is no reason why he did not procure an affidavit from BML or its officers to show the existence of the oral or unwritten agreement. If there was a record of an unwritten agreement, it would have been the simplest thing to produce the record in court.

In the absence of any iota of proof or assistance from the plaintiff and the defendants as to the terms and conditions of the management agreement or understanding that was created after the expiry of the written one on 31.7.2000 this court will not go on a further voyage of hypothesis, conjecture or imagination. In the absence of such evidence, this Court is entitled to reasonably deem it that the terms and conditions in the expired management agreement can be implied. Clause 4 on termination contemplated that the appointment of a receiver of the undertaking or assets of either party or part thereof would give the right to either of the parties to terminate the management agreement./ Such termination would take place with immediate effect if a written notice were given. In this case, BML was put under receivership but apparently without any notice, the receiver walked in and took possession of the premises and took over the management of the hotel business. It is questionable whether the Receiver of BML can demand to be given notice rather than BML who are strictly no longer in possession of the hotel premises. This entire question appears debatable and it is risky to make any conclusions. What is not in doubt in my mind, is that the receivership was an event capable of terminating the management agreement which has now expired.

At the moment the agreement has expired and the Court does not know the terms and conditions if any, pertaining to the *de facto* management understanding or mutual consents existing at the time the receiver was appointed over BML.

In the context of the facts before me, I hold that the plaintiff is the owner of the suit properties and the hotel business thereon. There is no debenture, legal charge, other legal instrument which has been

registered in favour of the 1st defendant under section 96 of the Companies Act. There is no legal or lawful appointment of a receiver over the assets of the plaintiff. There is no management agreement written, oral or otherwise which has been presented or proven to this Court at this stage and which is in force or is enforceable. It follows that the true legal status of BML on the premises and hotel is unknown or at the very least uncertain, unclear and incapable of enforcement or construction at this point in time.

The defendants have not established or shown that there is debt owing or due from the plaintiff in terms of management fees, working capital or investments. Even if such debt or liability existed it appears to be an unsecured debt recoverable in the normal, lawful and legal manner. It does not confer any rights or powers on BML to appoint a receiver over the assets of the plaintiff let alone the defendants.

The appointment of a receiver over the assets of the BML does not transfer those powers to or be imposed to the plaintiff under the alleged oral/ unwritten agreements which have not been disclosed with any particularity.

From what has occurred despite the denials, the 2nd defendant having been appointed to be the receiver of BML entered the plaintiff's premises on the basis of the Deed of appointment as receiver/manager. He used the said document as his legal basis and colour of right to walk in. He did not ask for permission or authority from anybody. He did not issue any notice or letter to the plaintiff explaining his capacity and legal status. He went in either under the mistaken belief that he was entitled to do so or as a result of an intention or decision to take over the control by any means.

As a result, the said action would appear to amount to a naked act of trespass. The deed of appointment of the 2nd defendant was not directed to the plaintiff. Its use or purpose was misapplied and abused. I do not think that acquiescence by the plaintiff is a good defence. I could refer to some strong observations in the *Microsoft Corporation –vs- Mitsumi Computer Garage Ltd*, Case – [2000], EA 127 but I would not wish to prejudice the trial herein and as the matter before me is an interim application.

What I would say without hesitation is that in the light of foregoing, the plaintiff/applicant has made out a *prima facie* case with a probability of success.

I therefore turn to the second question – has the applicant shown that it is likely to suffer irreparable injury which cannot be compensated in damages? The plaintiff is the owner of the 2 properties and the hotel business. It had entrusted the management of the hotel business to BML. Out of the blues, the 2nd defendant acting under a deed of appointment as a receiver/manager of BML issued by the 1st defendant enters the premises and takes possession and purport to run its business. The defendants did not have any apparent legal right and power to do so. There was no physical violence, riot or chaos. However, it appears that the said entry, possession and take-over violated the plaintiff's property rights as enshrined in the constitution. They violated the plaintiff's constitutional rights – specifically those protected under section 75 of the Constitution. This was a naked act of trespass. Force does not connote the drawing of blood—an illegal entry without any colour of right or legal backing or express consent of the owner of property is a forceful entry to me. The *status quo* today was attained through acts of trespass and violation of constitutional rights. The plaintiff has been ousted from its property. It is being used and abused by strangers. They have been there from October, 2003. The properties and the hotel business are substantial and must be extremely valuable in terms of monetary value. The defendants could carry out acts or omissions which may change the character and condition of the premises. The business could be interfered with leading to irreversible consequences. The hotel business which is a famous and long established concern among the tourist destinations in Kenya could be irretrievably altered to the plaintiff's detriment.

I therefore hold that the plaintiff has proven the second test – it is likely to suffer irreparable injury which cannot be adequately compensated in damages. The defendants have not offered any security or indemnities and may be in law, they cannot give such being trespassers on the premises.

The remedies being sought herein are substantially of compulsive nature. The plaintiff wants mandatory injunctions to remove the defendants from the properties and the hotel business. Should the Court or can

the Court grant the said injunctions in the said injunctions in the circumstances of this case?

As stated by this Court in the case of *Showind Industries Limited vs Guardian Bank Ltd and Another* [2002] 1 EA 284; an interlocutory mandatory injunction would be granted sparingly and only in exceptional circumstances such as where the applicant's case was very strong and straight forward. The standard of proof required in mandatory injunctions is much higher than that expected in prohibitive injunctions.

It is my view that the test or standard set in England for the grant of mandatory injunctions applies to Kenya. The said test does not affect or erode our principles in *Giella –vs- Cassman Brown* which applies generally to all interlocutory injunctions. All I am stating is that the degree or standard of proof, caution and inquiry in mandatory injunctions ought to be much higher than that in temporary injunctions of a restraining nature. In *Halsbury's Laws* (4th Edn) para 948 it is stated:-

“ A mandatory injunction can be granted on an interlocutory application as well as at the hearing but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiffa mandatory injunction will be granted on an interlocution application.”

In the decision of *Megarry J in Shepherd Homes Limited –vs- Sandhma* [1970] 3 ALL ER 402 at 351, he said:-

“Third, on a motion, as contrasted with the trial, the Court is far more reluctant to grant a mandatory injunction than it would to grant a comparable prohibitory injunction. In a normal case the court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted and this is a higher standard than is required for a prohibitory injunction.”

The standard is higher for mandatory injunctions, as *inter alia*, the grant of such an injunction results in a change of *status quo* before the trial. This Court must therefore act very cautiously and diligently. However, in a proper case a court of equity will not hesitate in correcting or reversing a *status quo* or situation obtained or created by the violation of the law. I cannot help but refer to the unforgettable words of Shah JA in case of *Gusii Mwalimu Investments Co Limited & Other –vs- Mwalimu Hotel Kisii Limited* (Court of Appeal Civil Appeal No 160 of 1995) – unreported). He said:

“The converse can also be true. Can a court of equity allow a litigant who takes unlawful and improper steps to evict a tenant to say that the tenants application ought to be dismissed as the litigant has already put someone else in possession thereby improperly changing the *status quo*.....It is fallacious for a person who forcibly and riotously enters premises to maintain that his occupation of the premises is the *status quo* which must be maintained. In this case if I were to allow the appeal, I would be giving any assent to occupation of the premises by a third party and assist the landlord to perpetuate what is did illegally. My equity conscience does not allow that”.

In the light of the facts herein and the aforesaid apt principles of law, the plaintiff's case is clear and straight forward. The circumstances are exceptional and special. It is a case for which the remedy of mandatory injunctions was intended and it is the appropriate remedy.

I therefore do hereby grant prayers 3, 5, and 6 of the Motion dated 14th January, 2004. I do not think that it would be appropriate for court to make any orders for accounts or payments in terms of prayer 7. This should await the trial. However, in the interest of both parties and for purposes of record keeping and good order, the plaintiff and defendants are ordered to take a joint inventory of the properties and assets therein at the time the defendants are handing over the properties and hotel business to the plaintiff.

In view of the nature of the order I have granted, I hereby direct that the orders herein take effect immediately.

I award the costs of the application to the plaintiff in any event.

It was agreed by the parties and it is now ordered by this court, that the ruling in this application in respect of this Motion, the orders thereunder shall apply to High Court Civil Case No 7 of 2004, *Lake Baringo Lodge Limited –vs – Kenya Commercial Bank Limited and Christopher Mwangi Chege* and the Notice of Motion dated 14th January, 2004. It is so ordered.

Dated and Delivered at Nairobi this 5th day of February 2004.

M.K.IBRAHIM

JUDGE