



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 619 OF 2003

INTERMART MANUFACTURERS LIMITED.....PLAINTIFF

VERSUS

AKIBA BANK LIMITED.....1ST DEFENDANT

VIPUL SHAH2ND DEFENDANT

KAMAL SHAH.....3RD DEFENDANT

RULING

The Plaintiff Company, Intermart Manufacturers Limited filed this application dated 1st October, 2003 by Way of Chamber Summons under Order 39, Rules 1, 2, 3 and 9 of the Civil Procedure Rules. The application sought the following Orders:-

- (a) That due to the urgency involved this application be heard ex parte in first instance,
- (b) That pending the hearing and determination of this application, the 2nd defendant and the 3rd Defendant be restrained by

themselves, their agents or servants 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 and assets.

- (c) That pending the hearing the determining of this application, the defendants be restrained by themselves, their agents or servants from selling, disposing of, 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.

- (d) That pending the hearing and determination of this application, the 2nd Defendant and the 3rd Defendant and their agents or servants, be restrained from entering the plaintiff's premises and properties and the Plaintiff's possession of all its premises and properties reinstated.

- (e) That the 2nd Defendant and the 3rd Defendant be restrained by themselves, their agents or servants 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 quiet possession and enjoyment of all the Plaintiff's land, properties, machinery, equipment and assets pending the hearing and final determination of this suit. (f) That in defendants be restrained by themselves, their agents or servants

from selling, disposing of, 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 final determination of this suit.

(g) The 2nd Defendant and the 3rd Defendant and their agents or servants be restrained from taking over the Plaintiff's business and if thereon be ejected and removed from all the Plaintiff's premises and properties be reinstated pending the hearing and final determination of this suit.

(h) The costs of and occasioned by this application be provided for. The 1st Defendant, Akiba Bank Limited is a Commercial Bank while the 2nd and 3rd Defendants are Receivers and Managers appointed by the Bank under powers it claims was conferred to it as a Debenture-holder by a Debenture dated 4th July, 1997.

The Application is supported by an affidavit sworn by Mr. Divyesh Indubhai Patel on 1st October 2003. The application is opposed by the Defendants who filed both grounds of opposition and a Replying affidavit which was sworn by Mr. Sekou Owino on 13th October, 2003. In its Plaint filed on and dated 1st October, 2003, the Plaintiff avers that in May, 1997 following negotiations between the plaintiff and the 1st Defendant Bank, the 1st Defendant agreed to provide to the Plaintiff, banking facilities amounting to a total of Kshs.47,000,000/= which comprise of Kshs. 17,000,000/= in term loan repayable in one year and overdraft facility in the sum of Kshs.30,000,000/=. These facilities were provided under a letter of offer dated 12th May, 1997. The securities to be provided by the Plaintiff for the Term Loan were:-

(i) Credit Agreement

(ii) Guarantee/Indemnity

(iii) Letter of Lien/set off.

(iv) Personal Guarantee of Directors.

(v) Letter of Appropriation.

(vi) Board Resolution to Borrow.

(vii) Pledge of Bearer Certificate of Deposits for Kshs.17 m. at interest rate of 18%. For the Overdraft, the securities were to be:-

(i) Credit Agreement of Advances.

(ii) Guarantee/Indemnity.

(iii) Personal Guarantee of Directors.

(iv) Letter of Lien and set off.

(v) Board Resolution to Borrow.

(vi) Debenture of Kshs. 30,000,000/= on all the moveable assets of the company.

(vii) Log Book of 2 Mercedes Benz cars KAE 732 and 320 E with duly executed Transfer forms.

(viii) Insurance Policy covering stocks with Bank interest noted. The Plaintiff pleads that pursuant to further negotiations, the securities in respect of the motor vehicles (No. vii above) on the Overdraft were duly discharged and that no securities were requested for or issued. That pursuant to the terms of the said letter of offer, the Plaintiff purportedly created a Debenture dated 4th July, 1997 in the 1st Defendant's favour to secure repayment of a sum not exceeding Kshs. 47,000,000/=. The main thrust of the Plaintiff's cause

of action is a challenge of the said Debenture. The Plaintiff's contends that the said Debenture is incurably defective, null and void and further contravenes the provision of the Advocates Act and that the 1st Defendant cannot derive any power under it to appoint the Receiver as it has purportedly done.

Upon filing the application herein, the Plaintiff company under certificate of urgency obtained ex parte Interim orders from this court on 1st October 2003 in terms of prayers and (a), (b) and (c) of the Chamber Summons of the same date. The court did not grant the Order sought in prayer (c) for restraining of the 2nd and 3rd Defendants, from interfering the Plaintiff's premises and properties and for the reinstatement of the Plaintiff's possession thereof pending the Inter partes hearing of the application. The Interim orders have been extended from time to time pending the hearing inter partes of the rest of the Application i.e. that Prayers (e), (f), (g) and (h) herein. This is what I heard after long and elaborate arguments and submissions by the parties' counsel.

The defendants, besides the Replying Affidavit and the Grounds of opposition filed their defence on 28th October, 2003 before the hearing of the Application inter partes. The Plaintiff on its part after being served with the Defendant's papers filed a Further Affidavit and a Notice to strike out the Affidavit sworn by Mr. Sekou Owino on 13th October, 2003 on behalf of the Defendants. In view of the nature and purpose of the said Notice it had to be heard as a preliminary matter at the outset. However on 10th December, 2003, the Advocates for the parties recorded a consent order that the Notice to strike out the Defendant's Affidavit would be dealt with within the main application. This meant that both parties would argue their respective cases and the court would decide on all issues. However, it would be the court's duty to deal with question of the Affidavit first in its Ruling so that if it was struck out or any part of it, then the court would not refer to the said affidavit or the portion that has been struck out respectively. If the court admitted the Affidavit in its entirety or a portion thereof, then only those parts retained would be considered by the court.

It is therefore incumbent on the court to consider and determine the issues raised in the Plaintiff's Notice to strike the Affidavit and dated 19th January, 2004 right away before going into any other matters. The Notice to strike out reads as follows:- "NOTICE TO STRIKE OUT AFFIDAVIT TAKE NOTICE that it is intended to be urged in limine on such day as this matter may be heard on behalf of the Plaintiff/Applicant herein that the Respondents Affidavit sworn and filed herein on 13th of October, 2003 is fatally defective in form and substance and thus incompetent and should be struck out on the grounds that:- 1. The "Affidavit" as drawn/sworn and filed violates the express provisions of Order XVIII (18) of the

Civil Procedure Rules as read together with Evidence Act.

2. The "Affidavit" drawn contains neither a specification as to which part is based on information (and documents forming the basis of such information) and where on belief the grounds of belief thereby offending the provisions of Order 18 of the Civil Procedure Rules. 3. The "Affidavit" offends/violates the Provisions of Section 176 and 177 of the Evidence Act inter alia.

4. The "Affidavit" contains an incomplete oath and offends the Oaths and Statutory Declaration Act, Cap 15 laws of Kenya.

5. Other grounds to be adduced at the hearing hereof.
....." This brings me to the Replying Affidavit of Mr. Sekou Owino sworn on 13th October, 2003. I have perused the said affidavit carefully and found that paragraphs 1-17 contain statements of fact. Paragraphs 18 and 19 contain conclusions, opinions and statements of facts by the deponent. Paragraph 20 – reads as follows:- "That I swear this Replying Affidavit in support of the Grounds of Opposition and that the Plaintiff's application be dismissed with costs and interests thereon "

This is the last paragraph. Order XVIII of the Civil Procedure Rules deals with Affidavits. Rule 3 provides as follows:- "3(i) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of Information and belief showing the sources and grounds thereof."

Nowhere and I repeat nowhere in the body of the said affidavit does the deponent state that any of the statements of fact made by him are from his own knowledge. Personal knowledge is the best evidence in any court of law and if any statement of fact is from a deponent's own knowledge he is required to expressly say so, so that the court knows that he is able or can prove the said fact. This is a mandatory requirement in the view of this court. There is a proviso in respect of Interlocutory proceedings like the present application. In interlocutory proceedings, an affidavit may contain statements of Information of and belief showing the sources and grounds of such information and belief respectively. Again nowhere in the deponent's affidavit does he expressly state that any of the statements of fact are based on information and belief respectively. Again nowhere in the deponent's affidavit does he expressly state that any of the statements of fact are based on information or belief and in such cases the sources of the information and grounds of belief respectively. The affidavit is wholly and totally silent in respect of the requirements of Order XVIII of the Civil Procedure Rules. In order to comply with the legal requirements of Order XVIII, Rule 3 (1), the long established practice in Kenya is for an affidavit to end as follows:-

“That what is deponed to hereinabove is true to the best of my knowledge, information and belief, save as otherwise stated.” Such a paragraph in an affidavit captures the requirements of the said legal provision. Suitable variations could be accepted by the court in compliance of the said rule as what is important is the substance and not the form. In the case of KENTAINERS LIMITED –V- V.M. ASSANI AND 4 OTHERS H.C.C.C. No. 1625 OF 1996 (NAIROBI – (unreported) Justice Ringera (as he then was) cited HALSBURY'S LAWS OF ENGLAND, 3RD EDITION, PARAGRAPH 845 as follows:- “Affidavit filed in the High Court must deal only with facts which the witness can prove of his own knowledge, except that, in interlocutory proceedings or with leave, statements as to the deponent's information or belief are admitted,

provided the sources and grounds thereof are stated For the purpose of this rule, those applications only are considered interlocutory which do not decide the rights of the parties, but are made for the purpose of keeping things in status quo, till the rights can be decided, or for the purpose of obtaining some direction of the court as to the conduct of the cause.”

This is exactly the same position in Kenya in respect of Order XVIII, Rule 3 (1) of the Civil Procedure Rules. From the authorities, an affidavit in support of an interlocutory application must, where it is based on the deponent's knowledge specify the means of his knowledge, and where it is based on matters of information and belief it must specify the deponent's sources of the information and the grounds for entertaining the belief. Mr. Sekou Owino does none of the above and to aggravate the situation, he does not even state that any of the statements are within his own knowledge, based on information or belief.

Justice Ringera (as he then was) in the Kentainers case puts it the application of the aforesaid Rule succinctly:-

“..... Accordingly, facts are to be proved only by the direct testimony of the witnesses own perception, or by his testimony of the admissible hearsay statements comprehended by the above-mentioned provisions of law, or by real evidence. Order XVIII permits a court to allow proof of facts by affidavit subject to the stricture that the deponent may be called for cross -examination . Such an affidavit should contain only such facts as the deponent is able of his own knowledge to prove except in interlocutory matters where it is permissible to adduce evidence of information received and belief ente rtained provided the sources are stated. Does it mean then that in interlocutory proceedings the court will accept proof of the fact, by information received? If the information constitutes an admissible hearsay statement, the answer is yes. No offence is caused to the Evidence Act in this case. If the information constitutes an inadmissible hearsay statement, the answer must be in the negative. It is not admissible to prove the fact asserted. The most it could do is provide a basis for the witness's belief or opinion in which case the statement is accepted by the court as original evidence. Rule 3 (1) of Order XVIII cannot be interpreted so as to provide for a mode of proof in interlocutory proceedings which is not countenanced by the Evidence Act it self. I say so because to hold otherwise would be wholly subversive of the Evidence Act. I cannot see that Rules of court could ever be interpreted so as to nullify substantive enactments” I am wholly persuaded by the aforesaid sound interpretation of the law. Accordingly I do hereby hold that Mr. Sekou Owino's affidavit is defective in form and substance and thus incompetent. The said defects are without

doubt incurable and fatal. The use of the words “oath” and “Swear”

at the opening and end of the affidavit are not capable of giving the so called affidavit any curative sustainability. The said purported affidavit is not an affidavit and is a meaningless document. With much regret, I have no option but to strike out the entire document referred to as a “Replying Affidavit” which I hereby do. As a result of the foregoing, the only document to be considered on the Defendant’s side in respect of this application is the Grounds of Opposition and to some extent the Defence. This also means that the statements on oath in the Plaintiff’s Affidavit sworn on 1st October, 2003 and that sworn on 9th January, 2004 remain uncontroverted and unrebutted by the Defendants.

I have carefully considered the Plaintiff’s application and 2 supporting affidavits, the Grounds of opposition and the counsels’ submissions. Applying the principles in *GIELLA –V- CASSMAN BROWN LIMITED* (1973) E.A. 358, I do hereby hold that the Plaintiff/Applicant on a balance of probability has made out a prima facie case with a probability of success at the trial. Secondly, considering the 2 affidavits of the Plaintiff which present the facts available to the court, the Applicant is likely to suffer irreparable injury which may not be adequately be compensated in damages. In the event I am wrong or in the event that I should have been placed in doubt by the fact that there appears to be a duly registered Debenture from the Plaintiff’s own documents irrespective of the allegations of illegality or defects, then I would have decided on a balance of convenience. In the Plaintiff’s supporting affidavit it is deponed as follows:-

“21. That on 30 th October 2003, the Receivers came to our premises with 4 guards and attempted to forcefully take over and unless they are restrained forthwith there is likely to be a breach of the peace. We have in the meantime suspended the operation of the companies. 22. That I verily believe that unless urgent orders are issued, the situation will degenerate into chaos as the attempt to take over is taking place at the end of the month and our employees are already starting to become rowdy due to non -payment of their salaries.” In the Deed of Appointment of Receiver and Manager shown in the affidavit and marked DP – 8, it is clear that it is dated 29TH September, 2003. It would appear that there is an error apparent on the face of the record in the affidavit, that the Receivers attempted to move into the Plaintiff’s premises on 30th September, 2003 and not 30th October, 2003. The Interim Orders were granted and have been in force ever since. It is, therefore, reasonable to conclude and which I hereby do that the Plaintiff is still in custody, care, control and possession of its premises and properties. In deciding the balance of convenience, I would have held that the said balance is in favour of the Plaintiff. In conclusion the Plaintiff herein is successful in this application and do hereby grant prayers (e), (f) and (g) of the Application. The defendant shall pay the Plaintiff’s costs of the application. Orders accordingly.

Date and delivered at Nairobi this 25th day of November, 2004.

MOHAMMED K. IBRAHIM

JUDGE 25.11.04 Coram: Ibrahim, J.

Court clerk - Buoro Mr. Kingara for the Applicant.

Mr. Kipkorir for the Respondent Ruling read in their presence.

MOHAMMED K. IBRAHIM JUDGE

Order by consent: This matter will be mention on 29th November, 2004 at 9.00 a.m. at Milimani Commercial Court (High Court) for further directions/orders. MOHAMMED K. IBRAHIM

JUDGE