



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
COMMERCIAL DIVISION, MILIMANI

CIVIL SUIT NO. 586 OF 2004

TRAVEL SHOPPE LIMITEDPLAINTIFF

VERSUS

INDIGO GARMENTS EPZ LIMITED1ST DEFENDANT

**KIERAN DAY (receivers and managers of Indigo Garments. Epz Limited)
.....2ND DEFENDANT**

AKIBA BANK LIMITED3RD DEFENDANT

RULING

The Plaintiff by way of chamber summon seeks orders as follows: -

(1) That the defendants either by themselves, their agents and or servant be restrained by way of temporary injunction from selling, alienating disposing or transferring or in any other manner from interfering with the assets of **Indigo Garments EPZ Ltd**, pending the appointment of a liquidator in Winding up cause No. 10 of 2004;

(2) In the alternative, the defendants either by themselves, their agents and/or servants be restrained by temporary injunction from selling, alienating, disposing or transferring or in any other manner from interfering with the assets of the 1st defendants pending the hearing of this suit.

The application is brought under Order 39 Rules 1,2 and 9 of the Civil Procedure Rules.

The application is based on the following grounds:

- That the plaintiff has obtained judgment against the 1st defendant in the Chief Magistrate, which judgment has not been satisfied;
- That the plaintiff consequently filed a winding up petition against the 1st defendant namely WC No. 10 of 2004;
- That the 2nd defendant was appointed pursuant to unlawful debenture which debenture did not comply with Section 35 (1) and (2) of the Advocates Act and accordingly the said appointment is void;
- That the plaintiff will be greatly prejudiced and will suffer irreparable loss and damage if the defendant sells, alienates or otherwise interferes with the assets of the 1st defendant.

The Managing Director of the plaintiff deponed in the affidavit in support that the plaintiff instituted proceedings against the 1st defendant and a sister company, namely **Indigo Trading Ltd**. whereby the

plaintiff obtained judgment against the said defendants for kshs 1, 994, 005/- plus costs and interest. The said judgment remains unsatisfied and on obtaining warrants of attachment the auctioneers were denied entry into the defendant's premises. The plaintiff thereafter filed a winding up cause No. 10 of 2004 against the said defendants. That the receiver manager appointed by the 3rd defendant have advertised for sale the 1st defendants assets and such disposal will lead to the plaintiff's claim, that is the judgment of the Chief Magistrate, never being satisfied. That the appointment of receiver managers is illegal.

Plaintiff's counsel argued that the debenture is void because it has contravened sections 34 and 35 of the Advocates Act in that it does not show who drew it. Counsel relied on the cases of *OBURA V KOOME (K) LTD – V – BARCLAYS BANK OF KENYA LTD & OTHERS (2001) LLR 1381 (CCK)*. To quote a passage from the latter case referring to the previous one: -

“That decision of the court of appeal held that a document drawn in breach of the provisions of section 34 of the Advocates Act was null and void. Now although that decision is strictly one on the interpretation it would appear to me that the broad logic of it is that a document prepared otherwise than in compliance with the Advocates Act is invalid.” per Ringera J

Plaintiff's counsel submitted that the requirement to show the drawer of legal documents was to protect the public who may inspect such a document and who would need to know the drawer thereof, in this regard counsel relied on the case of *ANDERSON LIMITED – V – DANIEL (1924) IKB 138*.

Counsel concluded by saying that if the debenture is void for violating sections 34 and 35 of the Advocate's Act then the appointment of the receiver manager was also void.

The defendant's counsel relied on the affidavit filed in reply and sworn by Sekou Owino. The said deponent stated that the name of the firm of advocates who drew the debenture was clearly indicated on the face of that document. That the said firm of advocates had also filed form 214 at the company's registry which form also clearly indicated the firm's name and address. The debenture accordingly does not offend sections 34 and 35 and the appointment of the receiver manager by the 3rd defendant was valid and consequently the 3rd defendant's debt was secured and its interest rank in priority over the one of the plaintiff.

The defendant's counsel argued that Section 35 does not state on what page the endorsement should be and if the purpose of such endorsement is to protect the public what better way to do it than to have that endorsement on the first page. She distinguished this case with the Jambo Biscuit case in that the latter did not have an endorsement of the drawer but this one does. The receiver was appointed in September 2003 and this application is brought one year latter. She described the plaintiff's action as an unsecured creditor trying to steal a match against a secured creditor. That the plaintiff had obtained judgment and accordingly damages since they were quantifiable is what the plaintiff can be awarded rather than the injunction sought hereof.

I must begin by saying that I am of the persuasion that any document which violates sections 34 and 35 is invalid. The present document, the debenture has a top cover, which indicates as follows: -

Dated 25 November 1999

INDIGO GARMENTS EXPORT PROCESSING ZONE LIMITED

- AND -

AKIBA BANK LIMITED

DEBENTURE

MOHAMED MADHANI & CO ADVOCATES

NATION CENTRE (7TH FLOOR)

KIMATHI STREET

NAIROBI

In the rest 50 pages of the debenture there is no other endorsement thereof. The objection raised by the Plaintiff is that the debenture fails to state the word drawn and that such an endorsement of an advocate as in this debenture does not suffice and accordingly the registrar ought not to have accepted it in registration. Section 35 states in part.

“Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in Section 34 (1) shall at the time endorse thereon his name and address.....”

The pertinent words in that section are **“person who draws or prepares.”** Those are important words in this section I believe because the public who is being protected by sections 34 and 35 ought to know, without a doubt that the person who has endorsed their name and address on the document are in fact the drawer and not just any busy body. I am therefore of the opinion that the firm of Mohamed Madhani & Co. Advocates needed to indicate that they are the drawers of the debenture.

I have to remind myself that this is an interlocutory application and all I am required to do is to weigh up the strength or otherwise of each sides proposition without making final findings of fact. In that vein I find that the debenture is between **Indingo Garment EPZ Ltd and Akiba Bank Ltd.** The plaintiff has no privity of contract thereof and accordingly I find that the plaintiff did not sufficiently prove that it is entitled to bring action on a document that it was not a party to. From the aforesaid the plaintiff did not prove before me that it has locus in this matter. This to my mind is very fundamental to this matter and I am therefore of the view that the plaintiff has failed to prove a prima facie case with a probability of success. The plaintiff’s rights, that is the unsatisfied decree, are nebulous as regards the debenture. The plaintiffs accordingly must fail.

The court’s order is that the plaintiff’s application dated 27th October 2004 is dismissed with costs to the defendants.

Dated and delivered this the 8th day of December 2004.

MARY KASANGO

AG JUDGE