



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**(MILIMANI COMMERCIALCOURT)**  
**CIVIL CASE NO. 2106 OF 1999**

**SPARES & INDUSTRIES LIMITED.....PLAINTIFF**

**-VERSUS**

**FINA BANK LIMITED.....DEFENDANT**

**JUDGMENT**

On or about the February 1997 the plaintiff applied for a credit facility of Shs 75,000,000/- from the defendant, which was granted with such conditions as are contained in the facility letter of 6.2.1997. As security the plaintiff charged several of its securities. In a debenture dated 3.7.1999 the plaintiff charged all its business undertaking to the defendant. The directors of the plaintiff company in addition provided personal guarantees for the repayment of the advanced monies. As a result of these facilities the plaintiff operated a number of accounts namely of accounts numbers CC1764, CC474 as overdraft accounts and a loan account number LN 4210 with the defendant. On 2.11.99 the defendant wrote to the plaintiff demanding the payment of all the outstanding amounts failure to which the defendant would appoint receivers under the terms of the debenture.

The plaintiff having not paid the demanded amount of monies the defendant appointed receivers on 2.11.1997. The plaintiff then filed a suit and the present application in which it is asking for orders that:

- (1) The defendant and its appointed receiver and manager be restrained from interfering with the business until the hearing and determination of the suit
- (2) And a mandatory injunction do issue to compel the appointed receivers to leave the premises.

Evidence

The application by the plaintiff is based on the grounds that:

- (1) The power contained in the debenture to appoint receivers had not become exercisable.
- (2) Appointment of receivers will occasion the plaintiff irreparable damages.
- (3) No true copies of the accounts were supplied to the plaintiff.
- (4) The appointment of the receivers was not made in good faith.

These grounds were supported by an affidavit sworn by Mr Pandya which gives details and facts of the various allegations. The affidavit has a number of annexures referred to in the affidavit.

The application is opposed on the grounds as detailed in the grounds of opposition filed on 8.11.99. These grounds are supported by an affidavit sworn by Mr Pardhasaradhi giving the facts of the grounds of the opposition.

The defendant annexes reports and valuations to the replying affidavit.

The plaintiff in this application contends that the securities securing the facilities outstrip the amount borrowed and hence fear by the defendants about repayment of the loan is unfounded and that in any case the defendants should have sought to sell the securities instead of appointing receivers. The defendants on the other hand say that the financial reports annexed to their reply indicate that the plaintiff company had been making considerable loss in its operation. This information is to be found in the observations on the balance sheet as at 30.11.99 which observations are based on the trading profit and loss account for the year 1998. What is clear from these accounts is that the accumulation of the interest on the borrowed money which in 1997/98 stood at Shs 41.127 million makes it impossible to service the loan with a gross profit of Shs 25,262 million.

These observations do not indicate mismanagement on the business on the part of the plaintiff rather they show that the problem is the interest rates.

The plaintiff has sought to show that it was upto the time the receivers were appointed making payments and that if it were not for the interest rates it would have been upto date with its payments. In other words it is questioning the interest rates charged by the defendant but clause 2 of the debenture gives the power to charge interest at such rates as the bank may think fit. The debenture forms a contractual document between the parties and this provision can only be changed or altered like any other contract under certain conditions. In the absence of any proof that this contractual relationship should be rescinded this provision for the interest remains valid. As to whether the right to appoint the receiver had become exercisable one has to turn again to the document which has created the present relationship between the parties and that is the debenture clause 16 of the debenture allows the defendant the lender to appoint receiver and or a receiver manager when the security becomes enforceable in case there is a breach of any of its conditions. In this case the default is based on the failure by the plaintiff to repay the loan when called upon to do so under clause 13 of the debenture which lists a number of conditions if defaulted by the plaintiff would entitle the calling up of the entire loan without demand.

It is necessary to go back a little on what passed between these two parties leading to the appointment of the receivers. After the plaintiff was granted the loan and the overdraft facilities in 1997, these credit facilities were increased in February, 1998 a year after. The increase of the facility would ordinarily indicate that the defendant was happy with the performance of the borrower. On 18th October 1998 the defendant writes to the plaintiff demanding the payment of the outstanding amount of Shs 88.4 million before the 1st of November 1999. On 2nd November 1999 the defendants wrote to the plaintiff demanding the payment of Shs 90.5 million pointing out that failure to pay this money forthwith they would appoint a receiver.

The same day they appointed the receivers.

What is not clear is why the defendants who had increased the facility a year before and after the operation of the accounts were satisfactorily managed decided to make a demand of the repayment of the whole amount giving the plaintiff less than a month in which to pay a sum of Shs 90 million. The situation of the company although making a loss as per the balance sheet is not as would appear that the defendant stood to lose his money if such drastic steps are not taken. The loss referred to is clearly due to the interest rates but not because the company is undergoing mismanagement. The securities offered were quite adequate under the circumstances. Mr Fraser for the defendant admits as much that the interest payable overshadows the repayments. There is no doubt judging from the repayment as ascertained from the statements of accounts that the plaintiff was making payments upto 2nd November 1999 confirming

that there was no mismanagement on the part of the company as to warrant the Bank to take over management from the owners. Looking at the circumstances leading to the appointment of the receivers in this case it becomes clear that the appointment was not for the benefit of the Bank. Whereas the Court would normally not interfere with the appointment of a receiver under the terms of a debenture holder nevertheless the Court will interfere where such appointment is not for the benefit of the debenture holder. In such a case the Court could use its inherent powers to appoint its own receiver or to make any other order necessary. See the *Halsburys Laws of England* 3rd Edition Vol 6 Paragraph 699

Where it is stated that:

“A debenture or a trust deed often gives power to appoint a receiver and manager in specified events. Such a power given in debenture is fiduciary power and if an appointment is made which is not for the benefit of the debenture holders but with a view to the benefit of the company or third persons the Court will interfere and appoint its own receiver.”

And in the English case of *Re Masklyne British Typewriters Ltd* [1958] 1 Ch, 133 CA

It was held that the right to appoint a receiver in the debenture does not oust the inherent power of the court to intervene when the circumstances of the case allow.

In addition to this decision I am of the view that the Court has powers under section 3A of the Civil Procedure Act which preserves the inherent powers of the court to intervene in a situation like in the present case to make such orders as are necessary to meet the ends of justice notwithstanding the provision of the debenture. In the Civil Appeal No 134 of 1987 *Godfrey Nyaga and Housing Finance Company of Kenya (HFCK) Ltd*. The Court of Appeal observed that:

“Where a party has a statutory right of action the Court will not usually prevent that right being exercised except that the Court may interfere if there was no basis on which the right could be exercised or it was being exercised oppressively”.

The notice given to the applicant to pay up the entire loan looked at all angles is unreasonable and as such I would find that the right to appoint a receiver had not become exercisable. I would like to believe that the appointment of the receiver by a debenture holder is the last resort and is undertaken only when the lender is in danger of losing his money. While

I would not like to read ‘*malafide* in the acts of the Bank’ in this case one still wonders whether the appointment of the receiver in this case was made to enable the Bank to recover its money. I find that the power in this case was exercised oppressively and that there really was no basis for exercising that power as the respondent did.

The applicant in the present application is asking for a mandatory injunction removing the receivers appointed. A mandatory injunction should only be given under exceptional circumstances. The appointment of the receiver in this case will no doubt have the effect of grounding the company. This is unnecessary as the Bank can at the end of the day recover its money from the realisation of the securities it is holding.

The grounding of the company would have grave consequences, which would constitute irreparable damage to the company.

I therefore find that under these circumstances an injunction should issue.

I do not think the Court intervention should include the appointment of a receiver by the Court at this juncture.

The application is allowed as prayed for in prayers 2 and 3 of the chamber summons dated 3rd November, 1999.

The costs shall be in cause.

**Dated and Delivered at Nairobi this 25th day of January, 2000.**

**KASANGA  
JUDGE**

**MULWA**