



Wab Hotels Ltd & another v Industrial Development Bank Ltd & 3 others (Civil Suit 734 of 2002) [2023] KEHC 897 (KLR) (Commercial and Tax) (10 February 2023) (Judgment)

Neutral citation: [2023] KEHC 897 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 734 OF 2002
A MABEYA, J
FEBRUARY 10, 2023**

BETWEEN

**WAB HOTELS LTD 1ST PLAINTIFF
JOSEPH WAMBUA MULUSYA 2ND PLAINTIFF**

AND

**INDUSTRIAL DEVELOPMENT BANK LTD 1ST DEFENDANT
LAWRENCE ODORI NABWANA 2ND DEFENDANT
PONANGIPALLI VENKATA RAMANA V RAO 3RD DEFENDANT
KOLLURI VENKATA SUBBARAYA KAMASTRY 4TH DEFENDANT**

JUDGMENT

1. Vide an Amended plaint dated 16/09/2005, the plaintiff moved this Court for judgment against the defendants for: -
 - a. A declaration that the purported receivership was illegal, unlawful, null and void or in the alternative, was effected in bad faith as against the 1st plaintiff.
 - b. An order directed against the 1st defendant and its representatives restraining them from placing the 1st plaintiff under receivership or selling the plaintiff's property being L.R. No. Nairobi/Block75/10/Wab Hotel, until the hearing and determination of the suit.
 - c. An order that accounts be taken in respect of monies lent and advanced to the 1st plaintiff by the 1st defendant and payments made thereafter in addition to accounts for amount received by the receivers as a result of running the 1st plaintiff's prime asset, Wab Hotel, during the total period of receivership.



- d. An order that a current and independent valuation to determine the market value of land and buildings and moveable assets charged in favour of the 1st defendant by the plaintiffs be done and undertaken by the 1st defendant prior to the hearing and determination of this suit.
 - e. A declaration that, for all purposes and effects, the receivers be and deemed representatives, servants and agents of the 1st defendant and consequently, the 1st defendant to be vicariously liable for the actions of the receivers being the 2nd, 3rd and 4th defendants herein.
 - f. An assessment of costs and damages caused by the defendants to the plaintiffs as a result of running the hotel premises.
 - g. Costs and other reliefs deemed fit by this court.
2. The plaintiffs' case was that the 1st defendant advanced a loan of Kshs. 25 million to the 1st plaintiff to expand and renovate its hotel business. Its property L.R. Number Nairobi Block 75/1031 ("the suit property") was charged as security. The Loan Agreement, Charge, and Debenture were all dated 29/12/1998. Erected on the suit property was a hotel known as Wab Hotel. That there were delays by the 1st defendant in releasing the funds to the 1st plaintiff causing it to obtain a bridging loan of Kshs. 15 million from Housing Finance Company thus causing further expenses and losses to the 1st plaintiff amounting to Kshs. 4,559,452/=.
 3. Whilst the 1st plaintiff was in the process of acquiring an off-shore facility to off-set the loan, the 1st defendant served a demand notice upon the 2nd plaintiff on 5/06/2002 demanding Kshs. 38,224,372.65. On the same day, the 1st defendant placed the 1st plaintiff under receivership of the 2nd defendant causing the 1st plaintiff's bank account to be frozen.
 4. It was contended that the receivership was illegal and done with ill motive to block the 1st plaintiff from obtaining the off-shore loan despite having incurred expenses of Kshs. 3,116,000/= in applying for the same.
 5. By a consent order made on 10/02/2004, the 1st plaintiff was surrendered to the 1st defendant and placed under the receivership of the 2nd defendant as receiver/manager to enable the 1st defendant recover its debt from running the hotel.
 6. The plaintiffs contended that the 1st defendant frustrated the 1st plaintiff's attempt to sell the hotel at Kshs. 198 million. The defendants refused to give consent to the 1st plaintiff to lease part of the property to K-Rep Bank at a monthly rent of Kshs. 218,575/= from 1/08/2004, which by the time of filing the suit would have reduced the 1st defendant's debt by Kshs. 2,622,900/=.
 7. The 1st defendant demanded from the plaintiffs Kshs. 76,4040,634.97 which made them contract the Interest Rates Advisory Centre (IRAC) for a recalculation who found the debt to be Kshs, 44,175,425.30 as at 30/09/2004. Demands for accounts as to the running of the hotel by the receivers were futile.
 8. The defendants advertised the property for sale on 31/08/2005 without giving accounts for the period of receivership. That when the hotel was placed under receivership, it was generating Kshs. 1,500,000/= per month and should have made a minimum of Kshs. 25,500,000/= for the duration of the receivership.
 9. The plaintiffs also claimed that despite the hotel being valued at over Kshs. 200 million, the subsequent valuation done by Kinyua Koech on the 1st defendant's instructions valued it at Kshs. 126 million, with



- a forced sale value of Kshs. 85 million. That if the property was to be sold based on that valuation, it would have caused the plaintiffs loss in excess of Kshs. 115 million.
10. The plaintiffs thus prayed for accounts and that there be an assessment of the losses incurred as a result of the defendant's excesses and that they be compensated.
 11. The defendants filed a joint defence dated 9/11/2005 denying the plaintiffs' claim. That the 2nd defendant served as a receiver/manager from 5/6/2002 to 25/7/2002 and 10/2/2004 and 6/4/2004 when the 3rd and 4th defendants were appointed to replace him.
 12. They denied that there was any delay in disbursement of the loan. That the loan was neither for 8 years as alleged nor that there was any agreement for a moratorium of 2 years. The moratorium was magnanimously granted on the principal sum only. The allegations of off-shore funding were denied.
 13. It was contended that due notice for the appointment of the receivers was given and that such appointment was permitted under the debenture and the law. That the plaintiff's claim was statute barred under the *Limitation of Actions Act*, estoppel, volenti non fit injuria and/or waiver.
 14. It was further contended that the plaintiffs' claims were barred by the doctrine of remoteness of damages. Ill will and bad faith were also denied. The valuations of Centenary Valuers and Mbinda and Company Valuers were said to be self-serving and prepared in complicity with the plaintiffs and were biased. The defendants contended that they had religiously given detailed and professional accounts.
 15. Finally, it was contended that the plaintiffs had admitted indebtedness to the tune of Kshs.44,175,425/33 as at 30/04/2004. The value of the suit property at Kshs.220,000,000/- was disputed as were losses alleged by the plaintiffs. That since the summons had not been extended, the suit against the defendants was a nullity. They urged that the suit be dismissed.
 16. At the hearing, the plaintiffs called 3 witnesses. P1w1 was Francis Kieti Mutunga, a Certified Public Accountant and a Member of the Institute of Certified Public Accountants. He adopted his witness statement dated 24/10/2016 and produced the documents paginated 580-658 as P1Exh1 being a forensic report prepared between 2012-2015.
 17. It was his testimony that the forensic audit established a case of financial fraud against the defendants for selling the suit property together with a neighboring uncharged property at a gross under-value. That the valuations done by M/s Kinyua Koech Ltd and Lloyd Masika Ltd and the advertisement for forced sale had all included the uncharged parking lot.
 18. That the joint receivers failed to keep or maintain proper books of account for the 1st plaintiff, failed to produce such books to the plaintiffs despite numerous demands and failed to audit the 1st plaintiff's accounts. That without audited accounts, there was no justification for the defendants to sell the charged property and the hotel business. That the defendants failed to conduct a going concern valuation to determine the value of the hotel business. Thus, the business was handed over to the purchaser at no consideration despite the same having been a going concern.
 19. He further testified that the accounts submitted to Court by the defendants in form of Form 223 were not accounts but rather abstracts of accounts. That Form 223 ought to have been accompanied by a full set of audited accounts.
 20. That the Profit and Loss Statement filed in Court for 1/04/2004 to 31/07/2009 was different from the one filed with KRA for the same period via letter dated 14/05/2012. That the one filed in Court declared net losses of Kshs. 6,282,146.24, while the one filed with KRA indicated net losses of Kshs. 4,688,309.24 thus a difference of Kshs. 1,593,837.00. That the statements also indicated two different



payments for the receivership fees whereby the court version indicated Kshs. 9,734,000/= whereas the KRA version indicated Kshs. 5,030,742.75 thus a difference of Kshs. 4,703,257.25.

21. He further testified that the defendants indicated to KRA a non-computed depreciation amount of Kshs. 2,542,312/= which was not indicated in the court version, whereas the actual computed depreciation of the 1st plaintiff's assets was Kshs. 88,963,302/=. That there were many expenditure items shown in the 5 years Form 223's which greatly differed with the totals in the Profit and Loss Statement. For instance, the casual payments were only indicated in the years 2004/05 of Kshs. 815,039/=:, while in the Profit and Loss Statement the casual's expenditure was Kshs. 6,784,263.00/=:, a difference of Kshs. 5,969,224/=:.
22. He further testified that there were items disclosed in the Form 223's but were absent in the Profit and Loss Statements filed in Court and with KRA. This included loan repayment to the 1st defendant of Kshs. 4,100,000/= indicated in the Form 223's. This was meant to mislead the Court and KRA that the 1st plaintiff could not afford to make any loan repayments.
23. The receivers also failed to disclose the basis of their fees despite the plaintiffs demands. The 2nd defendant had disclosed being paid 20% of operating profit. That based on the 20% operating fees, Pw1 established that the loan of Kshs. 43,201,061/= as at 27/05/2004 ought to have been repaid and the hotel returned to its directors.
24. Pw1 also testified that the receivers were filing annual returns with KRA and the Registrar of Companies as required. They underpaid VAT and Catering and Tourism Development Trustees Levy. They failed to remit PAYE in full to KRA despite deducting the same from staff. There were no proper records of NSSF and NHIF remittances. They failed to pay domestic taxes to KRA and by end of July 2012, KRA was demanding Kshs. 20,713,936/- that had not been received from the 1st plaintiff.
25. Further, there was under declaration of revenue collection. Despite there being tenancies by Jubilee Christian Church and Eagle Supermarkets Ltd in the two valuations, the only rent disclosed for the 62 months in the Profit and Loss Statement was only Kshs. 6,780/=:.
26. It was Pw1's testimony that according to financial reporting, the book value of the 1st plaintiff was Kshs. 277,519,583/=:, but was only sold for Kshs. 46.5 million, thus undersold by Kshs. 231,019,583/=: . It was his testimony that the 1st plaintiff could have recovered from the receivership and post cash balance of Kshs. 362,713,458/=: for the period ending 31/05/2009. He concluded that there was no economic basis for the defendants to have sold the suit property and transfer the hotel business to a 3rd party.
27. In cross-examination, he told the Court that he saw the books of accounts for the 1st plaintiff for 2003-2009, but did not see the banking slips and cheque counter foils. That he saw some of the payment vouchers, that he was aware that the 1st plaintiff made losses of Kshs. 9.9 million in year 2002 and loss of Kshs. 3.7 million in 2003.
28. That the hotel was sold in 2008. That before that, the tenants occupying part of the hotel were paying rent to Mulusya Land Consultants Ltd. That in his assessment, the hotel was supposed to be profit making and should not have posted losses in any year. That it was a mistake to include the car park as part of the hotel.
29. In re-examination, he testified that though the Profit and Loss Statement was filed from 1/07/2004 to 31/07/2009, it was grossly different from that filed with KRA.
30. P2w1 was Joseph Wambua Mulusya. He adopted his lengthy witness statement dated 17/06/2020 and produced Volumes 1 and 2 of P2EXh1 and 2. His testimony was similar to that of P1w1. In addition,



he testified that the Registrar of Companies in 3 separate letters found at pages 176- 180 of P2Exh1, denied that the receivers had ever filed any statutory returns in Form 223's from 2004.

31. That the only Form 223 filed with the Registrar General was filed on 23/11/2010 long after the suit property had been sold. That all government receipts produced by the defendants at pages 200, 204, 206 and 208 of P2Exh1 as evidence of filing Form 223's were issued by the office of the official receiver and not by the registrar of companies. Further, that all the filing receipts for the years 2005-2008 were all filed with the official receiver on 12/05/2008.
32. P2w1 further stated that there was a conflict of interest as the 1st defendant appointed one of its senior managers, the 2nd defendant, as the first receiver thus converting the 1st defendant into a mortgagee in possession. That the same was evidenced by the CV annexed at pages 484-492 of P2Exh2. That the 1st defendant also maintained an illegal receivership account.
33. In cross-examination, he stated that the receiver never filed any accounts and that the documents filed in Court were forgeries. That the receiver collected more than what was due and over-prolonged the receivership. That the valuation used in the sale was expired and that it only factored in the buildings and not the ongoing business.
34. That the hotel was sold by the bank on 24/10/2008. He did not have any opportunity to hand over a statement of affairs to the receivers as he was forced out by the police after the receivership was resumed.
35. He further testified that the hotel was capable of making more than Kshs. 50,000/= daily or Kshs. 1.5 million monthly and it would have been making profit if it was not fraudulently sold. That the valuation reports by Kinyua Koech and Loyd Masika should not have been relied on as they were expired. That even if parcel 1036 was removed from the valuations, the value of parcel 1031 would still have been at about half a billion shillings. The value of the furniture and fittings would go down due to depreciation. He stated that the plaintiffs did not challenge the sale of the hotel in 2008 because the court gave consent, though the consent was based on fraudulent information.
36. On the debenture at page 33 of P2Exh1, P2w1 testified that though the same stated that the appointed receiver would be deemed to be an agent of the 1st plaintiff/hotel, that is not what happened as the receiver failed to give the hotel's directors any accounting information or any information at all as to the running of the hotel for the five years and 2 months that they were in possession. They were answerable and reporting to the 1st defendant. That the receivers should have rendered an account of the amount received during that period but failed to despite numerous requests.
37. The last witness was P2w2, Lawrence Waititu Muchiri, a registered valuer. He testified that the valuation done by the defendants did not include a going concern valuation for the hotel. That the valuers only considered the real estate portion of the assets of a going concern and not the whole entity. That the assets alone did not make the full value of the hotel. That the valuation also included plot 1036 which was not part of the plaintiff's assets, as it was public land. That the plaintiff's parcel was thus overvalued. That he requested the defendants to issue financial statements for the last 3 years but none was given.
38. That for him to conduct the valuation, he required financial information to moderate how the management was performing, the capital structure of the hotel and know the actual amount which was going to the shareholders after paying all expenses and taxes. That he did not get all this information from the directors or receivers. That from the 2 valuations he received from the defendants, both valuers indicated that they were unable to get audited accounts and gauged the rental income of the property on prevailing rates which they termed as reasonable. That the cash flow was not considered



yet it was a crucial moderator when undertaking the valuation and the valuation of the business of the hotel was not considered.

39. In cross-examination, stated that the inclusion of the packing lot inflated the figure for the hotel but not the going concern value. That a business that would continue for more than one year was considered a going concern. That what really mattered was cash flow and not profitability.
40. The defendant did not call any witness having failed to file any witness statement or document despite being given a chance to do so on three occasions, 2/12/2020, 11/2/2021 and 11/3/2021. This Court has considered the pleadings, the evidence and the submissions on record.
41. The issues for determination are; whether an order for accounts ought to be issued in respect of monies lent and advanced to the 1st plaintiff by the 1st defendant and payments received by receiver during receivership; whether the 1st defendant ought to be held vicariously liable for the actions of the receivers; whether the defendants acted irregularly as a result of which the plaintiffs suffered any loss and damage; what loss or damage, if any, the plaintiffs suffered.
42. I will start with the second issue. In *Manuel Anidos v Kinangop Windpark Limited (In Receivership) & 2 others* [2019] eKLR, the court cited with approval the case of *Surya Holdings Limited & 2 others v Cfc Stanbic Bank Limited* [2015] eKLR wherein it was held that:

“... The receiver is the agent of the company and the powers of the company are just delegated to the receiver so far as regards carrying on business or collecting the assets of the company... See also Halsbury’s Laws of England, Volume 39, Fourth Edition, at paragraph 938, on Receivers and Managers’ duty as agent of the company to account to the company and all parties interested including guarantors and that failure to so account may elicit an order being made directly to the Receivers and Managers... See also *Medforth v Blake*, [1999] 3 All ER 97 (supra) and *Smiths Ltd vs. Middleton* where it was held that a receiver and manager runs the company as its agent and so is answerable to the company for the conduct of its affairs as well as to keep or cause to be kept full accounts (i.e. fuller than the abstracts of receipts and payments required under s. 372(2) of the 1948 Act) and to produce those accounts to the company.”

43. Further, in *Top Time Enterprises Ltd v P.V.R. Rao as Receiver/Manager appointed by Kenya Commercial Bank Limited to run Nyali Beach Hotel Limited in Receivership & another* [2014] eKLR, the Court of Appeal cited with approval Halsbury’s Laws of England third Edition volume 6 at paragraph 975, wherein it is stated: -

“A receiver or manager of the property of a company appointed under the powers contained in any instrument (a), is, notwithstanding that he may be an agent of the company and able to bind it by his contracts, to the same extent as if he had been appointed by order of the Court (b), personally liable on any contract entered into by him in the performance of his functions except in so far as the contract otherwise provides and is entitled in respect of that liability to indemnity out of the assets; ...

44. From the foregoing, it is clear that receivers are agents of the company and are answerable to it for the conduct of its affairs. They also have a duty to keep full accounts and not just abstracts of receipts and payments. Their position as receivers of the company means that they have a responsibility to discharge their fiduciary duty faithfully to the company, failure to which they become exposed to personal liability for breach of those fiduciary duties.



45. As regards the relationship between a lender and a receiver, in *Kaplana Shashikant Jai and another vs. Eco Bank Ltd and another* [2015] KLR, the court held: -

“Appointment of receiver outside court”

The receiver is the agent of the company and the powers of the company are just delegated to the receiver so far as regards carrying on business or collecting the assets of the company.

46. In *Manuel Anidos v Kinangop Wind Park Limited (In Receivership)* [2019] eKRL, the court found that the receivers were agents of the bank and since the bank itself had been sued as a principal, there was no need to join the receivers in the suit. The court held: -

“Consequently, as stated in the Public Notice the applicants are agents of the 1st Respondent and pursuant to the principles in principal –agent relationship there would be no cause of action against the applicants to warrant their joinder in the suit. ...

The protection given to Receiver Managers against legal liability was developed to encourage Persons into accepting the functions of Receivers, without the fear that by so accepting, they exposed themselves to liabilities which would otherwise belong to the Debtor Company or the Debenture Holder. No prudent man, this theory holds, would accept trust, and expose himself to liabilities. Receiver Managers are treated like Public Officers, who cannot be held liable for breaches of official contracts. Claims against Receiver Managers are like actions in rem...”

47. It would seem therefore that when a receiver acts contrary to the fiduciary relationship he has to the company, his principal is someone else, his appointing authority. If he conducts himself in a manner disregarding the company and suggesting that his principal is the appointing lender, that he only reports to and is responsible to the appointing authority, then the lender would be vicariously liable to the company for the receiver’s actions.

48. In the present case, after being appointed by the 1st defendant, the receivers exclusively reported to the 1st defendant. Requests by the 1st plaintiff for accounts fell on deaf ears. They acted as though their principal was the 1st defendant.

49. In my view, whilst receivers are appointed by a lender their fiduciary duty to the company requires that; they act and exercise independent judgment, they act for the benefit of both the lender and safeguard the well-being of the company, this includes rendering accounts to the company as and when required.

50. In the present case, it is this Court’s finding that the receivers owed a fiduciary duty to the company, breach whereof exposed them to personal liability. It is also this Court’s finding that to the extent that the 2nd to the 4th defendant so conducted themselves as agents of and for the exclusive benefit of the 1st defendant, the 1st defendant would be liable jointly with the other defendants for the wrongs committed.

51. As to whether an order for accounts ought to be issued, Order 20 rules 1 and 4 provides as follows: -

“Where a plaintiff prays for an account, or where the relief sought or the plaintiff involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made.”



52. There was no preliminary question raised by the defendant. The denials contained in the defence were only bare. They were not supported by any evidence. The plaintiffs' testimony was forceful and compelling that the defendants run the 1st plaintiff's business for 5 years before disposing it for a mere Kshs. 46.5 million in 2008.
53. The Court saw the Form 223's for 2001 to 2009 filed by the defendants at pages 190-216 of P2Exh2 titled Receipts and Payment Accounts. The Court has also considered P1Exh1 being a forensic report prepared between 2012-2015 by P1W1, a Forensic Auditor. It was the plaintiffs' case that the forms were not audited accounts but rather abstracts of accounts which ought to be accompanied with the actual audited accounts.
54. At page 507 of P1Exh2 was also a letter dated 4/1/2012 from the Institute of Public Accountants. The same confirms that the said Form 223's were just abstracts of accounts and needed to be accompanied by the actual audited financial accounts. There were also discrepancies between the financial information filed with KRA, and the one filed in Court. The totality of the evidence produced in Court calls for a full disclosure by the defendants by way of accounts.
55. It was P1W1's testimony that the 1st plaintiff could have recovered from the receivership and post cash balance of Kshs. 362,713,458/= for the period ending 31/05/2009. There was also testimony that the 1st defendant did not disburse the full loan and that several payments made towards repayment were never credited. It was the plaintiffs' case that there was no economic basis for the defendants to sell the suit property and transfer the hotel business. This evidence was neither challenged nor rebutted.
56. In *Smiths Ltd v Middleton*, [1979] 3 All ER 842 at page 846, who also cited the words of Jenkins LJ in *Re B Johnson & Co (Builders) Ltd*, [1955] 2 All ER 775 at page 790 thus:
- “... The company is entitled to any surplus assets remaining after the debenture debt has been discharged, and is entitled to proper accounts.”
57. In *Gomba Holdings UK Ltd and others v Homan and another*, [1986] 3 All ER 94, at page 99, it was observed: -
- “... the fact that the board may need information in order to exercise the company's right to redeem. It seems to me at least arguable that the right to redeem gives rise to a right on the part of the company to ask for sufficient information to make it effective. If the company has no way of finding out which assets have been sold and which remain to be redeemed, the right may in practice be incapable of exercise.”
58. It is trite that the primary duty of a receiver is to get in and, as necessary, realize sufficient of the company's assets and undertaking to satisfy the outstanding debt of the creditor on whose behalf he has been appointed. He is under an obligation to keep and produce to the company proper accounts. The receiver's duty to provide accounts or other information to a debtor company is not restricted to his statutory obligations under the *Companies Act*, it goes beyond.
59. In this case, I find that the receivers were supposed to be answerable to the plaintiff company but were not. That they were under a duty to keep and produce full accounts and not mere abstracts of payments. It is imperative that the Court and the plaintiffs get to know the loan status as at the time of appointment of the receivers, during the pendency of receivership and at the point of sale of the 1st plaintiff's business. Only full accounts can reveal this information which is only in the custody of the defendants.



60. Receiverships are not conduits for either secret enrichment for receivers nor lenders. Neither should they be shrouded in mystery or unclear cloud. They must be transparent as they are intended to be undertaken on behalf of the company even though for the benefit of the appointing lender. Moreover, liability to account may even extend after termination of appointment of Receivers and Managers. Accordingly, the Court finds merit in the prayer for production of accounts.
61. There is also the challenge that the sale of the hotel was done at an under value. It was the plaintiff's case that the valuation reports relied on were expired. All the plaintiffs' witnesses testified that the valuations relied on by the defendants in the sale were wrong as they considered a neighboring piece of land that was not charged under the debenture.
62. There was also evidence that before the sale, 3 different valuations had been undertaken. These were produced at pages 79, 402 - 411 of P1Exh 1 & 2. The first one dated 13/6/1997 was by Muyoti & Associates limited. It valued the property at Kshs.75 million before renovations and extensions of the hotel had been done.
63. The second valuation dated 19/1/2002 was by M/s Mbindah & Company and valued the land and developments only at Kshs. 196,913,574/=. The third was by Centenary Valuers dated 10/9/2001 which valued the property at Kshs. 177 million after developments and expansions had been undertaken albeit incomplete.
64. However, the Sale Agreement dated 24/10/2008 at page 131 P1Exh1 shows that the property was sold at Kshs. 46.5 million. It has already been established that the receivers had not provided full accounts for the hotel for the basis of selling the property at such a low amount in the face of the previous valuations over their own valuations.
65. In *Surya Holdings Limited & 2 others v Cfc Stanbic Bank Limited* [2015] eKLR, the court held: -
 “Any eventual sale is to be done in accordance with the law and not at the whims of the Receivers and Managers or to their preferred purchaser. ... Preventing the mortgagor from redeeming payment of the principal, interest and costs is a clog on the right of redemption.”
66. In the present case, the receivers run the business for over 5 years. They failed and refused to give any accounts of the business. They filed falsified documents in Court as well as misleading information with the KRA. Without a doubt, they seriously breached their fiduciary duty in doing so and more so when they sold the 1st plaintiff's property without a proper valuation. There is nothing to show that the company had failed to repay the loan at the time the property was sold.
67. There was evidence to show that the defendants frustrated the plaintiffs' efforts to produce income towards loan repayment. An example is the leasing out shop space that was surrendered by Eagle Supermarkets Ltd to interested persons such as K-REP Bank Ltd and KCB Bank (see pages 569-571 of PExh 2). They also turned down two offers from other banks to repay and take over the 1st plaintiff's loan. They also sold the property at gross undervalue.
68. The totality of the foregoing is that, the Court finds that the plaintiffs have made a case for production of accounts. It also finds that the receivers breached their fiduciary duties thus exposing themselves to personal liability. It finally finds that the 1st defendant is also liable for the acts of the receivers who acted as its agents. The plaintiffs have proved their case to the required standard.
69. Accordingly, I enter partial judgment in favor of the plaintiffs against the defendants, jointly and severally, in the following terms: -



- a. A declaration that, for all purposes and intents, from the conduct of the defendants in this matter, the receivers herein are deemed to have been representatives, servants and agents of the 1st defendant and consequently, the 1st defendant is vicariously liable for the actions of the receivers being the 2nd, 3rd and 4th defendants.
- b. The receivership herein was conducted in bad faith and the defendants breached their fiduciary duty to the 1st plaintiff.
- c. The defendants do produce and file in Court within 21 days of the date hereof, the full account of all the dealings with the 1st plaintiff and its business together with its assets from the date of appointment of the receivers to the date of the sale of the 1st plaintiff's property.
- d. The 1st defendant do file an affidavit within 30 days setting out in detail an account of the sums lent to the 1st plaintiff, the sums outstanding at the date of appointment of the receivers and at the date of the sale of the 1st plaintiff's property together with supporting documents. The accounts shall also include all the monies received and monies paid out by the receivers in the course of the receivership.
- e. The 1st defendant shall produce within 30 days the full and current bank account statements of the 1st plaintiff's loan account from the date of disbursement of the loan amount to the date of the sale of the property belonging to the 1st plaintiff.
- f. After the production of the accounts aforesaid, there be an assessment of damages suffered by the plaintiffs. In default of those accounts, damages shall be assessed based on the evidence already on record.
- g. The matter shall be mentioned on a date to be allocated to confirm compliance and give a date for final judgment on damages.
- h. The costs of the suit to the plaintiffs in any event.

70 It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2023.

A. MABEYA, FCIArb

JUDGE

