**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**HCCC NO.68 OF 2015**

**SURYA HOLDINGS LIMITED…..…..…….....1ST PLAINTIFF**

**RHEA HOLDINGS LIMITED……..……..2ND PLAINTIFF**

**YESHODA INVESTMENTS LIMITED……..……. 3RD PLAINTIFF**

**KARUTURI LIMITED……..……...4TH PLAINTIFF**

**KARUTURI OVERSEAS LIMITED……..…….. 5TH PLAINTIFF**

Versus

**ICICI BANK LIMITED.....1STDEFENDANT**

**KOLLURIVENKATA**

**SUBBARAYAKAMASASTRY……..2ND DEFENDANT**

**RULING**

**Injunction: Temporary and Mandatory**

[1] The Plaintiffs applied in a Motion dated 17th February 2015 for the following orders,*inter alia*

1. **An Injunction restraining the 1st Defendant either by itself or through Mr. Kolluri Venkata Subbaraya Kamasastry, the 2nd Defendant, being its Receiver and Manager or such other Receiver and Manager that it may purport to appoint or any of them, servants, auctioneers, agents, or advocates or any of them or otherwise from advertising or offering for sale, or purporting to sell, or in any other way alienating the 1st, 2nd, 3rd and 4th Plaintiffs movable and immovable properties including but not limited to ALL THOSE PROPERTIES KNOWN AS Land Reference Number 10854/60 (Title No.I.R 87312), in the name of Rhea Holdings Ltd, the 2nd Plaintiff /Applicant herein, Land Reference Numbers 12248/19, 12248/20, 12248/21,12248/38, 25261 and 25262 in the name of Surya Holdings Limited, the 1st Plaintiff herein or otherwise from howsoever dealing with the Suit propertiespending the hearing and determination of this suit.**

2. **Aninjunction restraining the 1st Defendant either by itself or through Mr. Kolluri Venkata Subbaraya Kamasastry, the 2nd Defendant, being its Receiver and Manager or such other Receiver and Manager that it may purport to appoint or any of them, servants, auctioneers, agents, or advocates or any of them or otherwise from advertising or offering for sale, or purporting to sell, or in any other way alienating the 1st, 2nd, 3rd and 4th Plaintiffs' assets under or secured by the Debenture dated 24th October 2011pending the hearing and determination of this suit.**

3. **An injunction restraining Mr. Kolluri Venkata Subbaraya Kamasastry the 2nd Defendant being the 1st Defendant's Receiver and Manager or such other Receiver and Manager that the 1st Defendant may purport to appoint from discharging, executing and/or effecting any powers or such powers under the Deed of Appointment dated 9th June 2014 or such other appointing Instrument or in any other way interfering with the operations, management, running and affairs of the 1st, 2nd, 3rd and 4th Plaintiffs pending the hearing of this case.**

4. **That the present suit to be consolidated with the Nairobi HCCC Number 78 of 2012 Surya Holdings & 2 Others -V- CFC Stanbic Bank Limited.**

5. **Costs of the application are awarded to the Applicants.**

[2] The Notice of Motion is premised upon the Supporting Affidavit sworn by Mr. Pranab Kumar Ghosh on 17th February 2015 and a Further Affidavit sworn by Mr. Anil Tumu on 2nd March 2014. It is opposed through Replying affidavits filed.

**Plaintiffs Submissions**

[3] According to the Plaintiffs the crux of their application revolves around the following matters:

a. **Whether a defaulting party can enforce a contract that it has failed to honour;**

b. **Whether a borrower can default from repaying a loan for sums not availed in terms of the Letter of Offer;**

c. **Whether a bank can unilaterally vary the terms under which various Guarantees were executed;**

d. **The effect of unilateral and without the consent of Guarantors, variation of the contract with a borrower to the detriment of both the borrower and guarantors;**

e. **Whether the 2nd Defendant/Respondent has power to sell property based on an informal Charge; and**

f. **Disobedience of court orders by a Receiver.**

[4] The Plaintiffs gave details of ownership of the suit properties. The 1st and 2nd Plaintiffs own the following parcels of land:

a. Land Reference Numbers 12248/19, 20, 21 and 38 held by the 1st Plaintiff/Applicant, Surya Holdings Limited;

b. Land Reference Numbers 25261 and 25262 held by the 1st Plaintiff/Applicant, Surya Holdings Limited;

c. Land Reference Number 11669/2 held by the 1st Plaintiff/Applicant, Surya Holdings Limited;

d. Land Reference Number 10854/60 held by the 2nd Plaintiff/Applicant, Rhea Holdings Limited; and

[5] By leases dated31st October 2007; the 1st, 2nd and 3rd Plaintiffs/Applicants leased the aforesaid parcels of land to the 4th Plaintiff/Applicant, Karuturi Limited, at a consideration. The entire of Karuturi Limited's business, and assets, are located and run on the parcels of land owned by the 1st 2nd and 3rd Plaintiffs/Applicants. On various dates in the year 2010 and 2011, the 1st Defendant/Respondent sanctioned and agreed to advance to the 5th Plaintiff/Applicant, Karuturi Overseas Limited (as the borrower) certain banking facilities including a Foreign Currency Term Loan and a Working Capital Demand Loan broken down as follows:-

a. A Term Loan –

i. Foreign Currency Term Loan (FCTL) (1) - for USD 15 million, as per the sanction letter dated 20th December 2010, which was fully disbursed and has been repaid fully;

ii. Foreign Currency Term Loan FCTL (2) - for USD 25 million, as per the sanction letter dated 20th December 2010 and amended by a letter dated 27th September 2011, which was partially disbursed (USD 10.5 million). The 5th Plaintiff has made payments towards settling this amount and was not in default at the time the 2nd Defendant/Respondent was appointed.

a. A Working Capital Demand Loan of USD 11 million.

The Foreign Currency Term Loans are secured by securities in Kenya while the Working Capital Loans are secured by various securities in Ethiopia.

[6] The Working Capital Demand Loan was secured by *inter alia*, a Master Facility Agreement dated 9th June 2010. The security for this loan was by a first charge on all current assets of the borrower, Karuturi Overseas Limited, Corporate Guarantees from various companies and the Companies' Promoters. At no time were the Kenyan properties of the 1st, 2nd, 3rd, and 4th Plaintiffs/Applicants offered as security for the Working Capital Demand Loan.

[7] The Foreign Currency Term Loans were secured by *inter alia* a Joint and Several Debenture dated 24th October 2011 over the freehold and leasehold property, buildings, fixtures, fittings, additions and improvements from time to time on any such property as further described in the Joint and Several Debenture (hereinafter referred to as **"Securities"**.The total limit for the two Foreign Currency Term Loans offered to the 5th Plaintiff/Applicant and agreed between the parties was United States Dollars Forty Million (USD 40,000,000). Of the partially disbursed amounts, the 5thPlaintiff/Applicant has fully repaid the first FTCL of USD 15 million. At all times, the 1st, 2nd, 3rd and 4th Plaintiffs/Applicants', as guarantors, offered their properties situate in Kenya to the 1st Defendant/Respondent solely for these Term Loans and no other. The outstanding amount for the second FCTL which was partially disbursed in breach of the agreement is USD 9.84 million, an amount that the 5th Plaintiff/Applicant was not in arrears at the time of appointment of a Receiver.

[8] The Plaintiffs/Applicants had a legitimate expectation and contractual rights, that the 1st Defendant/Respondent would honour its contractual obligations under the various banking facility letters and advance to the 5th Plaintiff/Applicant the full amounts secured by the Securities as contractually agreed between the parties.The 1st, 2nd and 3rd Plaintiffs'/Applicants' parcels of land without any improvements thereon, were valued, by Hectares and Associates on behalf of the 1st

Defendant/Respondent and CfC Stanbic bank Limited and taken on record by ICICI Bank at approximately United States Dollars Ninety Million Nine Hundred and Fifty One Thousand Six Hundred and Thirty (USD 90,951,630), as at 20th June 2012, and are the subject of an attempt at an unlawful sale by the Defendants/Respondents for an alleged amount of approximately USD 19,991,580.

[9] The demand of USD 19,991,580 is made up of alleged balances arising from both the Working Capital Demand Loan (secured by, *inter alia*, properties in Ethiopia) and the FCTL. In effect, the 1st Defendant/Respondent has unlawfully combined two completely separate facilities that are secured by properties and other securities in two different jurisdictions, that is, Kenya and Ethiopia. The 1st Defendant/Applicant's unilateral act of clubbing the loans and loading the entire amount on securities offered by the 1st, 2nd 3rd, and 4th Plaintiffs/Applicants for the FTCL facilities only is completely illegal and an abuse of process. Additionally, the said amount is substantially made up of unconscionable and illegal interest loaded on the facilities and demanded from the Plaintiffs/Applicants thereby clogging the Plaintiffs'/Applicants' equitable right of redemption.

[10] The aforesaid Securities are also being held by CfC Stanbic Bank Limited (of Kenya), on a *pari passu* basis with the 1st Defendant/Respondent, to secure a sum of United States Dollars Six Million Five Hundred and Ninety Thousand (USD 6,590,000), and the said Securities are held under a Securities Sharing Agreement between the Defendant/Respondent and CfC Stanbic Bank Limited. At present, the indebtedness to CfC Stanbic Bank is unknown since the Receivers appointed by CfC have refused to disclose how much has been repaid from the proceeds of the 4th Plaintiff/Applicant's business. The Defendants/Respondents are well aware of this fact and have agreed to that arrangement.

[11] The Facilities advanced to the 5th Plaintiff/Applicant, Karuturi Overseas Limited, through the above arrangement were to be redeemed through the business proceeds of the 5th Plaintiff's/Applicant's herein to be generated from agricultural operations from Ethiopian companies. The 1stDefendant/Respondent has not commenced any operations against the 5th Plaintiff/Applicant or any or the guarantors, in Ethiopia or any other jurisdiction.Pursuant to the Facilities (being the various banking facility letters) and Securities, in which the 1st Defendant/Respondent was bound to advance to the 5th Plaintiff/Applicant as the borrower, the 1st Defendant/Respondent has willfully defaulted in its contractual duty and obligations to disburse the entire facilities in the process of repudiating the contract and only advanced part of the facilities as particularized below:-

**USD Mn**

| **Loan type** | **Company** | **Sanction** | **Disbursement** | **Repaid** | **Outstanding as at May 2014** |
|---|---|---|---|---|---|
| FCTL I | KOL | 15 | 15 | 15 | **0** |
| FCTL II | KOL | 25 | 10.5 | 0.66 | **9.84** |

[12] The Plaintiffs/Applicants, in fulfillment of their contractual obligations, have repaid substantially the FTCL and have as at the date of filing suit paid the first FTCL in full. The second FTCL stood at USD 9.84 as at November 2014. There has been no default on any of the payments and the account was up to date as at the date of the unlawful appointment of a receiver. In fact there was a credit balance of USD 600,000.The 1st Defendant/Respondent was at all times aware that the Plaintiffs/Applicants relied on the business the 4th and 5th Plaintiffs/Applicants and its Ethiopian affiliates in generating the income for settling the financial facilities advanced by the 1st Defendant/Respondent. This intentional and willful breach by the 1st Defendant/Respondent precipitated a financial crisis in the 4th and 5th Plaintiffs/Applicants, as they were no longer able to meet their contractual and financial obligations timeously. The 4th Plaintiff/Applicant was sued by *inter alia* its employees, suppliers and statutory bodies. The 1st Defendant/Respondent was kept abreast of all developments, including the filing of a Winding Up Petition by Allpack Industries Limited.

[13] The Applicants continued to submit that the Securities herein were created for the full amount that the 1st Defendant/Respondent had agreed to disburse, that is, a FCTL of USD 40,000,000. The 1st Defendant/Respondent also charged a loan processing fee for the full agreed amount of USD 40,000,000, which the 5th Plaintiff/Applicant settled in advance. Despite this full performance by the Plaintiffs/Applicants, the 1st Defendant/Respondent, without any justification or reasonable cause and in breach of the letters forming the Facilities and the Contracts between the parties, refused to disburse the agreed amount and recalled the facilities. This *mala fide* action, together with the related refusal by CfC Stanbic Bank Limited to disburse all agreed amounts occasioned damaging repercussions to the Plaintiffs'/Applicants' commercial and other operations.As a result of the pending petition, which was occasioned by the 1stDefendant's/Respondent's breach, the 5th Plaintiff/Applicant was assumed to be in default by virtue of the provisions of the securities executed and issued by the Plaintiffs/Applicants in favour of the 1st Defendant/Respondent, to secure the facilities agreed to be advanced to the 5th Plaintiff/Applicant. The same position was taken by CfC Stanbic Bank Limited.

[14] Following the predatory actions of CfC Stanbic Bank Limited, the 1st, 2nd and 4th Plaintiffs filed HCCC No. 78 of 2014, and after *inter partes* hearing, the Court ruled *inter alia,* that the receiver & managers appointed on behalf of CfC Stanbic Bank Limited be restrained from selling any property and assets belonging to the concerned Plaintiffs/Applicants.In a blatant attempt of defeating the Honourable Court's Order issued in HCCC No. 78 of 2014, the 1st Defendant/Respondent placed the 1st to 4th Plaintiffs in receivership and purported to appoint receivers, the 2nd Defendant/Respondent herein who advertised the 1st to 4th Plaintiffs property for sale despite subsistence of the said Court Orders.The advertisement, when taken together with the application dated 12th December 2014 by CfC Stanbic Bank Limited, is a poorly calculated collusive strategy at defeating the Honourable Court's Orders for *inter alia*, the following reasons:

a. The 1st Defendant/Respondent and CfC Stanbic Bank Limited share securities *vide* an **Inter-Bank Lenders Agreement** dated 2nd November 2011;

b. The Agreement, at Clause 8, provides that "Neither of the Banks shall transfer or otherwise dispose of any of the Securities or agree or attempt to do so without the prior written consent of the other Bank";

c. In a letter dated 8th March 2013, Kaplan & Stratton Advocates confirm that they hold the original titles in respect of the securities to the joint order of CfC Stanbic Bank limited and ICICI Bank Limited as per the Inter-Bank Agreement dated 2nd November 2011;

d. The 1st Defendant/Respondent has no registered Legal Charge or Mortgage over the Suit Properties. It therefore follows that its Receiver Manager is not in a position to sell the Suit Properties based on an informal charge without seeking authority from this Honourable Court;

e. CfC Stanbic Bank Limited has been restrained from selling the Suit Properties and has been permitted to run the business with a view of repaying itself. In its application dated 11th December 2014, its Receivers/Managers admit that they are incapable of running the business and that a sale "…will allow an investor with knowledge and willingness to engage in the business…" Instead of hiring individuals with the right skill set, they request for a variation of the order to allow them sell the property. No such order is granted and the application is pending in Court.

f. On 26th January 2015, the Defendants/Respondents, while fully aware of the proceedings in HCCC. No. 78 of 2014 and the Court Orders issued therein, contemptuously advertise the Suit Properties for sale in breach of the said Court Order, provisions of the Land Act and applicable fiduciary duties owed to the Plaintiffs/Applicants by the 2nd Defendant/Respondent;

[Effect of inter-bank agreement and joint receiverships]

g. From the above sequence of events, it follows that the title deeds to the Suit Properties are held to the joint order of the two Banks and that any sale can only take place with the concurrence of both Banks; and

h. It is therefore impossible for such a sale to take place without both Banks being in contempt of the Court Order issued by the Honourable Justice Gikonyo on 11th June 2014.

[15] Whilst under the debenture the 1st Defendant/Respondent is entitled to appoint a receiver over the assets of the 1st, 2nd, 3rd and 4th Plaintiffs/Applicants, the appointment of the 2nd Defendant/Respondent, **Kolluri Venkata Subbaraya Kamasastry,** was premature, in bad faith, and oppressive, for the following reasons:-

a. The appointment is in exercise of a right under a Debenture being part of a security Agreements for a Loan Agreement terms of which have been breached by the 1st Defendant;

b. The appointment was done during the pendency of two court orders issued in HC Winding Up Cause No. 12 of 2013 and HCCC. No. 78 of 2014;

c. At the time of the appointment, the 1st Defendant/Respondent was in breach of its covenant to lend, hence its rights under the charges and debentures, and in particular, to appoint receivers/managers has not crystallized. The 1st Defendant/Respondent breached the contract by failing to disburse the entire amount with regard to the FCTL as agreed;

d. Indeed, at the time of the unlawful appointment of the 2nd Defendant/Respondent, the assets of the other guarantors were (still are) more than sufficient to cover the disputed liability claimed by the 1st Defendant/Respondent.

e. The 1st Defendant/Respondent **failed to issue valid notices to Karuturi Overseas Limited, the 5th Plaintiff/Applicant herein, as provided in the contract documents between parties and, quite unsurprisingly, insisted on this breach by sending notices to wrong addresses.**

f. The 2nd Defendant/Respondent failed to inform or serve the directors of the Plaintiffs/Respondents in clear contravention of the agreement between parties and instead, he has mischievously served the notices on Mr. Kieran Day and Ian Small by sending the notices to the post office box of the Company where directors did not have access due to the receivership;

g. The 5th Plaintiff/Applicant has not defaulted in making payments and none of the accounts has been declared nonperforming. Indeed, it is instructive to note that no recovery process has been initiated against Karuturi Overseas Limited, the borrower herein who made the last payment on 28th April 2014, approximately one month before the appointment of the 2nd Defendant/Respondent;

h. Due to various breaches on its part, the 1st Defendant/Respondent is attempting a quick kill by clubbing the FCTL and WCDL and in a most unlawful manner, lumped the entire demand on Kenyan securities which do not cover the WCDL;

i. The 1st Defendant/Respondent may be in collusion with the 2nd Defendant/Respondent and CfC Stanbic Bank Limited. Having failed to enforce its securities against the borrower in Ethiopia due to numerous breaches on its part, the 1st Defendant is imagining that the Kenyan legal system is its play-ground where it can, after issuance of faulty notices, advertise for expressions of interest in blatant contravention of Court Orders;

j. Additionally, the 1st Defendant/Respondent is fully aware that a Joint Lenders' Forum, as is

provided for under Indian Law, has been called to restructure the entire loan, and as per the RBI process, lenders are required to form a joint committee called Joint Lenders Forum. The Defendant/Respondent is aware that once the Joint Lenders Forum is formed, all lenders are required to jointly consider all the options for restructuring and exhaust those options before recovery. This is yet to be done in this case;

k. The 1st Defendant/Respondent is also aware of the various initiatives being undertaken by the Plaintiffs/Applicants and their officers to settle any ascertained debts including any due debt to CfC Stanbic Bank Limited and Allpack Industries Limited. The Plaintiffs/Applicants have provided the 1st Defendant/Respondent with a detailed Corrective Action Plan and has filed an application before this Honourable Court to compel Mr. Kieran Day and Ian Small to provide accounts to enable them comply with statutory requirements and issue shares to raise financing;

- By colluding with the 1st Defendant/Respondent and its cronies, the 2nd Defendant/Respondent is in absolute breach of his fiduciary duties which require him to, amongst others, act lawfully and reasonably towards the Plaintiffs/Applicants and their interests.

[16] The FTCL that is secured by the Suit Properties is in credit, the Plaintiffs are not in default and thus no rights subsist on behalf of the Defendant.The Plaintiffs/Applicants are reasonably apprehensive that unless the orders sought are granted as prayed, they will suffer irreparable harm and injury that cannot be compensated by damages as the entire business of the Plaintiffs/Applicants will be crippled through no fault of their own. The Plaintiffs/Applicants will be exposed to risk of litigation, the charged properties will be sold off and the Plaintiffs/Applicants will definitely be wound up which has ripple effects.

[17] The Applicants also submitted on the law. They argued that William Kerr, in his book, ***"Treatise on the Law and Practice of Injunctions'',*** 6th Edition, sets out in detail the factors that a Court should consider when dealing with injunctions against the violation of common law rights, particularly a party's right to property. At page 16, the authors state, *inter alia*, that:

> **"If the legal right is not disputed, a man who seeks the aid of the court must be able to show that the act complained of is in fact a violation of the right, or is at least an act which, if carried into effect, will necessarily result in a violation of that right, or is at least a violation of the right. The mere prospect or apprehension of injury or the mere belief that the act complained of may or will be done, is not sufficient; but if an intention to do the act complained of can be shown to exist, or if a man insists on his right to do, or begins to do, or threatens to do, or gives notice of his intention to do, an act which must, in the opinion of the Court, if completed, give a ground of action, there is a foundation for the exercise of discretion. The mere denial of by a man of his intention to do an act or to infringe a right will not prevent the Court from interfering…"**

The Author then writes that:

> **"A man who seeks the aid of the Court by way of interlocutory injunction, must, as a rule be able to satisfy the Court that its interference is necessary to protect him from that species of injury which the court calls irreparable, before the legal right can be established upon trial. By the term irreparable injury it is not meant that there must be no physical possibility of repairing the injury; all that is meant is that is, that the injury would be a material one, and one which could not be adequately remedied by damages and that by the term inadequacy of the remedy of damages it is meant that the remedy by damages is not such a compensation as will in effect, though not in specie, place the parties in the position which they formerly stood."**

[18] Applying the test in the text cited above, the Applicants urged that, it is not in dispute that the

properties the subject matter of the suit herein are owned by the 1st, 2nd, 3rd and 4th Plaintiffs/Applicants' who are guarantors of the 5th Plaintiff/Applicant. These properties and the investments therein are unique and cannot be replaced in the manner suggested by the Defendants/Respondents. The acts complained of by the Plaintiffs/Applicants' are in complete violation of their rights especially given the1st Defendant's/Respondent's failure and or refusal to Honour its contractual obligations under the contract. There is breach of Contract on their part when the 1st Defendant as a Lender failed to abide by his duty to disburse the agreed loan of USD. 40,000,000.00- the duty was not delegable. **The Failure to Perform Concept** is not new in commercial transactions. See J.W Carter in ***Carter's Breach of Contract*** states as follows;

> **"A promisor's obligation to perform is discharged only if the performance rendered exactly matches the requirements of the contract, including as to the time of the performance.If performance is not exact, there is failure to perform unless parties have agreed to the contrary".**

Also see the decision by Lord Atkin in **Arcos Limited -vs- E.ARonaasen and Son [1933] AC 470**that:

> **"It was contended that in all commercial contracts the question was whether there was "substantial compliance with the contract: there is always must be some margin: and it is for the tribunal of fact to determine whether the margin is exceeded or not. I cannot agree. If written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton.....the right view is that the conditions of the contract must be strictly performed. ."**

[19] The Applicants argued that, with regard to the Foreign Currency Term Loans, **it was agreed between parties that the 1st Defendant/Respondent would disburse a total of USD 40 million**. The disbursement was as shown in the table below.

| **Facility** | **Overall Limits** |
|---|---|
| Fund Based Limits | |
| Foreign Currency Term Loans – I (FCTL – I) | 15.0 |
| Foreign Currency Term Loans – II (FCTL – II) | 25.0 |
| **Sub Total (A)** | **40.0** |
| **Grand Total (A)** | **40.0** |

The 1st, 2nd, 3rd and 4th Plaintiffs/Applicants' as Guarantors, agreed to offer and offered their properties as security to guarantee the above amount and no other. The Obligation on the part of the Guarantors was PRIMARILY PEGGED ON the discharge by the 1st Defendant of its obligation to the borrower. The 1st Defendant/Respondent, upon receiving the securities indicated in the Debenture, released the first term loan of USD 15 million which has since been repaid. It refused to fully disburse the second loan of USD 25 million and instead, combined two distinct facilities and put the guarantors under receivership. It threatens to sell the Suit Properties.

[20] In a loan Agreement, the non-delegable duty on the part of the Lender is to remit the sums being borrowed fully UNLESS there is a variation of the terms of the Letter of Offer. It is criminal in commercial world for a lender not to provide the financial facilities sought when in fact the securities

contemplated under the Letter of Offer have been provided.The Equitable question herein would then be, can and should this court shut its eyes to this fundamental breach on the part of the Borrower and allow it to kill the business of the Plaintiffs through a receivership process? See the case of **Nairobi HCCC Number 573 of 2011 (Talewa Road Contractors Limited & Another-vs- Jamii Bora Charitable trust Registered Trustees & Another)** the Honourable Justice G.K. Kimondo while noting that parties to a commercial contract are bound by the terms thereof observed that a party should not be permitted to benefit from its breaches. The Judge while granting an order restraining a Debenture Holder from *inter alia* appointing a Receiver Manager held as follows:

> **"However, in view of the assertion by the plaintiff that a sum of Kshs 51,800,000 for the machinery was paid into the Jamii Bora's current account at City Finance Bank, I would express doubts that the 1st or 3rd defendants have rights to forcibly take the machinery. And if the allegations that it is the 1st defendant's failure to honour its undertaking or promise to pay the installments to the bank that have occasioned the breach, then it should not benefit from the breach. Those matters will emerge clearly on the evidence but at the moment, I would say the plaintiff has on that score established a *prima facie* case. I would thus order that the defendants be and are hereby restrained by injunction from forcibly taking possession of the 1st plaintiff's construction machinery. The plaintiffs will be at liberty to remove the machinery from the project site without interference or obstruction by the defendants."**

The Judge went ahead to hold that Damages can never be a substitute for the loss which is occasioned by a clear breach of law.

The breach complained of in the matter was so fundamental. It was not a situation where the ***de minimis*** rule would be cited to remedy the same. It related to total failure, and not a delay, in disbursing the full loan.

[21] See also the case of **Fina Bank Limited V Spares & Industries Limited** [**2000]eKLR**, Justice Tunoi of the Court of Appeal, on considering the questions, *inter alia*, of whether or not the appointment of a Receiver had become exercisable, observed that:

> **"The respondent concedes that it is now in arrears of several instalments but argues that the interest rate the applicant is charging is oppressive, was being increased at short intervals, and that although such increases may be within the terms of the contract between the parties the frequency of the increases make the appellant's action oppressive and inequitable."**

On the Appellant's insistence that it had a right to appoint receivers, the Honourable Judge observed, *inter alia*, that:

> **"However, it is also correct law 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. See Godfrey Nyaga vs Housing Finance Co. Kenya Ltd. C.A. No. 134 of 1987 Nai. (unreported) and further that "The issue of Receivership is an emotive one and I understand why the respondent had to resort to litigation. It destroys the business. It is expensive. The appointment of Receivers and Managers may not necessarily improve the financial position of the business. These, in my view, are matters for consideration as to whether to grant a temporary injunction or not. I am satisfied that all these observations were in the mind of the learned Judge when he acceded to the application for injunction. Indeed he acted in accordance with the principles laid down in Giella v Cassman Brown & Co. Ltd [1973] EA 358 and came to the correct decision. I find no ground to fault him as he had exercised his discretion correctly and judicially."**

[22] More judicial authorities on the concept of performance of contract were cited by the Applicants. In **Mea Limited v Echuka Farm Limited & 2 others[2007] eKLR**, the Defendant failed to fulfill its obligations under a contract that it sought to enforce. Justice Mohamed Warsame, ruled *inter alia*, as follows:

> **"My opinion is that the enforcement of any right under a contract must ordinarily result from an infringement of a right known under the law or stipulated in the contract agreement. The subject contract stipulates that the 1st defendant was to perform certain acts in order to derive some benefits from the agreement. It is alleged and the material points out that it did not perform its part of the bargain, so that a party cannot have a cause of action in respect of a claim falling outside the contract. I cannot accept a party can circumvent his own part of the contract and at the same time apply to obtain and sustain benefits under that contract. One may be tempted to conclude that by failing to perform its side of the sales contract, the 1st defendant may have lost any legitimate right to rely on the terms of the contract. Such a debate needs the support of oral evidence, which can only be done at a full hearing."**

The Honourable Judge went further to state that:

> **"However, the central question is whether the court should allow a party to benefit from his own default and his lack to fulfil his part of the bargain to the detriment of the other side. I think a court of equity cannot allow that to happen. I cannot accede to Mr. Ohaga's argument that a defendant can deprive a plaintiff of his right when it has not performed its part of the transaction and at the same time wants to obtain the full benefits of the subject transaction. That would mean equity aiding a fraudulent conduct which would be dangerous to justice and equity. I hold the view that there must be reference to the contract and the exact point of reference is whether the 1st defendant has fulfilled its obligations towards the completion of the sale contract, which it aggressively wants to benefit.**
>
> **It is my decision that the plaintiff has brought itself within the realm of Giella vs Cassman Brown and is entitled to an order of injunction as prayed. That is what an officious by-stander would have said he understood the parties to this agreement had in mind when they incorporated the issue of the performance and letter of credit. The duties and obligations of the parties were defined in the sale agreement and I do not think the conduct of the 1st defendant would entitle it to draw a sum of US Dollars 246875/= for no work done."**

[23] And more was cited. See the case of**Alghussein Establishment V Eton College, where** the House of Lords, held *inter alia*, that;

> **"The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach. The terms of the proviso, clause 4, were not apt to displace the presumption that a party could not take advantage of his own wrong and accordingly the appellants were not entitled to invoke the proviso to Clause 4 to secure the grant of lease.'**

Lord Jauncey of Tullichettle, who wrote the opinion, stated that:

> **"My Lords it is well established by a long line of authority that a contracting party**

**will not in normal circumstances be entitled to take advantage of his own breach against the other party. The Court also quoted with approval a decision of the Court of Appeal in New Zealand Shipping case [1917] 2KB 717 where Viscount Reading CJ said "Unless the language of the contract constrains the Court to hold otherwise, the law of England never permits a party to take advantage of his own default or wrong. …it is so contrary to justice that a party should avoid his own contract by his own wrong, that unless constrained, we should not adopt a construction favorable to such a purpose. That appears to me to be a true underlying of the cases in which the word "void" has been construed as it meant voidable."**

In dismissing the appeal, Lord Jauncey of Tullichettle stated that

**"It only remains to refer to the respondent's arguments that there is an absolute rule of law and morality which prevents a party taking advantage of his own wrong whatever the terms of the contract."**

[24] The Applicant also referred the court to the decision by Justice AnyaraEmukule, in **Kwality Candies & Sweet Ltd v Industrial Development Bank Ltd [2005] eKLR**, where in considering the effect of the Defendant's failure to advance monies secured by a Supplemental Debenture and a Second Further Mortgage adopted a the decision of Justice Ringera in the case of **Jambo Biscuits** by stating as follows:

**"In these modern times and in our own Courts, Ringera J. (as he then was) has in the case at <u>Jambo Biscuits (K) Ltd. –vs- Barclays Bank of Kenya Ltd. Andrew Douglas Gregory and Abdul Zahir Sheikh</u> (Milimani Commercial Courts, HCCC No. 1833 of 2001) put it this way –**

> **"As regards whether the Company would suffer irreparable loss and injury unless the prayers sought are granted, I have no doubt it would. The receivership would most probably result in the complete destruction of the business and goodwill of the company …… And I think it is a notorious fact of which judicial notice may be taken that receiverships in this country have tended to give the kiss of death to many a business.**

**I adopt and apply these words to this case. This is an application for a *quiatimet* injunction. There is no question of a receiver being in place as in the Jambo Biscuits case. There is however nothing to stop the Defendant from exercising its power reserved in the Further Charge and Further Debenture to appoint one or more Receiver/Manager. If the Defendant did so, and from the dictum of Ringera J (as he then was) cited above, it is almost as sure as the sun rises in the east and sets in the west, that the death bell of the Plaintiff would have been sounded. Experience has shown that most businesses which are going concerns collapse a few months upon being placed under receivership. I believe their appointors and Receivers themselves have legitimate answers for such fatal consequences to the companies or businesses to which Receiver Managers are appointed. That however is not the subject of this Ruling. Our concern here is to grant or not to grant the quiatimet injunction"**

[25] The Applicants saw it fit to elaborate more on the above case and stated that the Court further quoted the Authors of Halsbury's Laws of England, 4th Edition Vol. 24 who, when discussing the principles for granting interlocutory injunctions noted, *inter alia*, that;

"…**it is not necessary that the Courts should find a case which would entitle the Plaintiff to relief at all events, it is quite sufficient for it to find a case which shows that there is a substantial question to be investigated, and that the status quo should be preserved until that question can be finally disposed of."**

The Applicants were up-bit that they have demonstrated breach of a contractual obligation, thus, they meet the threshold of the *Giella -vs Cassman Brown Case.*The duty of the Court is ensure that injustice is not done as a result of the illegality. The breach has resulted in the irregular appointment of the Receiver Manager who in terms continues to engage in acts that are outside the Deed of Appointment and/or in defiance with Court orders. It is to be noted that:

i. It is the 2nd Defendant who has custody of personal effects of a director after a callous demolition process of a priceless house which demolition was done under his watch;
ii. That it is the same Defendant who has closed and relocated medical equipment from a hospital that was being run at the farms; and
iii. It is this receivership that has not queried the Hive-down actions being undertaken by which the name of the business of the borrower has been changed from Karuturi Roses to Twiga Roses. These processes should be appreciated in light of an application filed by CFC Stanbic Bank Limited elsewhere seeking to sell the business of the borrower together with the suit properties.

[26] The Applicants also addressed the effect of the 1st Defendant's Breach, Unilateral Variation of the Terms of the Contract and Lifting of the Receivership. They submitted that, the law of Guarantee brings into commercial transactions that which is now referred to as the **"secondary obligation"**. They gave the definintion of guarantee to be a binding promise of one person to another to be answerable for a present of future debt or obligation of another ***if that other defaults***. In the law of Guarantee, there are three main players, the Creditor, the Debtor and the Guarantor.There can never be an obligation on the Guarantor if;

i) There is no disbursement of the sum that would constitute the debt;

(ii) There has been breach by the creditor of his obligation to the potential debtor;

(iii) There has been unilateral variation of the terms of the loan agreement on the basis of which the guarantee was given.

See Dr. James O'Donovan in his book ***"The Modern Contract of Guarantee"*** at page10 writes as follows;

> **"A contract of Guarantee is predicated upon the existence of a valid principal obligation owed by the principal debtor. If there is no such principal obligation, generally the obligation fails... In terms of general principle, not only must the principal obligation exist but it must also remain unchanged throughout the life of a Guarantee. Even slight unauthorized changes in the primary obligation may discharge the guarantor. Moreover, if the principal obligation determines, so does the guarantee"**

By the Lender's (the 1st Defendant) unilaterally varying the terms of the Joint and Several Debenture executed between itself and the 5th Plaintiff, the guarantees were discharged. The fact of variation has not been rebutted by the 1st Defendant in the Affidavits filed herein.

[27] The Credit Arrangement Letter dated 20th December 2010 as amended by the Amendment to Credit Arrangement Letter dated 27th September 2011 is clear on what the securities for both Foreign Currency Term Loans were to be. For the first Foreign Currency Term Loan of USD 15 million, the amendment provides that the following shall constitute security;

> **"First Charge on all of the Karuturi Limited (formerly Sher Karuturi), Rhea Holding, Yashoda Investments and Kalasha holdings Assets in Kenya including all immovable and movable properties including land, both present and future, on pari passu basis with term lenders and other participating banks valuing not less than USD 75.7 million. Valuation to be done preferably by one of the top 4 audit firms to**

**the satisfaction of the bank.**

**Security for FCTL – 1 to be created before October 30, 2011.**

**Other terms to remain as per the original sanction."**

For the second Foreign Currency Term Loan of USD 25 million, the amendment provides that the following shall constitute security:

> **"First Charge on all of the Karuturi Limited (formerly Sher Karuturi), Rhea Holding, YashodaInvestments and Kalasha Holdings assets in Kenya including all immovable and movable properties including land, both present and future, on pari passu basis with term lenders and other participating banks valuing not less than USD 75.7 million. Valuation to be done preferably by one of the top 4 audit firms to the satisfaction of the bank.**
>
> **Common debenture deed, as per Kenya Law, to be executed for both FCTL-1 and FCTL-2 loan for a combined loan value of USD 40.0 million.**
>
> **Other terms to remain as per the original sanction."**

[28] According to the Applicants, at all times, parties were fully aware that the Joint and Several Debenture is only in relation to the Foreign Currency Term Loans and not any other loans as is being blatantly misrepresented by the Defendants/Respondents. As admitted by the 1st Defendant/Respondent, the first Foreign Currency Term Loan, which was disbursed in full, has been repaid in full. The second Foreign Currency Term Loan was partially disbursed and was not in arrears at the time of the 1st Defendant/Respondent's breach.The demand for payment by the 1st Defendant/Respondent is for a total of USD 19,991,580.80 and comprises of loans secured by various securities and guarantors in Ethiopia. The 1st, 2nd, 3rd and 4th Plaintiffs/Applicants did not, at any time agree, to this material change of the terms of the contract to permit the 1st Defendant/Respondent to, without specific consent, alter the terms of the Joint and Several Debenture and or Guarantees.

On this argument see the case of **Burnes V Trade Credits Limited**,**Lord Keith** of **Kinkel** observed that

> **"The granting of an indulgence to a debtor may have the effect of prejudicing the rights of the guarantor vis – a – vis the debtor, and accordingly, in absence of provision such as this one, it has the effect of releasing the guarantor from liability. The purpose and effect of the provision in question is merely to safeguard the creditor against any eventuality. It does not enable the debtor and creditor, by agreement between themselves, to require the guarantor to shoulder an added liability."**

[29] In addition to the above, the 1st Defendant's breach of contract occasioned massive financial strain on the 5th Plaintiff/Applicant's business operations due to lack of much needed funds that were inexplicably withheld by the 1st Defendant/Respondent after being provided with disproportionately high security. Indeed, in an e-mail dated 30th September 2013, Mr. Ramakrishna Karuturi pleaded with the 1st Defendant/Respondent to fulfill its obligations under the contract and or to release some of the securities to enable sourcing of additional funding to the 5th Plaintiff/Applicant's critical business requirements. See page 19 of the Further Affidavit sworn by Mr. Anil Tumu on 2nd March 2015. Unfortunately, the 1st Defendant/Respondent relied on its massive advantage, particularly unduly squatting on all properties that could be used as security and thereafter declining to release funding as agreed and or a portion the securities. In effect, the 1st Defendant/Respondent engaged in unconscionable conduct that exerted undue economic pressure on the 5th Plaintiff/Respondent and the Guarantors.

[30] The Applicants did not stop there. They submitted that, further to the above, the 2nd Defendant/Respondent has been appointed "receiver" over non trading companies. The 1st, 2nd and 3rd Defendants/Respondents are land holding companies and are not involved, whatsoever, in any trading. The 4th Plaintiff/Applicant was already under Receivership, Mr. Ian Small and Kieran Day having been appointed by CfC Stanbic Bank Limited. The numerous conflicting positions, including the attempted sale which was in disobedience of Court Orders issued in HCCC No. 78 of 2014 are as a result of this capricious and whimsical appointment of receivers. That the Hive down process is ongoing despite the orders issued herein is telling of the contemptuous attitude of the Defendants.The appointment of the 2nd Defendant/Respondent was oppressive, unfair and as a result of the 1st Defendant/Respondent's dominating position over the 5th Plaintiff/Applicant.In **National Westminister PLC V Morgan [1985] UKHL 2**, the House of Lords dealt with various issues including unconscionable bargains, undue influence and unfair advantage and held, *inter alia*, that:

> **"The wrongfulness of the transaction must, therefore, be shown: it must be one in which an unfair advantage has been taken of another. The doctrine is not limited to transactions of gift. A commercial relationship can become a relationship in which one party assumes a role of dominating influence over the other. In Poosathurai's case, the Board recognized that a sale at an undervalue could be a transaction which a court would set aside as unconscionable if it was shown or could be presumed to have been procured by the exercise of undue influence. Similarly, a relationship of a banker and a customer may become one which the banker acquires a dominating influence. If he does and a manifestly disadvantageous transaction is proved, there would then be room for the court to presume that it resulted from the exercise of undue influence."**

[31] The Applicant continued. Lord Scarman quoted with approval the decision of Lord McNaughten in **Bank of Montreal V. Stuart**, and in particular, the consideration of Sir Eric who considered the relationship necessary to give rise to the presumption of undue influence in the context of a banking transaction. Sir Eric said:

> **"There remains to mention that Mr. Rankin, whilst conceding that the relevant special relationship could arise as between a banker and customer, urged in somewhat doom-laden terms that a decision taken against the bank on the facts of this particular case would seriously affect banking practice. With respect to that submission, it seems necessary to point out that nothing in this judgment affects the duties of a bank in the normal case where it obtains a guarantee, and in accordance with standard practice explains to the person about to sign its legal effect and the sums involved. When, however, a bank, as the present case, goes further and advises on more general matters germane to the wisdom of the transaction, that indicates that it may – not necessarily must- be crossing the line into the area of confidentiality so that the court may then have to examine all the facts including off course, the history leading up to the transaction, to ascertain whether or not that line has, as here, been crossed. It would indeed be rather odd if a bank which vis-à-vis a customer attained a special relationship in some ways akin to that of a 'man of means' – something which can be a matter of pride and enhance its local reputation – should not, where a conflict of interest has arisen between itself and the person advised, be under the resulting duty now under discussion. Once, as was inevitably conceded, it is possible for a bank to be under that duty, it is, as in the present case, simply a question for 'meticulous examination' of the particular facts to see whether that duty has arisen. On the special facts here it did arise and it has been broken"**

Lord Scarma'swent on to state that there is no precisely defined law setting limits to the equitable jurisdiction of the court to relieve against undue influence and that "This is a world of doctrines and not of neat and tidy rules."

[32] See also the case of **LTIKisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Enwicklungsgellschaft ('Deg') & others [2011] eKLR**,in the majority decisions by Justices Onyango Otieno and Philip Tunoi, the Court considered, at length, the effect of undue economic pressure on a borrower and the circumstances under which a receivership should be lifted. Justice Tunoi, while lifting the receivership, considered the Defendant's conduct prior to the appointment. He found that;

> **"…in his view, therefore, based on the above findings, that the respondents had not shown or justified the basis under which they put LTIKisii under receivership. The appointment of the receivers was not to say, the least, malicious, arbitrary, capricious and unreasonable. It was, indeed, a crude attempt to "grab" the property on the basis of Agreements which were largely unconscionable and obtained fraudulently under duress."**

In **Spares & Industries Limited Vs Fina Bank Limited [2000]eKLR,** Justice KasangaMulwa held *inter alia*, that 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. (1598) 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. According to the Applicants, in addition to these decisions, the Honourable Judge was 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 end of justice notwithstanding the provision of the Debenture. The Lady Justice quoted the Court of Appeal i**n the Civil Appeal No. 134 of 1987 Godfrey Nyaga and Housing Finance Company of Kenya (HFCK) Ltd, where** 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 above decision was upheld by the Court of Appeal, (Justice P.K. Tunoi) on appeal in***Fina Bank Limited V Spares & Industries Limited [2000]eKLR.*** .

[33] In the circumstances, the Applicants argued that, the 1st, 2nd, 3rd and 4th Plaintiffs/Applicants should be discharged from their liabilities under the Guarantees, and the Receivership should be lifted forthwith.

[34] The Applicant submitted on whether the 2ndDefendant/Respondent has power to sell property based on an informal charge. They cited Section 79 of the Land Act, which provides, *inter alia*, as follows and stated that *a* ***formal charge shall take effect only when it is registered in a prescribed register and a chargee shall not be entitled to exercise any of the remedies under that charge unless it is so registered. And in any event, a chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect..***There is no registered informal charge and no authority of court has been sought and granted.

[35] The Applicant urged that it is common ground that the 1st, 2nd and 3rd Plaintiffs/Applicants are land owning companies. It is also common ground that CfC Stanbic Bank Limited possesses registered charges over the said parcels of land and that the 1st Defendant/Respondent failed to prepare or register any charge over the said parcels. The sale of any charged Land in Kenya is regulated by provisions of the Land Act. It is submitted that whilst the 2nd Defendant/Respondent may be permitted under the Joint and Several Debenture to sell the Land, he must do so within the provisions of the Mortgagees/Chargees Powers since his appointment flows from these instruments. The Charge created by the Debenture is an informal Charge as defined by Section 79 of the Land Act and must therefore be sanctioned by the Honourable Court.In any case, orders restraining Mr. Kieran Day and Mr. Ian Small from selling the suit properties were issued in HCCC. 78 of 2014 *(Surya Holdings Limited & 2 Others –vs- CfC Stanbic Bank Limited).* The2nd Defendant/Respondent, while fully aware of the said orders, in a clear case of *mala fides*, failed to seek this Honourable Court's directions with regard to the intended sale. Instead, he raises a claim that since his appointment in June 2014 up to the advertisement in the Daily Nation of 26th January 2015, he was unaware of any orders issued restraining the sale of all Suit Properties. It is worth noting that CfC Stanbic Bank Limited also filed a belated application dated 12th December 2014 seeking to sell the Suit Properties despite a failure to apply for review or appeal the Honourable Court's Orders which were issued on 11th June 2014 in HCCC. 78 of 2014 *(Surya Holdings Limited & 2 Others –vs- CfC Stanbic Bank Limited).*

[36] In the view of the Applicants there is clear disobedience of court orders by the Receiver which restrained any sale of the charged properties until determination of the case No 78 of 2014. Black's Law Dictionary (Ninth Edition) defines contempt of court as:-

> **"Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment."**

See also the decision by **Lenaola J** in the case of **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** that:

> **"...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order, the strict requirement that personal service must be proved is rendered unnecessary"**

[37] In Replying Affidavits filed by the 2nd Defendant/Respondent, he does not deny knowledge of the restraining orders issued in HCCC. 78 of 2014 *(Surya Holdings Limited & 2 Others –vs- CfC Stanbic Bank Limited).* In submissions filed on behalf of the Defendants/Respondents, a peculiar position is taken: that court Orders do not bind third parties. See **Margaret Rose Wambui v Silvester John Njoroge [2014] eKLR Gitumbi J** quoted with approval various Court decisions regarding contempt of Court.The Court, in **Chuck v. Cremer (1 Coop Tempt Cott 342)** cited in judgment of Romer, LJ in **Hadkinson v. Hadkinson [1952] All ER 567** that,

> ***"A party who knows of an order, whether null or regular or irregular, cannot be permitted to disobey it… it would be most dangerous to hold that the suitors, or their solicitors, could themselves judge or irregular. That they should come to the court and not take (it) upon themselves to determine such a question. That the course of a party knowing of an order, which was null and irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."***

The Honourable Judge went on to state at page 571 that

> ***"Disregard of an order of the court is a matter of sufficient gravity, whatever the order may be".***

The Honourable Lady Justice also quoted with approval the decision in ***Z Ltd v A and Others*** **[1982] 1 All ER 556 where**Court of Appeal Judge, Eveleigh LJ held that even third parties may be held in contempt of court. He stated that;

> ***" ... (1) The person against whom the order is made will be liable for contempt of court if he acts in breach of the order after having notice of it. (2)A third party will also be liable if he knowingly assists in the breach that is to say if knowing the terms of the injunction he wilfully assists the person to whom it was directed to disobey it. This will be so whether or not the person enjoined has had notice of the injunction".***

As far as third party contempt is concerned Eveleigh LJ said at page 567 that:

> ***"He is liable for contempt of court committed by himself. It is true that his conduct may very often be seen as possessing a dual character of contempt of court by himself and aiding and abetting the contempt by another, but the conduct will always amount to contempt of court by himself. It will be conduct which knowingly interferes with the administration of justice by causing the order of the court to be thwarted".***

The Defendants/Respondents are now aware of the said Court orders. No explanation is offered as to why these orders should be disobeyed.No explanation is offered as to why the Defendants/Respondents should be allowed to sell the Suit Properties in contravention of the said Court Orders.

[38] The court sanctioned a visit at the suit properties which revealed one key issue; the business of the Borrower is now being carried out in the names of Twiga Roses. This happening was neither sanctioned by the Court nor was it at the instance of the Plaintiffs.Sir Gavin Lightman in his works, ***The Law of Receivers of Companies*** writes as follows;

> **"...a hive down is the transfer of certain assets of the business of the Company in receivership to a new wholly-owned subsidiary controlled by the Receiver, but leaving behind the liabilities...**
>
> **Hiving down is often an important ingredient in preparing the business for an advantageous sale to a purchaser."**

The Defendants herein have in fact engaged in and/or oversee a Hive Down of the Company with the sole

aim of disposing of the business to a willing Third Party. Simply put, the pendency of the Court proceedings herein and elsewhere is perceived as an academic exercise as it does not affect the ultimate intention of the 1st Defendant. The hive down will occasion irreparable loss on the Plaintiff as it arises from the illegal acts by the Defendants shall occasion the Plaintiffs. This matter most deservesthe intervention by the court. On all material presented in application, the submissions and affidavit evidence thereto, the threshold set in *Giella -vs- Cassman Brown* has been met. The Plaintiffs/Applicants urged the court to issue an injunction.

**1ST& 2ND DEFENDANTS SUBMISSIONS**

[39] The Respondents filed affidavits as well as submissions in opposition of the application herein. The Respondents relied on the (1) 1st Defendant's**Kavita Shetty's** Replying Affidavit sworn and filed on the 26th February 2015; (2) the 2nd Defendant **Kolluri Venkata Subbaraya Kamasastry's** Replying Affidavit sworn on the 25th February 2015 filed on the 26th February 2015; (3) the Supplementary Affidavit of **Kavita Shetty** filed on 9th March 2015 (4) the additional affidavit of **Kolluri Venkata Subbaraya Kamasastry** filed on 13th March 2015 and (5) the written Submissions and the Authorities filed herewith.

[40] The Respondents started by stating that the Court granted interim injunction orders in favour of the Applicants on the 26th day of February 2015 pending the hearing and determination of the injunction application.According to the Respondents, the gist of the matter in this suit is that the 1st Defendant/Respondent (hereinafter called "the Bank") which is a public company incorporated in India under the Companies Act 1956 and a banking company within the meaning of the Banking Regulation Act 1949 vide a facility agreement dated 3rd November 2011 and through its Bahrain Branch separately sanctioned a **Foreign Currency Term Loan** (FCTL) totalling a sum of **USD 25.0 Million** (amended from time to time) to Karuturi Overseas Limited (hereinafter called "the Borrower").The Foreign Currency Term Loan was secured and supported by amongst others:

a. a joint and several debenture deed dated 24th October 2011 in relation to first charge on all assets (moveable and immoveable, both present and future) of Karuturi Limited, Rhea Holdings, Yeshoda Investments and Surya Holdings Kenyabeing group companies which is shared *pari-passu* with CFC Stanbic Kenya;

b. irrevocable and unconditional corporate guarantee from the Borrower's Indian Parent Karuturi Global Limited (under the Automatic Route);
c. irrevocable and unconditional corporate guarantee from Ethiopian Meadows PLC, Ethiopia;

d. irrevocable and unconditional corporate guarantee from Surya Blossoms PLC Ethiopia;

e. irrevocable and unconditional corporate guarantee from Karuturi Agro Products PLC, Ethiopia;

f. irrevocable and unconditional corporate guarantee from Flower Express FZE, Dubai;

g. irrevocable and unconditional corporate guarantee from Karuturi Limited, Kenya; and

h. irrevocable and unconditional personal guarantee of Mr. K. Sai Ramakrishna.

[41] The bank also issued **Working Capital Facilities** to Karuturi Overseas Limited with a limit of **USD 11 Million** vide a Master Facility Agreement dated 29th June 2010 for the working capital requirements of the borrower before and after harvest activities such as spraying, weeding, harvesting, grading, sorting, processing and transporting of floriculture/horticulture crops arising out of contract farming and leased land.The Working Capital Facilities to Karuturi Overseas Limited was secured and supported by:

a. A pledge on receivables routed through a bank account situated out of DIFC;

b. First *pari passu* charge on the fixed assets of Surya Blossoms Limited (subsidiary of Karuturi Overseas Limited) situated at Ethiopia excluding the land and excluding security value of USD 1.9 Million which is exclusively charged to Zemen Bank for loan value of USD 1.9 Million;

c. First *pari passu* charge on the fixed assets of Ethiopia Meadow PLC (subsidiary of Karuturi Overseas Limited) situated at Ethiopia excluding the land and excluding security value of USD 1.236 Million which is exclusively charged to Dashen Bank for loan value of USD 1.236 Million;

d. corporate guarantee from the Borrower's Indian Parent Karuturi Global Limited;

e. corporate guarantee from Ethiopian Meadows PLC, Ethiopia;

f. corporate guarantee from Surya Blossoms PLC Ethiopia;

g. corporate guarantee from Sher Karuturi (now Karuturi Limited) and Karuturi Agro Products PLC, Ethiopia;

h. personal guarantee of Mr. K. Sai Ramakrisha; and

i. a joint and several debenture deed dated 24th October 2011 in relation to first charge on all assets (moveable and immoveable, both present and future) of Karuturi Limited, Rhea Holdings, Yeshoda Investments and Surya Holdings Kenya(hereinafter called "the guarantors") being group companies which is shared *pari-passu* with CFC Stanbic Kenya.

[42] The Respondents submitted that. it was an express provision under **Clause 14** of the debenture that

> **"…all money, obligations and liabilities secured thereunder would become due and payable upon failure to pay sums demanded, breach of an undertaking, issuance of a statutory notice to exercise power of sale by a 3rd party, if the company ceases to carry out business, if a winding up petition is presented…….".**

These provisions were reiterated in the Master Facility Agreement and the Foreign Corporate Facility agreement. In their view, it was clear that the entire liability accruing to the 5th Plaintiff/Applicant howsoever accrued was secured by the Joint and Several Debenture executed by the 1st to 4th Plaintiff/Applicants dated 24th October 2011 except that the upper limit of the secured amount under the debenture was a sum of USD 40,000,000.00 plus costs, interest and related charges. The debenture covered the immoveable property being the leasehold and freehold property of the companies and by way of first fixed charge all future freehold and leasehold property of the companies.In breach of the aforementioned contracts, the 5th Plaintiff/Respondent defaulted in making payments as and when they fell due, consequently, the entire loan amount became due and payable forthwith. The Bank issued several reminders and demand letters to the Borrower in this regard but the Borrower failed, neglected and/or refused to respond positively to the said reminders and demand letters. Subsequently, the Bank issued a notification of intention to exercise the power to appoint a receiver and a manager under Clause 17 as read with Clause 13 and 14 of the Joint and Several Debenture.

[43] The Respondents stated that a Receiver and Manager, being the 2nd Defendant/Respondent was duly appointed by the bank vide Deed of Appointment dated 5th June 2014 for each of the 4 companies as captured in the Debenture and he proceeded to file the Notice of Appointment of Receiver and manager with the Registrar of Companies and properly served the same upon the Applicants. In addition and as required by law, the Bank placed a Notice of Appointment of the 2nd Defendant/Applicant as the duly appointed Receiver Manager in the Daily Nation newspaper on the 25th June 2014 as such and in light of

the aforementioned facts, the entire process was sanctioned by both fact and law.

[44] This application was, therefore, filed to stop the Respondents from selling the properties listed hereinabove and forming the subject matter of the Joint and Several debenture and also seeking the consolidation of the present suit with **Nairobi HCCC Number 78 of 2014**. The Respondents averred that the 2nd Defendant/Respondent having been duly appointed was properly mandated to exercise his powers as Receiver Manager including but not limited to selling the suit properties in settlement of the outstanding debt of USD 19,991,580.80 plus interest of USD 152,071.82 due and owing to the 1st Defendant/Applicant as at May 22, 2014.

[45] Similarly, the Respondents strongly opposed the consolidation of the present suit and HCCC Number 78 of 2014.On consolidation, the Respondents relied on **Black's Law Dictionary** (8th Edition), which defined to consolidate is

> **"to combine, through court order, two or more actions involving the same parties or issues into a single action ending in a single judgment or, sometimes, separate judgments…."**

They also cited the case of **Nyati Security Guards & Services Ltd vs - Municipal Council of Mombasa [2004] eKLR that**:

> **"The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-**
>
> **1. Some common question of law or fact arises in both or all of them; or**
>
> **2. The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or**
>
> **3. For some other reason it is desirable to make an order for consolidating them."**

The essence of consolidation of suits is twofold, (1) to allow for the efficient and expeditious disposal of disputes, and (2) to provide a framework for a fair and impartial dispensation of justice to the parties.See: Wanjala &Njoki'sSCJJ decision in **The Law Society of Kenya V Centre for Human Rights & Democracy and 12 Others [2014] eKLR**.The effect of consolidation of suits ought not to present any undue advantage to the applicant and expose the party opposing to any disadvantage. Where any injustice would be occasioned to the respondent as a result of the consolidation of the suits, the application should be disallowed.See: **Republic v National Environment Tribunal & Another [2013] eKLR.** Consolidation of the suits should be refused because it will work against the overriding objectives on just, expeditious, proportionate and affordable resolution of disputes. In **Korean United Church of Kenya & 3 others vs. Seng Ha Sang (2014) eKLR** the court observed that:

> **"Consolidation of suits is done for purpose of achieving the overriding objective of the Civil Procedure Act, that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action."**

Secondly, other principle governing stay of suits was stated by the High Court in **Motokov vs. Auto Garage Ltd and others (1970) EA 249**. **In County Council of Nakuru v Simon Ole Kaminta and 3 others (2007) eKLR**, the court stated as follows:-

> **"If the two are consolidated, it is obvious that it is not convenient for the determination of issues as one suit challenging the ownership of the property while the other suit challenges the exercise of the power of the transfer. The suits are not also between the same parties and consolidation would confuse the issues and further**

**prolong the resolution of the matters in dispute."**

**See alsoNyati Security Guards & Services Ltd v. Municipal Council of Mombasa (2004) eKLR**where the court held that:

> **"There was however situations where consolidation is undesirable …. The other situation where consolidation is undesirable is where the plaintiffs in two or more actions are represented by different advocates. In such a situation the hearing will be longer and the purpose of saving time will be defeated**."

The reasons for opposing consolidation are contained and elaborated in the Replying Affidavit of Kavita Shetty including:

a. Consolidation will not facilitate the efficient and expeditious disposal of the issue;

b. The Plaintiffs in the two causes of action are different save for Rhea Holdings Limited, Surya Holdings Limited and Karuturi Limited;

c. The causes of action in the two suits are wholly different both for the Plaintiffs and the Defendants;

d. The documentation[and witnesses] to be relied upon by the parties are wholly different;

e. Different questions of law and fact arise in the separate suits;

f. Parties are represented by different advocates; and

g. Considering the circumstances of the case, an order for consolidation will merely delay the expeditious determination of the two cases.

[46] From their perspective, the Respondents listed the following as the issues for determination by court:

a. Whether the 1st Respondent acted in contempt of court orders given in HCCC No. 78 of 2013?
b. Whether the 2nd Defendant was properly appointed as receiver manager by the 1st Defendant;
c. Whether the Receiver Manager duly appointed by the 1st Respondent can exercise the power of sale of the properties?
d. Whether an injunction ought to be issued against the Respondents and if so, on what terms?
e. Whether the present suit could be properly consolidated with HCCC Number 78 of 2014?

[47] The Respondents respectfully submitted that this Honourable court should not overlook the basic tenets of the Law of Contract. It is hackneyed that the parties to a contract are deemed to be the masters of their engagement and therefore, would be in the best position to interrogate the tenets of the contract and conscientiously agree as to its terms except themselves?[1]It is trite law that parties are bound by the terms of the contracts they engage in unless the existence of a vitiating factor is properly proved by either party. See **National Bank of Kenya Limited v PipeplasticSamkolit (K) Limited [2002] 2 EA 503 (CAK).***Where parties have set out the obligations and rights to either party, they are bound to abide by the terms thereof. Therefore, breach of the obligations would result in some repercussions T*he Respondents referred the court to the ***Halsbury's Laws of England*** **4th Edition Volume 16, Para. 144 that;**

> **"…The court will not interfere with the freedom of contract and will not … merely because a man has made an improvident contract, relieve him from its consequences."**

The Respondents argued that the debenture herein set out the terms of security as a condition for issuance of a loan. Any contract which by way of security for payment of a debt creates an interest in property

defeasible on payment of such a debt must be regarded as creating a charge. In practice where a charge is created by a formal agreement, the agreement gives the chargee the powers of sale and to appoint a receiver without an application to court. See **Bradgate R. *"Commercial Law,"* 2nd Edition: Butterworths (1995)[2].** And, by the execution of Debenture Deed along with the certificate of Registration of Mortgage & the deposit of the original title deeds pertaining to the immoveable properties/lands owned by the Plaintiffs itself created an equitable mortgage & thereby transferring the beneficial interest in favour of the Defendant No.1. Therefore, as the contract provides for the appointment of a receiver manager upon some condition being met and/or upon some default in the obligations of the parties, the 1st Defendant was entitled to exercise the said right without any reservations. In **Re Potters Oils Ltd [1986] 1 WLR 201** it was held that a Debenture Holder who has a right to appoint a receiver is under no duty to refrain from exercising its rights because doing so might cause loss to the company. This principle was applied by this Court in **Madhupaper International Ltd vs Kerr and Others C.A. Nai. 116 (unreported).*"Kerr and Hunter on Receivers and Administrators,"*(18TH EDITION LONDON: SWEET AND MAXWELL (2005),** at paragraph 20-15 A on page 469 states that:

> **"If the debenture holders are contractually entitled to exercise a right to appoint a receiver, they do not, when deciding whether to exercise the right, owe any duty of care to the company, or to any guarantors of its liabilities, although perhaps they may owe a duty only to exercise it in good faith; this may include the duty not to appoint an incompetent person. But debenture holders who act in what they consider is good faith, to be their own interests, can exercise their contractual right to appoint a receiver, without regard to its effect upon the company or on a guarantor."**

See also the case of **Kenya United Steel Company v Kenya Commercial Bank (2005) eKLR**where the Court heldthat:

> **''…it was not appropriate to interfere in the passage of receivership unless it could be shown that the conduct of the receiver is seriously oppressive or not in accordance with recognized principles of law and commercial practice or that there were clear and compelling reasons to do so''.**

The Respondents submitted humbly that based on the evidence on record, the exercise of discretion by the bank to appoint a receiver was done (1) in compliance with the joint and several debenture and the law and (2) was conducted in good faith and cannot be faulted at all by the Plaintiffs

[48] The Respondents argued that in the premises, the Applicants have not shown that (**1**) they have a **prima facie case** with chances of success, (**2**) that if the order is not issued, an award of **damages would not adequately compensate them** and (**3**) that the **balance of convenience** tilts in favour of granting the orders as required under the celebrated case of ***Giella -V- Cassman Brown & Co. Ltd. 1973 EA 338.*** *They have not satisfied the test ofprima facie* case in the case of **Mrao –vs- First American Bank (K) Ltd (2003) KLR 125**as the Applicants have not established that his legal right has been infringed by a Defendant thereby calling for a rebuttal by the latter.

[49] According to the Respondents, as an injunction is an equitable relief, the Applicants must come with clean hands as he who comes to equity must come with clean hands. The Applicant's conduct is such as to warrant the actions sought to be stopped, the remedy of injunction ought not be granted. An order for maintenance of status quo on the other hand is basically a freezing order in the sense that the state of affairs are to be sustained as they were at the time of issuance of the order however, no new action is to be taken up and/or engaged in until the determination of the dispute. Where an order for maintenance of the status quo is issued, both parties are barred from dealing with the suit property outside the mandate initially conferred to them prior to the order being given until the suit is resolved thereby protecting the interest of both parties. The court in the case of **Republic vs. National Environment Tribunal Ex-parte Palm Homes Ltd & another(2013) eKLR** explained the meaning and effect of maintenance of *status quo* as follows:

> **"……That leads me to the issue *status quo*. The word *status quo* is defined by ***Black's Law Dictionary*****, 9th Edition at page 155 as "state in which" that is "the situation that currently exists". ***Ballantine's Law Dictionary*** by Jack G Handlerat page 522 defines the same word as "……the existing state of affairs: things as they are". ***A Concise Law Dictionary*** by P G Osborn, 5th Edition at page 300 defines the word as "the state in which things are, were". Therefore when a Court of law orders or a statute ordains that the *status quo* be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining *status quo* is meant to preserve existing state of affairs…."**

*In* ***Boabab Beach Resort as quoted by F. Tuiyot SaifudeenAbdullahi & 4 Others in Mombasa High Court Misc. Civil Cause no 11 of 2012*** *Murithi J stated that:*

> **"In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof**.*(Emphasis ours)*

[50] The Respondents also addressed the alleged contempt of court. They submitted that the Respondents have not breached any court order(s) known to them and more so any orders given in HCCC No. 78 of 2013. The Applicants bears the duty to demonstrate that the contemnor had knowledge of the court order but went ahead to act in breach of the said order.The Respondents further submitted that they were not parties in that case and were not served with the order issued by the court on 11th June 2014 which they are accused of breaching. They did not, therefore, act in contempt.It was not enough to say that the Respondent had the knowledge of the order. Service was important. On this, they relied on the case of ***Kariuki & Others –vs- Minister for Gender, Sports, Culture & Social Services and 2 Others (2004) 1 KLR*** *where Lenaola-Judge,*held that in Kenyan Law, Service was higher than knowledge. This was held notwithstanding that the Advocate for the Minister was present in court when the order being the subject of contempt proceedings was given.Further to the foregoing, the order referred to hereinabove was never directed to the Respondents but to one Mr. Ian Small and Kieran day prohibiting. The court in ***Hadkinson –vs- Hadkinson 2 ALL ER 1952 p.569.***

> **"It was the plain and unqualified obligations of every person against, or in respect of, whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged".**

[51] On Whether the Receiver Manager duly appointed can exercise the power of sale of the properties, the Respondents urged that a debenture holder reserves the right to appoint a receiver manager without any restriction or further reference to the borrower except that due diligence and process ought to be observed in this endeavour. See court's decision in **Rico Steel Fabricators Ltd & Another v Commercial Bank of Africa Ltd & 3 Others [2004]eKLR** to the effect that parties are bound by their contracts unless fraud, coercion and undue influence are pleaded and proved. The question of whether or not to appoint a Receiver Manager is first of all determined by the terms of the security documentation and in particular, the Joint and Several Debenture duly executed by the parties hereto.The 1st Respondent appointed the 2nd Respondent *vide* a deed of appointment dated 5th June 2014 and pursuant to the terms of the Joint and Several Debenture dated 24th October 2011 which terms are well within the Applicants' knowledge.The 1st Respondent issued a demand letter setting out the breaches on the part of the 1st to 4th Applicants and a notice of their intention to appoint a Receiver Manager under clauses 13, 14 and 17 of the Joint and Several Debenture on the 23rd May 2015 and which letter was delivered to the said Applicants. The 2nd Respondent also registered a Notice of appointment of receivers and managers as required under the Companies Act, Cap 486 Laws of Kenya.In light of the foregoing, the Respondents submit that the Receiver Manager was properly appointed.The court ought not to interfere with the

exercise of the power(s) of receivership **except where there are patent injustices being perpetrated by the said manager**. See **Silven Properties V Royal Bank of Scotland Plc [2003] EWCACiv 1409** in which the court held that the receiver is not managing the mortgagor's property for the benefit of the mortgagor, but the security, the property of the mortgagee, for the benefit of the mortgagee. His powers of management are really ancillary to that duty. The powers and duties of the Receiver Manager were not only provided for by the law but were also contained in the debenture agreement herein. The determination of whether or not to sell the business is therefore, the sole discretion of the receiver. **See *"The Law Of Receivers And Companies,"* Sweet & Maxwell (1986),** at Paragraph 2-07 on pages 10 that:

> **"…A debenture in the ordinary case provides for the appointment by the secured creditor, on the occasion of any default, by the debtor or the occurrence of specified events, of a receiver with power to carry on the company's business. This power may be exercised either with a view to reviving the company or with a view to the beneficial sale of the undertaking as a going concern."**

[52] They ultimately submitted that the injunction sought is not merited as the Applicants seek merely to disregard its obligations under the contract. The Applicants have not shown that their rights have indeed been infringed. The Respondents confirm that the appointment of the Receiver Manager occurred after the breaches by the Applicants. The Applicants are guilty of latches. Equity does not aid the indolent. It has been amply demonstrated in court documents that the directors of the Plaintiff's came to know of the appointment of the receiver by the bank [and in fact met with the receiver [2nd Defendant] on numerous occasions] sometime in June 2014. The application challenging that appointment was only presented in court in February 2015, about seven months later. That delay has not been explained at all by the Plaintiffs. This application is a mere afterthought. The Receiver Manager has exercised the powers rightfully including the power to sell the properties. The Plaintiffs in their affidavits filed in court have admitted default and the amount owed to the bank. They also relied on the opinion by Lord Diplock in the case of ***American Cyanamid vs Ethicon Limited[1975] AC 396***thus,

> ***"If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief."***

Accordingly, the Respondents argued that the Applicants have not established that they will suffer irreparable loss which cannot be adequately compensated by the award of damages. The Company having given property as security under, *inter alia*, a Debenture providing for the appointment of a receiver, the property became a commodity for sale. See the case of **Thomas NyakambaOkong'o v Co-operative Bank of Kenya Ltd [2012]eKLR**, where the Court expressed itself on this issue by stating;

> **"...once a property is given as security, it becomes a commodity for sale and there is no commodity for sale to which a value cannot be attached."**

The Respondents submitted that in the circumstances and in the interest of justice, the court ought to issue an order for maintenance of status quo which order would effectually have the state of affairs continue as they now stand. Consolidation of suits should also be refused. The situation is aggravated by the fact that all the parties are represented by different lawyers.

**DETERMINATION**

[53] From the length and depth of the submissions herein, doubtless this matter involves issues which require serious treatment by the court. I should, however, state from the outset that parties' submissions are quite elaborate and seems to argue the merits of their substantive cases. The court should be careful not to make findings which will prejudice trial. Hence, I will make findings which are enough to determine the application before me.

**Issues**

[54] Parties set out issues in their respective submissions. Out of those issues, I see the following as the issues which emerge for determination:

a. **Whether this suit should be consolidated with NBIHCCC NO 78 OF 2014;**

b. **Whether non-disbursement of the entire loan is a basis for injunction. Here, I will consider arguments that the bank breached the loan agreement and, therefore, as a defaulting party it cannot enforce a contract that it has failed to honour. I will also consider whether a borrower can default on repaying a loan for sums not availed in terms of the Letter of Offer.**

c. **Whether a bank can unilaterally and without the consent of Guarantors vary the terms under which various Guarantees were executed, and the effect of such unilateral variationof the contract with a borrower to the detriment of both the borrower and guarantors;**

d. **Whether the 2nd Defendant/Respondent was properly appointed as Receiver and Manager of the Applicants. The legal position of the power to sell property based on an informal Charge and whether the receiver herein should sell the properties herein will be addressed as well; and**

e. **Allegations of disobedience of court orders by a Receiver.**

f. **Whether the relief sought is deserved.**

[55] Except issue (a) above, all the other issues are inextricably related and the diving line is a tenuous one. But, ultimately, after I have determined the request for consolidation of suits, the court should be able to decide an injunction ought to be issued against the Respondents and if so, the terms thereof.

**Consolidation**

[56] The Applicants applied for consolidation of this suit with NBIHCCC NO 78 OF 2014. They did not specifically address this request except from their submissions it is discernible that they see a direct connection between the two suits especially in view of the order of 11th June 2014, the alleged contempt of the said order in the appointment of the 2nd Defendant as a Receiver and his actions intended to sell the suit properties and the illegal actions by Cfc Stanbic Bank in appointing a receiver without the consent of the 1st Defendant herein- according to the Applicants this was an act of collusion between the two banks to call-up the loans and sell off the suit properties and business. The Respondents are the ones who strongly opposed the consolidation of the present suit and HCCC Number 78 of 2014.According to the **Black's Law Dictionary** (8th Edition), a consolidation of suits is;

> **"…to combine, through court order, two or more actions involving the same parties or issues into a single action ending in a single judgment or, sometimes, separate judgments…."**

A consolidation of suits does not necessarily result into a single judgment; it may lead to separate judgments. But the important thing to note is that, consolidation will be ordered:-

a. **Where there are two or more suits or matters pending in the same court;**
b. **Some common question of law or fact arises in both or all of them; or**
c. **The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or**
d. **For some other reason it is desirable to make an order for consolidating the suits.**

See the case of **Nyati Security Guards & Services Ltd vs - Municipal Council of Mombasa [2004] eKLR. But even in making an order for consolidation of the suits, the court is minded to ensure that the course taken will serve the overriding objective of the law to attain** efficient and expeditious

disposal of disputes as an enabler of fair hearing in the suits. Therefore, a consolidation should not lead into injustice to any party. See **Korean United Church of Kenya & 3 others vs. Seng Ha Sang (2014) eKLR**. Looking at both suits, there are some common issues of law and fact except there are others which are peculiar to the specific contracts between the parties which will require to be dealt with separately. I note also that only the Plaintiffs are common parties in both suits. This suit has different defendants and other Plaintiffs too. But, other than consolidation, a court of law may order for such suits to be heard ‘’back to back’’ if the suits share fundamental points of nexus which may require reference of one suit in the other as is the case here. There is alleged collusion between the two banks in the appointment of Receivers and Managers in order to induce breach. This is critical issue. Again, the two banks have a common Inter-bank Agreement which governed appointment of receivers and the realization of the securities given to both banks which substantially consist in the same properties. Because of these points of nexus between the suits, the appropriate order to make is that the two suits be heard together or ‘’back to back’’. It is so ordered. **The course taken will allow the suits to be dealt with separately but in a more efficient manner. Hearing will be shorter and efficient.**

**Non-disbursement of entire loan**

[57] I have stated that issues (b) to (d) are inextricably related. Under this title, the court will determine whether non-disbursement of the entire loan is a basis for granting an injunction. Here, I will consider arguments that the bank breached the loan agreement and, therefore, as a defaulting party it cannot enforce a contract that it has failed to honour. I will also consider whether a borrower can default on repaying a loan for sums which were not availed contrary to terms of the Letter of Offer. Invariably, depending on the findings of the court on the foregoing, the right to appoint and the appointment of receivers as well the hive down or purported sale of the enterprise herein will come into sharp focus.But, the latter issues will be dealt with exhaustively under issue (c) and (d).

[58] It is not in dispute that the 1st Defendant did not disburse the entire loan agreed upon by the parties in the letter of offer. The Applicants argue that the Foreign Currency Term Loan that is secured by the Suit Properties was not fully disbursed as agreed. The 1st Defendant did not disburse USD. 40,000,000.00- as agreed, and therefore, they breached their duty- the dutywas not delegable. According to the Applicants, this breach was deliberate and was in collusion with Cfc Stanbic Bank in order to appoint a receiver and sell of the entire enterprise and charged lands. They argued that the 1stDefendant had inter-bank lending agreement with Cfc Stanbic Bank that none of the banks will appoint receiver without the consent of the other. But, Cfc Stanbic Bank on an alleged breach appointed a receiver and manager over the suit properties and business. The 1st Defendant was aware of this fact and used it to claim that the Applicants have committed an act of default. Mr. Luseno urged further that the Applicants requested for full disbursements of funds so as to enable them operate optimally and re-pay the loan as agreed but the 1st Defendant vehemently refused to make the disbursement. This was in total disregard of the provisions on forbearance contained in the debentures as well the loan agreement. That was not all. Mr. Luseno submitted further that the Applicant even tried to convince the 1st Defendant to release some securities so as to enable them to seek for financing from other sources for operations and re-payment of the loans herein. Again, these requests fell on deaf ears. All these things were happening during the Post-Election Violence in Kenya (PEV) which had affected the flower business of the 4th Defendant which is situated in the heart of Rift Valley where ugly PEV incidents took place, i.e. Naivasha. They are of the view that the 1st Defendant should have exercised forbearance. Therefore, the 1st Defendant acted in bad faith and in breach of their duty to disburse the funds as agreed with the consequences of exerting dire operational stress on the 4th Plaintiff. The breach of contract is an infringement of right for which an injunction should issue.

[59] Mr. Nyaribo argued before court that the 5th Plaintiff here is a foreign company registered in UAE, Dubai with no known assets in Kenya. This plaintiff is the principal borrower of the 1st Defendant Bank. The 1st, 2nd, 3rd and 4th Plaintiffs are only guarantors to the borrowing. He relied on 3 primary documents whose validity has not been challenged. The documents are:

1. **Master facility agreement dated 29.6.2010 – it secured the working capital facility. See page 2-26 of our Replying Affidavit by 1st Defendant.**
2. **Facility agreement dated 3.11.2011 which secured the foreign currency term loan – See page 37 of our Replying affidavit.**
3. **The joint and several debentures executed between 1st Defendant and 1st, 2nd, 3rd and 4th Plaintiff dated 24.10.2011. It secures a sum of USD 40 million.**

[60] Mr. Nyaribo submitted that the following acts of breachby 1st – 4th Plaintiffs necessitated appointment of receiver, namely:

a. Karuturi Ltd was served with Winding up cause and appointment of receiver by CFC Bank. See clause 13( e ), 14( e) and ( c) of debenture.

b. 1st – 3rd Plaintiffs were issued with statutory Notices by CFC Bank. See page 286-293 of Replying Affidavit. They also failed to execute a deliver a charge over their properties. See clause No.9.14( c) and 13 (e) of debenture.

c. 1st Plaintiff failed to deposit the original title to LR.No11669/2 in breach of clause 13(9) of debenture.

d. Karuturi ltd failed to inform the bank of Tax audit by KRA and analyzing liability of Kshs.950 million. See page 312 -343 of Replying Affidavit.

He submitted that these breaches were communicated to all the Plaintiffs through recall notices. See page 396- the letters were delivered to all Plaintiffs. See page 345-348. They acknowledged them. See letter of 5th Plaintiff at page 366. In respect of 5th Plaintiff the breach was failing to pay monies when they fell due. Demand letters are at page 355-395. Statements of accounts have even been exhibited at page 268-285. The 5th Plaintiff's director admitted the outstanding amount in the supporting affidavit. According to the Respondents, there was breach by the borrower, i.e. the 5th Plaintiff and recall of the loan was proper.

[61] As I stated earlier, it is not disputed that the 1st Defendant did not disburse the entire loan as agreed. I have perused FCTL-1 and FCTL-2 and none contains a clause which entitled the lender not to disburse the entire loans agreed. There is no provision in these contracts which allowed the 1st Defendant to withhold any funds. The entire amount would have to be drawn either at once or on pro rata basis in accordance with the contracts during the availability period. There is evidence that the Applicants communicated to the 1st Defendant the fact that there has been failure by the 1st Defendant to disburse the entire loan and requested them to disburse the funds so as to enable them operate optimally and re-pay the loan as agreed. The agreed loan was USD $ 40,000,000. The 1st Defendant/Respondent, upon receiving the securities indicated in the Debenture, released the first term loan of USD 15 million which has since been repaid. It did not fully disburse the second loan of USD 25 million and instead, combined two facilities and put the guarantors under receivership. Prima facie evidence presented in documentary evidence as well as affidavit evidence on events and circumstances of this case raise a substantial question of law and fact which need full interrogation by the court in a trial. On prima facie basis, it is arguable that non-disbursement of the entire loan is tantamount to breach of contract and the bank may not have the equitable grounding to insist on strict adherence of the contract. A breach of contract is an infringement of a right of the other party.In commercial transactions, performance by parties is a matter in the heart of rights of parties**.** See J.W Carter in ***Carter's Breach of Contract***that;

> **"A promisor's obligation to perform is discharged only if the performance rendered exactly matches the requirements of the contract, including as to the time of the performance. If performance is not exact, there is failure to perform unless parties have agreed to the contrary".**

Also see the decision by Lord Atkin in **Arcos Limited -vs- E.ARonaasen and Son [1933] AC 470**where

he disagreed with the proposition: ‘’…***that in all commercial contracts the question was whether there was "substantial compliance with the contract: there is always must be some margin: and it is for the tribunal of fact to determine whether the margin is exceeded or not. His considered view was that; ‘’… If written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton.....the right view is that the conditions of the contract must be strictly performed. ."***

I should also state that the Inter-bank Agreement between the 1st Defendant and Cfc Stanbic Bank set out terms and conditions for the banks in lending money to the Karuturi Group. Both banks had some sort of relationship under the Inter-bank Agreement and that is why they set out joint responsibilities on the Distribution Monies and appointments of receivers. Appointment of receivers by CFC Stanbic Bank has been seriously contested in case number 78 of 2014 and there is every indication that the said appointment was done without the consent of the 1st Defendant. Therefore, it is insincere for one bank (1ST Defendant) to use such actions by the other bank (Cfc Stanbic Bank)to declare default for purposes of appointing receivers. Therefore, in accordance with the case of Mraoa prima facie case is established where, on the material before the court and the court directing its mind properly will conclude that a right has been infringed as to call upon the other party for rebuttal. I have found this to be the case here.

**Alteration of terms of borrower’s contract**

[62] The Applicants argued that the 1st, 2nd, 3rd and 4th Plaintiffs/Applicants’ as Guarantors, agreed to offer and offered their properties as security to guarantee a sum of USD $ 15 Million granted under FCTL-1 and Kshs. 25 Million granted under FCTL-2 and no other. They submitted that the Obligation of the Guarantors was PRIMARILY PEGGED ON the discharge by the 1st Defendant of its obligation to the borrower. The 1st Defendant/Respondent, upon receiving the securities indicated in the Debenture, released the first term loan of USD 15 million which has since been repaid. The 1st Defendant did not fully disburse the second loan of USD 25 million and instead, combined two distinct facilities and put the guarantors under receivership and now threatens to sell the Suit Properties.

[63] The Applicants claimed that the 1st Defendant’s Breach, Unilateral Variation of the Terms of the Contract and appointment of receiver was contrary to the law. The unilateral alteration of the loan agreement without the consent of the Guarantors discharged them of any liability. Mr. Nyaribo submitted that the breach was occasioned by the borrower which made the Guarantors liable. He stated that there was nothing prohibiting consolidation of the debts as they were guaranteed by the same guarantors. I take the following view of these arguments.

[64] A guarantor makes a binding promise to the lender that he will be liable for a present or future debt or obligation of the borrower the borrower ***defaults***. As long as the borrower is repaying the debt, the guarantor will not be liable. His liability attaches when the borrower defaults. There is a presumption of a debt which of course, in commercial transaction between banks and borrowers arises from financial lending. Therefore, where no funds are disbursed no liability will attach to the guarantor. But the issue here is that, in breach of the contract herein, only part of the funds were disbursed by the 1st Defendant. I have found that it is arguable the bank breached the agreement. The variation of the borrower’s contract will in law affect the liability of the Guarantor unless the Guarantor gives his guarantee to the changed situation.See the literary work by Dr. James O'Donovan, ***"The Modern Contract of Guarantee"*** at page10 that;

> **"A contract of Guarantee is predicated upon the existence of a valid principal obligation owed by the principal debtor. If there is no such principal obligation, generally the obligation fails... In terms of general principle, not only must the principal obligation exist but it must also remain unchanged throughout the life of a Guarantee. Even slight unauthorized changes in the primary obligation may discharge the guarantor. Moreover, if the principal obligation determines, so does the guarantee"**

But, for purposes of this ruling, the breach by the 1st Defendant and the consolidation of distinct contracts without a written agreement between the borrower and the lender is a unilateral act of variation of the contract for lending. There were no serious objections or challenge to the said unilateral variations of the contract for lending. The variation will affect the Guarantors' liability. On this point, the Guarantors have shown a prima facie case which will need protection by an injunction as the case is heard fully. I have perused the Credit Arrangement Letter dated 20th December 2010 as amended by the Amendment to Credit Arrangement Letter dated 27th September 2011. It emerges that in respect of Foreign Currency Term Loan 1 of USD 15 million, the amendment provides that the following shall constitute security;

> **"First Charge on all of the Karuturi Limited (formerly Sher Karuturi), Rhea Holding, Yashoda Investments and Kalasha holdings Assets in Kenya including all immovable and movable properties including land, both present and future, on pari passu basis with term lenders and other participating banks valuing not less than USD 75.7 million. Valuation to be done preferably by one of the top 4 audit firms to the satisfaction of the bank.**
>
> **Security for FCTL – 1 to be created before October 30, 2011.**
>
> **Other terms to remain as per the original sanction."**

In respect of the second Foreign Currency Term Loan of USD 25 million, the amendment provides that the following shall constitute security:

> **"First Charge on all of the Karuturi Limited (formerly Sher Karuturi), Rhea Holding, YashodaInvestments and Kalasha Holdings assets in Kenya including all immovable and movable properties including land, both present and future, on pari passu basis with term lenders and other participating banks valuing not less than USD 75.7 million. Valuation to be done preferably by one of the top 4 audit firms to the satisfaction of the bank.**
>
> **Common debenture deed, as per Kenya Law, to be executed for both FCTL-1 and FCTL-2 loan for a combined loan value of USD 40.0 million.**
>
> **Other terms to remain as per the original sanction."**

There is nothing in those amendments which would support the variation which the Applicants feel offended by.The 1st Defendant act of consolidating the Foreign Currency Term Loan and the Working Capital Demand Loan, and loading the entire amount on securities offered by the 1st, 2nd 3rd, and 4th Plaintiffs/Applicants for the Foreign Currency Term Loans will need evaluation in the trail. It is a substantial issue. When such consolidation happens, the guarantors must have a say on and promise to be liable for the extra load or consolidated load.

**Appointment of receiver**

[65] Under this title, I should address arguments as to whether the right to appoint receivers had accrued and whether the Receiver appointed is qualified to be appointed as Receiver. The Joint and Several Debenture dated 24th October 2011 by the 1st – 4th Plaintiffs secured a sum of USD $ 40,000,000 which was presumably advanced to the borrower. There were other Debentures and guarantees given by Ethiopian companies. As I have found that the 1st Defendant did not disburse the entire sum agreed, the right to appoint a receiver is put to doubt. It did not accrue. However, there are other important matters which I should determine on appointment of Receiver herein. The Joint and Several Debenture herein provided for appointment of a Receiver in case of default herein. The 1st Defendant claims to have appointed the Receiver, the 2nd Defendant pursuant to the said Debenture. The most important factor to note is that these Debenture and guarantees were subject to the Inter-bank Agreement between the 1st

Defendant and Cfc Stanbic Bank. EvenCfc Stanbic Bank gave its consents to the Debentures, charges and guarantees executed in favour of the 1st Defendant and vice versa. The reason is that the debts ranked *pari pasu*. According to Clause 3 of the Inter-bank Agreement, any bank which wishes to appoint a Receiver would immediately give notice to the other bank of the intention and endeavor to agree with the other bank on the method by which the securities will be realized in accordance with the said deed. Even where either bank wishes to move under some sort of urgency, it still had to give the notice of appointment to the other bank. And any person appointed by any bank as a Receiver must be a partner in a reputable firm of accountants practicing in Nairobi.

[66] Purportedly pursuant to the Joint and Several Debenture and the Inter-bank Agreement, CFC Stanbic Bank appointed a Receiver and the appointment elicited hotly contested litigation in NBIHCCC NO 78 OF 2014.Mr. Nyaribo has argued that these two suits are not related. However, the Inter-bank Agreement will bring the appointment of Receiver by any of the bank to bear on the other. First, the Agreement requires notice for appointment of Receiver to be given by the bank so desiring to appoint Receiver and also such bank should endeavor to agree on method of realization of the securities. The **Inter-Bank Lenders Agreement** dated 2nd November 2011 at Clause 8, provides that ***"Neither of the Banks shall transfer or otherwise dispose of any of the Securities or agree or attempt to do so without the prior written consent of the other Bank".*** Serious complaints have been raised in this case and in number 78 of 2014 that no consent or notice was given by CFC Bank in the appointment of the Receiver and that the appointment was mere collusion between the lenders to sell off the enterprise. The 1st Defendant did not deny that it did not give consent to or receive notice fromCfc Bank on the appointment of the Receivers and Managers herein. It did not also confirm that it received consent from CFC Stanbic Bank on the appointment of the 2nd Defendant. This is not idle talk. It is a serious legal issue worth further interrogation by the court at the trial especially in the face of the accusations that they were doing all these things to induce default and sell off the enterprise and the properties herein.. Secondly, where two or more persons are entitled to appoint a Receiver over the same property, the appointment should be made as joint Receivers or the law will treat the appointments as joint receivers. There are legal as well as practical reasons for this approach of law; for optimal realization of the receivership as opposed to unhealthy competition amongst the Receivers. Therefore, questions on whether the appointment of the receivers herein is in order are reasonable to ask. When the Plaintiffs made a request for the court to visitthe site, the court wanted to know whether the Receivers and Managers on site were joint receivers in view of the law. In answer to the question, Mr. Nyaribo and Mr. Ogunde who appears for CFC Stanbic Bank, informed the court that the Receivers and Managers by CFC Stanbic are the joint Receivers and Managers. My. Nyaribo confirmed that their Receiver is not in control of the business or hospital. See proceedings. Hence, how and why has the 2nd Defendant as Receivers and Managers engaged on hive-down of the Plaintiffs and the business? I will deal with this issue when I shall be dealing with the claim of disobedience of court orders and contempt of court allegations. At the moment, let me settle one small issue which is also related with the foregoing.

[67] Who is competent person to appoint as a Receiver? Under section 345 of the Companies Act, a body corporate cannot be appointed as a Receiver and Manager. Similarly, I think that business firms or partnerships may not be qualified to be appointed as Receiver and Manager as such firm or partnership. But, the individual partners in their individual names are competent to be appointed Receivers and Managers. But, according to the Inter-bank Agreement any person who was to be appointed receiver and Manager for the companies herein must be a partner in a reputable firm of accountants practicing in Nairobi. All transactions by the Receiver and Manager must be transacted in the name of the Receiver and Manager. Therefore, the Notices in the Nation Newspaper for the sale of the flower farm are invalid and are so declared. But, I see that the appointment was in the Name of the 2nd Defendant. I will not determine his qualifications for now as they have not taken management of the enterprise yet where he must of necessity be of competencies or hire expert competencies to manage the enterprise.

**Claim of disobedience of court order**

[68] The Applicants claimed that the Respondents were aware of the order of the court that was made in NBIHCCC NO 78 of 2014 stopping the sale of the enterprise of the 4th Plaintiff as well as the

properties of the 1st – 4th Plaintiffs. The Respondents insisted that they were not aware or served with the court order in question; they were not parties in the said suit; and that the order related to only 1st – 4th Plaintiffs. Therefore, the Defendants claimed that they cannot be in contempt. My view of the matter is that the Defendants were aware of the order in NBIHCCC NO 78 OF 2014. Despite arguments that the 2nd Defendant has not taken actual management of the enterprise of the 4th Plaintiff and properties of the 1st – 4th Plaintiffs, the visit by the Deputy Registrar and subsequent agreements between the parties and material before the court revealed that the 2nd Defendant had the custody of personal effects of a director, there was a demolition of some house and he had closed and relocated medical facility on the farms. Also from the material before the court and this has not been denied by the Defendants, the 2nd Defendant has engaged in the Hive-down of the business and has changed the name of the business of the borrower from Karuturi Roses to Twiga Roses. The 2nd Defendant also placed invalid advertisements in the Nation Newspaper for sale of the business of the 4th Defendant and securities. While these things are taking place and being done by the 2nd Defendant, the Receivers and Managers by Cfc Stanbic Bank are making more borrowings and CFC Stanbic Bank has applied to sell the business of the borrower together with the suit properties. The said Receivers and Managers have also flatly refused to account for all transactions on the business or borrowings or let the Plaintiffs or any prospective investor into the properties and business of the company. This issue has been substantively determined in NBIHCCC NO 78 OF 2014. The 2nd Defendant was aware of all these happenings and also the order of the court. I do not accede to the arguments that they were not aware of the court order. The 1st Defendant was also aware of the order. Therefore, actions by the 1st Defendant as well as all the Receiver and Managers herein is not *bona fides* and render credence to the accusations that there is collusion to induced default and create hardship to the Applicants in order to force sell off the business and then charged properties herein. But before I address the other thresholds on irreparable damage and balance of convenience, I will say something about informal charge.

**Informal charge**

[69] The letter dated 8th March 2013, Kaplan & Stratton Advocates confirm that they hold the original titles in respect of the securities to the joint order of CfC Stanbic Bank limited and ICICI Bank Limited as per the Inter-Bank Agreement dated 2nd November 2011. But, no legal charge was executed and registered in favour of the 1st Defendant. The Applicants defended themselves against accusation by the 1stDefendants that they refused to execute formal charge. They argued that there were no formal charges that were prepared or send to them by the said advocates for execution. There was nothing to show that the advocates prepared and transmitted formal charges to 1st – 4th Plaintiffs for execution. That notwithstanding, according toSection 79 of the Land Act:**An informal charge may be created where—**

> **a) a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor's land or interest in land, with the repayment of money or money's worth, obtained from the charge**
>
> **b) the chargor deposits any of the following—**
>
> **i) a certificate of title to the land**
>
> **ii) a document of lease of land**
>
> **iii) any other document which it is agreed evidences ownership of land or a right to interest in land.**

However, under the same section:-

> **"A formal charge shall take effect only when it is registered in a prescribed register and a chargee shall not be entitled to exercise any of the remedies under that charge**

**unless it is so registered.**

And;

> **''A chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect."**

[70] The court has not been shown any registration of a formal charge herein. Similarly, there is no court order for the taking of possession or selling of the lands subject of the purported informal charge. Consequently, I do not think any action taken herein was so taken pursuant to any informal charge.

**Irreparable damage**

[71] Ultimately, I find that there is doubt whether the right to appoint the 2nd Defendant had accrued. The appointment of the 2nd Defendant is, therefore, premature. In view of the requirement for joint receivers or to act as joint receivers and managers, and the circumstances of the case, the hive-down by the 2nd Defendant is without proper grounding and authority in law. The 1st Defendant did not disburse the entire loan as agreed. Yet they insisted on appointment of receiver. Even where a right to appoint a receiver exists, it must be exercised in good faith and for the sake of satisfying the law and requirements in receiverships.And, where it has been exercised oppressively, the court should intervene.In **FINA BANK LIMITED vs. SPARES & INDUSTRIES LIMITED** [**2000]eKLR**, Justice Tunoi JA (as he then was), on considering the questions, *inter alia*, of whether or not the appointment of a Receiver had become exercisable, observed that:

> **"However, it is also correct law 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. See Godfrey Nyaga vs Housing Finance Co. Kenya Ltd. C.A. No. 134 of 1987 Nai. (unreported) and further that "The issue of Receivership is an emotive one and I understand why the respondent had to resort to litigation. It destroys the business. It is expensive. The appointment of Receivers and Managers may not necessarily improve the financial position of the business. These, in my view, are matters for consideration as to whether to grant a temporary injunction or not. I am satisfied that all these observations were in the mind of the learned Judge when he acceded to the application for injunction. Indeed he acted in accordance with the principles laid down in Giella v Cassman Brown & Co. Ltd [1973] EA 358 and came to the correct decision. I find no ground to fault him as he had exercised his discretion correctly and judicially."**

[72] There has been infringement of right by the 1st Defendant when it did not fully perform its obligation under the contract. The 2nd Defendant has also engaged in hive-down while fully aware of the court orders herein; he did not also act as by law required in such receiverships with more than one debenture holderswho have appointed receivers. Such course taken by the 1st Defendant was not only in violation of the law and the Inter-bank Agreement, but will destroy the enterprise and will benefit no one including the Debenture holders. It would be contrary to the law to allow a party in default to derive advantage from its wrong or default. See the case of**ALGHUSSEIN ESTABLISHMENT vs. ETON COLLEGE,** wherethe House of Lords, held *inter alia*, that;

**As per Lord Jauncey of Tullichettle:**

> **"My Lords it is well established by a long line of authority that a contracting party will not in normal circumstances be entitled to take advantage of his own breach against the other party. The Court also quoted with approval a decision of the Court of Appeal in New Zealand Shipping case [1917] 2KB 717 where Viscount**

> **Reading CJ said "Unless the language of the contract constrains the Court to hold otherwise, the law of England never permits a party to take advantage of his own default or wrong. …it is so contrary to justice that a party should avoid his own contract by his own wrong, that unless constrained, we should not adopt a construction favorable to such a purpose. That appears to me to be a true underlying of the cases in which the word "void" has been construed as it meant voidable."**

The defendants stand in that position of a party at default. The appointment of the 2nd Defendant/Respondent was oppressive, unfair and is the epitome of dominating posture taken by the 1st Defendant over all the plaintiffs. See the case of **NATIONAL WESTMINSTER PLC vs. MORGAN [1985] UKHL 2**, where the House of Lords dealt with dominating influence, *inter alia*, that:

> **"…A commercial relationship can become a relationship in which one party assumes a role of dominating influence over the other…a relationship of a banker and a customer may become one which the banker acquires a dominating influence. If he does and a manifestly disadvantageous transaction is proved, there would then be room for the court to presume that it resulted from the exercise of undue influence."**

[73] Doubtless, the Plaintiffs' arguments that the 4th and 5th Plaintiff is suffering massive financial strain on their business operations due to lack of much needed funds that were inexplicably withheld by the 1st Defendant are not far-fetched. Other Receivers and Managers are already on site. I have seen e-mail dated 30th September 2013, in which Mr. Ramakrishna Karuturi pleaded with the 1st Defendant to fulfill its obligations under the contract and or to release some of the securities to enable sourcing of additional funding to the 5th Plaintiff/Applicant's critical business requirements. See also page 19 of the Further Affidavit sworn by Mr. Anil Tumu on 2nd March 2015. From these events and the actions by the 1st Defendant, indeed the 1st Defendant relied on its dominating position in the entire contract and retained a portion of the loan but also retained all the securities which the Plaintiffs quantified at more than USD $ 90,000,000. I should state that there was no consideration given to the rights of the Guarantors whatsoever.

[74] Taking all the circumstances of this case into account, it bears repeatingwhat Ringera J. (as he then was) said in the case at **JAMBO BISCUITS (K) LTD. v BARCLAYS BANK OF KENYA LTD. ANDREW DOUGLAS GREGORY AND ABDUL ZAHIR SHEIKH (2003) 2EA 434** that;

> **"As regards whether the Company would suffer irreparable loss and injury unless the prayers sought are granted, I have no doubt it would. The receivership would most probably result in the complete destruction of the business and goodwill of the company… And I think it is a notorious fact of which judicial notice may be taken that receiverships in this country have tended to give kiss of death to many a business''.**

See also the decision by AnyaraEmukule J, in **KWALITY CANDIES & SWEET LTD vs. INDUSTRIAL DEVELOPMENT BANK LTD [2005] eKLR**, where in considering the effect of the Defendant's failure to advance monies secured by a Supplemental Debenture and a Second Further Mortgage adopted the above decision of Justice Ringera in the case of **Jambo Biscuits.**

[75] Accordingly, I find that the Company will suffer irreparable injury that is not compensable in an award for damages as the receivership most probably will result into the complete destruction of the business and goodwill of the company. Similarly, the 1st – 4th Defendants will suffer irreparable damage that cannot be compensated by an award of damages because their right to redeem their properties will be foreclosed forever in most unfair manner. Indeed, no amount of damages would act as a substitute for infringement of a right or breach of law.

**Balance of convenience**

[76] The question of whether the debt if admitted is subject to the entire facts of the case. Thus, I will determine whether an injunction is merited on legal threshold. In sum, the facts of this case tilts the balance of convenience towards granting an injunction to preserve the suit properties belonging to the 1st and 4th Plaintiffs as well as the business of the 4th Plaintiff until the suit is heard. It will be a tragedy to allow a set of affairs obtaining now to continue as urged by the Defendants. The enterprise will be totally decimated. The right to redeem the charged property will be foreclosed forever. Accordingly, the court cannot close its eyes where debenture-holders and Receivers act contrary to the law. Despite the right to appoint receivers, if the right has been exercised oppressively, the court should intervene and stop the debenture-holders as well as the Receivers and Managers. The Receiver and Manager as well as the 1st Defendant have acted oppressively.

[77] I consider the following submissions by Mr. Nyaribo during oral highlights of the submissions to be useful. That: -

> **But should you issue injunction, make it conditional and on terms in view of admission of liability especially that 5th Plaintiff is a foreign company. Let them pay the admitted sum within a specified time. The injunction should be time-bound.**
>
> **Removal of receiver is mandatory injunction at a preliminary stage. Only Karuturi ltd has two receivers. All the others have one receiver. The order sought will compromise the entire suit. No demonstration at all of the special nature of the flower business. The CV of the receiver demonstrates his competence and capability as an individual or as consultancy as is the case.**

[78] I have stated that sustenance of the status quo will only hurt the law and the entire enterprise. The appointment of the Receiver has been questioned and put to doubt. Such appointment should be put in limbo until the suit is heard and parties' substantive rights are determined. Notably, in a clear case, removal of a Receiver may be ordered whether at interlocutory stage or final stage. But for now, I will grant orders which are appropriate to the case. Meanwhile, let me provided answers to the specific issues framed herein.

**Specific answers to issues**

[79] In light thereof, I give the following specific answers to issues herein;

a. **Whether this suit should be consolidated with NBIHCCC NO 78 OF 2014;**

   The two suits shall be heard together or back to back.

b. **Whether non-disbursement of the entire loan is a basis for injunction.**

The non-disbursement of the entire loan in contravention of the loan agreement is a ground of issuing an injunction especially where it amounts to failure to perform your part of the bargain, thus, breach of the contract. A bank which negates on its obligation to disburse funds under a loan agreement is in default of the contract and will not be allowed to derive advantage from its own default. This is the case here. In such case, the borrower may argue that there is no default in so far as non-disbursed funds are concerned. There is, therefore, an infringement of right for which an injunction would issue.

c. **Whether a bank can unilaterally and without the consent of Guarantors vary the terms under which various Guarantees were executed, and the effect of such unilateral variationof the contract with a borrower to the detriment of both the borrower and guarantors;**

There were unilateral variations of the agreement by the bank without consent of the borrower or the guarantors. Such variation would affect the lending contract as well as the guarantee. It may also afford the guarantors a defence and claim discharge of guarantee. It is a basis for issuing an injunction in

appropriate cases such as this one.The 1st Defendant act of consolidating the Foreign Currency Term Loan and the Working Capital Demand Loan, and loading the entire amount on securities offered by the 1st, 2nd 3rd, and 4th Plaintiffs/Applicants for the Foreign Currency Term Loans will need evaluation in the trail. It is a substantial issue.

d. **Whether the 2nd Defendant/Respondent was properly appointed as Receiver and Manager of the Applicants. The legal position of the power to sell property based on an informal Charge and whether the receiver herein should sell the properties herein will be addressed as well.**

The 2nd Defendant's appointment as Receiver and Manager as well as the right to appoint such receiver is seriously in doubt. The actions by the 2nd Defendant on hive-down were also done in bad faith as he was aware of the court order issued on 11th June 2014 and that there were other two Receivers and Managers on the suit properties and business.In view of the inter-bank Agreement and the law, the actions by the 2nd Defendant were inappropriate for they were taken unilaterally and without reference to the other Receivers and Managers who were appointed by CFc Stanbic Bank. The power to appoint the receiver was exercised oppressively.

e. **Allegations of disobedience of court orders by a Receiver.**

**The Defendants were fully aware of the court orders issued on 11th June 2014 when they chose to move forward with the sale of the enterprise and the suit properties. Their actions were inappropriate and completely squeeze out the core of receivership the way it is envisioned in law. Although they were no parties to suit number 78 of 2014, they ought to have acted carefully and in recognition of the effect of such order and the fact that there were receivers and managers on same site. They acted negligently in respect of the properties and business of the 1st – 4th Plaintiffs when they ignored the law, the court order and the existence of the Receivers and Managers on the site with whom they ought to have endeavoured to act jointly.The Defendants actions negate the maxims of equity that; *"he who comes to equity must come with clean hands"*and*"he who seeks equity must do equity"*.**

f. **Whether the relief sought is deserved.**

The thresholds set out in the case of **Giellavs**. **CassmanBrown** have been met.The Applicants have established a prima facie case with high probability of success, that they will suffer irreparable injury unless an injunction is issued, and on applying the balance of convenience, it lies in favour of granting and injunction. There is infringement of right and a possibility of complete destruction of the company as well as foreclosure of right of redemption of the suit properties. There is really no informal charge as prescribed in law which is capable of enforcement. These issues require canvassing at the trial and they will be guaranteed of a meaningful trial by not letting the affairs existing today to continue. In the circumstances of the case, an injunction is deserved.

**Orders**

[80] The court is well equipped to exercise its discretion upon the facts of the case and the law. Accordingly,I issue the following orders:-

6. **An Injunction restraining the 1st Defendant either by itself or through Mr. Kolluri Venkata Subbaraya Kamasastry, the 2nd Defendant, being its Receiver and Manager or such other Receiver and Manager that it may purport to appoint or any of them, servants, auctioneers, agents, or advocates or any of them or otherwise from advertising or offering for sale, or purporting to sell, or in any other way alienating the 1st, 2nd, 3rd and 4th Plaintiffs movable**

**and immovable properties including but not limited to ALL THOSE PROPERTIES KNOWN AS Land Reference Number 10854/60 (Title No.I.R 87312), in the name of Rhea Holdings Ltd, the 2nd Plaintiff /Applicant herein, Land Reference Numbers 12248/19, 12248/20, 12248/21,12248/38, 25261 and 25262 in the name of Surya Holdings Limited, the 1st Plaintiff herein or otherwise from howsoever dealing with the Suit propertiespending the hearing and determination of this suit.**

7. **Aninjunction restraining the 1st Defendant either by itself or through Mr. Kolluri Venkata Subbaraya Kamasastry, the 2nd Defendant, being its Receiver and Manager or such other Receiver and Manager that it may purport to appoint or any of them, servants, auctioneers, agents, or advocates or any of them or otherwise from advertising or offering for sale, or purporting to sell, or in any other way alienating the 1st, 2nd, 3rd and 4th Plaintiffs' assets under or secured by the Debenture dated 24th October 2011pending the hearing and determination of this suit.**

8. **An injunction restraining Mr. Kolluri Venkata Subbaraya Kamasastry the 2nd Defendant being the 1st Defendant's Receiver and Manager or such other Receiver and Manager that the 1st Defendant may purport to appoint from discharging, executing and/or effecting any powers or such powers under the Deed of Appointment dated 9th June 2014 or such other appointing Instrument or in any other way interfering with the operations, management, running and affairs of the 1st, 2nd, 3rd and 4th Plaintiffs pending the hearing of this case. This order is not removal of the Receiver and Manager. It only stops him from exercising any of his powers.**

9. **Costs of the application are awarded to the Applicants.**

**Dated, signed and delivered in court at Nairobi this 14th day of July 2015.**

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**F. GIKONYO**

**JUDGE**

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