REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISON & ADMIRALTY DIVISION

CIVIL SUIT NO 78 OF 2014

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

RHEA HOLDINGS LIMITED.....2ND PLAINTIFF

KARUTURI LIMITED.....3RD PLAINTIFF

Versus

CFC STANBIC BANK LIMITED.....DEFENDANT

RULING

Revoking appointment of receivers

[1] The Applicants applied for a number of orders in a Motion dated 28th February, 2014 which is expressed to be brought under Order 40 Rules 1, 2, 3 and 4; Order 51 Rule 1 of the Civil Procedure Rule (hereafter CPR); Section 3 and 3A of the Civil Procedure Act; the Constitution of Kenya; and all other Powers and Enabling Provisions of the law. Prayers 1, 2, 3 and 5 of the said Motion have been overtaken by events. I will therefore consider prayers No 4, 6, 7, 8 and 9.

Prayer 4 is seeking for:

> ***An injunction to restrain the Defendant by itself, its 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, or dealing in any manner howsoever with all those pieces or parcels of land known as; a) LR NO 10854/60 (Title No I.R. 87312), in the name of Rhea Holdings Ltd; and b) L.R. No. 12248/19, 12248/20, 12248/21, 12248/38,25261 and 25262 in the name of Surya Holdings Limited***

Prayer 6 also seeks for:

> ***An injunction to restrain the Defendant by itself, its servants, auctioneers, agents or advocates or any of them or otherwise from appointing a receiver-manager, liquidator, or any other person whatsoever to interfere with the status, management, or operations of the plaintiffs***

Prayer 7 and 8 seeks for:

> ***The lifting of the receivership placed on the 3rd Plaintiff by the Defendant, and an injunction to compel the Receivers and Managers, Kieran Day and Ian Small or any other receiver or manager or agent appointed by the Defendant, to leave the premises of the 3rd Plaintiff.***

And of course, the Applicants pray for an award of costs on the application.

[2] The application is supported by the affidavit of **S**HIREESH JAIN, the grounds on the face of the application and other grounds which were advanced in the written and oral submissions made on behalf of the Applicants. The written and oral submissions made by the counsel for the Applicants sums the grounds as recited below.

Submissions by the Applicants

[3] The Applicants recognized that receivers have been appointed over the business and premises of the 3rd Plaintiff, except they presented serious objections to the appointment as follows:

1. That the e debenture against which the Defendant has sought to exercise its powers to appoint receivers is unenforceable for want of consideration.
2. That the Defendant has breached the same contracts it now purports to enforce against the Plaintiffs. It is trite law that a party cannot seek to enforce or take refuge in a contract, which it has itself breached.
3. That the Defendant is guilty of clogging the Plaintiffs' equitable right of redemption.
4. That the right to appoint the receivers has not crystallized and the appointment is unlawful and wrongful.
5. That the appointment of the receiver by the Defendant smacks of malafide on the part of the Defendant.
6. That the Plaintiffs have established beyond doubt that the receivership ought to be lifted ex debito justitiae both in law and in proper conduct of commerce.

Unenforceability of the Contract for Want of Consideration

[4] The Applicants made specific submissions on unenforceability of the contract for want of consideration. Arguments put forth to support this submission include that:

1. It is trite law that past consideration is not good consideration in law and a contract based on such consideration is unenforceable. **Chitty on Contract** states ***"The consideration for a promise must be given in return for the promise. If the act or forbearance alleged to constitute the consideration has already been done before and independently of , the giving of the promise, it is said to amount to " past consideration", and such past acts or forbearance do not in law amount to consideration for the promise".***
2. The receivers were appointed pursuant to a Deed of Appointment of Receivers and Managers dated 10th February, 2014. This was pursuant to alleged default of the Debenture dated 8th December, 2010 and 10th January, 2013 as per the letter dated 7th February 2014 at Page 284 of the Notice of Motion Application.
3. Recitals A and B of the Debenture dated 8th December, 2010 are clear that the debenture was created for existing indebtedness of the 3rd Plaintiff.
4. The Charges ("SJ 5" in the Supporting Affidavit of Shireesh Jain sworn on 28th February, 2014), were created on 10th January 2013, after disbursement of the facilities.
5. The financial facilities offered to the 3rd Plaintiff by the Defendant were pursuant to letters dated 9th May, 2012 at Page 10 and 28 of the Application which were later amended by the letter dated

6th July, 2012 at Page 49.

6. The financial facilities were a term loan of USD 2 590 000, a General Short Term Banking Facility (Not limited to overdrafts, letter of credit and guarantee by bank facility) of USD 2 500 000 and Letters of Credit of USD 1 500 000.
7. The facilities were made available to the 3rd Plaintiff on 27th December, 2012, before the creation of the Further Debenture.
8. The Plaintiffs submit that the consideration of this Debenture was the past indebtedness of the 3rd Plaintiff which leads to a conclusion that it was for past consideration and hence unenforceable and void ab initio.
9. The Further Debenture of 10th January 2013 is based on the existing debenture of 8th December, 2013 (See Recital A) and it is also unenforceable. It is trite law that nothing comes from nothing (ex nihilo nihil fit)
10. The Further Debenture was also created for existing indebtedness (See Recital B) of the 3rd Plaintiff which is past consideration.
11. The Debenture and the Further Debenture are unenforceable and as such, the right to appoint the receivers under the Debentures and/or Charges cannot be enforced and neither can be Defendant rely on the two debentures to appoint the receivers.
12. The Defendant has no right to appoint the receiver under the unenforceable debentures.

Breach by the Defendant

[5] The Applicants also addressed the breach by the defendant and submitted that it is trite law that a party in a contract cannot take advantage of his own wrong to seek a benefit against the other party. They drew support in the decision of the House of Lords in the case of **ALGHUSSEIN ESTABLISHMENT v ETON COLLEGE (1991) 1AII ER 267,** that:

> ***"A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations".***

[6] According to the Applicants, the House of Lords in the decision above, relied on a speech by Lord Diplock in **CHEALL v ASSOCIATION OF PROFESSIONAL EXECUTIVE CLERICAL AND COMPUTER STAFF (1983) 1 ALL ER** that:

> ***"This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated a contract by frustration is often expressed on broad language as "A man cannot be permitted to take advantage of his own wrong".***

[7] They pressed on; that similar position was held in **NEW ZEALAND SHIPPING v A M SATTTERTHWAITE & CO. LTD. (1971) 1 ALL ER 267;** and **IN GIVAN OKALLO V HOUSING FINANCE COMPANY OF KENYA (2007) eKLR.**

[8] The Applicants submitted that the Defendant has fundamentally breached and repudiated the very contracts that it purports to enforce against the Plaintiffs and based its illegal action to appoint a receiver on the same. This illegal and oppressive action on the part of the Defendant should be addressed and stopped by the Honourable Court. On or about 9th May, 2012, the Defendant sanctioned and agreed to advance to Karuturi Limited certain banking facilities including a term loan of USD 2 590 000, a General Short Term Banking Facility (Not limited to overdrafts, letters of credit and guarantee by bank facility) of USD 2 500 000 and Letters of Credit of USD 1 500 000. See pages 10 and 28 of the Application and Paragraph 7 to 9 of the Supporting Affidavit.

[9] More was submitted by the Applicants. The offer letters of 9th May, 2012 were later amended by the letter dated 6th July, 2012 at Page 49. Upon acceptance of the terms contained in

all the letters, a contract for the provision of the facilities was formed, by execution of Chargor. Contractually, the Defendant was bound to provide *the financial facilities to the 3rd Plaintiff in full.* However, instead of the Defendant disbursing the contractual amount and/or allowing the 3rd Plaintiff to utilize the overdraft facilities, the Defendant only disbursed the sum of USD 2 590 000 (term loan), USD 2 100 000 (Overdraft instead of USD 2 500 000) and USD 750 000 (instead of USD 1 500 000). See Paragraph 14 of the Supporting Affidavit.

[10] The Applicants did not stop there. They stated that the Defendant has admitted at Paragraph 22 of the Replying Affidavit that the financial facilities were not fully disbursed to the Plaintiff. It is trite law that a party cannot unilaterally alter the terms of the contract. Where a party unilaterally alters the terms of the loan facilities, the equitable right of redemption is clogged which is illegal and which is a ground for granting an injunction. See the case of **SHAROK KHER MOHAMED v SOUTHERN CREDIT BANK LIMITED (2008) EKLR.** None of the contractual documents allow the Defendant to unilaterally adjust the conditions of the same.

[10] The Applicants quipped: Is the Defendant therefore entitled to enforce the contracts against the Plaintiffs where it has admitted that it did not disburse the full amounts? Their view is that the answer to the question is in the negative. The Defendant, having breached its obligations cannot take advantage of its own breach to enforce any of the contracts, whether charges or debentures, entered into between the parties against any of the Plaintiffs. The failure to provide the full financial facilities including limiting access of the overdraft facilities amounts to a unilateral adjustment of the facilities by the Defendant.

[11] The Applicant was of the view that the right to appoint the receivers has not crystalized as there was no breach of the terms of the debentures upon which to appoint receivers. Only that the Defendant relied on imagined breach as per the letter at Page 284 of the Application stating "As you are aware, you are in breach of the provisions of the debentures". In the Replying Affidavit, the Defendant states that the 3rd Plaintiff defaulted on the letters of offer. Subsequent to the creation of the charges and the debentures, the letter of offer became superfluous. On 6th September, 2013, the Defendant sent statutory notices to the Plaintiffs providing that the 3rd Plaintiff was facing a winding up petition and that there was a further default on the payments and that the Defendant would exercise its powers under the charges created.

[12] According to the Applicant, the Defendant acted prematurely, as its rights under the various securities (if enforceable, which are not) could only crystallize after full disbursement of the facilities. The 3rd Plaintiff was therefore not in default as alleged. The 3rd Plaintiff has repaid the Term Loan, and is up to date. In the interest of justice, the court should preserve the assets of the Plaintiffs and the business of the 3rd Plaintiff. The right to appoint receivers having not crystallized, the equitable right of redemption is still alive and the bank cannot clog it.

Clogging the Equitable Right of Redemption

[13] The Applicants were categorical; that it is trite law that a chargee should not clog the chargor's equity of redemption. It is clear that the Defendant's deliberate refusal to disburse the facilities or to allow the 3rd Plaintiff to utilize the facilities was the sole cause of the alleged default, which led to the filing of winding up proceedings against the 3rd Plaintiff. The Defendant unilaterally and in breach of the Charges, levied unlawful penal interest on the loan. This has resulted in increase in the alleged outstanding amount and clogging the equity of redemption. The Plaintiffs submit the Defendant did/does not have unfettered discretion to charge penal interest or vary the rate of interest chargeable on the facilities. This was the holding of the court in **GIVAN OKELLO v HOUSING FINANCE COMPANY OF KENYA (2007) eKLR** where the court held that the bank had acted contrary to the terms and conditions of the charge thus clogging the equitable right of redemption. The same ratio decidendi was applied in **SHAROK KHER MOHAMED v SOUTHERN CREDIT BANK (2008) EKLR,** and **HCCC 583 OF 2010, BRANTON INVESTMENTS v CONSOLIDATED BANK OF KENYA (unreported).**

[14] The appointment of receivers and managers over the business and assets of the 3rd Plaintiff has made it impossible for the Plaintiffs to service the facilities, since the receivers have engaged in wanton wastage and cannibalization of the Plaintiffs' assets. The Defendant has also declined reasonable offers for settlement, and is hell bent on selling the Plaintiffs assets to powerful politicians and businessmen.

The Appointment of the Receivers was in Bad Faith

[15] It is the Applicants' submission that the action of the Defendant of appointing receivers was made in bad faith and in an attempt to cause a crisis in the Plaintiffs. The receivers have confirmed that they indeed want to sell the assets of the 3rd Plaintiff by July, 2014. See the Further Affidavit herein. In **SPARES & INDUSTRIES LIMITED v FINA BANK (2000) eKLR,** the court stated;

> ***"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 also 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."***

In addressing this issue, it is prudent to look at the Mala fides events leading to the appointment:-

a. The Defendant has admitted that it did not disburse the full financial facilities. See the Replying Affidavit.
b. The Defendant declined to allow the 3rd Plaintiff to utilize the overdraft facilities and letters of credit. See the confirmation in the Replying Affidavit.
c. The Defendant was at all times aware that the Plaintiffs relied on the business of the 3rd Plaintiff to generate income for redeeming the financial facilities offered by the Defendant.
d. On 7th February, 2014, the Defendant recalled the entire loan (despite the fact that the Plaintiffs were making payments and that it was not the entire facilities that had been disbursed). The receivers were appointed on 10th February 2014 just before Valentine's Day when the 3rd Plaintiff expected to make huge profits due to booming flower business normally expected at the time of the year.
e. None of the valid and enforceable contractual document between the parties specifies the filing or presentation of winding up proceedings as an act of default. It is trite law that parties must be held to the term under the contract.
f. The 3rd Plaintiff has always made offers to have any outstanding amounts regularized, notwithstanding the failure to lend by the Defendant. See Paragraphs 25 and 26 of the Supporting Affidavit. In fact, on 3rd January, 2014, the sum of Kshs. 21,757,547/- was paid to the Defendant.
g. In the Replying Affidavit, the Defendant contends that the 3rd Plaintiff breached the terms of the letters of offer. This is in contradiction to the statutory demands for breach of the debentures.

[16] The Applicants are convinced that the ripple effect of the above actions by the Defendant was to create a financial crisis in the 3rd Plaintiff and to the general business of the Plaintiffs. The financial crisis resulted in the 3rd Plaintiff not being able to discharge its financial obligations to

its creditors and suppliers. See Paragraphs 10 and 11 of the Supporting Affidavit. As a result, the 3rd Plaintiff was faced with a winding up petition which could not have arisen had the Defendant fully disbursed the financial facilities; the petition which could not have arisen had the Defendant fully disbursed the financial facilities; the petition was made possible solely by the actions of the Defendant. The Defendant now seeks to rely on the filing of winding up proceedings as an event of default. The winding up proceedings were made possible solely by the actions of the Defendant and the Defendant seeking to rely on the same to appoint the receivers further proves its bad faith.

[17] The 3rd Plaintiff is not in default as it has regularized its account by repaying all outstanding instalments of the term loan, and its account is in credit.

Removal of the Receivers: Plaintiffs Case is Very Strong

[18] The Plaintiffs argue that they have established a prima facie case for the removal of the receivers. Critically, the Plaintiffs urge they have established that the charges and debentures are unenforceable, that the charge documents are invalid as the Plaintiffs are fully owned by foreigners, the appointment of the receivers was in bad faith, the Defendant has created the crisis in the 3rd Plaintiff, some of the property which the receivers have taken over belong to third parties (whose proprietary rights will be defeated in the event they are sold), the Defendant fundamentally breached the very same contracts that it is seeking to enforce. These are all issues that establish the prima facie case of the Plaintiffs.

[19] The Applicants further submitted that the receivers are not acting in the best interests of the 3rd Plaintiff and are keen in cannibalizing the assets and selling the company and its assets at a throw away price. The actual acts complained of are at Paragraph 27 of the Supporting Affidavit. It is trite law that where receivers act negligently and against the interest of the company, that is a sufficient reason for their removal.

[20] The Applicants contend that the Defendant is well aware the business of the 3rd Plaintiff is the sale and export of flowers. By refusing to take care of the flowers, cut and sell the same, it is evident that the receivers are not acting in the best interests of the company. It is clear that the activities of the receivers will lead to the ultimate death of the 3rd Plaintiff. This will lead to damage that is irreparable. The Defendant is keen to clog the Plaintiffs equitable right of redemption. The right can only be protected by the way of an injunction and the removal of the receivers. The balance of convenience tilts in favour of the Plaintiffs who have proved that they are not in debt and that the value of the assets by far outstrips the amount claimed by the Defendant. In **BALOZI HOUSING v SHELTER AFRIQUE (2007) eKLR,** the court considered the balance of convenience as being in favour of the chargor whose assets were by far valuable than the amount that was claimed by the chargee.

Ringera J. (as he then was) in the case at **JAMBO BISCUITS (K) LTD. v BARCLAYS BANK OF KENYA LTD. ANDREW DOUGLAS GREGORY AND ABDUL ZAHIR SHEIKH (2003) 2EA 434** stated;

> ***"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''.***

The Defendants opposed application

[21] The defendant opposed the Plaintiffs application dated 28th of February, 2012. They reproduced the prayers and the grounds on which those prayers were premised in the way they appear in the application.

1. The court is to determine if he Plaintiffs are entitled to :-

a. An injunction restraining the Defendant or its agents from advertising or offering for sale, or purporting to sell, or in any other was alienating all those pieces or parcels of land known as:-

. Land Reference Number 10854/60 (Title No. I.R 87312), in the name of Rhea Holdings Ltd;

. Land Reference Number 12248/19, 12248/21, 12248/38, 25261 and 25262 in the names of Surya Holdings Limited; ("charged properties")

b. An injunction restraining the Defendant or its agents from appointing a receiver manager, liquidator, or any other person whatsoever, to interfere with the status, management or operations of the Plaintiffs.
c. An injunction to compel the Defendant and its appointed Receivers and Managers, Kieran Day and Ian small or any other receiver or manager or agent appointed by it, to leave the premises of the 3rd Plaintiff.
d. An order to lift the receivership placed on the 3rd Plaintiff by the Defendant.

2. The grounds upon which the orders are sought is that-;

a. The Defendant is alleged to have unlawfully appointed receivers over the 3rd Plaintiff and is keen in exercising its statutory power of sale over the properties.
b. The Defendant defaulted in its contractual obligation to disburse facilities that it extended to the 3rd Plaintiff by advancing only part of the facilities since, on 23rd May 2013; the Defendant declined to allow the 3rd Plaintiff to utilize the overdraft facilities and letters of credit and recalled the facilities.
c. The appointment of receivers of the 3rd Plaintiff was in breach of the order made on the 22nd of October, 2013 in Winding up Petition No. 12 of 2013. Further the appointment breached a Securities Sharing Agreement between ICICI Bank Ltd and the Defendant.
d. The receivers have since their appointment crippled the business of the 3rd Plaintiff, to the detriment of all the Plaintiffs, as the 3rd Plaintiff is not able to service its obligations to the Defendant at the moment.
e. The appointment of the receivers over the 3rd Plaintiff was premature, in bad faith, and oppressive.
f. The charges and Debentures held by the Defendant as security for the various facilities advanced to 3rd Plaintiff are void since the Plaintiffs are wholly owned by non-Kenyan citizens and the same is in breach of preemptory statutes and laws of Kenya.
g. The Defendant has Levied unconscionable, oppressive and illegal charges and interest on the facilities extended to the 3rd Plaintiff which is double the principal amount and clogging the chargor's equity of redemption.
h. The Defendant's conduct is actuated by malice and is part of powerful politicians' and businessmen's plan to acquire the suit properties through predatory tactics on the part of the Defendant.
i. The receivers appointed over the 3rd Plaintiff are acting wantonly exposing the Plaintiffs to losses and risks of claims.
j. The Plaintiff will suffer irreparable harm and injury that cannot be compensated by damages.
k. The Plaintiffs are ready and willing to comply with any conditions which the Court may deem fit to impose for grant of the orders sought.
l. The interest of justice will best be served with grant of the orders sought.
m. The Plaintiffs have a strong prima facie case with a very high chance of success.
n. The conduct of the Defendant is beyond the bale of law and equity.

Applicable Legal Principles: the Respondents' view

[22] The Respondents urge that for the orders sought to issue, the Plaintiffs must show that-:

a. They have prima facie case that can succeed;
b. That an award of damages cannot adequately compensate them; and
c. The balance of convenience tilts in favour of granting the orders.

[23] The conduct of the Plaintiffs is also relevant since the remedy sought is equitable and cannot therefore be availed to a party whose conduct has been inequitable.

[24] There is no dispute that receivers over the 3rd Plaintiff have already been appointed. The order seeking to restrain their appointment cannot, therefore, be granted. As for the orders that seek the removal of the receivers, this would constitute mandatory injunctions which are only available where a clear case is made out and special circumstances shown to warrant the removal of the receivers and where the Plaintiffs themselves have not breached any of their obligations to the Defendant. See the holding in the case of **KENYA BREWERIES LIMITED v OKEYO (2002) 1EA 109.**

[25] The Respondents analyzed the issues raised in the application to be:

a. **Did the Defendant fail to avail all facilities that it granted the Plaintiff or otherwise breach its obligations under the facilities?**

[26] The Respondents discern that the evidence supporting the claim by the Plaintiff is in the two affidavits sworn by Shireesh Jain filed on the 3rd of March, 2014 and 18th of March, 2014 which show that the Plaintiffs entire case is built on the allegation that the Defendant breached its obligation to avail the overdraft facility and letters of credit. Amazingly, the only evidence submitted to support this allegation is the bare statement at paragraph 15 of the affidavit filed on 3rd of March, 2014. The date of the alleged breach or breaches is not stated in any of the affidavits filed on behalf of the Plaintiff. Ground no 9 on the face of the application; however, alludes to the breach specifically being on the 23rd of May 2013 while the Plaint at paragraph 15 claims the breach was on or about the 21st of May, 2013. There is not a single letter or e-mail annexed to the affidavits or any evidence of any oral communication showing that there was ever any complaint in connection with the alleged breach or that the alleged breach was ever raised before this suit was filed. Not even the first correspondence between the current advocates for the Plaintiff and the Defendant's advocates alluded to this alleged breach. That letter is at page 301 of the affidavit of Shireesh Jain sworn on the 3rd of March, 2014.

Is there prima facie evidence to support the alleged breach?

[27] It is submitted by the Respondent that the evidence adduced by the Plaintiffs, even on prima facie basis, fails to support the allegation that the Defendant breached its obligation to avail Letters of Credit and Overdraft facility from around 21st of May, 2013. There is no dispute that the term loan was disbursed to the 3rd Plaintiff. The complaint, as couched in ground 9 of the application, is that the 3rd Plaintiff was not allowed to utilize its overdraft facilities and letters of credit from the 23rd of May, 2012. The Defendant has through the affidavit of Alfornse Kisilu filed on 11th of March, 2014 shown the true position to be that the 3rd Plaintiff breached the terms of the facilities even before 23rd May 2013 and was therefore not entitled to continue enjoying the overdraft that he had been granted or letters of credit facility. In this regard, the Defendant has shown, and the Plaintiffs have not denied that-;

a. The term loan for USD 2,590,000 was disbursed on the 27th of December, 2012.
b. Monthly repayment was pegged at USD 52 127.36 on the basis of clause 4.1 of the letter of offer, as the loan was to be repaid in 60 months on the last day of each month commencing from the date of the initial drawdown.

c. Under clause 10.1.1 of the letter of offer, **any default would lead to the entire loan becoming immediately due and payable.** (The relevant part of this offer letter is at pages 18 and 19 of the bundle annexed to the affidavit of Shireesh Jain filed on the 3rd of March, 2014).
d. The 3rd Plaintiff made the first repayment instalment on the 31st of January, 2013 but later **failed to make repayments due at the end of February, March and April, 2013 as is evident from the statement of accounts which are in the exhibit annexed to the affidavit of Alfornse Kisilu.**
e. At that point, in accordance with **clause 10.2 the entire debt, under that facility becomes due and payable.**
f. Efforts were made to accommodate the 3rd Plaintiff, on a without prejudice basis to the rights of the Defendant/Respondent that had accrued, but the 3rd Plaintiff failed to make proposals that were acceptable to the bank. This is evident from correspondence annexed to the exhibit produced by Alfornse Kisilu through his affidavit.

[28] The Respondent made further arguments. As regards the General Short Term Banking Facility which incorporated the Overdrafts, Letters of Credit, the terms agreed between the Plaintiff and the Defendant in the letter of offer dated 9th of May, 2012 at pages 28 to 48 in the exhibit produced by Shireesh Jain in his affidavit filed on 3rd of March, 2014-;

a. Clause 3.a (page 29) made repayment strictly on demand without any obligation on the defendant to give notice.
b. Clause 7.4 (page 36) made it **a condition that the 3rd Plaintiff would route 100% of its turnover through the Defendant.**
c. Under clause 8.1.2 (page 38) any breach of the conditions of this facility or any other facility to the 3rd Plaintiff **would render all sums under the facility due and payable. The extension of the facilities would end.**

[29] Accordingly, the Respondent argued, the 3rd Plaintiff's failure to make repayment of the term loan constituted an event of default of all the facilities. To compound the situation, the 3rd Plaintiff does not deny that in blatant breach of the terms of the General Short Term Banking Facility which incorporated the Overdrafts, Letters of Credit, opened other accounts with Equity Bank and Prime Bank and failed to route 100% of its turnover with the Defendant/Respondent. After the said defaults, the obligation by the Defendant/Respondent to continue making any advance or accommodation to the 3rd Plaintiff ceased. A court of law cannot re-write a contract between parties. Parties are bound by their contract unless coercion, fraud and undue influence are pleaded and proved. See the case of **RICO STEEL FABRICATORS LTD & ANOTHER v COMMERCIAL BANK OF AFRICA LTD & 3 OTHERS [2004] eKLR,** and **NATIONAL BANK OF KENYA LTD v PIPEPLASTIC SAMKOLIT (K) LTD [2002] 2 EA 503 (CAK).** The 3rd Plaintiff cannot expect the court to change the agreements that provided that default in making repayment of one instalment of the term loan would result in the entire loan becoming due and payable and would result in obligations of the defendant under other facilities being extinguished. Similarly, the consequence of the 3rd Plaintiff failing to bank its entire turnover with the Defendant cannot be re-written by the court.

[30] The other breach alleged by the Plaintiff is that the Respondent charged interest on the facilities which was illegal, oppressive or unconscionable. No attempt is made by the Plaintiffs to even suggest that interest charged to the 3rd Plaintiffs facilities accords with the letters of offer. Even if such an attempt were made it would amount to no more than a dispute as to amount due, which in law cannot form the basis for stopping a chargee from exercising its statutory power of sale. **See page 20 of the NATIONAL BANL CASE (ibid).**

Alleged mismanagement of 3rd Plaintiff's assets by the Receivers

[31] The Respondent associated itself with the replies made by the receivers to alleged misconduct of the receivers in paragraph 33 (f) of the affidavit filed on the 3rd of March, 2014.

The receivers' response is in the affidavit of Ian Small filed on the 11th of March 2014. Suffice it to say, that bare allegations made against the receiver ought not to be upheld when considered against the detailed evidence submitted by the receiver. Was the appointment of the receiver a breach of the orders of 22nd of October, 2013 in Winding up Cause 13 of 2013 and the security share agreement between the Defendant and ICICI Bank Limited? Whether the appointment of receivers over the 3rd Plaintiff breached any order in winding up cause no 12 of 2013, is the subject of the application dated 11th of February, 2014 filed in those proceedings. It is an abuse of the court process for this issue to be raised in these proceedings when it is still alive in the winding up cause. That said, in law, the existence of a winding up cause against a company cannot prevent a debenture holder from appointing a receiver. See the literally work by **Gavin Lightman and Gabriel Moss** (supra)

[32] The Respondent posit that the Applicants have alleged that the appointment of receivers is in breach of an agreement that the 1st Defendant has with ICICI Bank on sharing securities provided by the Plaintiffs. The existence of the agreement is not disputed. The Plaintiffs are not party to that security sharing agreement. They have no rights or duties under it. The Defendant has informed ICICI Bank of the appointment of receivers and the validity of the appointment has not been challenged by ICICI Bank. The information submitted to ICICI Bank is in the exhibit annexed to the affidavit of Alfornse Kisilu filed on the 11th of March, 2014 at pages 31 to 34.

[33] The Respondent posed: Is it proper for the Plaintiff to seek orders on the basis that the receivers appointed over the 3rd Plaintiff are agents of the Defendant? The Respondent takes issue with the view taken by the Plaintiffs on this matter and the way they have phrased their prayers in the application; they have misapprehended the legal status of the receivers as they look at the receivers of the 3rd Plaintiff as agents of the Defendant. It is unfortunate that an elementary point of company law that receivers appointed under debenture become agents of the company, is the subject of contention in these proceedings. At page 154 of the exhibit annexed to the affidavit of Shireesh Jain filed on the 3rd of March, 2014, is clause 18 of the Debenture pursuant to which the receivers of the 3rd Plaintiff was appointed. That clause shows the receiver so appointed, becomes the agent of the company. Even without going to any legal arguments, by virtue of the debentures, the 3rd Plaintiff and the Defendant agreed that any receiver appointed under the debenture would be the agent of the 3rd Plaintiff. See cases in the Defendants supplementary authorities filed on the 21st of March 2014 at pages 3, 9, 21, 30, 35, 40 and 43 which show that the courts have always considered receivers to be the agents of the companies in respect of whom they are appointed. **LOCHAB BROTHERS v KENYA FURFURAL CO LTD & OTHERS [1976-1885] EA 257, LUBEGA v BARCLAYS BANK (U) LTD [1990-1994] EA 294 (SCU),** and other cases thereto. In so far as the Plaintiffs' claim that the receivers of the 3rd Plaintiffs are agents of the Defendant is obviously untenable.

[34] The Respondent asked yet another question: Are the Legal Charges given by the 1st and 2nd Plaintiff to the Defendant and the Debentures given by the 3rd Plaintiff void on the basis that the Plaintiffs are wholly owned by non-Kenya Citizens? The Plaintiff asserts that the securities held by the Defendant are void as the Plaintiffs are owned by non-Kenyan citizens. No law is cited to support the contention. On that basis alone that contention cannot hold.

[35] And again the Respondent queried: does the conduct of the Plaintiff deserve any benefit from the court's discretion to grant the remedies sought? The Respondent indicts the Plaintiffs' conduct that it has not been equitable. The 3rd Plaintiff failed to meet its obligation to repay the term loan shortly after it was disbursed. The Plaintiff did not candidly disclose this to the court when they moved the court ex-parte. The 3rd Plaintiff also failed to bank its entire turnover with the Defendant in spite of having agreed to do so. That was aimed at avoiding its obligations to repay the 1st Defendant. Again, the Plaintiff did not candidly disclose this to the court when they moved the court ex-parte. The 1st and 2nd Plaintiffs have been aware of steps being taken to sell

the properties that they gave legal charges to the Defendant. Statutory notices were issued in September, 2013. No explanation is given for the delay in challenging the sale from that time and in particular why the alleged invalidity of the securities has never been raised since. The Plaintiffs have made sensational and alarming claims that well connected politicians and businessmen have conspired with the Defendant to buy the properties charged to the Defendant without adducing any evidence. An unmitigated alarmist who openly and without any justification, disregards his own legal obligations, expressed clearly in a contract he has signed, is surely not one that deserves the favour of equity.

Is the balance of convenience in favour of granting the orders?

[36] According to the Respondent, the Directors of the Plaintiffs have not adduced any evidence that would tilt the balance of convenience in their favour. The task has been left to a person called the group chief executive officer who does not reside in Kenya. The directors of the Plaintiffs do not also reside in Kenya. The plaintiffs now want control of the 3rd Plaintiff given back to persons who do not even reside in Kenya. These are the same people who when they were last in control of the 3rd Plaintiff, there was upheaval with industrial action from workers, and numerous creditors in hot pursuit before the alleged breach by the Defendant of its obligations to disburse facilities to the 3rd Plaintiff. The 3rd Plaintiff was deducting money from employee's dues in the guise of making remittances to 3rd parties but the money was diverted to other things. **See page 204 of the annex to the affidavit of Ian Small filed on the 11th of March, 2014.**

[37] The Respondent submitted that it is strange that the Applicants did not file any answer to the winding up petition facing the 3rd Plaintiff. The Applicant just makes an allegation without any evidence that they are making efforts to settle the debts owed to the creditors in the winding up petition. The consequence of a winding up petition succeeding is liquidation of the 3rd Plaintiff with a sale of all its assets. On the basis of what is before court, it is very likely that the petition will succeed, inevitably the Defendant as secured creditor should not be stopped from realizing its security. In addition, see the statement by the Court of Appeal in **KENYA UNITED STEEL COMPANY v KCB (2005) eKLR** restating the principle that

> ***…..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.***

[38] In connection with the Plaintiffs move to have the receivers appointed over the 3rd Plaintiff, removed, the Respondent submits that no evidence has been adduced to show that the receivers' conduct is seriously oppressive or violates the law or commercial practice or that there is any other compelling reason.

[39] For the reasons stated in these submissions and the affidavits sworn in response to the application, the court ought to dismiss the application.

Submissions by the Receivers and Managers

[40] The receivers and managers also filed an affidavit sworn by Ian Lawson Small and submissions following the order of the court made herein. They opposed the application before me and provided the following specific answers to the allegation by the plaintiff which questioned their qualifications and propriety of their appointment.

The qualification of the receivers and the legality and propriety of their appointment

[41] According to the affidavit sworn by Ian Lawson Small on 11th March, 2014, contrary to the claims by the plaintiff that the receivers are not qualified accountants and thereby putting their

ability to manage the affairs of the 3rd Plaintiff in doubt, the receivers are qualified and experience receivers and in matters of receivership. The document titled inter-bank agreement produced as exhibit "SJ 7" in the affidavit of Shireesh Jain sworn on 28th February, 2014, and which the Applicants seek to rely on particularly clause 3 (d) is undated and unexecuted document, The particular clause provides that unless otherwise agreed, no person shall be appointed as a receiver other than a partner in a reputable firm of accountants practicing in Nairobi. The Respondent makes the following observations on the said document:

i. Assuming the document is authentic, it would be an agreement between the defendant and ICICI Bank Limited (ICICI). It does not confer any rights upon the applicants or any third parties.
ii. If any breach arises from the document, only the party deriving a right from the agreement would be entitled to seek for its enforcement, i.e. ICICI.
iii. The default herein and for which the receivers were appointed does not arise from the document produced or an inter-bank agreement between the defendant and ICICI.

[42] Proceeding on the assumption the said document is authentic, the receivers further observed that Clause 4 of the document provides that nothing contained in the deed shall, inter alia:

i. As between the Borrowers and the Banks affect or prejudice any rights or remedies of the Banks under the securities which shall remain in full force and effect according to their terms as effective securities for all moneys, obligations and liabilities referred to in the securities without limit.

ii. Prejudice or affect the rights of either of the Banks under any guarantee, lien, bill, note, charge or other security from any person other than the respective Borrower.

That alone should deal with the Applicants' argument.

[43] However, the receiver made further observations in relation to clause 4 of the document, that: 1) The rights of the defendant with regard to appointment of receivers, and the powers of receivers, as provided for under Clause 15 of the Debenture dated 8th December, 2013 (the further debenture) and Clause 15 of the Further Debenture dated 10th January, 2013 (the further debenture) are not affected by the provisions of the document produced by the applicants or any inter-bank agreement between the defendant and ICICI; 2) Upon default as provided for in the debenture or further debenture, the defendant was within its right to exercise the power to appoint receivers; and 3) Having taken charge of the 3rd Plaintiff as receivers, the receivers have confirmed default did occur which entitled the defendant to appoint receivers.

[44] The receiver submit that the main consideration in the appointment of a receiver is that such a receiver is familiar with insolvency and can be relied upon to perform the functions of the receiver professionally. They cited **GAVIN LIGHTMAN AND GABREL MOSS, "THE LAW OF RECEIVERS AND COMPANIES," LONDON: SWEET & MAXWELL (1986)** at paragraph 2-02 on page 6 which states that:

> ***"The company's board of directors may seek fresh management talent or have it imposed by its institutional shareholders or bankers as a condition for continuing support. Frequently this takes the form of a "company doctor," who is given the role of restoring the company to good health. His specialist knowledge and his independence of the board and shareholders enable him to take drastic or unpopular measures unembarrassed by considerations of loyalty to colleagues.Equally, the new man can take a balanced view of the company's future viability and trading prospects rather than succumbing to the natural temptation for management and seeking to trade out of difficulties."***
>
> (Emphasis added)

[45] The receivers also urged that they have between them over 40 years' experience as receivers and are highly qualified and experienced. In addition to that, in the present case, the receivers are working with a team of professionals, including professionals in accounting in the floriculture industry. Further, they argued, since the receivers took up their appointment and started running the third plaintiff (the Company), various issues that were derailing operations at the Company have been resolved or are in the process of being resolved by the receivers. These issues include:

i. Widely publicized industrial action by the Company's employees, which the receivers resolved.
ii. The greenhouses which were in a state of disrepair and which the receivers are repairing. This is admitted by the Company.
iii. Plant husbandry and management practices which the receivers have reinstated.
iv. The electricity bills that had accrued, which the receivers are settling. The 3rd plaintiff did not, albeit it is alleged, make any efforts to pay the bills before the receivership commenced.

[45] The receivers pressed on. Paragraph 7-02 on page 69 of **"THE LAW OF RECEIVERS AND COMPANIES,"** (**ibid),** deal with the question whether a mortgagee or debenture holder owes a duty of care to the borrower with respect to the exercise of the power to appoint a receiver and state:

> ***"That a mortgagee owes <u>no duty to care</u> in respect of the exercise of his contractual power to appoint a receiver is clear. At most, he owes a duty to act in good faith. So long as he acts in good faith, if he considers that appointment will serve his best interests, he is under no duty to refrain from doing so…" (Emphasis added).***

Similarly, **"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." (Emphasis added)***

[46] The receivers in this case were appointed by the defendant under a power in law and recognized by the Debenture and Further Debenture. Their appointment was not only legal but also; proper and appropriate, and for the benefit of both the Company and the defendant.

The legal position of the receivers as agents of the Company

[47] **"THE LAW OF RECEIVERS AND COMPANIES" (supra),** at pages 10 to 12, discusses various issues pertaining to receivers that are relevant to the present case. The following extracts are instructive:

i. ***"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."*** (Paragraph 2-07, on page 10)
ii. ***"In the case of floating charge, the creditor has the choice whether to make the appointment. Once the appointment is made, it is then for the receiver to decide whether to carry on the business with the objective of a rescue in the long-term or of a beneficial sale as a going concern in the short term or to close the business and sell up."*** (Paragraph 2-07, on page 11)
iii. ***"If the receiver does continue the company's business, five limitations on his freedom of action***

operate: (a) the receiver will ordinarily be granted power to carry on the company's business as agent of the company…"

[48] **"KERR ON THE LAW AND PRACTICE AS TO RECEIVERS" (16TH EDITION) LONDON: SWEET AND MAXWELL (1983)** at page 331 states that

> ***"Although the receiver is technically the principal, yet of course he is not acting on his own behalf. He is still acting as receiver of the company, and his possession and control is throughout for the benefit of the debenture holders and the company to the extent of their respective interests in the assets he holds."*** (Emphasis added)

[49] The receivers in the present case were appointed by the defendant in the exercise of a contractual right under the Debenture and the Further Debenture. The mere fact of their appointment by the defendant does not, however, make the receivers agents of the defendants. The role of the receivers is to take possession and control of the company, and to exercise that control for the benefit of the debenture holder (the defendant) and the Company to the extent of their respective interests in the assets. In exercising this mandate, the receivers are the agents of the company. Even if there was any doubt as to the general legal position of a receiver appointed by a debenture holder as an agent of the borrower/company, and it is submitted there is absolutely no doubt, the Further Debenture herein, at Clause 18, at page 154 of the exhibit annexed to the supporting affidavit of Shireesh Jain, provides expressly that "Every receiver shall be the agent of the Company … The receivers are agents of the company and that position of law has long been settled – see **LOCHAB BROTHERS V KENYA FURFURAL CO. LTD. [1983] KLR 257** and also more recently **JOSEPH ASHIOYA & 165 OTHERS V KENYA UNITED STEEL CO. 920060 LTD. & ANOTHER [2013] eKLR**. It is useful to set out what Radido J had to say at paragraph 20 on page 2 of the decision in the latter case:

> ***"The receiver becomes on appointment, not the agent of any other company such as the 2nd Respondent but the company placed under receivership."***

The general position of law is that the receiver remains an agent of the company until commencement of liquidation when such agency determines. And even then, if the receiver continues to carry on business, he does not in a normal case become an agent of the Debenture-Holder, but a principal. This legal position is explained in "Kerr on the law and practice as to Receivers" (supra) at page 330. There should therefore be no doubt whatsoever that the receivers in the present case are agents of the Company.

[50] The Respondent sees the law above to be of great significance; 1) in determining who, between the receivers and the directors of the Company, are best placed to look after the Company's and debenture holder's interests; and 2) in that it deals a fatal blow to the Applicants' argument that the defendant must remove its agents from the Company's premises. In 1) above, the court has to bear in mind that: a) The directors of the Company have already brought the Company to its knees; and b) The Company has been in default including failure to make payment in accordance with the contract and is now faced with a winding up cause. A debenture holder who has a floating security upon the undertaking and all the property, present and future, of the company, is entitled to the appointment of a receiver of the property subject of the debenture if their security is in jeopardy. – See the case of **IN RE LONDON PRESSED HINGE COMPANY LTD. CAMPBELL v LONDON PRESSED HINGE COMPANY LTD [1905] 1 Ch. 576**.

Whether the applicants are entitled to the interlocutory injunction sought

[51] The receivers are of the view that the Applicants need to satisfy the thresholds of issuance of interlocutory injunctions as set out in the case of **GIELLA v CASSMAN BROWN & CO. LTD [1973] EA 358** that:

i. ***The applicant must show a prima facie case with a probability of success.***

ii. ***An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and***
iii. ***If the court is in doubt, it will decide an application on the balance of convenience.***

[52] The Respondent clarifies further that the court defined *prima facie case* in the case of **MRAO LTD v FIRST AMERICAN BANK OF KENYA LTD [2003] KLR 125** as follows:

> ***"...a prima facie case is a case which, on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."***

But, according to the Res[pendent, the nature of the orders sought against the receivers are mandatory interlocutory injunctions whose grant is not only governed by the test in **GIELLA v CASSMAN BROWN** (supra), but is subject to an additional qualification that a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases. On this see the case of **KENYA AIRPORT AUTHORITY V NEW JAMBO TAXIS NBI. CIVIL APPEAL NO 29 OF 1997 (C.A),** where the Court of Appeal, while applying the decision of Megary J. (as he then was) in **SHEPHERD HOMES V SANDHAM [1979] 3 WLR 348**, held that:

> ***"…an order which results in granting a major relief claimed in the suit, which may not be granted at final hearing, ought not to be granted at an interlocutory stage."***

In the **Kenya Airport Authority case** (supra), the Court of Appeal cited with approval the passage in "Halsbury's Laws of England," Volume 24, at paragraph 948 to the effect that:

> ***"A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff … a mandatory injunction will be granted on an interlocutory application."***

[53] The receivers submit that the present suit neither satisfies the requirements for grant of an interlocutory, nor the threshold for the grant of a mandatory interlocutory injunction. Having been in control of the Company and having checked the records and studied what was going on prior to their appointment, the receivers can confirm that events of default occurred on the part of the company before the defendant exercised the power to appoint receivers. A clear event of default is the filing of the winding up petition – see clause 14(e) of the Debenture and Further Debenture at pages 114 and 153, respectively, of the exhibit annexed to the supporting affidavit of Shireesh Jain. The 3rd Plaintiff having defaulted on the contract with the defendant, the defendant is entitled and empowered under the contract to appoint receiver; and the 3rd Plaintiff cannot seek to challenge the process of receivership. On that basis, the applicants have not shown a prima facie case with a probability of success. Secondly, the Applicants have not established that they will suffer irreparable loss which cannot be adequately compensated by the award of damages; the applicants have failed to show how they will suffer loss if the injunction sought is not granted. Lastly, 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 NYAKAMBA OKONG'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."***

Parties in a contractual relationship are bound by the contract. The value of the security is not a basis to challenge appointment of receiver especially where the bank is realizing security as per the contract. It

should be noted, as already established, that the receivers are not only the agents of the borrower but also exercise their control over the property for the benefit of the both the borrower and the bank to the extent of their respective interests in the assets.

[54] The Respondent takes the view that, in the event that the applicants are successful in the suit, they will be adequately compensated by an award of damages as the value of the property given as security is capable of being ascertained. See what the Court of Appeal in **JOHN NDUATI KARIUKI T/A JOHESTER MERCHANTS v NATIONAL BANK OF KENYA LTD. [2006] 1 EA 96** held, that:

> ***"A bank has no money of its own and it is axiomatic that it uses funds to trade with. The applicant having obtained a large amount of those funds and had full benefit of it and having offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents, cannot be heard to say that the securities are unique and special to him as the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capacity has not been challenged."***

The receivers submit that the Applicants have not demonstrated a prima facie case nor shown any irreparable loss that would be suffered. Even upon consideration of a balance of convenience, it has been demonstrated by the receivers that the company has been better managed since they took control of it. The defendant has injected funds to ensure that the operations of the company continue. Should the situation revert to what it was before the receivers were appointed, even the fate of the employees whose salary arrears dated back to October 2013 will be in jeopardy. The receivers found the company unable to trade due to industrial action by the employees, and they have since resolved the issue. The company, the business of the company and the employees of the company are all in a better position with the receivers in charge.

[55] The Respondent is convinced that the Applicants have not demonstrated that any special circumstances exist which would entitle them to a mandatory injunction. Similarly, there are no compelling reasons for the court to order the receivers to leave the premises of the 3rd Plaintiff. On account of the foregoing, the receivers submit that the plaintiffs' application dated 28th February, 2013 lacks merit and should be dismissed with costs to the respondent and the receivers.

COURT'S RENDITION ON THE MATTERS RAISED

ISSUES

[56] The tempo and pitch with which counsels submitted in support of their respective standpoints in this matter, is reminiscent of a hotly contested matter. And for their worth, those submissions have been reproduced above ***in extenso***. Because the arguments in both divides were expressed in absolute simplicity, conciseness and clarity, the court finds no difficulties in discerning the issues for determination, which are;

> ***a) Whether the contracts between the 3rd Plaintiff and the Defendant herein are enforceable***
>
> ***b) If answer to a) is in the negative, whether the right to appoint receivers and managers accrued to the Defendant; here breach of the said contracts by the 3rd Plaintiff must be established***
>
> ***c) If answer to b) is in the affirmative, whether the Receivers and Manager appointed herein are qualified to be appointed as receivers and Managers.***

[57] The issues the court has formulated are also attended to by other strands of arguments which belong to one or more of the issues or are the converse of the issues above; and those

arguments too, will be accorded appropriate proportion of importance and accordingly determined within the particular issue or issues to or under which they fall or relate. For purposes of this Ruling, the terms Applicants, Respondent, 3rd Plaintiff and Receivers will be used as appropriate or as the case may be.

CASE OF INTERLOCUTORY AND MANDATORY INJUNCTIONS

[58] Two types of relief are sought in the application; a temporary injunction, and a mandatory injunction. The temporary injunction is to restrain the Respondent; 1) from selling or in any way alienating the suit property; and 2) from appointing receivers and managers to interfere with the status, management or operation of the Plaintiffs. The mandatory injunction entails lifting of the appointment of, and compelling the Receivers and Managers KIERAN DAY and IAN SMALL to leave the premises of the 3rd Plaintiff. What are the legal thresholds ordained in law for granting of these remedies?

Grant of temporary injunction: The Legal thresholds

[59] The threshold in granting a temporary injunction, the way I know it, is as set out in the case of **GIELLA v CASMAN BROWN** and as they have evolved in later decisions especially in cases where there have been violations of law or public interest is involved. The basic thresholds are:

i. ***The applicant must show a prima facie case with a probability of success.***
ii. ***An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and***
iii. ***When the court is in doubt, it will decide the application on the balance of convenience.***

Grant of mandatory injunction: The Legal thresholds

[60] But, the test applied in granting a mandatory injunction at an interlocutory stage is as set out in the case of **Kenya Airport Authority case (supra),** where the Court of Appeal cited with approval the passage in "Halsbury's Laws of England," Volume 24, at paragraph 948 to the effect that:

> ***"A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff … a mandatory injunction will be granted on an interlocutory application."***

Ringera J (as he them was) in the case of **SHOWIND INDUCSTRIES LTD v GUARDIAN BANK LTD & ANOTHER [2002] 1 EA 284 (CCK)** also gave a good rendition on the test in granting mandatory injunction to be:

> ***''As I understand the law, an interlocutory mandatory injunction is granted very sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the applicant's conduct does not meet the approval of a court of equity or his equity has been defeated by laches''.***

[61] I will, therefore, determine the prayers sought herein within the legal dimensions I have set out above.

PRIMA FACIE CASE WITH PROBABILITY OF SUCCESS

[62] In order to come to the conclusion whether the Applicants have established a prima facie

case, I need to determine several issues. I will start with; whether the debentures herein are unenforceable.

Argument on the unenforceability of the Debentures herein

[63] The Applicants have argued that the Debenture on which the Defendant sought to rely upon in appointing the Receivers and Managers herein is unenforceable because it is based on past consideration, which in law, is not good consideration. According to the Applicants: Recitals A and B of the Debenture dated 8th December, 2010 show that the debenture was created for existing indebtedness of the 3rd Plaintiff. The Charges marked ("SJ 5" in the Supporting Affidavit of Shireesh Jain sworn on 28th February, 2014), were also created on 10th January 2013, after disbursement of the facilities. Equally, the Further Debenture of 10th January 2013 is based on the existing debenture of 8th December, 2013 and it is also unenforceable. The financial facilities of a term loan of USD 2 590 000, a General Short Term Banking Facility (Not limited to overdrafts, letter of credit and guarantee by bank facility) of USD 2 500 000 and Letters of Credit of USD 1 500 000, were made available to the 3rd Plaintiff on 27th December, 2012, before the creation of the Further Debenture. To the Applicants, therefore, these Debentures were based on past consideration, i.e. past indebtedness of the 3rd Plaintiff, and hence unenforceable and void ab initio. The Applicants quoted a passage in **CHITTY ON CONTRACT** on past consideration to support the position they have taken.

[64] These arguments are fantastic and quite attractive; admittedly, they may easily create an impression that this is a case of past consideration until one realizes that the subject matter of this case is debenture. Consider for one moment what Ringera J in the case of **SHOWIND INDUCSTRIES LTD v GUARDIAN BANK LTD & ANOTHER (supra)** said that:

> ***''…it is very trite law that a contract under seal need not be supported by a consideration for its formal validity. The debenture here is such an instrument''.***

In addition to the above proposition of law, it is worth to state briefly what a debenture is or entails. Debentures take varied forms, say, sinking-fund debenture, subordinated debenture, convertible debenture, convertible subordinated debenture and so on. However, in current jurisprudence and commercial practice, a debenture is a legal instrument used to indicate acknowledgement of indebtedness given under seal by an incorporated company, containing a charge on assets of the company, and carrying an agreed rate of interest until payment in full. It is a company's security for a monetary loan which usually creates a charge on the company's assets or property. A Debenture also contains other terms and covenants which are agreed by the parties, such as; interest payable, periodic repayments, default clauses, restrictions on the company in dealing with the floating charges, and so on and so forth. A debenture could relate, and is the case here, to existing debts and future debts. That is the nature of a debenture as I know it in law. Therefore, and without administering any sudden shock, I find and hold that the debentures herein are enforceable; they were duly executed under the seal of the company; do not offend any law or law of contract. The legal charges thereto, were also created pursuant to debentures herein wherein the Chargor Borrower covenanted to procure the Chargor to charge the Premises to the Defendant by way of legal charge as collateral security for all moneys, obligations and liabilities secured by the Debenture. That is good consideration in law. The argument by the Applicants around the unenforceability of the debentures and charges thereto for being founded on past consideration, therefore, fails and are rejected. See the **BLACK'S LAW DICTIONARY, 9TH EDITION** on these legal issues.

Right to appoint Receivers and Managers not accrued

[65] Now that I have found that the debentures herein are enforceable, the other question would be: Had the right to appoint Receivers and Managers accrued? The Applicants argued that the Respondent breached the very contracts they seek to rely upon by not disbursing the entire facility

to the 3rd Plaintiff; they did not allow the 3rd Plaintiff to use the overdraft and letters of credit as agreed. They, therefore, argued that the said breach by the Respondent is responsible for the difficult financial situation the 3rd Plaintiff found itself in, and the eventual inability to meet its obligations under the charge. The Respondent on the other hand argued that the 3rd Plaintiff breached the terms of the debentures herein and of the agreements contained in the letter of offer herein particularly clause 10.1.1 of the letter of offer which provides that….**any default would lead to the entire loan becoming due and payable.** It is on this reference to letter of offer that counsel for the Applicants placed serious objections about the legal status of the letter of offer herein. And I wish to settle that aspect first in the following manner.

Status of Letter of Offer in a Loan transaction

[65] The place of documents preceding Charge, to wit, Letter of Offer and other related correspondences in a loan transaction, has received fairly comprehensive treatment by the courts. Without multiplying the numerous decisions on the issue, I will quote the decision of Ringera J (as he then was) in **MORRIS & COMPANY v KCB LTD [2003] 2 EA 605,** that parties to a contract must be held up to their bargain. Also I am content to quote a work by Kimondo J in the case of **JOHN MURIITI GACUGO NG'ANG'A v HFCK LTD & ANOTHER NBI HCCC NO 15 OF 2005 (UR)** that:

> ***''…..The 1st Defendant had pleaded in paragraph 4 of its amended statement of defence that upon execution of the charge instrument, the letters of offer were not relevant to the contract. I disagree. The letters of offer executed by the parties are relevant in forming the foundation of the contract and the intention of the parties. Of course, as between them and the charge instruments, the charge is superior and if there is any conflict, then the terms of the charge would supercede any other agreement between the parties''.***

Mabeya J expressed similar opinion on the matter in the case of **CHRISTOPHER NDOLO MUTUKU & ANOTHER v CFC STANBIC BANK LIMITED [2013] eKLR.**

[66] Accordingly, the Letter of Offer and any other pertinent document in the bargain of the loan which eventually leads to a charge, bind the parties in so far as they are not inconsistent with the charge, and such documents preceding the charge are useful in ascertaining the intention of the parties. Quite apart from the legal position I have stated, all the debentures herein and the charges created thereto acknowledge the letters of offer and agreements in the bargain leading to the debt herein and there is nothing in those letters of offer and agreements which is inconsistent with the debenture thereto. See for instance clauses 13(q) of the Debenture dated 8.12.10, Clause 6(q) and 7 of Charge dated on 10.1.2013. The agreement of the parties in the letter of offer herein particularly clause 10.1.1 provided that….**any default would lead to the entire loan becoming due and payable.** I have also looked at the debentures as well as the charges thereto, and all contain clauses to the effect that all money secured by the Charge shall immediately become due and payable on the occurrence of breach or default by the Applicants on any term or condition of any facility secured by those debentures, charges or other credits, agreements in any facility letter, letter of commitment, or other agreement exchanged with the Bank on, before or after the date of the charge. If that be the position, the next question would be: whether the 3rd Plaintiff breached any of the facilities afforded to them by the Defendant. There is no doubt, and this has been acknowledged by the 3rd Plaintiff, that the 3rd Plaintiff is in arrears of the monthly repayments under the agreements herein. Except; the Applicants argued that the said 'breach' was occasioned by the Defendant. The Defendant on the other hand accuses the 3rd Plaintiff of breach, hence the appointment of the Receivers and Managers. The counter-accusations brings me to the point where I should ask whether this is a case falling within the doctrine of *in pari delicto* whereat the court will not ordinarily involve itself in resolving one side's claim over the other; and will be guided by the practice that the law leaves them where it finds them, in accordance with the maxim, *in pari delicto potior est conditio defendentis et possidendis.* Or, is this an appropriate

case where the court should take the view that whoever possesses whatever is in dispute may continue to do so in the absence of a superior claim. Judicial decisions on this subject are legion and I do not wish to multiply them except I am content to adopt a work of this court in **NBI HCCC NO 516 2013 C-HEAR KENYA LIMITED v LIQUID TELECOMMUNICATION KENYA LIMITED [2014] eKLR** on the said doctrine. The rendition below will unravel that issue and eventually determine whether the right to appoint receivers and Managers under the Debentures crystallized or whether the charged properties will be sold or not.

Breach of contract

[67] Before I consider this issue in a deep manner, there is one matter of preliminary importance. From the outset, there are occurrences particularly presentation of a petition for the winding up of the 3rd Plaintiff which would amount to an event of default under the debentures and the charges thereto and which entitle the Defendant to demand for immediate payment of the debt herein. See clauses 14 of the Debenture and 7 of the charges. I have decided to state that fact for three reasons. First, the issue was dragged into these proceedings. Second, it is a fact that there is a NBI WINDING UP CAUSE NO 12 OF 2013 against the 3rd Plaintiff which is still pending in court despite claims by the Applicants that the Petitioner had signified an intention to withdraw the said petition. And third, I handled the said petition at some point specifically on an order which had been sought to restrain the appointment of the Receivers and Managers in the instant case. I am however, hesitant to make remarks which might be prejudicial to that petition since it is yet to be determined; the less I say about it here the better. The said winding up cause is only relevant to these proceedings to the extent that there is an existing petition for the winding up of the 3rd Plaintiff which constitutes event of default.

Right to appoint receiver accrued

[68] The foregoing notwithstanding, the other more fundamental allegations of breach are that 3rd Plaintiff breached the contract herein. I am not convinced that the 3rd Plaintiff obeyed their agreement to route all the proceeds of business through the Defendant Bank. The allegation of breach in that behalf was not controverted by the 3rd Plaintiff. There is also no doubt the 3rd Plaintiff fell into arrears in repayment of the debt herein. The breach occurred before the other facilities had been disbursed. The Defendant may not, therefore, be said to have caused the breach. The Defendant, in the circumstances was justified to recall the entire loan and stop further disbursement of the overdraft and the letter of credit. I have already decided that a breach of any of the terms of the agreements herein would entitle the Defendant to make a demand for immediate repayment of the debt and appoint a receiver in default thereof. The overdraft facility and the letter of credit were also subject to observance of all the other agreements and conditions on any facility by the Defendant to the 3rd Plaintiff. The letter of offer for the overdraft facility, letter of credit and the debentures thereto contain clear default clauses and appointment of receivers on default. The material before me establishes that the 3rd Plaintiff was in breach; an act which often rolls back the magnanimous hand of Equity with which it would have granted a remedy and it becomes difficult to excite any lavish equitable remedy to remove the receivers as shall become clear in my decision. Accordingly, the right to appoint receivers accrued.

Removal of Receivers and Managers; a case for Mandatory Injunction

[69] I have already determined that the right to appoint receivers accrued. But the Applicants argued that the appointment of IAN SMALL and KIERAN DAY as the Receivers and Managers is void, against the law and oppressive. They have advanced other reasons apart from the one based on the non-crystallization of the right to appoint a receiver under the debentures. Those reasons are; 1) that they are not qualified as they are not accountants in accordance with Securities Sharing Agreement with ICICI; 2) they are cannibalizing the assets of the Applicants in order to sell it off in undervalued price; and 3) they were appointed during the pendency of a court order.

[70] Let me start with the last one. I said this earlier, the winding up cause is pending and the less I say about it the better. I made an order in the said cause in which I set aside the orders of temporary injunction I had issued against appointment of the receivers herein for non-disclosure of material facts by the Company-3rd Defendant therein. That should be enough for the purpose of this ruling. I say no more. With regard to the qualifications of the receivers, I do not think there is anything to show that they are not qualified to do the work of receivers of companies; they have attested to the fact that they possesses vast experience in receivership of companies or enterprises. The qualifications set out in Clause 3(d) of the so called Inter-Bank Agreement purportedly between the Defendant and ICICI Bank means nothing in a judicial proceedings such as these, for it is not dated, not executed by signing and under seal of the purported companies thereto. It has not been authenticated and no other or independent evidence has been led on the purported Inter-Bank Agreement which may grant it a shred of evidentiary value. I will treat it as such. The allegations that the receiver managers are cannibalizing the assets or that they are acting in a predatory manner by stripping the assets of the company or that they have colluded with powerful politicians, to sell off the charged assets at a throw away price have not be proved. In the absence of evidence that the receivers are acting in a manner that is seriously oppressive or which glaringly exhibits sheer incompetence, I find no compelling reason to interfere with their appointment. To that end, I will adopt a statement in **KENYA UNITED STEEL COMPANY v KCB (2005) eKLR** that:

> ***''…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''.***

[71] Accordingly, I decline to order the removal of the receivers from the premises of the 3rd Plaintiff.

What about the interest of justice?

[72] The Defendant did not disburse the overdraft and the letter of credit facility. Perhaps, those advances may have ameliorated the situation. But that is not the point as the Defendant properly declined to advance those facilities following the breach by the 3rd Plaintiff. But two important issues of justice continue to echo in the mind of the court. The first one is; what is the position of the chargors herein? And the other one is; what damage will be caused by the sale of the charged property or the entire enterprise of the 3rd Plaintiff? Courts of law have held that…once a property is given as security it becomes a commodity for sale and the fact that the value thereof far outstrips the debt does not amount to irreparable damage which is not compensable in an award of damages. That is perfect. But in another sense, I find a lot of persuasion in the submissions by the Applicants based on clogging of the Equity of redemption of the chargors. The law- unlike before where equity of redemption was left to case law- has specifically provided for equity of redemption in section 89 of the Land Act, and no legal instrument or law that may entitle a chargee to foreclose the equity of redemption in charged land except in so far the law permits. The current laws on land have provided for elaborate procedures for enforcement of the chargee's power of sale of the charged property. That law has not changed and will still prevail even in cases where the Receivers and Managers of a company are seeking to sell the charged properties.

[73] Together with the foregoing, I would want to consider the other concern on the general well-being of the enterprise in the light of loss and injury that the company would suffer unless an order restraining the Defendant from selling the charged properties and the entire enterprise are granted. I am aware that there is a winding-up cause **NBI HC WINDING-UP CASE NO 12 OF 2013**, which is also coming up for directions before me on 11th of June, 2014-the date of delivery of this ruling-and there are other creditors who too have charges over the suit properties and rank in *pari pasu* with the Defendant. Looking at all these circumstances, I have no doubt that sale of the entire enterprise including the charged properties will occasion irreparable damage especially

given the general prescription in Kenya, that receiverships would probably result in complete destruction of the business and goodwill of the company. But one thing is comforting in the instant case; the Defendant and the Receivers have denied that there is a scheme which has been contrived by them to sell the properties or the enterprise as a whole at a throw away price. Indeed the Receivers and the Defendant have averred that the Directors of the 3rd Plaintiff are the cause of the diminished stature of the company which, has improved since the Receivers took over and they projected it would improve tremendously. They avowed to make it even better. That resolution should be seen in good light and as an optimistic answer to the dull picture that was painted, albeit correctly, by Ringera J. (as he then was) in the case at **JAMBO BISCUITS (K) LTD. v BARCLAYS BANK OF KENYA LTD. ANDREW DOUGLAS GREGORY AND ABDUL ZAHIR SHEIKH (2003) 2EA 434** when he stated that;

> ***"…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''.***

[74] The Receivers herein are agents of the company. On the prima facie material before me; they are competent and were properly appointed. They draw their powers and duties from the law and the debentures on which they are appointed which they must exercise ***throughout for the benefit of the debenture holders and the company to the extent of their respective interests in the assets he holds.*** I am guided by **"KERR ON THE LAW AND PRACTICE AS TO RECEIVERS" (16TH EDITION) LONDON: SWEET AND MAXWELL (1983)** at page 331 that:

> ***"Although the receiver is technically the principal, yet of course he is not acting on his own behalf. He is still acting as receiver of the company, and his possession and control is throughout for the benefit of the debenture holders and the company to the extent of their respective interests in the assets he holds."***

[75] Therefore, in the circumstances of this case, and as I ponder the words of Ringera J (as he then was) in **JAMBO BISCUITS (K) LTD (supra),** the court needs to engage in a novel balancing of the interests of the Debenture Holder and the company. And without insubordination of the interests of the Debenture-holder, the court hesitates to give a kiss of death to an enterprise which has potential of revival or continuation with business even if it be by the Receivers. Therefore, as the agents of the company, the law is that they should conduct the business to the benefit of the creditor as well as the Company to the extent of their respective interests. The almost symmetrical balance which the court must then strike is that the Receivers and Managers shall remain as such Receivers and Managers of the 3rd Plaintiff, but the interests of justice in light of the terms of the debentures herein, and the consent the Defendant gave toward the other debenture-holders ranking in pari pasu with them, demand that the charged property and the enterprise should not to be sold until this suit is determined. The Receivers and Managers of the 3rd Plaintiff will exercise all the other powers granted in the debenture including sound management of the enterprise- the 3rd Plaintiff and all the property subject of the debenture. The court makes that decision fully aware that apart from selling, revival and continuation of the business of the company is one of the acceptable duties and goals of a receiver of a company. See **"THE LAW OF RECEIVERS AND COMPANIES" (supra),** discusses that:

i. ***"A debenture....provides....a receiver with power to carry on the company's business....either with a view to reviving the company or with a view to the beneficial sale of the undertaking as a going concern."***
ii. ***"In the case of floating charge... it is then for the receiver to decide whether to carry on the business with the objective of a rescue in the long-term or of a beneficial sale as a going concern in the short term or to close the business and sell up."***

FINDINGS AND ORDERS

[76] Accordingly, I find and hold the Receivers and Managers IAN SMALL and KIERAN DAY are the receivers and agents of the 3rd Plaintiff of the company having been properly appointed. They will continue to be in possession and control of the company, and to exercise that control for the benefit of the Debenture-holder (the Defendant) and the Company to the extent of their respective interests in the assets and business of the company. In exercising their mandate in accordance with the terms of the Debentures herein and the charges thereto, the Receivers and Managers herein are, however, restrained from selling: 1) the charged properties herein namely, ***a) LR NO 10854/60 (Title No I.R. 87312), in the name of Rhea Holdings Ltd; and b) L.R. No. 12248/19, 12248/20, 12248/21, 12248/38, 25261 and 25262;*** or 2) the enterprise consisting in the 3rd Plaintiff Company until the determination of this case.

[77] The upshot is that the application dated 28th of February 2014 succeeds only in part and to the extent that I have specifically allowed above. I will not, however, make an order for costs given the outcome of the application. It is so ordered.

Dated and signed at Nairobi, this the 11th day of June, 2014

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi, this the 11th day of June, 2014

ERIC OGOLA

JUDGE