



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 886 OF 1998

SHABANA SUPERMARKET LTD.....PLAINTIFF

VERSUS

GLAD - ALL FINANCE LTD & OTHERS.....DEFENDANT

RULING

This is an application by way of chamber summons under section 3A of the Civil Procedure Act and Order 39 Rules 1 & 2 of the Civil Procedure Rules seeking Injunction orders against the defendants.

The facts are brief and straight forward. The plaintiff and the 1st defendant entered into a floating debenture agreement wherein the first defendant was to advance the plaintiff a sum of kshs. 15,500,000/-. A sum of Kshs. 6 million was advanced as part of the agreed sum in the debenture. There were other terms which do not concern us at this stage.

Apparently the plaintiff breached the terms of the debenture agreement and so the 1st defendant appointed the 2nd 3rd and 4th defendants as joint receivers and managers who took possession of the plaintiffs property on 9th April, 1998.

There is a dispute as to the sum due and payable as the plaintiff says not the total sum of the agreed sum in the debenture was paid by the first defendant. There is also a dispute as to the statement of account. Above all the plaintiff says that the notice or sufficient notice was given tot he plaintiff before the joint receivers and managers were appointed.

Both learned counsel have ably presented their respective cases. Most of the issues, however, canvassed at this interlocutory stage belong to the main trial.

For the plaintiff to succeed at this stage, it must be shown there is a prima facie case with a probability of success. Secondly, the plaintiff has to show that if the order is not granted, irreparable loss shall result that cannot be adequately compensated by an award of damages. If the court is in doubt it will decide the case on the balance of convenience.

The demand for the amount allegedly due and payable was made on the same day and time the receivers were appointed. This was on the evening of 9th April, 1998 after banks had been closed. The first defendant and I believe the receiver/managers must have known that the next day was Good Friday, a Public holiday.

Sufficient notice was not accorded the plaintiff to comply with the demand and it was unreasonable to expect compliance at the time the demand was made. One can easily read bad faith in the circumstances. Whether or not the plaintiff had defaulted is a triable issue. but to say that since the plaintiff was in

default meant it was impecunious is not supported by any evidence at all.

Taking into consideration the circumstances of this case one cannot resist the conclusion that the acts of the first defendant which were executed by the other defendants were tainted with malice and oppression. Having so found I do not deem it necessary to address the other issue involved save to observe that as a running concern the plaintiffs business should have been left, on a balance of convenience, open while the parties reconciled their accounts.

Accordingly the plaintiff's application hereby succeeds on prayers 2 and 3 of the Chamber Summons. The premises shall be opened forthwith.

The plaintiff shall also have the costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 6th May, 1998.

A. MBOGHOLI MSAGHA

JUDGE