IN THE COURT OF APPEAL,

AT KISUMU

(CORAM: HANCOX, NYARANGI JJA & MASIME Ag JA)

CIVIL APPLICATION NO. NAI 172 OF 1987

HASTINGS IRRIGATION (K) LTD……..….APPLICANT

VERSUS

STANDARD CHARTERED BANK (K) LTD & 2 OTHERS.…RESPONDENT

(Appeal from a ruling of the High Court at Nairobi, Mbogholi-Msagha J)

JUDGMENT

By a debenture dated October 19, 1978, the applicant company, Hastings Irrigation (Kenya) Ltd, whom we shall call 'Hastings Irrigation', thereby charged all its undertaking, goodwill, assets, books debts and property whatsoever and wheresoever, both present and future, including all its uncalled capital, with the payment and discharge of all moneys and liabilities thereby agreed to be paid or discharged, in favour of the Standard Bank Limited, who were the predecessors of the first respondent to this application (therein and hereinafter called "The Bank"). The debenture was said to be in consideration of the bank having agreed to make or continue to make advances to Hastings Irrigation of permitting it to overdraw on its current account and granting to it other financial accommodation from time to time. The limit of the security provided by the debenture was stated at Kshs 6 million, ranked as a first charge on all Hastings Irrigation's property, operated as a fixed charge on its immovable property and as a floating charge over all the other property concerned.

The debenture contained the usual power in favour of the debenture holder to appoint a receiver and manager of the property charged, which was exercisable after the principal moneys became due and payable either by way of lawful demand or under clause 10 thereof. Clause 10 provided, *inter alia*, that those moneys should become due and payable ….

"(d) If an order is made or a resolution is passed for the winding up of the company, or a petition for such winding up is filed,….

(f) …. If the company "(meaning Hastings Irrigation)" commits or attempts or purports to commit any breach of the covenants herein contained …"

The next relevant security to which we should refer is a guarantee, executed by a company known as Concrete Pipes and Products (1970) Ltd, up to the limit of the amount stated in the debenture, on November 29, 1978, of Hastings Irrigation's utilization of the bank's facilities by way of overdraft, also in favour of the bank. This guarantee was reinforced by the execution on November 26, 1982, of a charge

by Concrete Pipes and Products over its leasehold property at LR No 8116, Nairobi, amounting to ten acres. The legal date of redemption was stated in that document to be December 3, 1982, after which any sums owing by Hastings Irrigation were payable upon written demand by the bank. The mortgage debt was to become payable without demand, and the statutory power of sale exercisable, if an order was made, or an effective resolution passed, for the winding up of the mortgagor (Concrete Pipes) or of the borrower (Hastings Irrigation). The statutory power of sale under section 69 (1) of the Indian Transfer of Property Act, 1882, was as is required, subtended to the Instrument of Charge.

The connection between the two companies is demonstrated from a perusal of the record, which is before us, in two respects in particular, namely that Hastings Irrigation had as its component parts Concrete Pipes and Products, the Agricultural Development Corporation ("the ADC") and the Hastings Irrigation Pipe Company of Nebraska, USA. They all entered into the joint venture agreement made on December 21, 1977, whereby Hastings Irrigation was formed. Secondly the ten acre property at LR 8116 Nairobi which Concrete Pipes and Products had charged to the bank in November, 1982, has now been sub-divided into two portions, one for Hastings Irrigation and the other remaining with Concrete Pipes and Products. It is presumably the sale of the present subdivided plot which is threatened in the advertisements in the edition of the *Daily Nation* of November 20 and 27, 1987 respectively.

Exercising its powers under the debenture the bank appointed two receivers and managers, who are named as the second and third respondents, by an instrument dated February 4, 1987. This appointment apparently galvanized the applicants into action, and, as appears from the affidavit of Hezekiah Gitata filed in the High Court on September 11, 1987; energetic negotiations took place between the bank, the ADC, Hastings Irrigation and ICDC during the initial period of the receivership, with a view to refinancing and restructuring Hastings Irrigation. As appears from the affidavit, the ADC withdrew the rug from under Hastings Irrigation, and the bank also refused to participate further, and this undoubtedly precipitated the first advertisement by the second receiver and third respondent in the *Daily Nation* of August 14, 1987, threatening to sell the assets of Hastings Irrigation, with the closing date for offers stated as September 11, 1987.

This, in turn, seems to have precipitated the filing of a summons and plaint by Hastings Irrigation, against the present respondents on August 18, 1987, claiming an injunction to restrain them from proceeding with the sale of the assets, and for true accounts of the bank loan and of the receivership to be rendered to the court and to the plaintiff. Hastings Irrigation, through its advocates, then sought a temporary injunction from the High Court, which was opposed by the respondents on the grounds stated in the notice of opposition filed under order L rule 16 of the Civil Procedure Rules, and, in the event, refused by Mbogholi Msagha, J on November 11, 1987, who applied, though he did not accurately state, the principles governing the granting of such injunctions laid down by this court's predecessor in *Giella v Cassman Brown & Co Ltd* [1973], EA 358 at page 360. The balance of convenience is the third limb of the test, not the balance of probabilities.

It is from this decision of the High Court that the main intended appeal is brought, by a notice of appeal filed on November 16, 1987, and this court's jurisdiction to grant a similar injunction is invoked by virtue of the amendment to rule 5(2)(b) of our rules passed by legal notice No 14 of 1984. We would observe that there were a number of defects in the compilation of the record of appeal of which we had occasion to complain during the course of the *ex parte* hearing of the application before us, not the least of which was the misstatement of the rule in the heading and the erroneous reliance on the inherent jurisdiction provisions of rule 1(3). It is well established that that rule can only be prayed in aid in the absence of other, specific, remedies, such as is claimed here.

The basis of the submissions of Mr Thiongo (who appeared on behalf of the applicant) before us was that by reason of the two recent advertisements to which we have referred, the sale of Hastings Irrigation's assets is imminent, that this will cause irreparable harm, that there is a likelihood that the assets will be disposed of at an undervalue, and that the balance of convenience clearly lies with the granting of the order sought, and thus the status quo preserved until this application can be heard *inter partes*.

A subsidiary point taken by Mr Thiongo was that the company was in the joint venture agreement with

the other parties we have already mentioned for the purpose of manufacturing in Kenya aluminum irrigation pipes, which is of clear benefit to the people and to the economy of Kenya, there being as yet only a few companies operating in the field. This is indicated by the extracts from the newspaper reports which appear in the record as annexures to this agreement dated December 21, 1977, which was subsidiary to the joint venture agreement of the same date, to which we have already made reference. In support of this we also quote from paragraphs 7.03 and 8.0 of the Hastings Irrigation's re-financing proposals which state:

7.03 "The irrigation industry is of vital importance to the future economic stability of this country which is deeply centred on agriculture. There will be increased need to have more indigenous Kenyans participating in the industry.

8.0 "The recovery of "(Hastings Irrigation)" will largely depend on the company's ability to capture a sizeable share of the irrigation pipes market in which it has not featured prominently ever since it was established in 1979 …."

Mr Thiongo said in his submissions that Hastings Irrigation had put forward very concrete re-financing proposals, of which the above quotations form part, and that those, together with the scheme of arrangement whereby the ICDC have offered to pay Kshs 2 million towards the re-financing recited at paragraph 15 of the plaint, show that it would be a tragedy to allow the threatened sale to go ahead simply because ADC have "sabotaged", as it is put, the negotiations which were proceeding so fruitfully until July 27, 1987. The affidavit supporting this present motion states also that the assets available as security, over Kshs 80 million, are far in excess of the bank's "disputed" claims. This suggestion that there is a valid dispute over the bank's claims is inconsistent not only with the draft petition for the approval of a scheme of arrangement under section 207 of the Companies Act, Cap 486, exhibited to Mr Gitata's earlier affidavit, in which it is stated, at paragraph 9:

"The business of Hastings Irrigation Kenya Ltd did not prosper and in February, 1987, the said bank duly appointed (the two receivers of the assets in question)..."

No complaint is made there that the appointment of the receivers was premature or other than correct, as Mr Thiongo seemed to be claiming in the submissions, neither, as the respondents point out in their joint notice of opposition filed in the High Court, was any objection made to that appointment for the first six months of the receivership. They also state:

"The appointment was made following default on the part of the plaintiff and such default is not denied".

Moreover even if there is a dispute it would not materially affect the position because in the bank manager's affidavit of September 10, 1987, the indebtedness is stated as amounting to over Kshs 11.5 million, well in excess of the Kshs 6 million limit, so it is self-evident that the indebtedness itself constitutes a breach of the conditions. Much stronger against the applicants is the admission at paragraph 2.06 of the refinancing proposals, part of which we now set out:

"Because of liquidity constraints it experienced during maiden operations, HIK found it increasingly difficult

to service the Kshs 6 million loan borrowed from the Standard Bank in 1979 for the purpose of financing part of the project's cost. The company defaulted perpetually on the loan component of Kshs 3 million while the overdraft was always withdrawn beyond the authorised limit. The bank had therefore to close down the overdraft facility in 1981 after all the efforts to get it regularized proved unsuccessful."

There can be no doubt, in our view, that that admission, filed as part of the applicant's own case as recently as June, 1987, brings into play the power contained in clause 11 of the debenture to appoint the receivers, since there was a clear breach of the covenant's and conditions therein by Hastings Irrigation. Indeed it would be hard to imagine a clearer admission than that Hastings Irrigation "perpetually defaulted on its loan" … and "was continually overdrawn beyond the authorized limit". It also, very

probably, brought into operation the enforcement provisions of the charge executed by Concrete Pipes and Products in 1982, so that the property at LR 8116, or that part if it which after the sub-division belongs to that company, would be at risk whether the sale is made by the receivers under the debenture, or by the bank under the charge. In these circumstances, while paying heed to the claims in paragraph 8 of Mr Gitata's first affidavit, it seems to us that no extra risk is caused to Concrete Pipes property than is already inherent in the guarantee and subsequent charge which it executed.

Mr Thiongo referred us to one of two authorities upon which he urged us to rely in granting this temporary remedy. The first was *Jan Mohamed v Madhan*i [1953] 20 EACA at page 8, in which the court held that to justify the immediate grant of an injunction *ex parte* there must be immediate danger to the property concerned. The second was *Musa Simlani v Magotswe*, Civil Appeal 1 of 1987, which was clearly a decision of this court on the circumstances of that particular case and does not bind us to follow that, or any other course, on this application. In any event neither case concerned the exercise of a power of appointing a receiver under a debenture or the conduct of the receivership after a valid appointment had been made.

We do not think it can be seriously contended on behalf of the applicant, on the material before us at any rate, that the appointment of the second and third respondents as receivers and managers on February 4, this year, was other than a valid exercise of the power contained in the debenture. Mr Thiongo virtually conceded as much. Once that happened it does not seem to us appropriate for the court to interfere in the passage of the receivership unless it can be shown that the conduct of the receivers and managers is seriously oppressive, or not in accordance with the recognized principles of law and of commercial practice. The material we have indicates that the reverse has been the case, for not only did the receivers desist from any attempt to enforce the security while credible negotiations were going on, but that, as appears from paragraph 8 of Mr Muhindi, the bank manager's, affidavit of September 10, 1987, the bank even gave the applicant a first option to purchase the debenture. In these circumstances, the claim that the bank had "exercised the maximum restraint" would appear to be fully justified.

While we would not go so far as to say, as the respondents do in their notice of opposition to the High Court application, that the court "has no jurisdiction to interfere with the exercise of a statutory power of sale", (a claim no doubt made in view of the words "without the intervention of the court" in section 69(1) of the Transfer of Property Act), we certainly think that we should not interfere with a validly appointed receivership unless there are clear and compelling reasons for us to do so. No clear or compelling reasons, in our judgment, appear on the present material filed in this application. It is accordingly refused. Since the respondents have incurred no costs in attending the *ex parte* application, no order in that respect is necessary. Although this is an *ex parte* matter the voluminous record produced before us, amounting to well over 400 pages, without even an index to guide us, has necessitated a thorough investigation of the facts as presented in arriving at our decision not to grant the relief sought.

Dated and Delivered on this 2nd Day of December 1987

A.R.W HANCOX

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JUDGE OF APPEAL

J.O. NYARANGI

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JUDGE OF APPEAL

J.R.O MASIME

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Ag. JUDGE OF APPEAL