REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 66 OF 2015

KABIYET AGRO AND GENERAL ENTERPRISES

LIMITED (IN RECEIVERSHIP).....PLAINTIFF

VERSUS

BENARD ROP.....1ST DEFENDANT

EASTERN SOUTHERN AFRICA TRADE

AND DEVELOPMENT BANK (PTA BANK).....2ND DEFENDANT

JUDGMENT

By a plaint dated 6th March 2015 the plaintiff sued the defendants seeking for the following orders:

1) A Declaration that the defendant's overall conduct constitutes a clog of the plaintiff's equity of redemption.

2) That the defendants allow the plaintiff access to the premise to enable intending purchasers to undertake a test run of the plant.

3) That the plaintiff be allowed to sell the charged property by private treaty as a going concern and that recourse be had to sell in portions only if the sale of the plant as a going concern is not possible.

4) Costs of the suit.

The plaintiff contemporaneously filed an application for injunction restraining the defendants from disposing off the plant in the factory standing on all that parcel of land known as Eldoret Municipality Block 1081 as well as the land until this case is heard and determined. The application was heard by Justice Ombwayo who gave an order restraining the respondents from disposing off the plant and the land until the case is heard and determined on 19th February 2016.

Plaintiff's case

This matter came up for hearing on 12th March 2018 when the plaintiff gave evidence and stated that he took a loan of USD 11,7000/ from the defendant which was paid directly to Elexter a Finish Company who were supposed to supply, deliver, install and test run the machines at their Eldoret factory for processing UHT milk. It was the plaintiff's evidence that they were unable to repay the money because Elexter delayed in delivery and installation of the machines until 2008. It was further the plaintiff's evidence that they produced milk in 2008 and 2009 and made payments and were not able to go on due to lack of capital leading to the disconnection of electricity.

It was the plaintiff's further evidence that in 2005 he approached several banks for working capital but when the banks found out that the machines were not in working condition, they declined to give him a loan. He stated that he later got a potential buyer Tipsy Co. Ltd and Kenya Dairy Farmers but this was made impossible by the defendant's move to advertise the property for sale vide advertisement dated 17/2/15.

The plaintiff produced letters dated 22/7/12 from Nyairo & Company Advocates and a letters from Kenya Dairy Farmers as part of evidence of negotiations with interested purchasers (See P Exhibit I and 2 (a) and b). He also produced a letter dated 9/4/2015 from Tanykina Dairies and an email dated 27/3/2013 addressed to Daniel Ndiema as Pex 3 and 4.

The plaintiff testified that he took steps towards liquidating the amount which included getting investors partners and purchasers to have it sold by private treaty and that most of the purchasers wanted to purchase the entire factory i.e property, plant and machinery plus all the buildings as a going concern. He stated that this was not possible as the intended purchasers could not get access to the plant to test run to confirm that the machines worked. It was also his testimony that the bank through the 1st defendant went ahead to advertise the charged properties for sale as per Pexh 6.

The plaintiff further informed the court during re-examination that he knew the Receiver and Manager was appointed to work together with him to resolve the debts of the company and equally assist in saving it. The defendants' contention was that the option exercised was to receive and not to manage the security. He stated that the Receiver and Manager has never given the plaintiff company any proceeds or expenditure of the company. The plaintiff therefore prayed that the Receiver allows Elexstar Company to come and service the machines and a test run to be conducted.

On cross examination by Counsel for the 1st defendant the plaintiff confirmed that his advocate explained to him the implications of the agreement and that the bank financed the full factory. He also confirmed that the factory stopped operating in 2011 and therefore is not a going concern. The plaintiff further confirmed that the demand letters were clear on the amounts owing but that the 1st defendant did not inform him that they were advertising and exercising it statutory power of sale. The plaintiff stated that he was not aware that the Receiver was filing returns at the Company's registry. Plaintiff further confirmed that he was aware of the appointment of the Receiver manager but did not seek clarification of the appointment of the Receiver from his lawyers.

On cross examination by Counsel for the 2nd defendant the plaintiff stated that he did not seek the authority from the Receiver before filing the suit as he was suing him. He also confirmed that he did not seek a board resolution to authorize him to file this suit but he just swore an affidavit authorizing him to swear the verifying affidavit.

The plaintiff further stated that his main contention is that he had been prevented by the Receiver and Manager from selling the factory by private treaty. He confirmed that he had signed a letter where he was to raise funds within 3 months to restart the factory, raised the funds but could not do so as the Receiver prevented him from restarting the factory.

The plaintiff admitted that he received a letter from Walker Kontos Advocates dated 24/7/13 which was a notice pursuant to section 90(1), (2) & (3) of the Land Act. The plaintiff was also referred to the powers of a Receiver and he stated that he thought the Receiver was to come and help get the factory running. He also confirmed that the court granted an order stopping the Receiver from selling the property on 19/2/16.

On reexamination the plaintiff reiterated his evidence and closed his case.

1ST DEFENDANT'S CASE

It was the 1st defendant's case that the Plaintiff defaulted in its contractual obligation to repay the loan, which prompted the 2nd Defendant to, through a letter dated 5th February 2014, to issue the Plaintiff with notice of intention to exercise its statutory power of sale, at which time the Plaintiff's indebtedness to the 2nd Defendant stood at USD 2,646,598.

The 1st Defendant stated that consequent to the Plaintiff's aforesaid default of its contractual obligation to repay the loan, he was appointed by the 2nd Defendant as Receiver and Manager of the Plaintiff pursuant to a Deed of Appointment of Receiver and Manager dated 6th February 2014which he has been and still is the Receiver and Manager of the Plaintiff and averred that he has not authorized the filing of this suit, despite it being a mandatory legal requirement to obtain the consent of a Receiver and Manager before filing suit for or against a company in Receivership.

The 1st Defendant denies clogging the Plaintiff's equity of redemption and averred that whereas the Plaintiff's Directors had on several occasions represented to him that they intended to sell the charged properties by way of private treaty, nothing had ever materialized. He further denied that the charged properties would be sold at an undervalue and dismissed the Plaintiff's contention that selling the charged properties in portions would result in a lower price as having no basis.

The 1st Defendant also asserted that he has been filing the requisite returns of the Plaintiff company with the Registrar of Companies as required under the Companies Act and further that the Plaintiff had been informed of its indebtedness to the 2nd Defendant on numerous occasions. He produced a copy of the Receiver and Manager's abstract of Receipts and payments filed with the Registrar of Companies. He stated that he has not impeded access or sale of the of the property and that he wrote to the plaintiff vide a letter dated 5/3/14 informing them that they were free to visit the plant for assessment inspection with any potential buyers or investors. It was further the 1st Defendant's evidence that he had advised the Plaintiff's Directors that should they require to undertake a test run of the plant with respect to a potential buyer, they were at liberty to do so, provided that they bear the costs attendant to the same. That was the close of the 1st defendant's case.

On cross examination the 1st defendant stated that he did not issue any notice for the sale of the suit property and his duty as a Receiver and Manager was to run the company.

He further stated that as a Receiver he makes a decision to receive or to manage the company and that he did not supply statements of accounts and at the time of the advertisement he was preserving the assets of the company.

The 1st defendant also confirmed that there were letters to the Directors of the plaintiff allowing access to the plant and test run of which the test run was to be borne by the plaintiff. He also indicated that his duty was to run the company in good faith, file returns to the Company

registry and not necessarily to the owners.

On reexamination by his Counsel the 1st defendant stated that he filed returns up to the time of filing the suit and that valuation was done by professional Valuers. He also stated that there was no specific request by the Directors for statement of affairs. The 1st defendant gave evidence that his further request for funding for a test run was declined by the bank.

2ND DEFENDANT'S CASE

The 2nd Defendant testified through its Director of legal services who stated that the securities created in its favour to secure the Plaintiff's borrowing were contractually agreed upon and that the same conferred upon the 2nd Defendant the right to exercise its statutory power of sale by disposing off the charged property and appointing a Receiver and Manager. He stated that contrary to the Plaintiff's allegation, the plant and machinery were not permanent fixtures and could thus be disposed off separately from the land, and further that the right to dispose off the same could only be exercised by the 1st Defendant once the Plaintiff was placed under Receivership.

DW2 stated that the Plaintiff has defaulted on its contractual obligation to repay the loan, whereupon the 2nd Defendant caused numerous demand letters and notices to be sent to the Plaintiff, including the letters dated 23rd April 2013, 24th July 2013 and 5th February 2014. That the Plaintiff gave numerous promises to pay but never paid and thus the 1st Defendant was fully entitled to dispose off the plant as a whole or in portions, in order to recover the debt owed to it.

It was DW2's evidence that the Plaintiff having obtained a large amount of money from the 2nd Defendant and having enjoyed full benefit of the said funds and further having offered securities in full knowledge that the same would be subject to sale in the event of default cannot now be heard to challenge the sale.

DW2 also stated that the money advanced was not to fund the project in full and that the requirement was that the plaintiff gets further funds for working capital. It was his evidence that the bank has never received any evidence that the plaintiff secured any other funding from local banks. He further averred that the securities included all assets, debenture, plant and equipment, mortgage, guarantees of the shareholders and the Directors.

It was DW2's testimony that an MOU dated 17/10/11 set out the agreed steps on how to work out a solution to make payments and the plaintiff was to take steps to restart the plant. He stated that the timeline was not met as the plant was not up and running by 31/12/11 and that the plaintiff was given a further 6 months which was never met. He stated that this necessitated the bank to issue several demand notices in 2012, 2013 and 2014 and later appointed a Receiver manager as per security documents which gave the bank the authority to appoint a Receiver. It was his evidence that the outstanding amount stands at 4.4 million US Dollars and that the court issued an order stopping the bank from selling the property. DW2 stated that the collateral devalues with time and that the bank is of the view that it should be allowed to realize the security and that the current collateral may not realize the full amount.

On cross examination DW2 confirmed that the manufacturer was partly paid for the installation of the plant and that the notices were not to be issued by the bank. He stated that the letter dated 7/9/13 was before the Receiver and Manager was appointed and after the MOU had expired.

DW2 stated that the loan was supposed to have been paid in 2012 and that the plaintiff made attempts to look for potential buyers but nobody was ready to put in money to make the factory functional.

On reexamination by his Counsel, he stated that the powers of a Receiver and Manager are clearly set out in the debenture at clause'd' and that the Receiver and Manager is an agent of the company.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff gave a brief background to the plaintiff's case and submitted that from the evidence on record that it is clear that the intended sale as per the advertisement was illegal and thus void due to lack of 45 days Redemption Notice and Notification of Sale;that there was no proof of valuation prior to the said advertisement and thus no contest to the fact that properties were put up for sale at an undervalue and/or; that the actions of the 1st defendant of placing the securities in Receivership were not done in good faith and similarly clogged the plaintiff's right over the charged properties.

Counsel also submitted that the equity of redemption can never be extinguished by the statutory notices issued and /or further appointment of a Receiver and that the duty of the Receiver were under the Companies Act remained applicable in this case and went beyond the duty to filing mere returns but was a fiduciary duty to the company.

Counsel cited the ease of ALBERT MARIO -VS- VISHRAM SHAIVIJI (Gikonyo J) where the court noted that the equity of redemption is only extinguished after exercise of Chargee's Statutory Power of Sale and such sale ought to be strictly exercised in accordance with the Land Act. Section 96(2) of the Land Act is one of the provisions of the Land Act which reinforce the Chargors Equity of Redemption. A Notice to sale, a further Redemption Notice must issue and a 45 days Notification of Sale under rule 15 of the Auctioneers Act must follow. The court referred to the case of PALMY Company Limited vs. Consolidated Bank of Kenya [2014] eKLR setting out that:-"……this requirement of a notice to sell under section 96(2) of the Land Act and that the chargee shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed the date of the service of the notice to sell. Counsel further made reference to the case of MALINDI ELC COURT LAND CASE NO. 1 B' OF 2014 JOSIAH KAMANJA NJENGA v HOUSING FINANCE CORPORATION OF KENYA & ANOTHER where Angote J. stated that the said notices

serve the purpose of giving an opportunity to the Chargor to redeem the property and notifies him of impending sale of the property if the sum demanded is not paid within the period of 45 clays provided in the Notice.

Miss Adhiambo therefore submitted that in (the absence of a Notice to sell under section 96(2) of the Land Act, the Statutory Power of Sale cannot be exercised even if the Statutory Notice, the Notification of Sale and the Redemption Notice have been issued. Further that if the sale of the suit property is carried through in the absence of a proper Notice to sell it will amount to a clog on the Chargors' Equity of Redemption.

Counsel also cited the case of SHAROK KHER MOHAMED ALI & ANOTHER V SOUTHERN CREDIT BANKING CORPORATION LIMITED eKLR (Warsame J) where the court similarly applied the doctrines of Equity in mortgages stating that parties to a mortgage have contracted on the basis that some fundamental things or state of things shall continue to exist between them arid upon default the mortgagor would be entitled to sufficient notice before the equity of redemption is extinguished. Further that it is of fundamental importance that the mortgagee observes and avoids any breach which would clog or fetter the equity of redemption. The Judge stated that

> "…… borrowers in Kenya live in a mortal and perpetual fear of losing their property merely because he or she is in a debt and one may be tempted to say the legal regime in this country is substantially in favour of the banks. The courts in Kenya while applying the principles of equity and which are beyond statute , have played a pivotal role in the protection of the rights of the borrowers when there is flagrant contravention of the law and when there is a lacuna in the applicable law such as the RLA" .

Further in the case of Kaplana Shashikant Jai and another vs. Eco Bank Ltd and another [2015] KLR the court held inter alia that the equitable and legal right of the mortgagor to redeem the mortgaged property is zealously guarded by the courts of law and statute .Equity of redemption should not be clogged at all by the mortgagor or a Receiver and Manager.

The court referred to the finding of Lord Mac Naghten stated in Noakes& Co Ltd v Rice [1900-3] All ER 34 that;

> "Redemption is of the very nature and essence of a mortgage as mortgages are regarded in equity. It is inherent in the thing itself, and it is, think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption."

Counsel submitted that the court held that the nature of equity of redemption is a safeguard of right to property. No one, including the Receivers and Managers should clog equity of redemption in any manner, either inadvertently or by design. The Judge similarly made, findings that ……..*'despite the appointment of Receiver by a bank, the corporate stature and structure of the company remains and the Directors are not relieved of their normal statutory duties,……..the discharge of those duties becomes extremely difficult or almost impossible without the cooperation of the Receiver. That in the Directors' statutory obligations are not displaced and they can even use company's name to file suit against the Receiver'.*

Counsel therefore submitted that the defendant's objections on the bringing of' the suit without authority or consent of the Receiver lacks basis and finding in law since the statutory powers, obligations and the company stature including Directorship of the plaintiff remained intact during period of Receivership. Further that the suit was preferred against the Receiver who had a duty to act in good faith and in the interest of the chargor and the debenture holder but he failed in his said duty.

It was Counsel's submission that there was nothing stopping the plaintiff from bringing a suit in its own capacity and to agitate its rights that had been grossly violated by the Receiver. Counsel relied on the case of **Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited [2015] eKLR (Gikonyo J**) where it was further established that the primary duty of a Receiver is to get in and as necessary, realize sufficient of the company's assets and undertaking to satisfy the outstanding debt of the creditor on whose behalf he has been appointed. He is under an obligation to keep and produce to the company proper accounts,

In Medforth -vs Blake, [1999] 3 All ER 97 (page) , it was further held that a Receiver managing mortgaged property owes duties to the mortgagor and anyone else interested in the equity of redemption. The duties of the Receiver were described as *inter alia* a duty of good faith. In exercising his powers of management, the primary duty of the Receiver is to try and bring about a situation in which interest on the secured debt can be paid and the debt itself repaid. Subject to that primary duty, the Receiver owes a duty to manage the property with due diligence.

In response to the issue that the plaintiff did not seek the authority of the Receiver to institute this suit Counsel relied on the case of Kabiyet Agro & General Enterprises v Benard Rop & another [20161 eKLR where Ombwayo J. on the ruling for interim application for injunction decided that the plaintiff had locus standi to bring suit. He referred to NEWHART DEVELOPMENTS v. CO-OPERATIVE COMMERCIAL BANK, [1978] 2 ALL E.R. 896, where it was held that a provision in a debenture empowering the Receiver to bring an action in the name of the company whose assets were charged was merely an enabling provision, investing the Receiver with the capacity to bring such an action, and did not divest the company Directors of their power to institute proceedings on behalf of the company.

Further that the plaintiff is in Receivership and not in liquidation. Upon appointment of a liquidator the powers of the Directors cease by statutory provision and the Directors become functus officio , Receivership does not affect the powers of the Directors thus plaintiff has locus to commence suit to protect the interest of the company.That the plaintiff being the chargor of the property and debenture holder his rights of redemption have accrued and therefore was entitled to test run the plant to enable him convince the persons who offered to buy the property that the machinery was in working condition, failure to allow the plaintiff to test run the machinery raises an arguable point as to whether the equity of redemption was clogged.

Counsel therefore submitted that the defendants have not complied with mandatory provisions of issuing sufficient notice before arranging to sell the property and as such the plaintiff should be allowed to proceed with its arrangements to redeem the charged properties which remain to be its key assets in running the business. She prayed for judgment to be entered as prayed for the plaintiff plus costs of the suit.

1ST DEFENDANT'S WRITTEN SUBMISSIONS.

Counsel for the 1st defendant submitted that the Plaintiff's case is centered on the alleged clogging of its equity of redemption. That in the statement of Defence, the 1st Defendant identifies additional securities to secure the loan advanced to the Plaintiff by the 2nd Defendant as including a Debenture over the movable assets of the Plaintiff company, a Charge over Nandi/Eisero/220 and Nandi/Kaptich/717 and Deed of Guarantee by John Sambu, Rhoda Sambu and Felix Sambu which were produced as exhibit is before the court as a bundle.

Counsel listed the following issues to be determined by the court

1) Whether the suit is fatally defective for lack of having obtained authority of the Receiver and Manager before filing suit in the company's name?

2) Whether the Defendants have by their conduct clogged the Plaintiff's equity of redemption ?

3) Whether the Defendants are entitled to sell the charged property in portions or as a whole, in exercise of the statutory power of sale?

4) Whether the suit discloses a reasonable cause of action against the Defendants?

5) Who should bear the costs of the suit?

Whether the suit is fatally defective for lack of authority from the Receiver and Manager to file suit in the company's name?

On this issue Counsel submitted that the legal position that Directors of a company under Receivership can only institute proceedings in the name of the company with the authority of the Receiver and Manager is settled. He cited the case of Mandev Limited v M. K. & Sons Limited (Under Receivership) & Another (2010) eKLR the court held:

> *"The general principle is that once a company has been placed under Receivership it lacks the legal competence to institute a suit or be sued in its company name. It can only sue or be sued through the Receiver. " (emphasis provided)*

Counsel also cited the case of Cyperr Enterprises Ltd vs Metipso Services Ltd & 2 Others (2011) eKLR, where Okwengu J (as she then was) in striking out the Plaintiff's suit and application filed without leave of the Receiver and Manager held inter alia as follows:-

> *"Therefore prima facie the position appears to be that the Plaintiff Company is still under Receivership. If that be the case, then the suit ought to have been instituted through the authority of the Receiver manager and not the Directors of the company. This is because the Directors of the company have been temporarily put on the back seat so far as the management of the company is concerned. There being no evidence of any authority from the Receiver manager to file the suit, the suit is incompetent as Shakalaga Kwa Jirongo had no authority to authorize the filing of the suit " (emphasis provided*)

Further in Tudor Grange Holdings Ltd v Citi Bank N.A. (1991) 4 ALL ER 1 the Court of Appeal held that Company Directors have no power to sue on behalf of the company after appointment of the Receiver especially where the proceedings could directly infringe on the property subject of the Receiver's powers or where the Receiver's position would be prejudiced by their decision to bring such proceedings.

It was Counsel's submission that, PW 1 admitted that the 1st Defendant's authority to file suit was not sought but was instead instituted through the company's Directors, whilst the 1st Defendant also testified to the effect that he had not given his authority for the filing of the suit. 1t was therefore Counsel's submission that in the absence of the 1st Defendant's authority to the Directors of the company to file suit in the company's name, it follows that these proceedings are fatally defective and the same ought to be struck out with costs.

On the 2nd issue as to whether the Defendants have by their conduct clogged the Plaintiff's equity of redemption, Counsel submitted that PW 1 in cross-examination stated that he did not understand the meaning of the term "equity of redemption" and also rather perplexingly stated that he had only shared some of the letters in support of his contention that the Plaintiff's equity of redemption was being clogged "with God' and not the Receiver and

Manager.The equity of redemption refers to the equitable right of a Chargor, to redeem the Charged property after the legal right to redeem has been lost by default in repayment of the mortgage money at the due date. Counsel cited Halsbury's Laws of England 4th Ed. Vol 16 at para 779 which states as follows with regard to the equity of redemption:

> *"Equity of redemption. An equitable estate formerly arose under a legal mortgage when the day fixed for redemption had passed without payment of the mortgage money. Until that day the mortgagor retained his legal right under the terms of the mortgage to a reconveyance on payment." (emphasis provided).*

It was therefore his submission that in this case, the Plaintiff's equity of redemption can only be exercised through the Plaintiff paying up the outstanding loan and interest thereon, and not by way of overseeing or dictating the manner in which the 2nd Defendant's statutory power of sale is to be exercised. He also submitted that DWI stated in his testimony that he had not blocked the Plaintiff from accessing the property and clarified that while they were not opposed to test runs, the same could only be done at the Plaintiff's costs, which the Plaintiff seemingly could not afford.

On the 3rd issue as to whether the Defendants are entitled to sell the charged property in portions or as a whole, in exercise of the statutory power of sale, Counsel submitted that it is not disputed that the Plaintiff is substantially indebted to the 2nd Defendant. DW2 testified that the Plaintiff's debt stood at a colossal USD 4,169,316.87 as at 30th September 2017 and that the outstanding loan amount continues to accrue interest. Counsel cited a clause of the Debenture instrument which states as follows:

> "*1. The Company hereby covenants and agrees with the Lender to repay the Lender the said loan advanced to the Company by the Lender under the Loan Agreement by installments on the dates and in accordance with the provisions of the Loan Agreement and to pay and discharge all other moneys and liabilities covenanted and agreed to be paid and discharged in accordance with the provisions of the Loan Agreement or intended to be hereby secured and to pay interest on such loan and all such other moneys and liabilities aforesaid in accordance with the provisions contained in the Loan Agreement..*

That the Debenture instrument further provides at clause 13 (b) thereof that the same shall become enforceable in the event the Company shall commit a breach of any of the covenants or agreements herein or in the Loan Agreement contained or implied and on its part to be performed or observed. It also provided for the appointment of a Receiver at clause 14 as follows:

> "*14. At any time after this security has become enforceable under the provisions of Clause 13 hereof (and so that no delay or waiver of the rights to exercise the power hereby conferred shall prejudice the future exercise of such powers without prejudice of any other remedies provided by law) the Lender may in writing appoint any person or persons whether an officer or officers or agents of the Lender or not to be a Receiver or Receiver and Manager or Receivers and Managers of the property and assets hereby charged or agreed to be charged or any part thereof..*

It was Counsel's submission that the Debenture instrument at clause 15 thereof makes the Receiver and Manager an agent of the Company and grants him the power to sell the charged property in any manner he deems fit as follows :-

> *"15. Every Receiver so appointed shall be deemed to be the agent of the Company and the Company shall alone be liable for his acts, defaults and remuneration and he shall have the authority and be entitled to exercise the powers hereinafter set forth in addition to and without limiting any genera/ powers conferred upon him by law:-*
>
> *(d) To sell or assign or concur in selling letting or assigning any of the property and assets hereby charged or agreed to be charged in such manner and generally on such terms and conditions as he shall think fit and in the name of the Company to carry any such sale letting or assignment into effect.*
>
> *(i) To do all such other acts and things as may be considered to be incidental or conducive to any of the matter and powers aforesaid and which such Receiver can or may lawfully do as agent for the Company." (emphasis provided)*

It was therefore Counsel's submission that the Plaintiff admitted in the Plaint and through the evidence of its witness PW1, that it had failed to discharge its contractual obligation to repay the loan advanced to it by the 2nd Defendant as a consequence whereof the 1st Defendant was appointed as Receiver and Manager and is deemed to be an agent of the Company with power to sell the charged property and assets in any manner that he deems fit. That no sufficient grounds have been given by the Plaintiff to show that the 1st Defendant's move to realize the 2nd Defendant' security is unlawful or irregular. The advertisement inviting bids for sale of the charged property would clearly fall under the incidental powers granted to the Receiver and Manager in order to achieve a sale, while the Charge instrument expressly allows the sale of the charged property either as a whole or in parts.

Counsel further stated that no evidence whatsoever was furnished by the Plaintiff in support of its apprehension that the intended sale would fetch an undervalue. He cited the case of Giro Commercial Bank Ltd v Mutesi Civil Appeal No. 342 of 2000 (Unreported) the Court of Appeal quoted with approval the learned author in Halsbury's Laws of England as follows:-

> *"It has been held time and again that a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute, or that the mortgagor has commenced a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. See Halsbury's Laws of England, Volume 32, paragraph 725. "*

It was further Counsel's submission that DW2 stated in his testimony that the Bank holds no funds of its own, and it would be in breach of its duty to the public for a debt such as the Plaintiff's to be allowed to spiral out of control due to the Plaintiff's default, such that it behoved the 2nd Defendant to take remedial steps as permitted under the securities.The 2nd Defendant was therefore fully within its rights in appointing a Receiver and Manager, while the 1st Defendant was also acting within his rights under the Debenture and the Charge by advertising the property for sale.

On the 4th issue as to whether the suit discloses a reasonable cause of action against the defendants,Counsel cited the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 126 where Kwach JA (as he then was) stated as follows:-

> *"I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times, for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether…"*

In the case of Godfrey Ngumo Nyaga vs Housing Finance Company of Kenya it was held that

"Where a party has a statutory right of action, the court will not usually prevent that right being exercised except that the Court may interfere if there was no basis on which the right could be exercised or if it was being exercised oppressively. In this case, there was no ground for finding that the company had no basis for action and there is no evidence of oppression having in mind that the appellant is still indebted to the company…."

Counsel therefore submitted that the Plaintiff is deemed to have known what it was doing when it was entering into the loan agreement with the 2nd Defendant and creating securities for the loan, and cannot now be heard to decry remedies granted to the 2nd Defendant under the very same loan agreement and securities in the event of the Plaintiff's default. The suit discloses no reasonable cause of action against the Defendants and the Plaintiff is not deserving of the orders sought. He therefore urged the court to dismiss the plaintiff's suit with costs to the defendants.

SUBMISSIONS OF THE 2ND DEFENDANT

Counsel for the 2nd defendant gave a brief background of the case and listed the following issue for determination by the court

1. Whether the suit has been brought in breach of the provisions of Order 4 Rule (1) (4)

2. Was (and is) the Plaintiff in breach of the various agreements entered into between itself and the 2nd Defendant;

3. Did the 2nd Defendant clog the Plaintiff's equity of redemption; the 2nd Defendant entitled to appoint a Receiver and Manager over the Plaintiff Company to enforce its security; and

4. Is the Plaintiff entitled to equitable relief as sought?

The issues were similar to the 1st defendant's which have been dealt with elaborately above on the issue whether the plaintiff sought the authority of the Receiver to bring this suit. Counsel submitted that from the evidence on record and the documents produced it is clear that the Plaintiff is breach of its contractual obligations to the 2nd Defendant under the Loan Agreement, which breach has not been remedied and is continuing to this day.

Counsel also submitted that the Plaintiff was issued with various notices, and accorded numerous opportunities to redeem its security, by the 2nd Defendant prior to appointment of the Receiver and Manager and prior to the intended sale of the said assets. That the first opportunity accorded to the Plaintiff to redeem its security was offered during a meeting held at the 2nd Defendant's offices on the 14th of October, 2011. At that meeting, it was agreed as follows:

1. The Plaintiff be given three (3) months, up to 31st December 2011 to raise funds for the purpose of restarting the plant;

2. That upon the restarting of the plant's operations, the 2nd Defendant would give the Plaintiff an additional six (6) months, up to 30th June, 2012 to identify potential buyers/investors who will invest in or buy the plant with the proceeds being used to pay off the outstanding loan arrears; during the said period, the Plaintiff would inform the 2nd Defendant of the progress made in the re-opening of the plant and in identifying a potential investors/buyer;

3. That upon the expiry of the agreed period the Bank would be at liberty to take any necessary action in order to recover the outstanding debt at the Plaintiff's risk as to costs and other incidental expenses consequential thereto; and finally

4. That the bank still reserved its rights to take such action as envisaged in the loan agreement before the end of the period referred in the event that the its interests in the project are deemed threatened.

Counsel stated that PW1 admitted, under cross examination, that the said meeting did in fact take place and further that the letter of 17th October 2011, which is acknowledged by his signature, accurately captured the agreement of the parties at the meeting of 14th October 2011. Counsel cited the case of NATIONAL BANK OF KENYA LTD V PIPEPLASTIC SAMKOLIT (K) LTD AND ANOTHER (2002) EA 503 where it stated:-

"This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause.

Counsel submitted that in this case the Plaintiff was given 9 months within which to redeem his security by restarting the plant and finding a buyer for it; the Plaintiff, through PW1, agreed of its own volition to this timeline set out in the agreement reached on the 14th of October 2011 and that none of the timelines as agreed between the parties was met and that no buyer for the plant had been located by deadline of 30th June 2012.

It was therefore Counsel's submission that from the above, it is evident that the Plaintiff squandered his equitable right of redemption and cannot now be heard to say that its equitable right has been clogged. Counsel also submitted that the Plaintiff is not entitled to a grant of any equitable relief preventing the sale of its assets by the company for the reason that the Plaintiff is an admitted defaulter who has been in absolute default for a period of ten years and who has been given more than ample time to attempt a private treaty sale of the suit plant, to no avail.

Counsel submitted that the prayer for access to the Plant to allow the Plaintiff to test run for potential purchasers cannot stand as, by PWI's own admission, the Plaintiff does not have the funds to conduct such a test and further the Plaintiff has previously been granted every opportunity in the past to run such test to no avail. He urged the court to dismiss the plaintiff's suit with costs to the defendants.

Analysis and Determination

The parties listed issues for determination by the court as follows:

1. Whether the plaintiff's equity of redemption has been clogged by the defendants

2. Whether the suit is fatally defective for lack of obtaining authority of the Receiver and Manager before filing suit in the company's name?

3. Whether the Plaintiff is in breach of the various agreements entered into between itself and the 2nd Defendant;

4. Whether the Defendants are entitled to sell the charged property in portions or as a whole, in exercise of the statutory power of sale?

5. Whether the suit discloses a reasonable cause of action against the Defendants?

6. Who should bear the costs of the suit?

I have considered the submissions from Counsel for the Plaintiff and the Defendants together with the supporting documentation. I have also looked at the list of various judicial authorities and have condensed the issues for determination as follows:

1. Whether the suit is fatally defective for lack of obtaining authority of the Receiver and Manager before filing suit in the company's name?

2. Whether the plaintiff's equity of redemption has been clogged by the defendants

3. Whether the Plaintiff is in breach of the various agreements entered into between itself and the 2nd Defendant;

4. Whether the plaintiff is entitled to the orders sought.

5. Whether the Defendants are entitled to sell the charged property in portions or as a whole, in exercise of the statutory power of sale?

I will start by addressing the issue as to **whether the suit is fatally defective for lack of authority from the Receiver and manager to file this suit**. If the court comes to a finding that the suit is defective for lack of authority to sue from the Receiver and Manager then it will not move further to determine other issues.

The issue whether the plaintiff is entitled to the orders sought, the plaintiff and the defendants gave elaborate evidence on how they entered into the transaction which is currently the source of the dispute before the court. It is not in dispute that the plaintiff took a loan of USD 11,7000/ from the 2nd defendant which was paid directly to Elexter a Finish Company who were supposed to supply, deliver, install and test run the machines at their Eldoret factory for processing UHT milk. It was the plaintiff's evidence that they were unable to repay the money because Elexter delayed in delivery and installation of the machines until 2008.

The plaintiff testified that he took steps towards liquidating the amount which included getting investors partners and purchasers to have it sold by private treaty and that most of the purchasers wanted to purchase the entire factory i.e property, plant and machinery plus all the buildings as a going concern

From the evidence on record it is clear that the plaintiff admitted that he received demand letters in respect of the amounts owing and that he was aware of the appointment of a Receiver and manager who was an agent of the company although he denied knowing that the Receiver was the company's agent.

It is further not disputed that the plaintiff is in default as admitted by the plaintiff in his evidence in chief. What the plaintiff disputes is that he was not given an opportunity to test run the machines to enable him get buyers to sell the factory as a going concern.

It is not in dispute that the plaintiff Company is under Receivership and that the 1st defendant was appointed as a Receiver and Manager of the plaintiff of which the plaintiff was aware of. It is also acknowledged that clause 14 of the debenture provided for the appointment of a Receiver as follows:

"*14. At any time after this security has become enforceable under the provisions of Clause 13 hereof (and so that no delay or waiver of the rights to exercise the power hereby conferred shall prejudice the future exercise of such powers without prejudice of any other remedies provided by law) the Lender may in writing appoint any person or persons whether an officer or officers or agents of the Lender or not to be a Receiver or Receiver and Manager or Receivers and Managers of the property and assets hereby charged or agreed to be charged or any part thereof..*

Further clause 15 of the Debenture instrument thereof makes the Receiver and Manager an agent of the Company and grants him the power to sell the charged property in any manner he deems fit as follows :-

> *"15. Every Receiver so appointed shall be deemed to be the agent of the Company and the Company shall alone be liable for his acts, defaults and remuneration and he shall have the authority and be entitled to exercise the powers hereinafter set forth in addition to and without limiting any genera/ powers conferred upon him by law:-*
>
> *(d) To sell or assign or concur in selling letting or assigning any of the property and assets hereby charged or agreed to be charged in such manner and generally on such terms and conditions as he shall think fit and in the name of the Company to carry any such sale letting or assignment into effect.*
>
> *(i) To do all such other acts and things as may be considered to be incidental or conducive to any of the matter and powers aforesaid and which such Receiver can or may lawfully do as agent for the Company."*

The plaintiff admitted that he did not seek the authority to institute this suit from the Receiver and Manager as required by law. He also stated that he was not aware that the Receiver and Manager was an agent of the Company. I believe that if he had known this legal position then he would have cooperated with its agent for the best outcomes for the company instead of doing things at cross purposes.

It is trite law and the legal position that Directors of a company under Receivership can only institute proceedings in the name of the company with the authority of a Receiver. This was not adhered to in this case. I will rely on the case of Mandev Limited v M. K. & Sons Limited (Under Receivership) & Another (2010) eKLR where t the court held:

> *"The general principle is that once a company has been placed under Receivership it lacks the legal competence to institute a suit or be sued in its company name. It can only sue or be sued through the Receiver.*

Iam further persuaded by the case of Cyperr Enterprises Ltd vs Metipso Services Ltd & 2 Others (2011) eKLR, where Okwengu J (as she then was) in striking out the Plaintiff's suit and application filed without leave of the Receiver and Manager held inter alia as follows:-

> *"Therefore prima facie the position appears to be that the Plaintiff Company is still under Receivership. If that be the case, then the suit ought to have been instituted through the authority of the Receiver manager and not the Directors of the company. This is because the Directors of the company have been temporarily put on the back seat so far as the management of the company is concerned. There being no evidence of any authority from the Receiver manager to file the suit, the suit is incompetent as Shakalaga Kwa Jirongo had no authority to authorize the filing of the suit "*

I have considered the evidence, the rival submissions by Counsel and come to the conclusion that this case is defective for lack of authority to file the suit from the Receiver and Manager and is therefore dismissed with costs to the defendants. Had the suit been proper before the court, from the evidence on record, the same would still have been dismissed for want of proof on a balance of probabilities.

Dated and Delivered at Eldoret this 11th day of October, 2018.

M.A ODENY

JUDGE

Judgment rad in open court in the presence of Mr. Barasa holding brief for Mbaluto for the defendant. Miss Awinja holding brief for Mr. Mwetich for the Plaintiff.

Mr. Koech: Court Assistant.