



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L 66 OF 2015**

**KABIYET AGRO & GENERAL ENTERPRISES.....PLAINTIFF**

**VERSUS**

**BENARD ROP.....1ST DEFENDANT**

**EASTERN AND SOUTHERN TRADE**

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

**RULING**

The plaintiff, a Limited Liability company duly incorporated under the companies Act Cap 486 Laws of Kenya has commenced this suit against the 1st defendant a receiver Manager of the plaintiff and the 1st Defendant a trade and development institution operating withing Africa claiming that on or about the 8th day of June, 2005 the plaintiff company borrowed development funds from the 2nd defendant in the sum if USD 1,117,000/=. The said sum was repayable with interest thereon. However, the plaintiff's business in the fresh milk sector did not pick resulting in the closure of the plaintiff's milk factory at Eldoret. In order to secure the loan facility referred to in paragraph 4 of this claim, the plaintiff pledged as security to the 2nd defendant all plant and machinery in the milk factory and as well L.R No. ELDORET MUNICIPALITY BLOCK 10/81 (together referred to as "the charged property"). It is the plaintiff's case that the plant and machinery together with the land (all forming part of the land owing to their permanent fixture on the ground) were pledged by the plaintiff to the 2nd defendant only as security. Thus, the plaintiff's equity of redemption operates with respect to them.

In exercise of the plaintiff's equity of redemption, the plaintiff has consistently tried to dispose off the charged property by private treaty in order to secure a good sale price which will raise funds sufficient to clear the 2nd defendant's loan amount but the 2nd defendant has consistently scuttled such efforts thus unreasonably placing a clog on the plaintiff's right to redeem.

On 17th February, 2015, the 1st defendant, acting as an agent of the 2nd Defendant advertised the charged property for sale but in portions signifying an intention to dismantle the plant.

The plaintiff fears that this new development will only result in selling the charged property at an undervalue when the plaintiff has buyers who are ready to buy the plant as a going concern.

It is the plaintiff's contention that this development is a further clog on the equity of redemption as the 1st defendant is driven only with the 2nd defendant's interest in mind at the expense of the right to redeem by the plaintiff. The plaintiff claims that further and contrary to the provisions of Article 351 of the Companies Act Cap 486 Laws of Kenya, the 1st Defendant has failed to provide statements of affairs of the plaintiff company thus making it impossible to ascertain the degree of indebtedness of the plaintiff

to the 2nd Defendant.

The plaintiff therefore prays for a declaration that the defendants' overall conduct constitutes a clog on the plaintiff's equity redemption and that the defendants do allow the plaintiff access to the premises to enable the intending purchasers to undertake a test run of the plant. That the defendants allow the plaintiff to sale the plant by private treaty as a going concern and that recourse be had to sale in portions only if the sale of the plant as a going concern fails and ultimately pray for the costs of the suit.

The plaint is accompanied with a Notice of Motion dated 6/3/2015 seeking orders that pending the hearing of the suit there be injunctive orders restraining the respondents 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. The application is based on grounds that:-

- i. **The Respondents have advertised the charged property for sale in portions.**
- ii. **The Respondents' decision to sell the charged property not as going concern is likely to undervalue it.**
- iii. **The decision to sell the charged property in portions has been notwithstanding that the applicant is able to sell it as going concern and for a higher value.**
- iv. **The Respondents have however refused to allow potential buyers to undertake test runs thus blocking the exercise of the equity of redemption by the applicant.**

The application is supported by the affidavit of John Sambu the director of the plaintiff who states that the plaintiff took a facility with the 2nd Defendant to finance a milk processing plant but unfortunately the milk processing business closed down due to unfavorable prices as a consequence the plaintiff was unable to service its facility with the 2nd defendant and as a result, the 2nd defendant appointed the 1st defendant as receiver and manager of the plaintiff's plant.

Over time, the plaintiff has tried to facilitate a sale of the plant by private treaty in a bid to secure a good price for it which will not only clear the loan balance due to the 2nd defendant but also leave some funds to settle other liabilities due from the plaintiff which this has been in recognition of the plaintiff's equity of redemption. The plaintiff has a result, secured a number of offers for the property but most prospective buyers however insist on a test run of the plant. The installation managers confirm the plant is functional and only requires servicing, unfortunately, the defendants have been reluctant to allow such test run which has effectively ensured that all prospective buyers are kept at bay in violation of the plaintiff's equity of redemption, besides, the 1st defendant has not supplied the plaintiff's management team with a statement of accounts of affairs of the plaintiff company since his appointment.

He is informed by the plaintiff company lawyers which information he believes to be true that such refusal to furnish a statement of affairs is contrary to the requirements of the Companies Act and that the net consequence is that the plaintiff company, its directors and shareholders are totally in the dark on the goings on at the company and that in the absence of such information, it is not possible to determine the liabilities outstanding in favour of the 2nd defendant if at all hence the entire of these developments are solely intended to scuttle the plaintiff's equity of redemption.

On 17th February, 2015, the 1st Defendant ran an advertisement in a local daily offering to sell the plant in bits and pieces which sale the plaintiff believes will result in a gross under value of the plant as opposed to if it was sold as a going concern. The plaintiff believes that there is absolutely no reason to offer the plant for sale in the manner suggested by the 1st Defendant if there are persons willing to buy it as a going concern and for a better price once they test run it and therefore the only plausible account for the 1st defendant's behavior is that he is keen to deprive the plaintiff of the equity of redemption with regard to the suit premises. That it is imperative that the defendants are restrained from unfairly disposing off the plant and that a sale by private treaty be encouraged and that unless such order is issued the plaintiff's plant will be dismantled and sold at gross under value to the detriment of the plaintiff.

The 2nd Respondent filed a replying affidavit sworn by Mr Alto Chapota a senior management officer of the 2nd Defendant stating that it is clear in the Supporting Affidavit that the plaintiff was unable

to service its facility with the 2nd Defendant as a result of which the 2nd Defendant appointed a receiver and manager of the plaintiff's plant and that there is nothing before the Court, to demonstrate any refusal on the part of the Respondents to a test run of the plant, as clearly no offer to purchase has been made. The allegation that the Plaintiff's equity of redemption has been violated in any way is simply mischievous and untrue. The 2nd Respondent is also aware that the 1st Respondent has filed an abstract of receipts and payment at the Registry of companies. The allegation that the sale would result in a gross undervalue is mere speculative as the law provides various safeguards, to prevent the sale of assets at an under value and it is for this reason that the 1st Respondent's advertisement clearly specified that the sale was subject to a reserve price. He believes that the court cannot re-write contracts for parties.

The applicant has issued to the 2nd Respondent a charge dated 8th June 2005 over Eldoret Municipality/Block 10/81 to secure advance of USD 1,117,000/=, a colossal amount by any means. The Plaintiff has also issued a Debenture to the 2nd Respondent dated 8th June 2005 securing the sum of USD 1,117,000/= and a Certificate duly issued by the Registrar of companies.

These instruments contractually agreed upon conferred upon the 1st Respondent, upon default by the Applicant, the right to exercise its statutory power of sale by disposing off the charged property as well as to place the Applicant under Receivership. There have made a plethora of demands for payment by the Respondent to the Applicant which have not been honored including those dated 23rd April 2013, 24th Jul 2013 and 5th February 2014. The applicant has been making numerous promises to pay the Respondents' all of which have been empty. The 2nd Respondent was at all times welcome to the Applicant redeeming its properties and issued a letter dated 21st conformable 2013 setting out the terms of the proposed settlement. Most disappointingly, the Applicant's Advocates responded that they were seeking further instruction, never to revert.

The first defendant states that by a loan Agreement dated 30th March 2005 entered into between the Plaintiff and the 2nd Defendant; the plaintiff borrowed a sum of USD 1,117,000 from the 2nd Defendant. The terms of the said lending were contained in the said agreement wherein the 2nd Defendant created a debenture over movable assets and goodwill of the plaintiff Company. Pursuant to the requirements of section 96 of the /companies Act the said debenture was registered at the Companies Registry and that in accordance with Section 99 of the Companies Act, Chapter 86 of the Laws of Kenya a Certificate of Mortgage was issued and in terms of aforesaid agreement a Charge over Nandi/Eisero/220 and Nandi/Kaptich/717 was created in favour of the 2nd Defendant to secure the said loan facility and as required by the provisions of Section 96 of the Companies Act the particulars of the said Charge were registered at the Companies Registry. Pursuant to the provisions of Section 99 of the Companies Act the Registrar of Companies issued a Certificate of Registration of mortgage dated 27th June 1995.

Further to securing the loan facility, a Charge was created in favour of the 2nd Defendant over all that parcel of land known as Eldoret Municipality/Block 10/81 and that as required under Section 96 of the Companies Act the particulars of the said Charge were registered at the Companies Registry on 27th June 2005 and pursuant to the requirement of Section 99 of the Companies Act the Registrar of Companies on 27TH 1995 issued a Certificate of Registration of the Charge. The said facility was further secured by a Deed of Guarantee executed by John Kipkorir Sambu, Rhoda Chesanga Sambu and Felix Kipchumba Sambu. However, in breach of the terms of the Lending Agreement the plaintiff defaulted in its repayment obligations.

By a letter dated July 10, 2012, the 2nd Defendant informed the plaintiff of the default and made a demand of USD 2,300,949.42 which was the amount outstanding as at that date. The plaintiff failed to remedy its default and by letter dated 5th February 2014 the 2nd Defendant's lawyers issued statutory notice demanding a sum of US 2,646,598.88. On 6th February 2014, by an instrument of the same date, the 1st Defendant was appointed Receiver under the securities set out in the instrument of appointment and as required by the Companies Act a notice of his appointment was filed with the Registrar of Companies and by a letter dated 13th February 2014 he duly advised the Directors of the plaintiff of his appointment.

During his tenure as Receiver of the plaintiff, he has not authorized any person or party to

institute these proceedings on behalf of the plaintiff and that the directors of the plaintiff company have on occasion represented that they intended to sell the securities by private treaty and none of the representations have borne fruit. With respect to the allegations that he has been reluctant to run a test on the machinery, it is his position that he has consistently advised the directors of the Plaintiff that should they require such a test run they should do so at their own cost and therefore has not placed a clog upon the right of redemption. In carrying out any mandates as Receiver, he has complied with the requirements of the Companies Act hence there is need to progress the realization process as the loan balance keeps on rising and there is the real danger of the said balance exceeding the value of the securities. He is advised by his Advocate on record that the plaintiff has not established a *prima facie* case with reasonable probability of success nor have they demonstrated the damage they would suffer, if any, should I proceed to exercise my made under the security instruments.

The applicant in response filed a supplementary affidavit stating that he has been informed by his advocate on record and which information he believes to be true that the only time a company will need permission to sue is when it is under liquidation and nor receivership and in any event, the current suit is against the 1st Defendant as the Receiver Manager of the applicant and the 2nd Defendant as the financier and it is inconceivable that in the circumstances, the permission to bring and sustain these proceedings is unsound in law. He believes to be true that the real issue for determination in this cause is whether the applicant's right to exercise its equity of redemption has been clogged by the Respondents' actions of declining to allow a test run of the plant for purposes of promoting a sale by private treaty.

The plaintiff submits that though it is indebted to the 2nd Defendant it has the right to redeem the security pledged in the debt in question. The plaintiff contends that upon default it approached the 2nd Defendant with the intention of procuring the consent of the 2nd Defendant to dispose off the milk plant through private treaty and although the first offer failed subsequent offers were received but have been frustrated by refusal to test run the plant for the benefit of potential buyers.

The plaintiff submits further that question that the court is called upon to be determined is whether such refusal amounts to a clog in the applicant's equity to redeem the plant. From the earlier comments on the equity of redemption, it is clear that any conduct that can be interpreted as unconscionable in a commercial/financial dealing which is intended or has the effect of "hampering redemption". (***Team Dynamik Racing Pty Limited -vs- Longhurst Racing Pty Ltd*** and others as quoted in Sydney Jacobs 24). Unconscionable conduct has been interpreted so widely as to connote any conduct that allows one party to a transaction to unconscientiously take advantage of *inter alia*, "the inexperience, financial needs and other circumstances" affecting the other party's ability to protect his own interest.

In the current case, it is the applicant's submission that the refusal by the respondents to allow a test run of the plant under the pretext that risks arising from test runs are not included in the risks covered by the current insurance cover for the plant by the respondents effectively denies the applicant the opportunity to offload the machinery as a going concern. In a nutshell, this refusal to facilitate test run by the respondents constitutes unconscionable behavior within the meaning assigned to conduct that impedes the exercise of the equity of redemption.

The respondents are aware that refusal to facilitate a test run will prejudice any attempts by the applicant to exercise the equity of redemption through disposal of the plant by private treaty and thus prejudice the ability by the applicant to fetch the best possible price for the plant. The applicant argues that it has made out an arguable case demonstrating that the threatened disposal of its plant by the respondents whilst at the same time locking out all attempts by the applicant to seek alternative ways of selling the plant as a going concern indeed violates the applicant's equity of redemption. Thus, this case presents a valid basis for intervention by the court to require the respondents to accord the applicant the opportunity to exercise this right in equity.

The 1st Respondent submits that It is undisputed that the 1st Respondent was duly appointed as receiver manager of the Applicant Company by the 2nd Respondent and remains so to date. It is accordingly the 1st Respondent's submissions that the instant application is fatally defective as the Applicant being a company under receivership can only bring the present application and indeed any

other legal proceedings involving the company by leave and/or permission of its receiver manager. There being no evidence of any authority from the receiver manager to file the suit, the suit is incompetent and fatally defective. To that end, the 1st Respondent has been unequivocal in his replying affidavit dated 14th March 2015 is pertinent.

The 2nd Defendant submits that it is not in dispute that on or about 8/6/2002 the 2nd Defendant offered the plaintiff financial facility in the amount of USD 1,117,000/= to finance the establishment and running of a milk processing plant in Eldoret town. The facility was to be secured by inter-alia a legal charge or LR No. Eldoret Municipality Block 10/81 from the applicant. The plaintiff also issued as debenture to the 2nd Defendant security the amount and a certificate duly issued by the Registrar of companies. The 2nd Defendant argues further that the applicant has not demonstrated a *prima facie* case with a likelihood of success because he has admitted defaulting in paying the loan.

On irreparable damage, it is argued that the applicant has not demonstrated that he would suffer irreparable loss which cannot be compensated in damages. Concisely, the 2nd Defendant argues that the 2nd Defendant is a big financial institution that is over capable of refunding any money beyond the value of the subject matter. Moreover, the 2nd Defendant argues that the plaintiff is guilty of material non disclosure that the plaintiff has been indulged to settle his debt but have not settled the debt.

The 2nd Defendant further argues that the doctrine of *lis pendens* does not apply to charges/mortgages and that there is no evidence that the plaintiff has received an offer for the property.

I have considered the application, responses, and rival submissions and do find that there is no doubt that the applicant is indebted to the 2nd Defendant/respondent and that already in arrears. However, it is not the duty of this court to determine how much is owing by the applicant to the said defendant or to do the accountant's job, the duty of this court is to ensure that the process of realization of security is within the law where the chargor has defaulted in servicing the financial facility. It is evident herein that the plaintiff has defaulted in servicing the loan facility and in fact it is admitted so by the plaintiff. It is also not in dispute that the plaintiff is under receivership. This court is of the view that the following issues are ripe for determination:-

1. - **whether the applicant have locus standi to bring the proceedings**
2. - **whether the applicant's rights of redemption have accrued.**
3. - **whether injunction should be issued.**

On the issue of *locus standi*, this court finds that it is not in dispute that the plaintiff is in receivership and not in liquidation. It is trite law that once interim liquidator is appointed the powers of the directors cease by statutory provision and the directors become *functus officio*. The plaintiff herein is not under liquidation and therefore its directors are not *functus officio*. The plaintiff applicant is only under receivership and not under liquidation therefore has *locus standi* to commence suit to protect the interest of the company .

***In NEWHART DEVELOPMENTS v. CO-OPERATIVE COMMERCIAL BANK,[1978] 2 ALL E.R. 896, 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.***

Whether the right of redemption has accrued, the court finds that the plaintiff being the chargor of the property and debenture holder his rights of redemption have accrued and therefore was entitled to test running 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. I do find that the plaintiff has demonstrated that he has a *prima facie* case with a probability of success.

On the issue as to whether the plaintiff will suffer irreparable harm that cannot be compensated in

damages, if the injunction is not granted, I do find the plaintiff risk losing the whole plant if injunction is not granted,. The argument by the plaintiff to be allowed to look for a buyer is plausible. The argument by the 1st defendant that he is an International financial institution with huge investments and will be able to compensate the plaintiff in damages is also plausible but cannot take away the plaintiff's right to property, I am not in doubt that the plaintiff has satisfied the two limbs of ***Giella V Cassman Brown***. If I were in doubt, which am not, the application ought to be determined on a balance of convenience which tilts towards granting the plaintiff an order of injunction due to the fact that the plaintiff has the right of redemption. The upshot of the above is that it is hereby ordered that pending the hearing of the suit there be injunctive orders restraining the respondents 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. Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF FEBRUARY, 2016.**

**ANTONY OMBWAYO**

**JUDGE**