IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, TUNOI & OWUOR, JJ.A.)

CIVIL APPEAL NO. 48 OF 2001

BETWEEN

VIMAL V. RADIA ..... 1ST APPELLANT

KAMAL V. RADIA ..... 2ND APPELLANT

MRS. S. V. RADIA ..... 3RD APPELLANT

VINODEEP INVESTMENT PROPERTIES LTD…… 4TH APPELLANT

AND

CITY FINANCE BANK LIMITED .....RESPONDENT

(Appeal from the judgment and decree of the High Court of

Kenya at Nairobi (Milimani) P. J. Ransley Esq.,

Commissioner ofAssize given on the 7th day of

December, 2000

in

H.C.C.C. NO. 686 OF 1998)

****

JUDGMENT OF THE COURT

This is an appeal by the unsuccessful plaintiffs, now the appellants, against the judgment of the Honourable P. J. Ransley, Commissioner of Assize (as he then was), delivered on 7th December, 2000, whereby he dismissed with costs the appellants' suit against the respondent for a claim of Shs.17,519,353.20 together with interest thereon and costs being in respect of aggregate amounts of Fixed Deposit Receipts placed with the respondent on diverse dates between 26th August, 1998 and 15th October, 1998.

The facts giving rise to the appeal are largely not in dispute and may be briefly stated as follows. The 1st,2nd and 3rd appellants are directors of the 4th appellant. They are all engaged in business. The

respondent is a limited liability company operating as a financial institution under the Banking Act Cap 488 Laws of Kenya. Between 26th August, 1998 and 15th October, 1998, the appellants placed with the respondent a total of Shs.17,519,353.20 on Fixed Deposit Receipts. There is no dispute that these monies were deposited with the respondent and that in the normal course of events these sums together with accrued interest would have been repaid to the appellants on their respective maturity dates.

However and most unfortunately for the appellants, the Central Bank of Kenya on 9th November, 1998, acting in accordance with **Section 34 (2)(a)** of the Banking Act placed the respondent under its management and appointed a Manager to assume the management, control and conduct of affairs and business of the respondent and to exercise all the powers of the respondent bank to the exclusion of its Board of Directors. Immediately on taking over the management of the respondent, its new Manager, declared a moratorium on the payment by the respondent to all its depositors and creditors.

On 1st March, 2000 a Scheme of Arrangement under **Section 207** of the **Companies Act** Cap 486 Laws of Kenya, was sanctioned by the High Court of Kenya at Nairobi in the following terms, which we reproduce in full:

"IT IS ORDERED: -

1.THAT, the Scheme of Arrangement annexed to the

Petition herein and thereat marked 'A' be and is hereby sanctioned by this

Honourable Court.

2.THAT, the issue of upto 1,403,000 ordinary shares in the compan y of Kshs 1,000 each as authorised by the Extra Ordinary

General Meeting of the company held at Nairobi on the 6th day of January, 2000 and at the creditors meeting held on 14th February, 2000 be and is hereby authorised by this Honourable Court.

3.THAT, the Scheme of Arrangement be operative as soon as a copy of this order sanctioning the Scheme shall have been delivered for registration to the Registrar of Companies as specified inthe Act."

It is worthy of note that none of the appellants instituted any appeal against the order sanctioning the Scheme of Arrangement nor were there, at the material time, any grievances raised against it.

In its defence to the suit the respondent averred that the respondent having been placed under the Statutory Management of the Central Bank of Kenya, the Manager so appointed thereafter had properly and lawfully declared a moratorium on the payments made by all of its depositors, the appellants included and creditors and any payment made to the exclusion of any of them would amount to a preferential payment which is expressly prohibited by the Scheme of Arrangement. The respondent further contended that nonpayment of the appellants' monies is not unlawful nor is it in breach of contract.

After considering these rival submissions the learned Commissioner of Assize held that the appellants are creditors of the respondent and fell squarely within the Scheme of Arrangement. He further held that the Companies Act, in such circumstances as these, inhibits preferences between creditors and the question of setting off the deposits provided by the Scheme of Arrangement against the monies owed to the appellants did not arise. Finally, the learned Commissioner of Assize found that the appellants had no preferential rights to receive back their deposits.

Against this decision, the appellants have preferred this appeal mainly on the ground that the learned Commissioner of Assize erred in not forming the view and making a finding that the Scheme of Arrangement, as drawn and as sanctioned by the High Court of Kenya, specifically excluded from its

operation and application those deposit liabilities which the respondent owed to such of its creditors as had filed suits against it in Court or whose deposits were due for set-off.

The appellants have further contended that their deposits were, under the terms of the Scheme of Arrangement, not entitled to be converted to equity since a provision for a sum of Shs.120 million had been provided for the purpose.

The Scheme of Arrangement was presented and sanctioned by the High Court of Kenya pursuant to section 207 of the Companies Act which reads as follows:-

"207(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the court may, on the application of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of t he members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

(2) If a majority in number representing three - fourths in value of the creditors or class of creditors or members or class of members, a s the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company."

The appellants maintain that the Scheme of Arrangement did not apply to them and therefore there was no need for them to approve the same as it never bound them after it had been sanctioned by the court.

On 27th January, 2000, the High Court ordered the convening of a meeting of the creditors pursuant to **section 207 (1) of the Companies Act.** The meeting was duly held on 14th February, 2000. A majority in number representing more than three-fourths in value of the creditors or members attended and voted for the Scheme of Arrangement and on 1st March, 2000, the High Court sanctioned it.

In our view, the main issue in this appeal would be resolved if we determined whether or not the appellants are creditors of the respondent.

Every person having a pecuniary claim against the company, whether actual or contingent, is a creditor. See **Halsbury's Laws of England, 4th Ed para 2140**. Further, in the case of **Indian Contractors Ltd vs. R. B. Purohit [1964] EA 342** that issue was finally resolved in a situation like the one presenting itself before us by the predecessor of this Court.

The brief facts were as follows. In February, 1959, the respondent sued the appellant company claiming general damages for breach of a building contract. In November, 1959, a petition was filed for compulsory winding up of the company by another creditor and the Official Receiver was appointed provisional liquidator. Subsequently pursuant to an order made by the court under **section 207** of the **Ugandan Companies Act** (in similar words with **Kenyan Companies Act),** a meeting of creditors was called and the statutory majority of them approved a Scheme of Arrangement. As the respondent was not regarded as a creditor he did not attend the creditors' meeting. The scheme was later sanctioned by the court and the court rescinded the appointment of the provisional liquidator.

In February, 1963, judgment was given against the appellant.

By agreement of the parties a case was then stated to the court for a ruling whether the respondent was entitled to payment in full from the appellant company or whether the respondent was bound by the Scheme of Arrangement sanctioned by the court. The trial judge held that though the respondent was a creditor at the date when the Scheme of Arrangement was sanctioned by the court, the respondent was not

bound by the scheme as he had no notice of the meeting and no opportunity to oppose the scheme. On appeal, the court held that:-

"1.Once a scheme of arrangement is sanctioned by the court under s. 207 of the Companies Act, it is unimpeachable by any of the creditors whether the y were parties to it or not, except in the form of an appeal prescribed by the Civil Procedure Act;

2.The object of s. 207 (2) is to enable the specified majority to bind all the creditors and the judge erred in holding that the respondent was not bound b y the scheme of arrangement sanctioned by the court; further it was immaterial whether or not the respondent was absent at the meeting and failure to give notice of the meeting to the respondent did not ipso facto entitle him to dissent from the scheme;

3.Having regard to the development of company law in England the word "creditor" in s. 207 ibid. must be interpreted widely to include every person who has a pecuniary claim against the company, whether actual or contingent and accordingly the respondent wa s a creditor within s. 207."

In our view, the dictum enunciated by the above cited case is sufficient to dispose of the issues canvassed before us in this appeal. We hold that the appellants being depositors were clearly creditors of the respondent bank, and therefore, the Scheme of Arrangement sanctioned by the court bound them.

It is erroneous for the appellants to believe that the Scheme of Arrangement excluded their deposits from its operation and application. Again, in our my view, the learned Commissioner of Assize did not err in not holding that the appellants had not at the time they brought their suit, a valid and incontestable claim for the recovery of their deposits from the respondent.

The appellants were well aware of the Scheme of Arrangement but chose not to move the court, either before or after the Scheme had been sanctioned, so as to enable the court to revisit the Scheme and if necessary make such order as was necessary, say for example, not to sanction the Scheme or to review it in order to do substantial justice to all creditors. In the circumstances, the appellants could not avoid being subject to the Scheme of Arrangement.

In the result, we do not see any merit in this appeal and we order that it be dismissed with costs.

Dated and delivered at Nairobi this 21st day of February, 2003.

J. E. GICHERU

.....

JUDGE OF APPEAL

P. K. TUNOI

.....

JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR