



Mrao Ltd v First American Bank of Kenya Ltd & 2 others (Civil Appeal 39 of 2002) [2003] KECA 175 (KLR) (7 March 2003) (Judgment)

Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR

Neutral citation: [2003] KECA 175 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 39 OF 2002
RO KWACH, SEO BOSIRE & EO O'KUBASU, JJA
MARCH 7, 2003**

BETWEEN

NRAO LTD APPELLANT

AND

FIRST AMERICAN BANK OF KENYA LTD 1ST RESPONDENT

ABDI ZAHIR SHEIKH 2ND RESPONDENT

ANDREW DOUGLAS GREGORY 3RD RESPONDENT

(An appeal from the ruling & order of the High Courtst June. 2000 in HCCC No 2 of 2000)

Principles that guide courts in granting interlocutory injunctions

The instant matter was an appeal from the interlocutory judgment of the High Court, dismissing the appellant’s application for an interlocutory injunction among other orders. The court highlighted the principles that guided courts in granting interlocutory injunctions and the circumstances in which an appellate court may interfere with the exercise of discretion by lower court.

Reported by Kakai Toili

Civil Practice and Procedure - injunctions - interlocutory injunctions - grant of interlocutory injunctions - principles that guide courts in granting an interlocutory injunctions - what was the meaning of a prima facie case with a probability of success.

Jurisdiction - jurisdiction of appellate courts - jurisdiction to interfere with the exercise of judicial discretion by a lower court — what were the circumstances in which an appellate court may interfere with the exercise of discretion by lower court.

Equity - doctrines of equity - where party who goes to court failed to show utmost good faith - whether such party entitled to an equitable remedy.



Brief facts

The instant matter was an appeal from the interlocutory judgment of the High Court, dismissing the appellant's application for an interlocutory injunction among other orders. The appellant had borrowed a loan of more than Kshs 50 million from the 1st respondent on a security of a legal charge over the suit land in Mombasa and a debenture. At the time of tire demand the repayment stood at Kshs 88 million which was reduced to Kshs 68 million. The appellant failed to pay those debts whereupon the 1st respondent appointed the 2nd and 3rd respondents as receivers. The appellant sought an injunction restraining the 1st respondent from exercising its statutory power of sale and declarations that the charge and debenture were null and void having not been registered pursuant to section 69(4) of the Transfer of Property Act. The appellant further alleged fraud on the part of the 1st respondent.

Issues

- i. What were principles that guided courts in granting interlocutory injunctions and what was the meaning of a *prima facie* case with a probability of success.
- ii. What were the circumstances in which an appellate court may interfere with the exercise of discretion by lower court.
- iii. Whether where a party who went to court failed to show utmost good faith was entitled to an equitable remedy.

Held

1. The power of a court in an application for an interlocutory injunction was discretionary.
2. The Court of Appeal may only interfere with the exercise of a court's judicial discretion if satisfied:
 - a. The judge misdirected himself on law; or
 - b. that he misapprehended the facts; or
 - c. that he took account of considerations of which he should not have taken account; or
 - d. that he failed to take account of consideration of which he should have taken account; or
 - e. that his decision, albeit a discretionary one, was plainly wrong.
3. The principles for granting an interlocutory injunction are that:-
 - a. The applicant must show a *prima facie* case with a probability of success;
 - b. an interlocutory injunction would not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;
 - c. if the court was in doubt, it would decide an application on the balance of convenience.
4. A *prima facie* case in a civil application included but was not confined to a genuine and arguable case. It was a case which, on the material presented to the court, a tribunal properly directing itself would conclude that there existed a right which had apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
5. The Court of Appeal took all relevant matters into question in deciding whether the appellants presented a *prima facie* case. The appellants came to a court of equity but having failed to show utmost good faith, the court could not but hold that it was not entitled to the injunction in application.

Appeal dismissed with costs.

Citations

1. *Giella v Cassman Brown & Co Ltd* [1973] EA 358
2. *Francois Vieljeux, The* [1984] KLR 1; [1982-88] KAR 398
3. *BhattvR* [1957] EA 332

Texts

1. Hailsham, Lord *et al* (Eds) (1982) *Halsbury's Laws of England* London: Butterworths 4th Edn Vol XXXIII para 725



2. Watton, R (Ed) (1989) *Kerr on the Law and Practice as to Receivers and Administrators* London: Sweet & Maxwell 17th Edn p 357

Statutes

Indian Transfer of Property Act 1882 section 69(4)

JUDGMENT

JUDGMENT OF BOSIRE JA.

1. This is an interlocutory appeal from the order of the Superior Court dated 21st June, 2000, in which a Commissioner of Assize, Kassim Shah, declined to grant an interlocutory injunction to Mrao Limited, the appellant, a limited company which was engaged in the manufacture of matchboxes. The essential facts of the case can briefly be stated as follows. In or about October, 1996, the appellant applied for and obtained a Kshs 50 million loan from First American Bank of Kenya Limited, hereafter referred to as the first respondent, on the security of a legal-charge over Plot No 714 Section IV Mainland North, Mombasa, which for purposes of this judgment I shall refer to as the first charge. Under section 69(4) of the Transfer of Property Act, such a charge is required to be registered. However, according to the appellant, the said charge was not registered in the manner required by that section. The charge was to be a continuing security for the repayment of the aforesaid loan. Clause 7 of the said charge provides that the mortgage debt and interest thereon would “immediately become payable without demand and the statutory power of sale – would forthwith become exercisable without any further or other notice”, inter alia, upon breach of any or all the covenants and agreements on the part of the chargor. By the same charge, the chargee reserved the statutory right to appoint a receiver in the event of such breach. By an instrument executed on or about 14th September, 1998, the first respondent appointed Andrew Douglas Gregory, of KPMG, Peat Marwick, hereinafter referred to as the third respondent, as Receiver Manager of all the property and assets charged by the mortgagor. The appellant contends that the appointment was premature and that it adversely affected its business. It would appear to me that although the appellant felt that the appointment was irregular it did not challenge it. Instead it approached the first respondent and negotiated with it for a further loan on terms which were spelled out in a letter from the first respondent to the appellant dated 27th April 1999. That letter was written in response to the appellant’s letter to it dated 26th April 1999, in which the appellant acknowledged that it owed the first respondent Kshs 68 million and gave a proposal on how it was to repay the money as follows:

- “2. 68 million will be repaid as follows:
- (a) Kshs 4 million after 4 weeks of completion of all documents
 - (b) Kshs 1 million after 2 months after repayment of (a)
 - (c) Balance of Kshs 63 million to be converted into a new loan payable 6 months after item (b) on a mortization basis equally over 7 years.
 - (d) Interest to be charged maximum of 18% pa and to be serviced monthly after the completion of (a).”



2. The appellant offered to execute a debenture over its assets if and when the first respondent accepted its aforesaid proposal. The first respondent's letter of 27th April 1999, in effect made a counterproposal. The said proposal had five conditions as follows:-

“The Bank will be prepared to enter into an agreement upon the following terms:-

- (1) Execution by Mrao Limited of a debenture in favour of the Bank with immediate effect to secure a sum of Kshs 63,000,000/=.
- (2) Repayment to the Bank of Kshs 5 million within 4 weeks after the execution of No 1 above.
- (3) Upon execution of No 1 and repayments provided in 2 above the Bank will give Mrao a rebate of Kshs 18 million which will go to reduce Mrao's outstandings with the Bank.
- (4) The Bank will increase your credit line from the existing Kshs 50 million to Ksh 63 million which is subject to review on an annual basis.
- (5) The Bank will charge interest at a rate to be decided by the Bank from time to time presently set at 18% pa. This interest will be repaid on a monthly basis.”

3. The letter concluded that the conditions did not constitute an offer but that they were subject to a formal letter of offer being drawn up by the Bank and the same being duly executed by the appellant. The formal letter of offer was drawn, dated 3rd May 1999, and among the terms thereof was one requiring the appellant to meet and comply with the terms and conditions set out in its letter dated 27th April, 1999, which had apparently been accepted in writing by the appellant in its letter to the first respondent dated 29th April, 1999.

4. The appellant duly accepted the terms set out in the letter of offer by its letter to the first respondent dated 17th May, 1999. That letter, in addition, forwarded 3 copies of a further charge over the aforesaid property duly executed, directors resolution, three copies of a debenture duly executed, and three copies of directors guarantee duly executed. The letter concluded as follows:-

“We shall be grateful if you can finalise the execution of these documents upon which kindly let us have one set for our records so subsequently we can start payment as required in your letter of 27th April, 1999.”

5. The appellant has averred in its plaint that the first respondent deliberately failed to notify the appellant that it had duly executed the aforesaid documents, failed to have them duly stamped and registered with the result that the letter of offer did not create any contractual obligation on the part of the appellant for want of consideration. It, however, does appear to me that the first respondent duly executed and registered the aforesaid documents because on 9th November, 1999, acting on the basis of the letter of offer, it appointed Abdi Zahir Sheikh the second respondent and the third respondent receivers and managers jointly and severally of all the property and assets charged by the debenture the appellant executed and forwarded to the first respondent by the appellant's letter of 17th May, 1999. It should be recalled that the appellant had accepted the terms set out in the third respondent's letter of 27th April, 1999, one of which was that the appellant was to pay Kshs 5 million, about 4 weeks after executing the debenture. It would appear that the appellant did not honour that clause and the first respondent therefore exercised its powers under the debenture. It is the appointment of the second and third respondents as receivers and managers of the appellant's assets which prompted the appellant to bring



an action by plaintiff in the Superior Court against the three respondents herein claiming, inter alia, an injunction restraining them from alienating, disposing, dealing with, or selling its assets covered by the debenture, a declaration that the first charge it executed in favour of the first respondent over Plot No 714 section IV Mainland North, Mombasa, on 4th November, 1996, was null and void and that its registration at the Lands Registry be cancelled, general and exemplary damages for fraud, conspiracy and for loss of business.

6. Filed simultaneously with the plaintiff was a Chamber Summons praying for an injunction against the three respondents on the same terms as in the plaintiff, restraining them from alienating, disposing, dealing with or selling all the property and assets of the appellant included in the debenture under which the second and third respondents were appointed receivers and managers. There was also a prayer for an injunction restraining the second and third respondents from acting or purporting to act as receivers and managers of the appellant. That application was heard by a Commissioner of Assize, Kassim Shah, who after hearing lengthy submissions from the parties respective counsel dismissed the appellant's application and thus provoked this appeal.
7. The appellant's case before the trial court was simple. The first respondent obtained a further charge over the appellant's property and a debenture over its assets fraudulently and without any consideration. Consequently the appointment of the second and third respondents as receivers and managers was not only wrongful but it was also unjustified. Besides, it was also contended on behalf of the appellant that the first respondent did not make any formal demand of its money before taking the drastic step of appointing receivers and managers. It was further contended that prior to the appointment of the receivers and managers, the appellant's business venture was a viable one, but upon the receivers taking over its performance deteriorated. It was also its case that the first respondent had a personal vendetta against it.
8. The respondents' answer to the appellant's application was to the effect that the appellant's account with the first respondent was always overdrawn beyond the limit of Kshs 50 million, that the appellant had not made any payments of the loan for sometime, nor had it paid any interest thereon with effect from 9th October, 1996, and that in view of that default, it could not be justifiably said that the first respondent had any vendetta against the appellant; that there was sufficient consideration for the further charge and debenture as the first respondent clearly stated in its letter of offer, that it had agreed to forgo its immediate legal right to claim all and any monies due and owing to it from the appellant and also the immediate right to exercise its legal right of foreclosure under the first charge dated, 4th November, 1996, if the appellant agreed to execute the two instruments. In his ruling the learned Commissioner of Assize held, inter alia, that, as at the date of the agreement of 3rd May, 1999, the appellant was, in effect, under receivership; that there was valuable consideration which passed from the first respondent to the appellant by way of forbearance on its part to enforce its rights under the first charge; that before the first respondent appointed its co-respondents as receivers and managers, there had been a formal demand made for the appellant to pay the balance of the loan and interest and the receivers were appointed when there was default; that whatever the first respondent did against the appellant prior to the agreement of 3rd May 1999, was extraneous to that agreement and had no bearing on the decision in this matter; that the first charge and debenture were fully registered and there was therefore nothing wrong with them; that the receivers and managers did not in any way misconduct themselves in the management of the appellant's property and assets as would entitle a court of law to interfere, and that this was a court of equity and that consideration being given to the fact that the appellant had not made any payment towards reducing its indebtedness to the first respondent the conduct of the appellant disentitled it to an equitable remedy. The appellant was aggrieved and hence this appeal.



9. There are 17 grounds of appeal, but looked at closely they may be condensed. These are, that the learned Commissioner of Assize erred in finally determining some issues as though he was holding a trial, that he erred when he failed to find that a prima facie case had been made out after holding that bad faith though a relevant factor could not be determined at interlocutory stage; that he erred in failing to hold that a prima facie case had been made out after concluding that he could not form an opinion one way or the other on the issue of fraud even though it was a weighty matter. He erred when he held that there was consideration for the further charge and debenture when in fact the appellant received no money from the first respondent; that as the learned Commissioner was unable to resolve the issue whether or not a demand preceded the appointment of receivers he should have held that a prima facie case had been made out as without a formal demand for payment there would be no right of appointing receivers.
10. Mr FE Wasuna for the appellant submitted before us, inter alia, that the matter before the learned Commissioner of Assize was interlocutory, and that being the case the Court could only conclusively deal with issues of law but not issues of fact. To the extent that the learned Commissioner of Assize determined finally some issues of fact he erred. So Mr Wasuna urged that his decision should be interfered with on that amongst other grounds. The other grounds he said which fundamentally affected the exercise of his discretionary jurisdiction relate to his finding, first, that bad faith was a relevant issue, and also that fraud, which was raised by the appellant, is a weighty matter, but which could not be determined at interlocutory stage. According to Mr Wasuna, the learned Commissioner of Assize having come to those conclusions, he was precluded from holding that no prima facie case had been made out. With regard to the debenture, Mr Wasuna submitted that as there was already a receiver in situ who had been appointed under the first charge, it could not be said that the first respondent had forgone anything. Consequently, there was no consideration for the further charge and debenture. Besides, he said, the appointment of receivers would only be validly done if it was preceded by a demand for payment. In his view the first respondent did not make any demand before it appointed the second and third respondents as receivers and managers. Moreover he said, even assuming the first respondent could validly appoint receivers under the agreement of 3rd May, 1999, its power only extended to appointing a receiver or receivers, but not receiver manager.
11. Mr Ougo for all the three respondents approached the appeal differently. He looked at the matter as a whole from two perspectives and submitted, inter alia, that under the first charge the first respondent had the right to appoint a receiver upon default by the appellant to make payment of the money due and owing from it to the first respondent. In his view, the appellant having admitted in its letter dated 26th April, 1999, that it owed the first respondent Kshs 68 million and proposed on how it intended to repay the money there was something to forgo. The first respondent he said, had the right to demand immediate payment of the amount due and owing to it by the appellant. It also had the right to immediately foreclose, but it decided to forgo those rights.
12. The second limb of Mr Ougo's submission related to the issue of demand.
13. In his view the first installment under the new arrangement fell due but was not paid. No other payment was made subsequently. Mr Ougo called the Court's attention to the letter dated 1st November, 1999, from Messrs Salim Dhanji & Co Advocates, to the appellant. The letter clearly makes a demand for the payment of Kshs 99,625,025.10. This figure far exceeds the money the appellant admitted in its letter dated 26th April, 1999, as due and owing to the first respondent. It was however contended that the figure includes the element of interest and Kshs 18 million of which the appellant was to get a rebate, but which the appellant was asked to pay on account of default on its part. The appellant does not deny receiving that letter. Receivers were appointed when the appellant did not pay. In his view, therefore, receivers were properly appointed.



14. As I stated at the beginning of this judgment, this is an interlocutory appeal. The dispute between the parties is still outstanding. We were informed from the bar that a hearing date for the case has not been set. So care must be exercised to obviate the risk of trespassing on the jurisdiction of the judge who will eventually hear the case. The learned Commissioner of Assize quite properly reminded himself of the fact that what was before him was an interlocutory application for injunction. But it is quite clear that in several respects he improperly expressed a concluded view of factual issues. It is however, appreciated that it is sometimes difficult to skirt clear of the danger. But that is not to say that the danger cannot be avoided.
15. The power of the Court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence. And as was stated by this Court in the case of *Carl Ronning v Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux)* [1984] KLR 1 an appellate court may only interfere with the exercise of judicial discretion if satisfied either;
- (a) The judge misdirected himself on law, or
 - (b) That he misapprehended the facts, or
 - (c) That he took account of considerations of which he should not have taken an account, or
 - (d) That he failed to take account of consideration of which he should have taken account, or
 - (e) That his decision, albeit discretionary one, was plainly wrong.
16. The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In *Giella v Cassman Brown* to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case. I would certainly think that it would be in the appellant's interest to adopt a genuine and arguable case standard, rather than one of a *prima facie* case, the former being, in my opinion, the lesser standard of the two."
17. So what is a *prima facie* case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
18. What, in a nutshell was the appellant's case in the Superior Court? It was that the first respondent had fraudulently obtained both a second charge over its property, to wit Plot No 714/IV Mainland North, Mombasa, and also a debenture over its assets. The learned Commissioner of Assize after carefully considering the facts leading to the appellant executing the charge and debenture concluded that on his examination of the documents which were before him he found it hard to discern any fraud, conspiracy or any false pretence. Likewise, he did not think that in view of the contents of the appellant's letter to the first respondent, dated May 17th 1999, the appellant could validly argue that payment of Khs 5 million was subject to any prior notice to do so or that it was dependent upon the execution of the further charge and debenture. In his view the payment was an obligation which the appellant failed to meet. He concluded that absence of a notice from the first respondent to the appellant as to whether and if so when the further charge and debenture had been registered, did not deprive the first respondent of its rights under the debenture, and conversely, that it absolved the appellant from its duty of making payments to the first respondent. Viewed generally, the learned Commissioner did not think material had been placed before him sufficient to require him to hold that the evidential burden



- had shifted to the first respondent or that there were matters which the first respondent needed to explain. In short he was not satisfied that a prima facie case had been made out.
19. Mr Wasuna, appeared to me to imply that the test as to whether or not a prima facie case had been made out is satisfied if the applicant is able to show the existence of an arguable case.
 20. But as I earlier endeavoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.
 21. Did the learned Commissioner of Assize err? My objective view of the matter is that in some respects he proceeded as though he was writing a judgment, but that in my view, did not affect what I consider to be a well reasoned ruling. The matter before him was long and occasional slips are sometimes inevitable. As an Appellate Court, our duty is to consider whether any such accidental slip or slips caused or were likely to cause any discernible prejudice as will call for interference. For instance, the learned Commissioner of Assize, held that the appellant's letter to the respondent, dated 26th April, 1999, was not relevant as in his view it was a pre-contract document, and therefore extrinsic to the agreement of 3rd May, 1999. It should be recalled that the appellant was, in effect, attacking the validity of that agreement and such a concluded view of any matter may in an appropriate case be prejudicial to the case of the party relying on that letter, or may embarrass the judge who will eventually hear the case. However, I have objectively considered the matter and come to the conclusion that as of now I do not discern any possible prejudice to any of the parties such a finding has caused or is likely to cause.
 22. The learned Commissioner of Assize clearly took into account all relevant matters and I am unable to say there are any matters he took into account which were irrelevant to the matter before him. Nor can I say he fundamentally erred in principle or that his decision is plainly wrong. The appellant conceded it had obtained money from the first respondent, it had given its property as security, it had not repaid the money, and that since the date it executed the agreement dated 3rd May 1999, it had not made any payment to the first respondent and that with or without a demand it was required to repay the whole debt by 31st May, 2000, which it admitted it had not done. The applicant had come to a court of equity but having failed to show utmost good faith I cannot but hold that it was not entitled to the injunction it prayed for in its application. In my view, therefore there is no basis for interfering with the learned Commissioner's decision. I would on my part, without the need of considering the remaining two tests in *Giella v Cassman Brown & Co Ltd* (supra), dismiss the appellant's appeal with costs both here and in the court below.
 23. Before I pen off there are matters subsequent to the lower court's decision which to my mind merit comment. An earlier appeal by this appellant was struck out as incompetent. Before the appellant took steps to bring this appeal it went to the Superior Court and there made an oral application before Ouna J for an injunction. The learned judge reserved his ruling and ordered that the status quo be maintained. This was on or about 21st March, 2002. He did not deliver his ruling until 19th December, 2002. The ruling was sketchy and not a considered one. I do not think the learned judge had the interests of both parties in mind when he delayed delivery of his ruling. Had he given a considered ruling, one would have said that he spent all that time doing research and putting his ruling together. I personally do not think that the interests of justice were served in the matter. The judge's conduct only served to hinder rather than enhance the course of justice. I hope we shall not be hearing more of like behaviour in the future from the same or any other judge.



JUDGMENT OF KWACH JA.

1. I have had the advantage of reading in draft the judgment of my brother Bosire JA and I agree with it completely. Nevertheless I wish to add a few remarks of my own by way of emphasis only.
2. The principles governing the grant of interlocutory injunctions as set out in *Giella v Cassman Brown and Co Ltd* [1973] EA 358, have been lucidly analysed by Bosire JA. In recent times a tendency has developed in the Superior Court of treating applications by a mortgagor for a temporary injunction to restrain a mortgagee from exercising his statutory power of sale just like any application for injunction in an ordinary suit. The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury's Laws of England, Vol 32 (4th edition) paragraph 725 as follows:-

“725 When mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”(emphasis added)

3. There is no dispute in this case that Mrao Ltd, (the appellant) borrowed more than Kshs 50m from First American Bank of Kenya Ltd, the first respondent, (First American) on the security of a legal charge over Plot LR No 714 Section IV Mainland North, Mombasa (the suit land) and a debenture dated 27th July, 1999 over its assets to cover the debt which at the time demand for repayment was made stood at Kshs 88m, but was by mutual consent reduced to Kshs 68m. Under a timetable agreed between the appellant and First American the sum of Shs 5m was to be paid within 4 weeks after the execution and registration of the security thus reducing the ceiling under the debenture to Shs 63m.
4. Apart from the injunction the appellant also sought, among other reliefs, declarations that the charge and debenture were null and void and of no effect, and further that the appointment of Abdul Sheikh and Andrew Gregory, second and third respondents respectively, as receivers and managers was null and void and should be set aside.
5. I listened to the submissions of Mr Wasuna, for the appellant, and he seemed to place a great deal of emphasis on the allegation that the securities were invalid for one reason or another. And that because of that, his client is under no obligation to repay the debt. At no point in the course of argument did Mr Wasuna indicate to the Court when this alleged invalidity first came to the knowledge of the appellant. The appellant took a large amount of money on the strength of these securities. It has not paid back even a single cent. When First American asked for payment the appellant rushed to a court of equity and in effect told the judge, it is true I took the money, I have not paid it back but First American is precluded from realising its security because both the charge and debenture are invalid. And for good measure the appellant adds that if First American is minded to recover the debt it can file a suit in the normal way for recovery as money had and received.
6. This kind of attitude, prima facie, shows that when the appellant took the money on the strength of those securities it had no intention of repaying it under the terms agreed with First American. This was a clear case of default, and as the appellant admitted this, there was no basis, on the authorities, upon



which the appellant could obtain an order of injunction against First American. I have looked at the charge document and on the face of it I cannot detect anything wrong with it.

7. With regard to the appointment of receivers and managers, the complaint was that the power had been exercised irregularly and oppressively. Considerable emphasis was placed on the fact that First American did not give the appellant reasonable notice of the impending appointment. As to the mode of exercise of this power, I can do no better than to quote a passage from Kerr on Receivers and Administrators (17th edition) at page 357:-

“The other question which arises is as to the length of time within which, after receipt of such a demand, the company must make payment to avoid an appointment.

Clearly, in all such cases the creditor wishes for a minimum period, and the company for a maximum. Commonwealth cases apparently favour the proposition that the company has a “reasonable time” to make repayment, whilst English cases favour, at first sight, an apparently much shorter time, namely such time as is necessary for the company to recover the money from the place where it is assumed to be available, such as a vault or bank. (see R A Cripps & Sons Ltd v Wickenden [1973] 1WLR 944; Bank of Baroda v Panesar [1987] Ch D 335). Both lines of authority agree completely upon the proposition that the company is not entitled to any time to raise the money: this is not in contemplation of either party.”

8. 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 and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf. I would dismiss this appeal with costs to the respondents. As O’Kubasu JA also agrees, this appeal is dismissed in terms of the orders proposed by Bosire JA. Orders accordingly.

JUDGMENT OF O’KUBASU JA.

1. I have had the advantage of reading the draft judgments of Kwach & Bosire JJ A with which I concur and have nothing useful to add.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH, 2003**

RO KWACH

.....

JUDGE OF APPEAL

SEO BOSIRE

.....

JUDGE OF APPEAL

EO O’KUBASU

.....

JUDGE OF APPEAL

