



**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: TUNOI, SHAH & O'KUBASU, J.J.A.)**

**CIVIL APPEAL NO. 51 OF 2000**

**BETWEEN**

**FINA BANK LIMITED ..... APPELLANT**

**AND**

**SPARES & INDUSTRIES LIMITED ..... RESPONDENT**

Appeal from an Order of the High Court of Kenya at Nairobi (Mr. Justice Mulwa)  
dated the 25th day of January, 2000

in

H.C.C.C. 2106 OF 2000)

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**JUDGMENT OF TUNOI, J.A.**

The main issue in this appeal is whether the right by the appellant to appoint a Receiver had become exercisable under the terms of the Debenture dated 3rd July, 1997, which was issued pursuant to the agreement on credit facilities between the appellant and the respondent.

The appellant, on or about 6th February, 1997, agreed to grant to the respondent a term loan of Shs.20 million and an overdraft of Shs.55 million. As security the respondent would create in favour of the appellant firstly, legal charges over L.R.Nos.209/3467; 209/3803, 37/724, 209/11894, 209/10544/16 and Kisumu Block 11/80 all valued at Shs.77 million; secondly, a Debenture for Shs.75 million over all the assets of the respondent, and; thirdly, a joint and several guarantee for a similar sum by the two directors of the respondent company.

Both facilities attracted such rate of interest as the appellant in its sole and absolute discretion may decide from time to time but with an initial rate of 31% per annum which was subject to change at any time without any prior notice to the respondent. Repayment was on demand but the respondent was initially allowed to liquidate the loan facility by 35 equal monthly instalments of Shs.335,000/= and a final instalment of Shs.8,275/=. Late payments would attract additional interest of 6% per annum over and above the reigning rate.

The Debenture contained the usual power in favour of the Debenture holder to appoint a Receiver and Manager of the property charged, which was exercisable after the principal moneys became due and payable by way of lawful demand. It is the appellant's case that the respondent failed to repay the loan and the overdraft facilities by the agreed instalments and on 31st October, 1999 the respondent was

indebted to the appellant in the sum of Shs.90,505,556/02. It made demand for immediate payment and on failing to comply the appellant exercised its power under the Debenture and appointed two Receivers and Managers. This appointment apparently galvanised the respondent into action and it filed suit and summons on 3rd November, 1999, claiming an injunction to restrain the appellant from, *inter alia*, dealing with or closing down the business and to compel the Receivers and Managers to vacate the premises.

The respondent argued before Mulwa J that the appointment of the Receivers had not become exercisable and that their appointment would occasion the respondent irreparable loss and damage. Moreover, it was averred, no true copies of the accounts detailing the loan had been supplied to the respondent. It was further contended that the securities securing the facilities outstrip the amount borrowed and that in any case they should have been sold instead of resorting to the move the appellant did. The respondent sought to show that it had been making regular and constant payments and would have not been in arrears were it not for the exorbitant and unconscionable interest rates which kept on oscillating from time to time reaching the peak rate of 37% per annum.

The learned Judge held that the loss suffered by the respondent was due to the interest rates and not mismanagement. Only a year before receivership the appellant had increased the loan facility and was satisfied with the operations of the company.

The learned Judge held that the appellant in appointing the receiver exercised its power oppressively and without any basis. He held further that this was tantamount to grounding of the operations of the respondent. It was unnecessary as the appellant could at the end of the day recover its money from the realisation of the securities it is holding. It is from this decision that this appeal was lodged.

The basis of the submissions of Mr. Fraser, who appeared for the appellant, was that a default under the terms of the Debenture had occurred and interest and its rate being the only issue in dispute between the parties, the learned Judge gravely misdirected himself in granting a mandatory injunction.

The respondent concedes that it is now in arrears of several instalments but argues that the interest rate the applicant is charging is oppressive, was being increased at short intervals, and that although such increases may be within the terms of the contract between the parties the frequency of the increases make the appellant's action oppressive and inequitable.

Mr. Fraser correctly pointed out that the relationship between the parties is based on contract and that the appointment of Receivers and Managers is one of the contractual remedies available to the appellant for the respondent's default and the appellant should not be hindered from exercising it without good cause. He maintained that the appellant is contractually entitled to appoint a Receiver to protect its own interest including the right to take possession of the affairs of the respondent's company.

The learned Judge was of the view that the circumstances leading to the appointment of the Receivers attest to the contention that the move was not for the benefit of the respondent. Mr. Fraser submits that the learned Judge was wrong. In *re Potters Oils Ltd* [1986] 1 WLR 201 it was held that a Debenture holder which has a right to appoint a receiver is under no duty to refrain from exercising its rights because doing so might cause loss to the company. This principle was applied by this Court in ***Madhupaper International Ltd vs Kerr and Others*** C.A. Nai. 116 (unreported). Mr. Fraser so far is right.

However, it is also correct law 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 it was being exercised oppressively. See ***Godfrey Nyaga vs Housing Finance Co. Kenya Ltd.*** C.A. No. 134 of 1987 Nai. (unreported).

The respondent contends that it had made substantial payments to the appellant before the appointment of the Receiver and Manager. It claims it had paid Shs.63 million. Further, it was engaged in business as importers and distributors for industrial and agricultural machinery spares and general hardware and has established an expansive network within the Republic of Kenya worth Shs.210 million. These averments

were not seriously challenged. This being an interlocutory appeal it is not possible for this Court and the Court below to resolve conflicts of evidence. The respondent's assertion may well be true. If this is correct then the learned Judge cannot be faulted when he held that the action taken by the appellant might not have been made in order to enable it to recover its money.

It is also clear from the statements of accounts that the respondent was making repayments up to 2nd November, 1999, a day before the Receivership, lending support to the observation by the learned Judge that there was no mismanagement on the part of the respondent so as to warrant the appointment of the Receivers and Managers.

I am of the view that the grounds of appeal canvassed by Mr. Fraser require us to pronounce on intricate and complicated points of law which have not had the benefit of adjudication by the learned Judge. Moreover, issues relating to repayments by the respondent, mismanagement and securities cannot be properly determined in this interlocutory appeal without the benefit of a trial.

The issue of Receivership is an emotive one and I understand why the respondent had to resort to litigation. It destroys the business. It is expensive. The appointment of Receivers and Managers may not necessarily improve the financial position of the business. These, in my view, are matters for consideration as to whether to grant a temporary injunction or not. I am satisfied that all these observations were in the mind of the learned Judge when he acceded to the application for injunction. Indeed he acted in accordance with the principles laid down in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and came to the correct decision. I find no ground to fault him as he had exercised his discretion correctly and judicially.

It is my view also that the appellant had adequate security for its loans without relying on the security given by the Debenture. The allegation that they were either overvalued or undervalued was a matter for trial.

The upshot of this is that I find no fault or misdirection in the ruling of the learned Judge. I would dismiss this appeal with costs. I would order that the Receivers and Managers appointed by the appellant do vacate the respondent's business premises forthwith. They are also restrained from interfering, dealing with in any manner or closing down the respondent's business. They shall render accounts of the business for the entire period they have been operating the respondent's business. This should be done within 30 days hereof. The superior Court is directed to set down the hearing of the suit on a priority basis.

As O'Kubasu JA agrees these shall be the orders of the Court.

Dated and delivered at Nairobi this 10th day of November, 2000.

P. K. TUNOI

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JUDGE OF APPEAL