Proctor & Allan (EA) Limited v KCB Bank Kenya Limited & 2 others (Commercial Case E133 of 2025) [2025] KEHC 11651 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11651 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E133 OF 2025

MN MWANGI, J

JULY 31, 2025

BETWEEN

PROCTOR & ALLAN (EA) LIMITED ..... PLAINTIFF

AND

KCB BANK KENYA LIMITED ..... 1ST DEFENDANT

PONANGIPALLI VENKATA RAMANA RAO ..... 2ND DEFENDANT

SWAROOP RAO ..... 3RD DEFENDANT

RULING

1. This ruling is in respect to two applications. The first application is the plaintiff's Notice of Motion dated 26th February 2025 filed pursuant to the provisions of Sections 534, 535, 536, 537 & 538 of the *Insolvency Act*, 2015, Section 3A of the *Civil Procedure Act*, Order 40 Rule 1 & Order 51 Rule 1 of the Civil Procedure Rules, 2010 and any other enabling provisions of the law. The plaintiff prays for orders of temporary injunction restraining the 1st defendant from appointing Administrators or Receiver Managers, or exercising powers under the Debenture dated 1st November 2013 and the Supplemental Debenture dated 28th October 2015. The plaintiff also prays for an order suspending the appointment and actions of the 2nd & 3rd defendants as Receiver Managers pursuant to the same Debentures and restraining the defendants from interfering with the plaintiff's operations, including denying access to its Directors and authorized officials to company premises, records, funds, bank accounts, and business affairs. In addition, the plaintiff seeks an order to preserve the status quo as it existed immediately prior to the appointment of the 2nd & 3rd defendants on 24th February 2025.

2. The application is premised on the grounds on the face of the Motion and, it is supported by an affidavit sworn on the same day by Mr. Stephen Kyalo Nthei, a Director of the plaintiff company. Mr. Kyalo averred that the plaintiff secured credit facilities of Kshs.1,676,500,000/= from the 1st defendant via

a Debenture dated 1st November 2013 and a Supplemental Debenture dated 28th October 2015, and has already made repayments exceeding Kshs.506,000,000/=. That the aforesaid facility was secured by various fixed and floating charges over the plaintiff's assets, including real property, plant, machinery, intellectual property, contracts, and receivables. He contended that on 27th August 2024, the 1st defendant agreed to a final settlement amount of Kshs.1,000,000,000/= payable by 30th November 2024.

3. He deposed that the plaintiff engaged in an active investor acquisition process to raise funds for repayment, with the 1st defendant being fully informed vide a letter dated 18th June 2024 of an offer of USD 10,000,000.00 equivalent to approximately Kshs.1,250,000,000/=. He averred that vide a letter dated 10th December 2024, the 1st defendant was informed that the plaintiff had successfully completed the due diligence exercise and vide an email sent on 11th December 2024, the 1st defendant acknowledged the investor's interest to continue with the transaction and a request for 30 days' extension for financial closure. Mr. Kyalo contended that despite full disclosure and good faith cooperation, the 1st defendant issued a demand notice vide a letter dated 24th January 2025 for Kshs.1,000,000,000/=.

4. Mr. Kyalo averred that the plaintiff sought for a further extension on behalf of its investor and even explored another capital investment option with an investor interested in purchasing the plaintiff's business at Kshs.800,000,000/=. He averred that the 1st defendant ignored the aforesaid request and instead issued another demand on 21st February 2025 for Kshs.4,918,591,477.71, which was far above the previously agreed figure. He contended that on 24th February 2025, the 1st defendant appointed the 2nd & 3rd defendants as Receiver Managers resulting in summary termination on the same day, of the services of all the plaintiff's employees without Notice. That on 25th February 2025, the Receivers formally issued their Notice of appointment, after they had already assumed control of the plaintiff's operations the day before. He stated that the plaintiff challenges the lawfulness and good faith of the appointment of the Receivers due to lack of Notice, pre-meditation & bad faith and ignoring viable alternative solutions for repayment.

5. The application filed by the plaintiff was opposed by the defendants vide an affidavit filed by the 1st defendant. The said affidavit was also filed in support of the 1st defendant's Notice of Motion dated 4th March 2025.

6. The 1st defendant's application has been brought under the provisions of Order 40 Rules 7 & 10, Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the *Civil Procedure Act*, the inherent powers of the Court and Article 159 of the *Constitution* of Kenya. The 1st defendant prays for an order to set aside or vacate the ex parte orders issued on 27th February 2025. It also seeks an order striking out this suit for being scandalous, frivolous, vexatious, and an abuse of the Court process. In the alternative, the 1st defendant seeks an order directing the plaintiff to deposit Kshs.37,661,446.76 and USD 37,922,293.87 being the outstanding loan arrears with the 1st defendant or into a joint interest-earning account within 7 days, failure to which this suit should stand dismissed. The 1st defendant also prays for an order for a blanket moratorium against all creditors of the plaintiff to preserve its assets and property.

7. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Oscar Obuna, the 1st defendant's Head of Special Assets & Corporate Recoveries. Mr. Obuna averred that the 1st defendant advanced loans to the plaintiff totaling to Kshs.80,450,000/= and USD 28,913,000 secured by inter alia, Debentures dated 1st November 2013 and 28th October 2015, but the plaintiff defaulted on repayments since October 2022, leading

to issuance of a formal demand dated 12th October 2023. He stated that the 1st defendant allowed time for a potential settlement through an investor, Equitorial Nut Processors Ltd and even entered into a Settlement Agreement dated 27th August 2024, agreeing to payment of a compromised amount of Kshs.1,000,000,000/= payable by 30th November 2024, but the plaintiff breached the Settlement Agreement by failing to pay or provide proof of funds.

8. Mr. Obuna contended that a new investor by the name Broadway Bakery Limited later proposed an offer of Kshs.800,000,000/=, which the 1st defendant rejected for being below the agreed settlement figure. He deposed that following the continued non-compliance, the 1st defendant issued a final demand on 21st February 2025 for the full outstanding amount of Kshs.37,661,446.76 & USD. 37,922,293.87, but the plaintiff did not comply with the said demand. He stated that on 24th February 2025, the 1st defendant lawfully appointed the 2nd & 3rd defendants as Receivers under the Debentures, who assumed control of the plaintiff on 25th February 2025. Mr. Obuna maintained that the 1st defendant acted within its contractual rights under the Debentures since the plaintiff has been in breach since 2022. He emphasized that receivership is its only viable remedy for debt recovery since the plaintiff company's actions risk dissipation of assets to the 1st defendant's detriment.

9. In opposition to the application, the plaintiff filed a replying affidavit sworn on 12th March 2025 by Mr. Stephen Kyalo Nthei, a Director of the plaintiff company. He averred that the loan facility advanced to the plaintiff was for constructing a new plant in Limuru, but the COVID-19 Pandemic and Government lockdowns severely disrupted operations, causing the factory to remain shut for over two years, thus affecting the plaintiff's ability to repay the loans. Mr. Kyalo deposed that sometime in the year 2022, the plaintiff and the 1st defendant restructured the facilities advanced to the plaintiff into an overdraft of Kshs.80,450,000/= and a Standby Letter of Credit valued at USD. 28,913,000.00. He further averred that Clause 3.3 of the letter of offer provided that the exit point of the SBLC would be the final and full settlement of an amount of Kshs.1,500,000,000/=, repayable within one year and granted the 1st defendant the discretion to review its terms on default.

10. Mr. Kyalo stated that on 21st August 2024, the 1st defendant applied Kshs. 57,921,984.50 from the plaintiff's escrow account to the overdraft. Further, a Settlement Agreement was entered into for Kshs.1,000,000,000/=, based on a USD 10,000,000.00 acquisition offer by Equatorial Nuts Processors Ltd. He asserted that the 1st defendant was aware of, and was actively involved in these negotiations. He pointed out that the transaction with Equatorial Nuts was still ongoing as of early 2025. He stated that the 1st defendant was informed of offers and was requested for extensions, and that the investor had confirmed due diligence completion and was arranging financing through Equity Bank, but the 1st defendant declined to grant the requested extension of 60 days and instead demanded for payment within 7 days.

11. In addition to the foregoing, Mr. Kyalo averred that on 18th February 2025, Broadway Bakery Ltd offered Kshs.800,000,000/= to acquire the plaintiff company, but the 1st defendant refused to attend a proposed meeting, thereby frustrating potential negotiations. He challenged the appointment of the 2nd & 3rd defendants as Receivers of the plaintiff on grounds inter alia, that the 1st defendant's demand notice was improperly served after hours on Friday, 21st February 2025, in breach of Order 50 Rule 9 of the Civil Procedure Rules, and Clause 37 of the Debentures. He contended that the appointment of Receivers the following Monday was premature, invalid, and done in bad faith. He disputed the alleged debt of Kshs.4,900,000,000/= and asserted that the actual agreed amount was Kshs.1,000,000,000/=. He expressed the view that the in duplum rule prohibits further interest accrual.

12. In a rejoinder, the 1st defendant filed a further affidavit sworn on 24th March 2025 by Mr. Oscar Obuna, the 1st defendant's Head of Credit Support Unit. He asserted that the plaintiff failed to comply with

the letter of offer dated 24th October 2022, which required full payment of Kshs.1,500,000,000/= by 30th September 2023 failure to which the facility terms reverted, and the plaintiff's accounts remained overdrawn. He contended that the Settlement Agreement entered into on 27th August 2024 was based on a transaction with Equitorial Nuts Processors Ltd, but the plaintiff failed to pay by the extended deadline of 31st January 2025, neither did they provide proof of funds nor deposit 20% into an escrow, thus the 1st defendant reverted to exercising its legal rights under the Debentures.

13. Mr. Obuna asserted that the 1st defendant lawfully appointed Receivers under Clauses 16 & 18 of the Debentures and that service of the demand letter sent on 21st February 2025 was valid despite the fact that the 1st defendant was not legally obligated to issue it. He dismissed claims by the plaintiff that the debt violates the in duplum rule, and stated that as at 21st February 2025, the plaintiff owed the 1st defendant USD 37,841,617.55 and Kshs.37,022,783.76.

14. He averred that the plaintiff lacked the requisite locus standi to institute this suit as no leave was sought from the Receivers or the Court before this suit was filed. He contended that receivership was validly triggered and is a valid enforcement tool not limited to being a measure of last resort.

15. The plaintiff filed a supplementary affidavit sworn on 21st March 2025 by Mr. Stephen Kyalo Nthei, a Director of the plaintiff company. He averred that the demand for security is disputed, unreasonable, and would unfairly impede the plaintiff's access to justice. He maintained that the plaintiff is entitled to a fair trial, access to justice, and substantive justice without procedural barriers, and relied on Articles 48, 50, 159 & 259 of the *Constitution* of Kenya. Mr. Kyalo asserted that the amount in question is the central issue in the suit and remains disputed. He contended that on 5th March 2025, the 1st defendant also issued a Statutory Notice under Section 90 of the *Land Act* to sell the charged property being Title No. Limuru Town 185, which act undermines this Court's process and may render the suit moot if the property is sold. He asserted that a moratorium against Third Party creditors requires exceptional circumstances, which the 1st defendant has not demonstrated.

16. The applications herein were canvassed by way of written submissions. The plaintiff's submissions dated 21st March 2025 were filed by the law firm of Kasimbazi & Company Advocates, while the defendants' submissions dated 26th March 2025 were filed by the law firm of Oraro & Company Advocates.

17. Ms Atukunda, learned Counsel for the plaintiff cited the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010 and the case of Giella v Cassman Brown & Company Ltd [1973] EA 358, and submitted that the plaintiff has made out a case for being granted of the orders being sought in the application dated 26th February 2025. She referred to the case of Mrao Limited v First American Bank of Kenya Limited [2003] eKLR, and submitted that the plaintiff has established a prima facie case with a probability of success. She argued that pursuant to the provisions of Order 50 Rule 9(2) of the Civil Procedure Rules, 2010, service must be before 5:00pm on weekdays and not on Saturdays. Further, that Order 50 Rule 9(3)(b) of the Civil Procedure Rules, 2010 deems service on Friday afternoons as effective on the following Monday. She submitted that since service of the demand notice dated 21st February 2025 was effected at 5:45pm on a Friday, it was ineffective and void.

18. Counsel contended that the claimed amount of Kshs.4,900,000,000/= which forms the core dispute in the main suit is disputed, and not supported by bank statements, which renders the receivership premature and irregular. Ms Atukunda stated that denial of the orders being sought by the plaintiff would violate the plaintiff's rights to access to justice and fair hearing as provided for under Articles 25, 48, 50 & 159 of the *Constitution*. She contended that ongoing supplier contract breaches may trigger litigation and financial ruin for the plaintiff, which harm cannot be compensated by an award

of damages. She further submitted that the balance of convenience tilts in favour of the plaintiff since the 1st defendant stands to suffer no prejudice by virtue of it being a secured creditor with possession of the Title Deed in respect to Title No. Limuru Town 18 and a floating charge over the plaintiff's assets.

19. Ms Lubano, learned Counsel for the defendants referred to Clause 15 of the Supplementary Debenture and stated that it provides that upon default, the entire debt became immediately payable without demand, overriding the terms of the earlier Debenture as per Clause 40. She relied on the Court of Appeal case of John Njue Nyaga v Nicholas Njiru Nyaga & another [2013] eKLR, and asserted that the plaintiff approached this Court with unclean hands in breach of equitable principles hence it is undeserving of the injunctive reliefs being sought.

20. She cited the case of Cyperr Enterprises Ltd v Metipso Services Ltd [2011] eKLR, and stated that according to established legal principles, once a Receiver is appointed, Directors' powers are suspended, and any action on behalf of the company must be authorized by the Receiver. She submitted that the plaintiff lacked the requisite locus standi to file this suit as it was under receivership when the suit was instituted.

21. Ms Lubano submitted that the plaintiff has not met the threshold for a prima facie case as defined by the Court of Appeal in the case of Mrao Ltd v First American Bank (supra). She argued that the key claims by the plaintiff are insufficient and unsupported by evidence. Further, that the plaintiff defaulted on its repayment obligations under the letter of offer dated 24th October 2022 and the Settlement Agreement finalized on 20th August 2024, where USD 29,543,482.00 was written off conditionally, thus the entire debt of approximately Kshs.4,800,000,000/= became due again. The foregoing notwithstanding, Counsel contended that the plaintiff has admitted to owing the 1st defendant at least Kshs.1,000,000,000/=. She stated that the Debenture and Supplemental Debenture clearly provide for automatic crystallization of the debt without Notice upon default. She submitted that the 1st defendant lawfully appointed the 2nd & 3rd defendants as Receivers under Clauses 13, 15, 18 & 40 of the Debenture Instruments.

22. Counsel contended that although a demand letter dated 21st February 2025 was issued and served, there was no legal requirement under the Supplemental Debenture to do so. She relied on the case of East Africa Cables PLC v Ecobank Kenya Limited [2020] KEHC 7162 (KLR), and submitted that ongoing negotiations with investors do not bar receivership. Further, a mere dispute on the debt amount or alleged hardship does not justify an injunction. Ms Lubano submitted that the plaintiff's assets have become commodities for sale, and any harm suffered can be adequately compensated in damages. Additionally, that the 1st defendant is a reputable financial institution and capable of compensating the plaintiff, if necessary. In light of the above, she submitted that the balance of convenience favours the 1st defendant, and not the plaintiff.

Analysis and Determination.

23. I have considered the applications filed herein, the grounds and affidavit in support of the same. I have also considered the replying, further, and supplementary affidavits filed by the parties herein, together with the written submissions by Counsel for the parties. The issues that arise for determination are -

    i. Whether the plaintiff has made out a case to warrant the issuance of an order for temporary injunction;

    ii. Whether the suit should be struck out;

    iii. Whether the plaintiff should be compelled to deposit Kshs. 37,661,446.76 & USD 37,922,293.87 with the 1st defendant or into a joint interest-earning account; and

iv. Whether an order for a blanket moratorium against all creditors of the plaintiff to preserve its assets and property should issue.

Whether the plaintiff has made out a case to warrant the issuance of an order for temporary injunction.

24. Temporary injunctions are provided for under Order 40 Rule 1 of the Civil Procedure Rules, 2010 which states as hereunder-

Where in any suit it is proved by affidavit or otherwise-

a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.

25. The conditions for being granted interlocutory injunctions were set out in the case of Giella v Cassman Brown (supra). The Court in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR, when dealing with an application for an interlocutory injunction held that -

> In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> a. establish his case only at a prima facie level,
>
> b. demonstrate irreparable injury if a temporary injunction is not granted, and
>
> c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.

26. The Court of Appeal in the case of Mrao Ltd v. First American Bank of Kenya Ltd & 2 others (supra), considered what constitutes a prima case and stated thus-

> 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but 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.

27. Upon reviewing the pleadings filed in this matter, it is evident that the central issue in dispute between the parties herein is whether the 1st defendant was entitled to, under the Debenture Instruments securing the financial facilities advanced to the plaintiff, to appoint Receivers to take over the plaintiff company's operations for purposes of recovering the said facilities, without first issuing a formal Notice to the plaintiff.

28. The pleadings filed reveal that the dispute between the parties herein is that the 1st defendant advanced various loan facilities to the plaintiff between the years 2012 & 2022, totaling Kshs.80,450,000/= and USD 28,913,000.00 secured by a Debenture dated 1st November 2013 & a Supplemental Debenture dated 28th October 2015. Following persistent default by the plaintiff from October 2022, the plaintiff and the 1st defendant entered into a Settlement Agreement dated 27th August 2024, wherein the plaintiff undertook to pay a compromised sum of Kshs.1,000,000,000/= by 30th November 2024. The 1st defendant contended that the Settlement Agreement provided that in the event of default by the plaintiff, its right to enforce the full debt would be reinstated. The plaintiff on the other hand asserted that once the parties entered into the Settlement Agreement, they were bound by its terms and could not revert to the original contractual terms, irrespective of whether the plaintiff complied with the settlement terms or not.

29. Upon perusal of the letter dated 27th August 2024 addressed to the plaintiff by the 1st defendant, I note that it states as follows –

> We are pleased to advise that the Bank has exceptionally considered the transaction and has approved acceptance of a sum of KES 1,000,000.00 (Kenya Shillings One Billion Only) as full and final settlement to facilitate closure of the sale transaction by ENP, upon payment the entire debt position of Proctor & Allan (EA) Limited will be considered settled.
>
> The above settlement position is subject to: -
>
> i. A net payment of KES 1,000,000,000/- being received to the bank.
>
> ii. The settlement to be received by the bank on or before 30th November 2024.
>
> Please note that this offer will lapse should the Bank fail to receive the abovementioned full settlement amount within the approved period.
>
> We look forward to receiving the above sums at the earliest opportunity.

30. In my considered view, the import of the terms of the Settlement Agreement dated 27th August 2024 is that the 1st defendant conditionally agreed to accept Kshs.1,000,000,000/= as full and final settlement of all outstanding debts owed by the plaintiff, Proctor & Allan (EA) Limited, to the 1st defendant, Kenya Commercial Bank Ltd. The said Agreement clearly provides that once the aforesaid payment was received by the 1st defendant, no further claims or liabilities would be pursued by the 1st defendant against the plaintiff, and the plaintiff's debt would be treated as fully satisfied. The Settlement Agreement however provided that the settlement had to be received on or before 30th November 2024, failure to which the offer would automatically lapse and the 1st defendant reserved the right to revert to the original debt terms, meaning it could enforce the full outstanding debt amount which was more that the Kshs.1,000,000,000/=, which had been conditionally accepted by the 1st defendant.

31. It is not in contest that as at 30th November 2024, the plaintiff had failed to comply with the terms of the Settlement Agreement dated 27th August 2024. Instead, the plaintiff was actively seeking indulgence from the 1st defendant, requesting for additional time to fulfill its obligations under the said Agreement. The 1st defendant in its letter dated 24th January 2025, granted the plaintiff a further extension of up to 31st January 2025 to comply with the terms of the Settlement Agreement, failure to which the 1st defendant would rescind the settlement offer and demand for payment of the full outstanding debt together with accrued interest. For this reason, I am inclined to agree with the 1st defendant that owing to the plaintiff's failure to adhere to the terms of the Settlement Agreement, the

1st defendant was well within its contractual rights to demand payment of the full outstanding debt which stood at Kshs.37,022,783.76 & USD 37,841,617.55 as per the 1st defendant's demand letter dated 21st February 2025.

32. As stated here before, the financial facilities advanced to the plaintiff by the 1st defendant were secured by inter alia, a Debenture dated 1st November 2013 and a Supplemental Debenture dated 28th October 2015. Appointment of a Receiver in the Debenture dated 1st November 2013 is provided for under Clause 16, whereas in the Supplemental Debenture dated 28th October 2015, it is provided for under Clause 18. The said Clauses state as follows -

Clause 16

> At any time after the Bank shall have demanded payment of any money or the discharge of any obligation or liability secured by this deed or if requested by the Company, the Bank may, in writing under the hand of any of its officers or attorneys or under its common seal, appoint any person or persons, whether an officer of the Bank or not, to be a Receiver of all or any part of the Charged Assets upon such terms as to remuneration and otherwise as the Bank shall think fit and may in like manner from time to time remove any Receiver so appointed and appoint another in his place. Where more than one Receiver is appointed, the Receivers shall have power to act severally unless the Bank shall specify otherwise in their appointment.

Clause 18

> At any time after the moneys secured by this deed become payable either as a result of lawful demand made by the Bank or under the provisions of Clause 15 of this deed or if requested by the Company and so that no delay or waiver of its rights to exercise the powers conferred by this deed shall prejudice the future exercise of such powers and without prejudice to any other remedies provided by law, the Bank may, in writing under the hand of any of its officers or attorneys or under its common seal, appoint any person or persons, whether an officer of the Bank or not, to be a Receiver of all or any part of the Charged Assets upon such terms as to remuneration and otherwise as the Bank shall deem fit and may in like manner from time to time remove any Receiver so appointed and appoint another in his place. Where more than one Receiver is appointed, the Receivers shall have power to act severally unless the Bank shall specify otherwise in their appointment. (Emphasis added).

33. From the foregoing excerpts, it is clear that under Clause 16 of the Debenture dated 1st November 2013 and Clause 18 of the Supplemental Debenture dated 28th October 2015, the 1st defendant was expressly empowered to appoint a Receiver to take control of, or dispose of the charged assets in the event of default by the plaintiff and upon demand for repayment, or with the plaintiff's consent. In the present case, it is not disputed that the plaintiff defaulted on its loan obligations and that the 1st defendant issued a demand for payment, which the plaintiff failed to comply with.

34. Upon reviewing the terms of both the Debenture and the Supplemental Debenture, it is my finding that there is no provision that compels the 1st defendant to issue prior Notice to the plaintiff before proceeding to appoint Receivers over the charged assets. Clause 15 of the Supplemental Debenture provides that –

> Without prejudice to the obligations of the Company to make payment on the date and in the manner stipulated in Clause 1 or the right of the Bank to demand payment in the manner stipulated in Clause 1, all money, obligations and liabilities secured by this deed shall

> immediately become due and payable without any demand, protest or other notice of any kind all of which are expressly waived by the Company...

35. In view of the terms of the above Clause, I am persuaded to concur with the 1st defendant that it was not under any legal obligation to issue a Notice to the plaintiff prior to appointing the 2nd & 3rd defendants as Receivers. Accordingly, the demand notice dated 21st February 2025 issued by the 1st defendant to the plaintiff was extended purely as a matter of courtesy, and not pursuant to any requirement under the terms of the Debentures. My finding is that there was good faith on the part of the 1st defendant by acceding to the request made by the plaintiff to look for an investor to take up the loan. The 1st defendant was however not amenable to a subsequent request which was made by the plaintiff for another investor to take up the loan, when the 1st arrangement fell through.

36. A Court of law cannot re-write a contract between parties, as they are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. See National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503.

37. In the circumstances of this case, it is my finding that the plaintiff has not established a prima facie case with a probability of success to warrant being granted an order of temporary injunction against the defendants. Furthermore, the plaintiff will not suffer any irreparable injury as it is indebted to the 1st defendant. That being the case, the balance of convenience tilts in favour of the 1st defendant.

Whether the suit should be struck out.

38. The 1st defendant asserts that the plaintiff lacked the requisite locus standi to institute this suit, as no leave was obtained from either the appointed Receivers or the Court prior to its filing. It is not in contest that this suit was instituted after the 1st defendant had exercised its rights under Clause 16 of the Debenture dated 1st November 2013 and Clause 18 of the Supplemental Debenture dated 28th October 2015 by appointing the 2nd & 3rd defendants as the plaintiff's Receiver Managers.

39. Once a company is placed under receivership, its Directors may only institute legal proceedings in the name of the company with the express authority of the appointed Receiver or upon obtaining leave of the Court. This position was stated by the Court in Mandev Limited v M. K. & Sons Limited (Under Receivership) & another [2010] eKLR as follows -

> 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.

40. Further, in the oft cited case of Cyperr Enterprises Ltd v Metipso Services Ltd & 2 others (supra), the Court held as hereunder in respect to companies under receivership -

> 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.

41. In this case, the plaintiff has neither alleged nor demonstrated that it obtained the consent of the 2nd & 3rd defendants, who had been duly appointed as Receiver Managers of the plaintiff, prior to the institution of the plaintiff's application and this suit. The pleadings filed herein reveal that the plaintiff did not acknowledge the appointment of the 2nd & 3rd defendants but instead challenged their appointment through this suit. Consequently, having found that the appointment of the 2nd & 3rd defendants was lawful and in accordance with the terms of the Debenture dated 1st November 2013 and the Supplemental Debenture dated 28th October 2015, I hold that the plaintiff was required to first obtain authority from the said Receivers or seek leave of the Court prior to instituting these proceedings. As such, the plaintiff's suit is a non-starter for want of authority from the Receiver-Managers, or leave of the Court.

42. In view of the above finding, this Court finds it unnecessary to delve into the remaining two issues earlier identified for determination, as doing so will be an academic exercise.

43. In the end, it is my finding that the plaintiff's application dated 26th February 2025 is devoid of merits. The 1st defendant's application dated 4th March 2025 is merited. As a result, I make the following orders –

    i. The plaintiff's application dated 26th February 2025 is hereby dismissed;

    ii. The plaintiff's suit is hereby struck out;

    iii. The 1st defendant's application dated 4th March 2025 is hereby allowed; and

    iv. Costs of the plaintiff's and the 1st defendant's applications, and the struck out suit are hereby awarded to the defendants.

    It is hereby ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JULY 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Atukunda for the plaintiff/applicant

Ms Noella Lubano for the 1st, 2nd & 3rd defendants/respondents

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.