



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 329 of 2006

CHARTER HOUSE BANK LTD. PLAINTIFF

VERSUS

CENTRAL BANK OF KENYA

MINISTER FOR FINANCE

ROSE DETHO DEFENDANTS

R U L I N G

By a plaint filed on 23.6.2006, the plaintiff prays for the following reliefs apart from costs:-

(a) A declaration that the purported appointment of the 3rd defendant as Statutory Manager of the plaintiff is illegal, null and void.

(b) A permanent injunction to restrain the defendants jointly and/or severally from now or in the future interfering with the management or running of the plaintiff's business without compliance with the provisions of the Banking

Act or the Central Bank of Kenya Act.

(c) A mandatory injunction to compel the defendants to produce before the Honourable Court the inspection or inspection report, the basis of their purported act of appointing the 3rd defendant.

(d) A permanent injunction to restrain the 3rd defendant from assuming or exercising powers of Statutory Manager of the plaintiff company prior to the Compliance with the provisions of the Banking Act and the Central Bank of Kenya Act.

(e) General and punitive damages for any losses that the plaintiff may incur arising from the defendants' acts aforesaid.

(f) Special damages to be particularized.

The basis of the plaintiff's claim in the plaint is that there is no reason or circumstances as would bring into question its management and operations within the Banking Act and the Central Bank of Kenya Act and therefore the purported appointment of the 3rd defendant is without foundation or statutory blessings. The plaintiff avers that it has not failed to meet any of its financial obligations as and when the same have fallen due; that no petition has been filed nor has there been a resolution to wind up the plaintiff; that no auditors of the plaintiff have made a report to the 1st defendant under Section 24 of the Act and that the purported power of the 1st defendant is neither in the interest of the plaintiff, its depositors nor creditors.

The plaintiff further avers that the purported appointment of the 3rd defendant as statutory manager is a clear and blatant violation of the orders of this court issued in **H.C. MISC. CIVIL APPLICATION NO.186 OF 2006**.

Simultaneously with the plaint the plaintiff has filed an interlocutory application seeking a temporary injunction restraining the 3rd defendant from assuming the management and/or control of the affairs of the plaintiff or in any manner howsoever exercising any functions and/or powers over the plaintiff as Statutory Manager appointed by the 1st defendant pending the hearing and determination of this application. The plaintiff further seeks a temporary injunction restraining the defendants jointly and/or severally from interfering with the plaintiff's business operations and/or management including *inter alia* appointing any person and/or persons as Statutory Manager of the plaintiff pending the hearing and determination of this suit. There is also a prayer for a temporary injunction restraining the 3rd defendant from assuming the management and/or control of the affairs of the plaintiff or in any manner howsoever exercising any functions and/or powers over the plaintiff as a Statutory Manager pending the hearing and determination of the suit.

The primary reasons for the application are:-

(i) That no cause, reason and/or circumstances has/have arisen within the meaning of Sections 32, 33 and 34 of the Banking Act to warrant the appointment of the 3rd defendant as the plaintiff's Statutory Manager.

(ii) That the plaintiff has since its inception conducted its business and affairs strictly within the meaning of the Banking Act and the Central Bank of Kenya Prudential Guidelines.

(iii) That the plaintiff is unaware of any or any valid inspection report pursuant to the provisions of

of any

**rectification measures by the plaintiff as to warrant the appointment of Statutory
Manager to manage its affairs.**

(iv) That in any event the purported inspection report the basis upon which the plaintiff believes the 1st defendant is purporting to appoint the 3rd defendant as its Statutory

Manager is the subject of High Court Orders in *Miscellaneous Civil Application No.186 of 2006* barring the 1st and 2nd defendants from taking any adverse action against any person on the basis of the said report.

Section 32 of the Banking Act and concerning the plaintiff and demanding

(v) That the purported appointment of the 3rd defendant as the plaintiff's Statutory Manager undermines the considerations to be taken into account by the 1st and 2nd defendants in the exercise of their powers to appoint a Statutory Manager.

(vi) That more particularly the purported appointment of the 3rd defendant as the plaintiff's Statutory Manager is not in the interests of the plaintiff's depositors, creditors or the plaintiff.

(vii) That the plaintiff is fully compliant with its obligations under the relevant statutes governing its operations.

(viii) That the purported appointment of the 3rd defendant as the plaintiff's Statutory Manager is clearly actuated by malice, propaganda and is without any factual basis whatsoever.

(ix) That the plaintiff, its depositors, creditors and business partners stand the danger of losing irreparably from the act of such appointment.

(x) That in the totality of the circumstances and in the light of other such prior appointments in this country, the balance of convenience lies in favour of restraining such appointments.

The application is supported by an affidavit sworn by one Sanjay Shah, the plaintiff's Managing Director who has also sworn a further affidavit. There are several exhibits annexed to the supporting affidavit. The further affidavit has however only one annexure. The supporting affidavit has substantially elaborated upon the averments in the plaint and the grounds on the face of the application. There are however a few statements in the supporting affidavit that go beyond what is in the plaint and on the face of the application. The plaintiff's Managing Director depones that he believes that the plaintiff is being sacrificed at the altar of political propaganda and unsubstantiated press reports and further that he believes that the purported appointment of the 3rd defendant as the plaintiff's Statutory Manager is a propaganda tool to vindicate the suspended Governor of the 1st defendant in his now pending Criminal case. Then

there is the deposition that the plaintiff has discovered with regret that the 1st defendant has employed at least three of its former officers who were sacked for gross misconduct involving tempering with the plaintiff's internal documents and it is shocking that the 1st defendant would encourage misconduct and dishonesty in its purported enforcement of the Central Bank of Kenya Act.

The application was certified urgent by Waweru, J. on 23.6.2006 but the Learned Judge declined to grant any **ex parte** order of injunction. The application was then served and the 1st and 3rd defendants appointed M/S Oraro & Co. Advocates to act for them. A replying and a further affidavit have been sworn by one Gerald Arita Nyaoma, the 1st defendant's Director, Financial Institutions Supervision Department.

In the replying affidavit the said Nyaoma swears *inter alia* that during the course of a regular inspection of the plaintiff by the 1st defendant in August 2004, certain violations of the Banking Act were detected which violations were admitted by the management of the plaintiff and the 1st defendant imposed a fine of 1 million shillings. The plaintiff's Managing Director promised to take corrective action. Mr. Nyaoma also depones that a follow-up inspection was done in February 2005 to establish the status of compliance and although remedial action had been taken on most of the previous violations, the violations relating to the "know your customer procedures" remained. Mr. Nyaoma further depones that another inspection was carried out in October 2005 which revealed more weaknesses within the operations of the plaintiff including non-compliance with the regulation on classification of loans and the "know your customer procedures". The plaintiff undertook to remedy the violations. Yet another inspection was undertaken in April 2006 which revealed other weaknesses. A report of the inspection was availed to the plaintiff on 21.6.2006 for the plaintiff's comments but before the comments were received, adverse reports/allegations on the plaintiff were tabled in Parliament and in order to protect the interest of the plaintiff's depositors and creditors, the 1st defendant sought and received the 2nd defendant's approval to place the plaintiff under Statutory management in the exercise of powers vested in the 1st defendant under the Banking Act.

In the further affidavit of the same Nyaoma, it is *inter alia* deponed that there were facts and circumstances which led to the 1st defendant to form the opinion that it was necessary to place the plaintiffs under Statutory management. Some of the facts and circumstances Nyaoma gives are as follows:-

(a) Some credit facilities were advanced before their

beneficiaries executed letters of offer and in some cases there were no letters of offer at all.

(b) Some credit facilities were disbursed to their beneficiaries on verbal instructions of the plaintiff's directors.

(c) ...

(d) ...

(e) There is evidence of electronic transfer of funds without corresponding instructions and entries being posted without appropriate authority.

(f) It was established that some members of the plaintiff's staff are routinely paid cash bonuses outside the payroll and not subject to tax.

Mr. Nyaoma also depones that the decision to place the plaintiff under Statutory management is intended to protect the interest of the plaintiff's depositors and creditors following negative publicity generated through media/reports and is further intended to safeguard the integrity of the financial sector in fulfillment of the 1st defendant's statutory mandate and is consistent with the provisions of the Banking Act.

The application was debated before me on 27.6.2006, 3.7.2006 and 11.7.2006 by Mr. Odera assisted by Ms. Migiyo, M/s Kingara and Odongo, Learned Counsels for the plaintiff and Mr. Ougo, Learned Counsel for the 1st and 3rd defendants. The plaintiff's Counsel took me through the affidavits and the annexures and contended that the plaintiff had established a prima facie case with a probability of success at the trial. Counsel emphasized that no cause, reason and/or circumstances had arisen within the meaning of Sections 32,33 and 34 of the Banking Act to warrant the appointment of the 3rd defendant as the plaintiff's statutory manager. To the contrary the defendants had admitted that the plaintiff is solid and the latest inspection report had in fact vindicated the plaintiff. The plaintiff reads bad faith on the defendant's part in the appointment of the 3rd defendant as its Statutory Manager soon after the 1st defendant had given the plaintiff a clean bill of health in the inspection report availed to it on 21.6.2006 and even before the period given to respond elapsed.

Counsel further emphasized that the powers of the 1st defendant under Section 34 (2) of the Banking Act are only exercisable on the occurrence of all the circumstances set out in Section 34 (1) of the same Act. That had not happened and therefore the purported appointment of the 3rd defendant as the plaintiff's statutory manager is unlawful, illegal, null and void. It is also not in the interest of the plaintiff's depositors and creditors, none of whom have

complained.

Responding to the submissions made on behalf of the plaintiff, counsel for the 1st and 3rd defendants also took me through the affidavits and the same annexures and submitted that the plaintiff had not shown a prima facie case with a probability of success as the trial. He pointed out that as the 3rd defendant has already been appointed the plaintiff's statutory manager, the only remaining dispute is whether or not a temporary injunction should issue restraining her from exercising functions of a Statutory Manager of the plaintiff. In Counsel's view that prayer has been overtaken by events as on her appointment, assumption of the office was automatic and a temporary order of injunction cannot issue restraining her from performing the duties conferred upon her by Statute.

With regard to the reasons for the appointment of the 3rd defendant as Statutory Manager of the plaintiff it was the 1st defendant's case that the plaintiff has not been complying with the provisions of the Banking Act and the regulations made thereunder as explained in the replying and further affidavits of the said Gerald Arita Nyaoma. In Counsel's view, the violations given by the 1st defendant in the said affidavits have not been denied or otherwise contested and the defendant was in the circumstances entitled to appoint the 3rd defendant as the plaintiff's Statutory Manager in the interest of the general banking fraternity, the plaintiff's depositors and creditors.

Counsel also submitted that the 1st defendant does not have to wait for all the circumstances stated in Section 34 (1) of the Banking Act to occur before exercising its powers under Section 34 (2) of the same Act. In Counsel's view if that were to be the case, the said powers would never be exercisable at all as it was difficult to envisage all the circumstances happening at the same time. It was Counsel's argument that the provision of Section 34 (1) and (2) should be interpreted to give effect to the intention of the legislature and to avoid absurdity.

It was also Counsel's submission that the only way that the appointment of the 3rd defendant as Statutory Manager of the plaintiff could have been challenged is by way of invoking the review jurisdiction of the High Court and not by way of a plaint as the plaintiff has done. The basis of that submission was that the 1st defendant is vested with an absolute discretion under Section 34 and in exercising that discretion the view of any other person is irrelevant and if the process is faulty the same can only be challenged by proceedings under this court's judicial review jurisdiction.

In those premises, Counsel for the 1st and 3rd defendants submitted that the conditions laid down in the case of **Giella vs. Cassman Brown [1973] EA 358** for the grant of an interlocutory injunction had not been established by the plaintiff. In Counsel's view even if a prima facie case had been shown, it had not been shown that damages would not be an adequate remedy for the plaintiff.

Counsel also revisited the further affidavit of Sanjay Shah and argued that the same was inadmissible under the provisions of Order 18 Rule 3 (1) of the Civil Procedure Rules and should not be relied upon in any manner in this application.

In a brief reply to the submissions made in opposition to the application, Counsel for the plaintiff submitted with respect to the further affidavit that the same had already been admitted and the arguments belatedly made on its inadmissibility were misplaced. With regard to the procedure adopted in challenging the appointment of the 3rd defendant as Statutory Manager of the plaintiff, Counsel submitted that the procedure adopted cannot be faulted as the dispute between the plaintiff and the defendants is strictly commercial. In the alternative it was Counsel's view that the reliefs under the review jurisdiction of this court are also available in an ordinary suit. In any event, this challenge according to Counsel had not been raised in the affidavits filed by the 1st and 3rd defendants and so was the submission that the 1st and 3rd defendants would be able to meet any damages even if a prima facie case had been made out.

The above are the rival positions take by the parties. I have considered the said positions. I have perused the application and considered the affidavits filed together with the annexures thereto. I have also read the authorities cited and will refer to some of them. Finally, I have considered the submissions of Counsel. Having done so, I take the following view of the matter. The conditions for the grant of an interlocutory injunction were set out in **Giella vs. Cassman Brown & Co. Ltd. (supra)**. They are that the applicant must show a prima facie case with a probability of success at the trial and if the court entertains doubt it should determine the application on a balance of convenience. Secondly, an interlocutory injunction will not normally be granted unless the applicant will suffer an injury which cannot be adequately compensated by an award of damages. I remind myself that this is an interlocutory application and at this stage I should not make definitive findings on contested facts and law.

Now applying the above principles to the matter at hand, I ask myself, whether or not the plaintiff has established a prima facie case with a probability of success at the trial. There is no dispute that the 3rd defendant has been appointed by the 1st defendant as a Statutory Manager of the plaintiff. Indeed, in my view, it is that appointment that has provoked these proceedings. The appointment was conveyed to the plaintiff by the 1st defendant in its letter dated 23rd June 2006. The authority for the appointment was given in the said letter as Section 34 (1) (d) of the Banking Act. The reasons for the appointment were as follows:-

“In order to protect the interests of Charterhouse Bank Limited, its depositors and other creditors”.

It is clear at once that the 1st defendant appointed the 3rd defendant pursuant to the provisions of Section 34(1) (d) of the Banking Act - which reads:

“34. (1) This section applies, and the powers conferred by Section (2) may be exercised, in the following circumstances

(a) ..

(b) ..

(c) ..

(d) if the Central Bank discovers (whether on an inspection or otherwise) or becomes aware of any fact or circumstance which, in the opinion of the Central Bank, warrants the exercise of the relevant power in the interests of the institution or its depositors or other creditors.”

In the plaintiff's view the powers exercisable by the 1st and 2nd defendants under Section 34(2) of the said Act are so exercisable only if all the four (4) circumstances i.e. 34 (1) (a), (b), (c) and (d) have occurred. The plaintiff argues that that construction is necessary in the light of the sweeping powers given to the 1st defendant by Section 34 (2) which include appointing a statutory manager who can take over the management and control of a bank at the stroke of a pen. In the plaintiff's view the requirement that all the circumstances arise before the exercise of the said powers legitimately limits the exercise of the said powers. That interpretation of course favours the plaintiff's position which is said to be solid. This interpretation taken to its logical conclusion would however lead to absurd results in other situations. Take for instance an institution which fails to meet its financial obligations when the same fall due not just to one depositor but to all its depositors and persists in such failure over a long period of time. In this event if the interpretation suggested by counsel for the plaintiff is to be preferred the 1st defendant would watch helplessly as the depositors suffer since it would be unable to exercise the powers given under Section 34(2) on the ground that all the circumstances stated in Section 34(1) have not happened. Such a result in my view would be absurd and should be rejected. I agree with *Guru Prasarina Singh's treatise on Principles of Statutory Interpretation 7th Edition 1999 page 103* that a **“construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results.”**

The same author further states and I adopt his statement that **“the court will adopt that which is just, reasonable and sensible rather than that which is none of those things”** as it may be presumed **“that the legislature should have used the word in that interpretation which least offends our sense of justice. If the grammatical construction leads to some absurdity or some repugnance or inconsistency with the rest of the instrument, it may be departed from so as to avoid that absurdity and inconsistency ...”**

Besides the absurdity of the results if the interpretation suggested by the plaintiff is to be preferred, it would not be easy for all the circumstances stated in Section 34(1) of the Banking Act to happen simultaneously. It would therefore be almost impossible for an occasion to arise when the said powers would become exercisable by the 1st defendant. The legislature would therefore have acted in vain. That would definitely not be what the legislature intended. The courts duty in this event is to construe the Section and give “a sensible meaning to make the section operative (see Halsbury’s Laws of England 3rd Ed. Vol.36 paragraphs 578 and 582).

In the premises, I hold that on the occurrence of any one circumstance set out under Section 34(1) of the Banking Act, the 1st defendant was entitled to exercise the powers given under Section 34 (2) of the same Act.

The next issue to resolve is whether or not any of the said circumstances occurred before the 1st defendant appointed the 3rd defendant as statutory manager of the plaintiff. The 1st defendant contends that a series of circumstances happened which culminated in the appointment of the 3rd defendant under Section 34 (1) (d), of the Banking Act. The circumstances included various violations of the Banking Act listed in paragraphs 5 of the replying affidavit and the further affidavit of Gerald Arita Nyaoma. The violations included lending to both Nakumatt Holdings Limited and Triton Petroleum Limited in excess of the single borrower limit of 25% of the plaintiff’s core capital; involvement in insider lending without adequate security and above the prescribed limit of 20% of its core capital; Credit facilities advanced before beneficiaries executed letters of offer and in some cases no such letters of offer were executed at all; credit facilities disbursed to beneficiaries on verbal instructions of the plaintiff’s directors, payment of bonuses to staff outside the payroll and not subjected to tax; use of a lawyers account as a trading account for some of the plaintiff’s customers and failure to comply with **“know your customer procedures”** regulations issued by the 1st defendant.

These circumstances were not challenged by the plaintiff in an affidavit in response or otherwise. The position as stated by the 1st defendant must therefore be taken to be the true position. That being the position, I am persuaded that on the basis thereof the 1st defendant was prima facie entitled to exercise the powers vested in it under Section 34(2) of the Banking Act in appointing the 3rd defendant as a statutory manager of the plaintiff.

The plaintiff's position as I understand it seems to be that as its financial position is solid, the 1st defendant should have dealt with the individuals responsible for the violations detected by the 1st defendant. In its view as no depositor, creditor or anyone else is complaining, there was no warrant for the appointment of the 3rd defendant as statutory manager of the plaintiff. In those premises the plaintiff believes that the 1st defendant in appointing the 3rd defendant did so at the altar of political expediency but not for the efficient and prudential management of the plaintiff.

The 1st defendant denies the accusation and while admitting that the financial position of the plaintiff is sound nevertheless is of the view that in the light of the said violations and adverse reports/allegations on the plaintiff, it was in the interest of the plaintiff's depositors and creditors that the 3rd defendant be appointed a statutory manager of the plaintiff. In the 1st defendant's view, the said appointment was to pre-empt public panic and a run on the plaintiff by its depositors. So, both the plaintiff and the 1st defendant have a common goal to protect the interests of the depositors and creditors of the plaintiff.

I agree with the 1st defendant. It has a duty conferred by statute to protect the plaintiff and its depositors and creditors. It should not be accused of locking the staple when the horse has bolted.

The most prudent manner to protect the three is when the plaintiff is still considered to have a sound financial base. If the 1st defendant has evidence of electronic transfer of funds without corresponding instructions and entries being posted without appropriate authority. If there is evidence that credit facilities are disbursed to beneficiaries on verbal instructions of the plaintiff's directors, in my view it would not require a few seconds for the plaintiff to move from its status of a solid bank to an insolvent shell.

Having found on a prima facie basis that the 1st defendant was in the circumstances of this case entitled to appoint the 3rd defendant a statutory manager of the plaintiff is the remedy of injunction available to the plaintiff restraining the defendants on a temporary basis from interfering with the plaintiff's business operations and or management including *inter alia* appointing any person and or persons a statutory manager of the plaintiff" Can the 3rd defendant be now restrained by an order of injunction from assuming the management and/or control of the affairs of the plaintiff or in any manner howsoever, exercising any functions and or powers over the plaintiff as a statutory manager appointed by the 1st defendant"

The answer to both questions must now be obvious. The 1st defendant as I have already found was entitled to appoint the 3rd defendant as a statutory manager of the plaintiff. That was done by the instrument dated 23.6.2006

annexed to the plaintiff's supporting affidavit as "**SH4**". The instrument is headed:

Placing of Charterhouse Bank Limited under Statutory Management. The 1st paragraph reads:

"In order to protect the interests of Charterhouse Bank Limited, its depositors and other creditors, the Central Bank of Kenya has today appointed Miss Rose Detho as Statutory Manager for Charterhouse Bank Limited pursuant to Section 34(1) (d) of the Banking Act with effect from 23rd June, 2006."

The instrument specified the duties of the 3rd defendant as follows:-

"... exercise all the powers conferred on her by the Banking Act and shall enjoy the rights and privileges of a Manager in accordance with Section 34 (2) and 34 (b) of the Banking Act. She will assume the management, control, and conduct of the affairs and business of the institution to the exclusion of the Board of Directors."

In terms of that instrument the 3rd defendant's appointment as Statutory Manager of the plaintiff was effective from 23.6.2006. The plaintiff admits that the instrument was served on the same date. No restraining order was issued to stop the 3rd defendant from assuming her office as statutory manager of the plaintiff on 23.6.2006. Her appointment has not otherwise been revoked. Even if I had found that the power of the 1st defendant had not become exercisable under Section 34 (1) of the Banking Act it would appear that a restraining order would not be available to the plaintiff as the plaintiff is seeking to restrain what appears to have already occurred.

In the premises, I am constrained to hold that the plaintiff has not established a prima facie case with a probability of success at the trial. That means that the very first condition for the grant of an interlocutory injunction has not been met. Strictly speaking I need not consider the other conditions set out in **Giella vs. Cassman Brown & Co. Ltd. Case (Supra)**.

However, even if the plaintiff had established a prima facie case with a probability of success I doubt whether it would have crossed the second hurdle which is whether the plaintiff's injury would adequately be compensated in damages if an injunction were not granted at this stage. In its plaint referred to at the beginning of this ruling, the plaintiff has prayed for ***inter alia*** general and punitive damages for any losses that it may incur arising from the defendant's acts. There is also a prayer for special damages to be particularized. These prayers in my view recognize

that any injury that the plaintiff would suffer if the injunction is not granted would adequately be compensated in damages. The plaintiff is a commercial bank and any loss that it may incur because of the acts of the defendants can clearly be ascertained and I have no doubt that the 1st defendant would be able to meet the same.

It is also my view that if I had entertained doubt as to the prima facie merits of the plaintiff's case and application, the balance of convenience tilts in favour of refusing the injunction as the 1st defendant's statutory duty in the case at hand is being exercised in the interests of the plaintiff, its depositors and creditors.

Before penning off let me mention one or two side issues that Counsel could not resist making submissions on. The 1st issue is one of the further affidavit sworn by Sanjay Shah. Counsel for the 1st and 3rd defendants revisited arguments on the admissibility of the same. The same objection had been raised and a ruling delivered thereon in the course of this debate. I say no more about the same.

The second issue was with respect to the competence of this application. It was the view of Counsel for the 1st and 3rd defendants that the plaintiff should have invoked the review jurisdiction of this court. That issue was raised in reply after Counsel for the plaintiff had rested his submissions. The issue was neither in the replying affidavits nor were grounds of opposition filed. I got the impression that the issue had been raised as an after thought. In my view however, the objection raised as to the competence of the application was without merit and I say no more about the same.

The results of this application do not in any event turn on a consideration of the side issues.

To sum up however, I find that the plaintiff has not established a prima facie case with a probability of success. I also find that any injury the plaintiff may suffer can adequately be compensated in damages and that the 1st defendant being the Central Bank of Kenya is capable of meeting any award of damages. The balance of convenience would also tilt in favour of declining the injunction.

For all those reasons, the plaintiff's application dated and filed on 23rd June 2006 is dismissed with costs to the 1st and 3rd defendants.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 26th day of July, 2006.

F. AZANGALALA

JUDGE

26/7/2006

Read in the presence of:-



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