IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi, Platt and Apaloo JJA)

CIVIL APPLICATION NO. 130 OF 1987

J K INDUSTRIES……APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD & ANOTHER….RESPONDENT

(In an intended appeal from a ruling of the High Court at Nairobi, Dugdale J)

JUDGMENT

The applicant JK Industries Ltd brought this application as a matter of urgency under rule 5(2)(b) of the Court of Appeal rules, urging the court to restrain the receivers and managers from selling, alienating, parting with possession or in any other way disposing of the assets, properties and everything that belonged to the applicant pending the determination of an appeal. It appears that on September 4, 1987 the applicant filed a notice of appeal against the ruling of Dugdale J given on September 2, 1987. In this ruling the learned judge discharged the injunction which had been granted as an interim measure *ex parte*, pending the hearing of the applicant's application in the High Court for an injunction. Dugdale J having finally declined to grant an injunction after the hearing *inter partes* the interlocutory appeal was commenced by notice of appeal.

It will be seen at once that while the learned judge was bound to consider the application before him, in accordance with the principles laid down in *Geilla v Cassman Brown & Co Ltd* [1973] EA 458 confirmed by *Salim v Okong* [1976] KLR 42 although Madan JA explained in *Jethabhai v Fischer* Civil Appeal No 41 1980 that it would often be necessary to consider the issues on a balance of convenience, it is not for this court to enter into a discussion on that basis. What is required of this court is to consider whether the *status quo* should be maintained pending the hearing of the appeal, an approach which was laid down in *Butt v The Rent Restriction Tribunal* Civ Appl NAI 6 of 1979 and followed in most subsequent cases except for the exceptional decision in *Madhupaper International Ltd v Paddy Kerr* Civ Appl NAI 116 of 1985. The main issue to be decided in this application is whether the general rule applies, upon which the applicant relies, or whether the exception applies, upon which the respondent relies. Having considered the matter from the many angles presented to us, it is clear to us that the exception applies.

The company had raised money from the East Africa Development Bank and had secured the loan by a mortgaged debenture dated February 5, 1976. The amount secured was Kshs 7,000,000. One of the

terms of the debenture was that in the event of the company being unable to pay the loan as demanded the bank could appoint a receiver and manager, with power to sell or let, or concur in selling or letting any property or assets charged. It appears that in 1978 the company required a further injection of cash and this time it turned to the first defendant bank, the Kenya Commercial Bank Ltd. A further Kshs 7,000,000 was raised from the Kenya Commercial Bank Ltd and the company granted the latter bank a mortgage debenture over its assets which was to rank *pari pasu* with the debenture granted to the East African Development Bank. In this latter debenture there was similar powers as those granted in the first debenture.

Sometime prior to November 1986 the Kenya Commercial Bank Ltd demanded the repayment to itself of an unspecified part of the debt. The company could not make payment. So on November 21, 1986 it exercised its powers under the debenture and appointed a receiver and manager of the company's assets. It is common ground that the Kenya Commercial Bank Ltd acted jointly with the East African Development Bank or with its approval. The East Africa Development Bank made no formal demand for the repayment of its debt. That aspect of the case was relied on to show that the appointment of the receiver and manager was null and void. The East Africa Development Bank claimed to be entitled to make the appointment of the receiver and manager without formal demand in certain circumstances. One of these circumstances should be the case where the company did an act by which execution may be levied against its property. The East Africa Development Bank pointed out that the company had suffered judgment to be given against it by no fewer than six individuals or entities which may properly be enforced by execution. To buttress the argument the East African Development Bank pointed to clause 7(1) and (4) of the debenture. The position is that both defendant now respondent banks have shown *prima facie* their individual right to appoint a receiver. If each is entitled to make appointment, it would stand to reason that one bank may concur in the appointment made by the other.

The receivers and managers accepted their appointments and having done so, decided to sell the assets of the company. Correspondence followed because the company was anxious that the defendant lift the appointments of the receiver and manager so that the company could carry on its normal business activities. The tone of the company's letters suggest a plea for sympathy and consideration of the company's difficult circumstances. It does appear that the company at once put forward a case that the banks had interrupted its business upon unjustified grounds. It was more a question that the company had or that it had a projected contract with the Kenya Posts and Telecommunications Corporation to supply some telephone equipment. The order was worth a considerable sum of money. But there were two difficulties. One was that the working capital had to be borrowed to carry out the contract and the resulting profit would not very greatly affect the total indebtedness of the company. The situation seems in reality to have been that the company was insolvent but that it hoped to struggle on with better management. Indeed, it was hoped that because of its unique position as the only African company manufacturing these products, financial institutions would be sympathetic to it and keep it going.

The banks were dissatisfied with the way in which the company had been operated. Its trading results showed that between 1978 and 1984 it progressively made losses except that it made a profit in 1984. As at 28 February 1985 the evidence showed that its accumulative losses exceeded Kshs 11,000,000. The company has not produced any audited accounts since 1985. We were told that at present, the company is indebted to the Kenya Commercial Bank limited in the sum of Kshs 24,000,000. The company seems to have promised to raise its capital by Kshs 10,000,000 but it failed to implement this promise and its failure to do so has been the subject of correspondence between it and the Kenya Commercial Bank Ltd. Apart from its indebtedness to the two banks, it is also indebted to a number of persons and institutions some of which, as we have said, have obtained judgments against it. One of the creditors has since filed a winding up petition in the High Court. It is said that the total sum owed by the company to its unsecured creditors is in the neighbourhood of Kshs 5,000,000. There is little doubt that

in November 1986 the company was in a parlous financial state and still is. The advocate of the Kenya Commercial Bank Ltd submitted that the company is no longer an economic proposition.

Now what is the nature of the case which the company presents and by what material did it seek to show *prima facie* that either of these appointments is void" As against the first defendant bank, the Kenya Commercial Bank, the company said that the bank led it to believe that it would not exercise its right of appointing a receiver or a manager, and that it relied on this assurance to its detriment. So it says, in effect, that the Kenya Commercial Bank Ltd was estopped from exercising that right. The Kenya Commercial Bank Ltd replies that it gave no such assurance to the company and that that claim is without foundation.

As against the East African Development Bank the company relies on a lack of a demand for the repayment of its debt. We have already pointed out that this issue depends upon the construction of clause 7 of the debenture, so it is not disputed that various judgments had been entered against the company. A cursory reading of the debenture shows that the East African Development Bank was within its right to make or concur in appointment of a receiver.

As against the Kenya Commercial Bank Ltd one ought to bear in mind that this is not the stage to resolve conflicts of evidence or pronounce on complicated points of law. But in order to attract the court's discretion to hold a status quo until the hearing of the appeal, the applicant must show that a reasonable argument can be put forward in support of the appeal. What material then does a company provide to support its case of estoppel" The receiver was appointed on November 21, 1986. The company's first reaction on learning of it, was to address the first defendant on the subject in a letter dated November 25, 1986. That letter, in essence, expressed surprise that notwithstanding the company's attempts to explain all the issues it raised, the latter felt the need to appoint a receiver. It drew the first defendant's attention to the World Bank contract which was scheduled to be finalised on November 24, but which had become impossible by the appointment of a receiver. It is remarkable that there is nothing in this letter to suggest that in appointing the receiver, the bank had broken faith with the company or that the appointment had been made despite the bank's assurance to the company to the contrary. There is nothing in this letter to suggest that the bank had been guilty of misrepresentation or anything like bad faith. Between December 4, 1986 and June 18, 1987, no fewer than 23 letters were exchanged between the company and the bank. About three quarters of these letters were written by the company to the bank. The one constant thread which ran through all these letters, is the company's anxiety that the bank will be persuaded to raise the receivership to enable the company continue its normal activities. It is also not without significance that the claim of fraud and misrepresentation were first made against the bank in a plaint dated July 6, 1987 a fortnight after the receiver had advertised the company for sale as a 'going concern'.

It is, of course, clear that at the date the receiver was appointed, the company was on the threshold of finalizing a contract with the Kenya Posts and Telecommunications Corporation from which some profits may accrue to it. Both defendant banks were aware of this and it is somewhat puzzling that they should elect to exercise their right to appoint a receiver at this time. We would have thought it made business sense for them to stay their hands until the Post office 'deal' was clinched in the hope that the company may come by some funds which will enable it to, at least, reduce its indebtedness to the banks. But when in point of time, debenture holders should exercise their right to interpose a receiver in the management of a company's affairs is a matter for the judgment of business. It is not the business of courts. Indeed, there is authority for the proposition that a debenture holder is under no duty to refrain from exercising its rights because doing so might cause loss to the company or its unsecured creditors. (See *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1071] 2 All ER 633 and *Madhupaper International Ltd v Kerr* Civ Appl NAI 116 of 1985.

Accordingly, apart from pleading an elaborate case, the conclusion is inescapable that the company has failed to present a reasonable case that the first defendant bank made assurances to it that it would refrain from exercising its contractual right of appointing a receiver. Similarly, in view of the undisputed judgments given against the company considered against the express terms of the debenture, the company has entirely failed to present or even attempted to present an arguable case that any principle of law precludes the second defendant bank from appointing a receiver without making a formal demand for the repayment of its debt. These holdings are sufficient to dispose of this application against the company.

It is uncertain whether the company will be able to ‘wrap up’ the Post Office job and no other substantial contract is apparently in prospect. There are a number of unsecured creditors who are threatening to take legal steps to enforce their right. Would it be right to tie the hands of two secured creditors who, in all probability, provided the financial pad on which the company was launched and thus give their unsecured rivals, so to speak, a field day" All the company’s assets are now under the control of the receiver and the directors have not shown that they are in a position to provide substantial and acceptable undertaking in damages. On the contrary, there can be little doubt that the two defendant banks are in a position to pay any damages that the company may suffer in the unlikely event of the latter being successful in the pending suit. Both sides to this litigation can point to some hardship according as this application is granted or refused. But in all the circumstances, greater hardship would be caused in granting this application than in refusing it. In the comparatively recent case of *Madhupaper International Ltd* (supra) this court on not wholly dissimilar facts, felt it would be wrong to grant that relief in this matter.

Both defendant banks also united in submitting that as under the debentures, the receiver was not their agent, his nonrejoinder to this application was fatal. In the view that we take and which we have set out at some length, this point is unnecessary for our decision and we abstain from pronouncing on it. This is a hard result for the company and we are not without sympathy for it. But this court is governed by principles of law, not the hardship of any individual case. In the result, we think this application fails and ought to be dismissed with costs.

Dated and Delivered at Nairobi on this 20th November, 1987

J.O NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL