Case Number:	Civil Case 418 Of 2004
Date Delivered:	04 May 2005
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	-
Judge:	Mathew John Anyara Emukule
Citation:	Kwality Candies & Sweet Ltd v Industrial Development Bank Ltd [2005] eKLR
Advocates:	-
Case Summary:	[ruling] civil procedure - injunction - quia timet injunction - interlocutory injunction - order XXXIX rule 12 of Civil Procedure Rules
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL DIVISION, MILIMANI

CIVIL CASE NO. 418 OF 2004

KWALITY CANDIES & SWEETS LTD……..……..... PLAINTIFF

VERSUS

INDUSTRIAL DEVELOPMENT BANK LTD……....DEFENDANT

RULING

By an application dated 26th July 2004, the Plaintiff/Applicant sought orders inter alia that the Defendant whether by itself, its officers, servants and/or agents be restrained from appointing any person or persons as receivers/managers of the Plaintiff's company.

On 26th July, 2004, this Court granted those temporary orders pending the hearing of the application inter partes. The application was heard on 11th November 2004, and this Ruling was reserved for 9th December 2004. In the event, this file was inadvertently buried among others. This Court apologises to all the parties and their clients for the delay in the delivery this Ruling.

The application herein raised two basic issues upon which the other orders sought will stand or fall. The applicant seeks a restraining order against the Defendant from either attempting to sell the Plaintiff's business or assets or any of them and any other assets charged to the Defendant; the second prayer sought is like the first; an order restraining the Defendant Bank from appointing any person or persons as receivers/Managers of the Plaintiff Company.

The grounds upon which the application is based are set out in the application and will readily appear in the course of this Ruling. The application is also supported by the Affidavit of Dipan Mediratta a director of the Applicant, sworn on 26th July 2004, the Supplemental Affidavit and the Further Affidavit of the said Dipan Mediratta sworn on 7th October 2004, and 28th October 2004 respectively. The said director depones inter alia that –

(1) The Plaintiff applicant by a Loan Agreement dated 16th July 1999 borrowed a sum of US $ 1,204,000/= for the purpose of setting up a confectionery factory which I shall hereafter refer to as the "Project". The said agreement provided for a rate of interest of 12% and a default interest of 6% p.a.

(2) The Loan Agreement required the Plaintiff to grant a mortgage over the Plaintiff's immovable properly, LR No. 214/468, Nairobi ("the suit property") and also a Debenture over the Plaintiff's business.

(3) On 29th May 2003, the Plaintiff executed a Further Supplemental Debenture and also a Second Further Mortgage over the suit property over which the Defendant undertook to advance to the Plaintiff lending facilities totaling Kshs.12,500,000/=.

(4) The Defendant never actually advanced to the Plaintiff the said funds and that the said facilities had

been exhausted prior to the date of the said Further Supplemental Debenture and the Second Further Mortgage and depones on the advice of his Counsel that the said documents were based on past consideration which is not good consideration in law, and cannot be used as a basis to exercise any rights of the Defendant either over the Plaintiff's business or over the suit property.

(5) The Defendant backtracked on arrangements with M/s A.V. Holdings another financier to the Plaintiff's business, and thus denied the Plaintiff an opportunity to inject sufficient funds into the Plaintiff's business and pay off all amounts due to the Defendant Bank.

(6) The Defendant's principal officers Mr. Timothy K.

Tiampati and Mrs. Dorothy Njerithia had issued verbal threats to the Plaintiff's representative, a Mr. Ashok Mediratta that the Defendant would appoint a Receiver/Manager over the Plaintiff's business, on the basis of a notice issued on 11th July 2003, and would not give them any further notice.

(7) Admits that the Plaintiff's company is indebted to the Defendant Bank in the sum of Kshs.38,500,000/= against securities worth over Kshs.120,000,000/=.

(8) On advice from its advisers on interest, Interest Rates Advisory Centre (IRAC), the Plaintiff's director also deponed that the Defendant applied interest rates which are contrary to the Central Bank of Kenya Act, and the Banking Act.

In response to these averments and in opposition to the application, the Defendant/Respondent, filed a Replying Affidavit sworn on 26th August 2004 by Timothy K. Tiampati the Defendant's Chief of Credit. This deponent avers, so far as is relevant for the purposes of this Ruling, that –

(a) Article 1 (10) empowered the Defendant to charge default interest of 6%, and to also to vary the rate of default interest at its sole discretion,

(b) Despite applying all the repayments moneys received from the Plaintiff in terms of the Loan Agreement, the Plaintiff remained highly indebted to the Defendant.

(c) On advice from his Counsel, Mr. David Majanja, denies that the security documents were based on past consideration.

(d) The foreign exchange risks/losses incurred as a consequence of the conversion into US Dollars were to be borne by the Plaintiff.

(e) In view of the Plaintiff's admission of the indebtedness, the Plaintiff cannot claim to be ahead of schedule in the repayment of the loans. (f) Threats of foreclosure of the suit property or appointment of a Receiver/Manager cannot form a basis for a suit for an injunction to restrain the Defendant from so doing or acting.

(g) Since the Defendant has valid debentures over the Plaintiff's property the Plaintiff cannot obtain an injunction to restrain the exercise of contractual rights which have accrued to it in view of the admitted defaults by the Plaintiff, and

(h) The Plaintiff filed the suit and brought the application in bad faith because simultaneously with filing of the suit and the application for injunctive orders the Plaintiff/Applicant issued and stopped payment of a cheque for shs.2.8 million as part settlement of its liabilities to the Bank, and

(i) The Plaintiff was therefore intent to seek the Court's intervention in evading its contractual obligations and should not be allowed to do so.

Mr. Kariuki, learned Counsel for the Applicant, and Mr. Majanja learned Counsel for the Defendant/Respondent regurgitated the respective averments in the Supporting Affidavit and Further Affidavit and Replying Affidavit of the Applicant's and Respondents representatives.

Mr. Kariuki acknowledged that the principles for grant of interlocutory injunctions are well settled. The Plaintiff must show in his application that his rights have been violated in some way for him to be entitled to the equitable remedy of injunction. However, the Plaintiff is also entitled to an injunction even where no infringement of his rights has actually taken place but he merely fears and is threatened with the violation or infringement of his rights. These are what are referred to as preventive as opposed to restrictive injunctions and the Court will grant an injunction to restrain a defendant from dong what is unlawful.

Counsel submitted that the Defendant had not done anything yet but that according to the Affidavit of Dipan Mediratta in support of the Application, the Defendant's officers had issued verbal threats over a period of time, and that the only way to establish whether or not such threats have been issued is by viva voce evidence in examination of the Deponents herein and other persons upon whom the Defendant's representative have directed verbal threats. Counsel submitted that the Plaintiff had demonstrated through the Supporting and Further Affidavit of Dipan Mediratta that the Defendant's had maintained the Plaintiff's loan account with the Plaintiff in a manner contrary to the Loan Agreement dated 26.07.2004, and that the Replying Affidavit of Timothy K. Tiampati sworn on 27.08.2004 shows that the agreed interest was 12% p.a. for the US$ account. In breach of Clause 4 of the Loan Agreement interest on the said US Dollar Account was now being charged @ 14%. A party should not be allowed to benefit from its own wrong doing. For this proposition learned Counsel relied upon the case of **MARY WANJIKU & CHALLA HOLDINGS LTD. –VS- KENYA COMMERCIAL BANK LTD** (Mombasa HCCC NO. 250 of 2000) where the Hon. S. K. Shah (Commissioner of Assize Mombasa), said

"Equity will not allow the Plaintiff to gain from his wrongful act nor will a Court aid a man to derive advantage from his wrong for such would be unconscionable."

Counsel submitted on the basis evidence set out in the Supporting Affidavit and Supplementary Affidavit and Further Affidavit of Dipan Mediratta, that the Defendant had failed to maintain accounts as a prudent banker ought to do. The Defendant had debited the Plaintiff's account in contravention of the law, namely, the Central Bank of Kenya Act, and the Banking Act. The Defendant had also failed to explain the payment of US$38,634.86 which was first credited and later reversed without any explanation. The Plaintiff also complained that the Defendant has been frustrating the Plaintiff's efforts to redeem its loan accounts by getting an overseas investor, A. V. Holdings to inject funds into the Plaintiff's Company and to pay off the debt due to the Defendant's and thus help improve the Plaintiff's business, as did the sum of US $100,000/= paid by the said investor, but that the Defendant later backtracked on the transaction.

The Plaintiff further complains against the Defendant that the facility loan was a Project loan, and it was incumbent upon the Defendant to assist the Plaintiff Company to realise the project. Mr. Kariuki, submitted further that the Plaintiff was making arrangements to find another financier, and that the matter can be settled once an account is taken. Counsel submitted that as of the time of the threats pending the filing of this suit, the Plaintiff was upto-date in loan repayments if credit was given to the Plaintiff for all payments made under the loan, and the correct rate of interest was charged. Counsel submitted that the Plaintiff had paid to the Defendant over Kshs.100,000,000/= from the original loan of Kshs.78 million.

Counsel concluded that if the Court agrees with these submissions and finds that the Plaintiff has laid a prima facie case with a high probability of success, then the issue of the balance of convenience will not arise. For this proposition learned Counsel for the Plaintiff relied upon the dictum contained in paragraph 956 of Halsbury Laws of England Vol.24, 4th Edn. To which I shall refer to later in the course of this Ruling.

Counsel also submitted that the balance of convenience is in the favour of a Plaintiff who is willing to redeem his loan account and is running his business. Receivers do not run but kill business in this country. For his submission Counsel relied upon the case of **JAMBO BISCUITS (K) LTD –VS- BARCLAYS BANK OF KENYA, ANDREW DOUGLAS GREGORY & ABDUK ZAHR SHEKH** (NAIROBI MILIMANI COMMERCIAL COURTS) HCCC No. 1833 of 2001 to which I shall refer to in due course. Counsel also submitted that as a matter of public policy, it is prudent to let a business which is employing several people survive rather than let in Receivers to kill it.

Further, if interest has been charged outside the agreement, the Defendant cannot exercise any powers under the Debenture or charge as was held in the case of **JORAM THUO WAREGI –VS- KENYA COMMERCIAL FINANCE COMPANY LTD.** (Nairobi Milimani Commercial Courts HCCC No. 149 of 1999).

Finally, the Plaintiff challenged the instruments under which the Defendant intends to exercise its rights to appoint a Receiver. His Counsel submitted that the moneys purportedly advanced under the Supplemental Debenture and the Second Further Mortgage dated 29.05.2003 were not advanced on that date or thereafter. They are based upon past consideration which in law is not good or consideration at all. Counsel relied on CHITTY ON CONTRACTS, 28TH Edn. Vol. 7, (General Principles) paragraph 3 – 025 – PAST CONSIDERATION IS NO CONSIDERATION.

> **"The consideration for a promise must be given in return for the promise. If the act of forbearance alleged to constitute, the consideration has already been done before, and independently of, the giving of the promise, it is said to amount to "past consideration" and such past acts or forbearances do not in law amount to consideration for the promise."**

In summary Mr. Kariuki concluded that the Plaintiff had established a prima facie case with a high probability of success, his Client, the Plaintiff Borrower, was willing to redeem his loan account, and retain the right to operate its business and urged the Court to grant the prayers sought.

The principles upon which a **quia timet** injunction is granted are well settled. However, before I consider these principles, I shall first consider the Defendant/Respondent's arguments in opposition to the Plaintiff/Applicant's application.

Mr. David Majanja learned Counsel for the Defendant stated that he relied upon the Replying Affidavit of Timothy K. Tiambati and the Defence filed on 6.09.2004. He brought the Court's attention to prayers number 2(a) and (b) of the Application the subject of this Ruling regarding the mortgagees statutory power to sell the charged property or appoint a receiver. Counsel submitted that the right to appoint a receiver, and to sell the charged property are contractual and statutory rights under Sections 69A and 69F of the Indian, Transfer of Property Act as applied to Kenya (the Group 8 Acts).

The said prayers call for orders to restrain the Defendant from either exercising its statutory and contractual to sell the suit property and to appoint a receiver over the Plaintiff's operations. Counsel submitted that the Plaintiff had not established a prima facie case. He relied upon the provisions of Clause 4 (2) which provided that interest would be charged @ 12% as per the Fourth Schedule, Clause 10 provided for default interest of 6%, and also empowered the Defendant to vary the default rate of interest, and under the Fourth Schedule Clause 2, the Defendant had also power to vary the rate of interest.

Counsel also submitted that repayments by the Plaintiff are credited in terms of interest, costs and charges, and the balance on principal. This was in accordance with the terms of the Fourth Schedule which is part of the Loan Agreement.

On who took the foreign currency exchange risk, Counsel submitted that this was a US Dollar loan and the Plaintiff took the risk of currency fluctuations, the Plaintiff is therefore not entitled to cry that he borrowed so little, and has had to pay so much more. It is the risk they took. On the issue of lack of consideration, Counsel submitted that it is the Plaintiff who sought short term facilities of Kshs.1.0 million, and later Kshs.5.0 million. The Plaintiff had also sought facilities Kshs.7.5 million which upon its request was converted to a short term loan. It is these sums which were secured by the Supplemental Debentures and the Second Further Charge for a total of Kshs.11.,500,000/=. To say that there was no consideration is not correct. These sums were due for repayment and the Defendant deferred payment thereof through Supplemental Debenture and the Second Further Charge. Counsel relied upon the dictum by the learned authors of Halsbury's Laws of England, 3rd Edn. Vol. 8 paragraph 198 –

> **"Valuable consideration was defined as some right; interest profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other at his request;"**

An example of consideration consisting in some forbearance, detriment, loss or responsibility suffered or undertaken by the promisee are – the surrender of a security, or of a right to charge item charges by an Advocate, to surrender an interest in business - like in the instant case, from collecting immediately the due and payable facilities totaling Kshs.11,500,000/=. There was valid consideration.

The defendant also dismissed the Plaintiff's contention that the Defendant refused to cooperate with A. V. Holdings on the injection of further capital into the Plaintiff Company. It had no part to play and was not a party to the Plaintiff's arrangements with the new investor. Differences in accounts was no basis for finding a prima facie case. The balance of convenience did not also lie with the Plaintiff. Submission of interest calculations by the Interest Rate Advisory Centre was merely an afterthought, and it too was no basis for granting an injunction. Counsel therefore submitted that the Plaintiff's application lacked merit and should be dismissed with costs.

Having set out at length the parties rival arguments, I shall now consider the merits of the application and express my views thereon.

As intimated at the commencement of this Ruling the twin issues for determination in this application are whether the Plaintiff/Applicant is entitled to orders restraining the Defendant from selling the suit property, or appointing a Receiver/Manager over the Plaintiff Company's business affairs/interests.

The principles upon which a quia timet injunction is granted are not different from those upon which restrictive injunctions are granted with one important exception. In an application for a quia timet injunction a heavy burden is placed upon him to prove its case for a preventive injunction than in an application for a restrictive injunction. The principles for grant of a restrictive injunction are set out in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD. & ANOTHER [1973] EA 358**. These are that an applicant must or show establish a prima facie case with high probability of success, that damages would not be an adequate remedy, and that where there is a doubt decide the application on the basis of the balance of convenience.

I have in the past considered at length these principles in the cases of **Philip Wambua Masila –vs- Barclays Bank of Kenya Ltd**. (HCCC No. 215 of 2004 - unreported), and **Rajnikant Jashbhai Desai, Nila Rajnikant Desai and Kimana Lodge Limited –vs- Fina Bank Limited** (Milimani Commercial Courts, HCCC No. 1308 of 2001 – unreported) and proceeded to disallow applications for restrictive injunctive reliefs – similar applications for restrictive injunctive reliefs have been unsuccessful in the cases of **PETER KIMONYE, MOSES GITUMA and ANGER MWIRIGI –VSBARCLAYS BANK OF KENYA, ANTIQUE AUCTIONEERS and CORUK INVESTMENT COMPANY LTD** (Milimani Commercial Courts , HCCC No. 403 of 2004 – unreported), and in the majority judgement of the Court of Appeal in **KENYA COMMERCIAL FINANCE COMPANY LTD. –VS- KIPNGENO ARAP NGENY & BERRY FARMS LIMITED** (Civil Appeal No. 100 of 2005.

The orders of injunction sought in this application are what are commonly referred to as **preventive** as opposed to **restrictive** injunctions. The preventive injunction is usually referred to in their esoteric Latin name of **Quia Timet** injunctions. Quia Timet literally means **"because of fear**". So a **quia timet** action is one by which a person may obtain an injunction to prevent or restrain some threatened act being done which, if done, would cause him substantial damage and for which money would be no adequate or sufficient remedy. A quia timet action is based on the theory of an irreparable injury taking place if the act threatened is done. The principle applies equally to actions for an injunction to restrain any threatened act to be done by a public body in the exercise of its statutory powers or duties as to actions for an injunction to restrain the repetition of an act which had already been done by such a body in exercise of such powers or duties. In the latter case, as well as in the former, the injunction sought is an injunction to restrain future acts. The only difference between the two cases is that in a purely quia timet action the burden of proof resting on the Plaintiff is far heavier than in an action where an act has already been done and has caused actual damage e.g flooding of an empty reservoir and thus causing havoc to a local coal pit.

In both cases however the issue is the same – namely whether the act (whether completed or intended) is an act causing substantial damage to the Plaintiff. Discussing these principles in the case of **CRAICOLA MERTHYH COMPANY LIMITED –VS- MAYOR ALDERMEN AND BURGESSES OF SWANSEA** [1927] LR 235, an appeal from the decision of Tomlin J. who declined to grant a quia timet application, the Court of Appeal per Lord Hanworth M. R. who gave the lead judgement with which Sargant and Lawrence L. J J. agreed and said at P 241 –

> **"A quia timet action is not based upon hypothetical facts for the decision of an abstract question. When the Court has before it evidence sufficient to establish that an injury will be done if there is no intervention by the Court – it will act at once and protect the rights of the party who is in fear, and thus supply the need of what has been termed protective justice. It is a very old principle.**
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> **Sir E. Coke, 2nd Institute, P 299 says that – "Preventive justice excelleth punishing justice".**

In the same case of Craigola Merthyr Company Ltd. –vs- Swansea, Lord Hanworth M. R. also referred to the cases of Attorney General –vs- Manchester Corporation [1893] 2Ch. 87, 91 where Chitty J. said -

> **"Where it is certain that injury will a rise, the court will at once interfere by injunction. "He also called attention to the words of Lord Eldon in Crowder - vs- Jinker [1816] 19 vrs. 617,622" extreme probability of irreparable injury" and Lord Brougham in Earl of Ripon -vs- Habart (1834) 3 My L&K 169 at 176 – that -**
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> **"Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage"**

. It is, I think quite trite law to say that a chargee's statutory power of sale can only be exercised pursuant to the terms and conditions of the charge or mortgage instrument, and will not be justified outside the instrument of charge or mortgage. This statement equally applies to a debenture holder's power to appoint a receiver or manager over a company's property and business affairs. The power to do so must be expressly reserved in the instrument called the debenture. In the application at hand, the Plaintiff acknowledges indebtedness to the Defendant. It issued a cheque for shs.2.8 million. Midway to the payment of that cheque, it stopped payment thereof. That is clear evidence of bad faith. It will be said that the Plaintiff has come to the Court of Equity with tainted and dirty hands. The Plaintiff has breached a cardinal rule of equity. He who comes to equity must do equity. This is the one principle under which the **Giella –vs- Cassman Brown** Principles must be rooted. On these grounds alone, one could say, the Plaintiff has not established a prima facie case entailing it to the equitable remedy of injunction. The Plaintiff pleads that the security instrument were invalid because they were based upon past or no consideration. I do not agree. There was consideration, let alone adequate consideration for the Further Mortgage and Further Debenture. What was the consideration" The Plaintiff was in arrear in the sum of Kshs.12,500,000/= in payments to the Defendant. In consideration of the Defendant not foreclosing the securities, namely the Mortgage and the Debenture as it had the right to do so under those instruments, the Plaintiff in consideration or the Defendant foregoing the foreclosure actions granted further securities to the Defendant, the Further Mortgage and the Further Debenture.

Halsbury's Laws of England 3rd Edn. Vol. 8 paragraph 198 defines valuable consideration **"as some right interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or untaking by the other at his request ……."** The Defendant had a right an accrued right to the instruments due from the Plaintiff in respect of arrears. The Plaintiff cannot in conscience turn round and deny that there was valuable consideration for the further securities and for which the Defendant was at that stage in time entitled to foreclosure.

The Plaintiff complained in its application that the Defendant frustrated its arrangements for injunction of capital by an overseas investor, **A. V. Holding** who initially injected $100,000/= for which the Defendant gave credit to the Plaintiff. This is a matter I think of further investigation, as injection of foreign capital would certainly have saved the Plaintiff the endless and punitive principal interest which rose from the original rate of 12% to 22%, and interest surcharge which rose from 6% to 28% p.a. effectively charging a combined interest rate of 56% p.a. Few businesses, however well run, and however profitable, will

survive those rates of interest.

The principle on these matters as laid down by Kwach J.A. in the case of MIRAO LIMITED –VS- FIRST AMERICAN BANK OF KENYA LIMITED & 20 OTHERS (Civil Appeal No. 39 of 2002) **"is that Courts will not allow debtors to avoid paying their just debts – otherwise banks will be crippled out of business altogether, and that no serious investors will bring their capital into a country whose courts are a haven for defaulters.**"

And in Morris & Company Ltd. -vs- Kenya Commercial Bank Ltd. & 20 Others (Milimani Commercial Courts Civil Case No. 7 of 2003) Ringera J (as he then was) put it this way –

"As regards interest, I can only say that it behoves parties to read the contracts they sign and to believe that the terms thereof are not mere words but covenants to be enforced. If the lender reserves to himself the right to charge such interest rate as he shall determine and to vary the same without reference to the borrower, so it shall be …."

The relevant provisions in the Loan Agreement dated 10th July 1999 are Clauses 4 and 10 of Article 1.0 thereof. Clause 4 states –

> **"4 The Borrower shall pay to IDB in United States Dollars interest on the loan at the rate of twelve per cent (12%) per annum in the manner set out in the Fourth Schedule hereto, and Clause 10 says -**
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> **"10 In the event of the Borrower failing to pay when due, any instalment of the Principal of the loan, interest or any sum of money which it is liable to pay under this Agreement, IDB shall without prejudice to any action it may take hereunder be entitled to levy for such period of default, and on demand the Borrower shall pay to IDB, default interest at the rates of 6% per annum in addiction to the agreed rate of interest on the amount so unpaid. IDB reserves the right to vary the rate of default interest from time to time as IDB shall in its sole discretion decide."**

By a letter dated 12th July 2001, the Defendant offered the Plaintiff an overdraft facility of Kshs.1.0 million at the rate of 24% to be secured by a further mortgage over the suit property and a Supplemental Debenture over all the undertaking and assets of the Plaintiff.

By a letter dated 20th December 2002, the Defendant offered to the Plaintiff an overdraft facility of Kshs.5 million and conversion of the overdraft facility of Kshs.7.5 million to a short term loan at the interest rate of 20% per annum. The other conditions to this offer were that the Plaintiff would pay to the Defendant the sum of US $199,862.00 outstanding as at 30th November 2002 and being arrears on the long term loan advanced under the Loan Agreement dated 10th July 1999.

It is observed that notwithstanding these offers which were accepted by the Plaintiff, there were no changes to the rates of interest set out in the Loan Agreement of 10th July 1999. For the principal loan, the rate remained at 12%. There is reason to inquire us to when the rates changed to 22%. The Defendant did indeed under Article 1 (10) of the Loan Agreement aforesaid reserve to itself the right to alter the default rate of interest from 6% to any other sum it may decide at its sole discretion. The Plaintiff agreed to this covenant. Exercising this discretion, the Defendant has hiked the rate of interest from 6%

to 28%. As stated above, the effective rate for the principal and default interest became 56% p.a.

Again as stated above, no business, however exceptionally well managed and with exceptional products, would sustain that rate of interest for long. The Courts therefore anxious not re-write the contracts which parties have freely entered into and covenanted to abide by, come in, and say that whereas banks and other lenders have liberty to vary interests to reflect either the real cost of money to the lenders, and their ultimate borrower, or the opportunity cost to the banks and financial institutions if they had those repayments at hand to invest elsewhere and therefore not lose money, that right to increase and vary the contractual rates of interest shall be exercised by the banks and financial institutions in a manner or rate which also takes care of the health of the borrower.So the Courts say that such increase shall not be made arbitrarily capriciously or whimsically.

So when the Defendant's representatives, boldly depones that the current interest rates are –

(1) Principal Interest – 22%

(2) Principal Surcharge – 6%

(3) Interest Surcharge – 28%

it is quite clear that the cumulative interest rate which I shall call the cumulative of cost of funds to the Plaintiff is by simple arithmetic at least 56%. This to my mind calls for inquiry, whether these figures are a conscionable reflection of the contractual discretion granted to the Defendant by the lending instrument, the Loan Agreement of 10th July 199, and is not an arbitrary, capricious and whimsical exercise of that unfettered discretion.

So in an application for a quia timet injunction, the Court, proceeding upon what Lord Brougham said in 1834, **"a practical view of human affairs, the law will guard against risks which are so imminent that no prudent person would risk them, although they do not amount to absolute certainly of damage."**

In these modern times and in our own Courts, Ringera J. (as he then was) has in the case at Jambo Biscuits (K) Ltd. –vs- Barclays Bank of Kenya Ltd. Andrew Douglas Gregory and Abdul Zahir Sheikh (Milimani Commercial Courts, HCCC No. 1833 of 2001) put it this was – **"As regards whether the Company would suffer irreparable loss and injury unless the prayers sought are granted, I have no doubt it would. The receivership would most probably result in the complete destruction of the business and goodwill of the company …… And I think it is a notorious fact of which judicial notice may be taken that receiverships in this country have tended to give the kiss of death to many a business**.

I adopt and apply these words to this case. This is an application for a **quia timet** injunction. There is no question of a receiver being in place as in the Jambo Biscuits case. There is however nothing to stop the Defendant from exercising its power reserved in the Further Charge and Further Debenture to appoint one or more Receiver/Manager. If the Defendant did so, and from the dictum of Ringera J (as he then was) cited above, it is almost as sure as the sun rises in the east and sets in the west, that the death bell of the Plaintiff would have been sounded. Experience has shown that most businesses which are going concerns collapse a few months upon being placed under receivership. I believe their appointors and Receivers themselves have legitimate answers for such fatal consequences to the companies or businesses to which Receiver Managers are appointed. That however is not the subject of this Ruling. Our concern here is to grant or not to grant the quia timet injunction\

The learned authors of Halsbury's Laws of England, 4th Edn. Vol. 24, discussing the principles upon which to grant interlocutory injunctions say at paragraph 953, - **"it is not necessary that the Courts should find a case which would entitle the Plaintiff to relief at all events, it is quite sufficient for it to find a case which shows that there is a substantial question to be investigated, and that the status quo should be preserved until that question can be finally disposed of."**

The same learned authors of Halsbury's Laws of England. 4th Edn. Vol. 24, para. 954 – say that an interlocutory injunction (a quia timet injunction), will be granted to restrain an apprehended or threatened injury where the injury is certain or very imminent or where mischief of an overwhelming nature is likely to be done, especially destructive operations, in this case, manufacturing operations. To the extent of course that the Plaintiff is indebted and has admitted as much, to the Defendant, the balance of convenience will of course lie with the Defendant. So long as however as the Plaintiff is granted a lifeline of existence however temporary to continue its operations, some benefit will pass to the Plaintiff.

For all the above reasons and there being nothing in the stars above, or in the evidence now, or in the past concerning the revival of any business under a receivership, that the threatened appointment of receivers or managers to the Plaintiff's business would lead to the better operations of the Plaintiff's business and therefore accelerated repayments of the Defendant's loan facilities, I would have granted the Plaintiff's application in its entirety. The current application is premised upon the provisions of order XXXIX rule 12 which is in these terms –

> **"2. In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after judgement, apply to the court for a temporary injunction to restrain the Defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.**
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> **2A (1) The Court may by order grant such injunction, on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise as the Court admits fit."**

Being mindful therefore of the discretion conferred upon the Court by the above cited provisions, and being also mindful of the fact that the Plaintiff did not approach the Court of equity with clean hands, the Plaintiff stopped payments of a cheque of Kshs.2.8 million to the Defendants which they had no justifiable reasons to do and being further mindful of the fact that the Plaintiff has enjoyed the benefit of an undertaking by the Defendant's Counsel that the Defendant will not appoint a Receiver, since about 30.07.2004, that is a period of nearly nine (9) months, I would grant prayer No. 2 of the Plaintiff's application dated 26th July 2004 subject to the qualification or modification tha**t pending further orders** of this court the orders shall be for a period of three (3) months from the date of this Ruling and **not pending the hearing** and determination of this Court. Each party shall bear its own costs.

There shall be orders accordingly.

Dated and Delivered at Nairobi this 4th day of May 2005.

ANYARA EMUKULE

JUDGE