REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION & ADMIRALTY DIVISION

CIVIL SUIT NO 78 OF 2014

SURYA HOLDINGS LIMITED…...…..……1ST PLAINTIFF

RHEA HOLDINGS LIMITED.....2ND PLAINTIFF

KARUTURI LIMITED.....3RD PLAINTIFF

VERSUS

CFC STANBIC BANK LIMITED.....DEFENDANT

RULING

Two applications: Discharge of injunction and selling company asset

[1] I have before me two Motion applications. The first Motion is by the Plaintiff and is dated 28th August, 2014. The second one is by the Defendant and is dated 17th December, 2014. I will deal with and determine both motions. For ease of reference I will use the titles Plaintiffs and Defendant as appropriate.

[2] The Plaintiff's Notice of Motion dated 28th August, 2014 is expressed to be brought under Order 40, Rule 10(1) (a) and (b) of the Civil Procedure Rules, 2010. In the application, the Plaintiffs seek to be granted unrestricted access to the Plaintiffs' entire business enterprise including financial records, in the possession of the Receivers, for purposes of allowing potential investors an opportunity to assess and inspect the Plaintiffs' financial viability with the view of buying out the Plaintiffs' indebtedness to the Defendant Bank.

[3] The Defendant's Notice of Motion dated 17th December, 2014 is expressed to be brought under Order 40, rule 7 of the Civil Procedure Rules, 2010. It seeks discharge of Court's Order made on 11th June, 2014, in this suit, which restrained the Receivers appointed by the Defendant from selling the properties known as L.R. Nos. 10854/60, 12248/19, 12248/20, 12248/21, 122481/38, 25261 and 25262.

[4] I will now set out and examine the gravamen of each part in the application, affidavits and submissions filed thereto.

The Plaintiffs' view of the matters

[5] The Plaintiffs submitted that the Defendant's application emanates from the skewed view by

the Defendant that the Plaintiffs' entire enterprise is no longer financially viable and consequently should be sold as a going concern. They gave the background of the dispute. That vide a Ruling dated 11th June, 2014, this Honourable Court restrained the Receivers and Managers herein from selling: 1) the charged properties herein namely, *a) L.R. No. 10854/60 (Title No I.R. 87312), in the name of Rhea Holdings Ltd; and b) L.R. No. 12248/19, 12248/20, 12248/21, 12248/38, 25261 and 25262;* or 2) the enterprise consisting in the 3rd Plaintiff Company pending the determination of this case.In pursuance to directions given by this Honourable Court for parties to try and seek an out of court settlement, by a letter dated 30th June, 2014, the Plaintiffs' Advocates wrote to the Receivers' Advocates informing them that the Plaintiffs' had identified potential investors who wished to assess the current financial position of the Plaintiff Companies and tour the farm. Furthermore, the Plaintiffs through their Advocates, requested for financial information, stock, operational information and assets, for purposes of ascertaining the Company's position. Despite the letter being acknowledged, no response was forthcoming from the Receivers.

[6] The Plaintiff's advocates then sent a reminder letter dated 10th July, 2014, to the Receivers advocates which similarly never elicited any response. The Plaintiff then filed the Notice of Motion application dated 28th August, 2014, seeking *inter-alia* access to the Plaintiffs' farms and financial accounts from the Receivers.On the 29th August 2014, this Honourable Court, upon considering the merits and urgency of the Plaintiffs' application, granted the Plaintiffs access to the said farms and accounts from the Receivers pursuant to the proposed settlement scheme. However on the 12th September 2014, the Receivers filed a Notice of Motion application dated 11th September 2014, the crux of which was to stay the Orders granted on the 29th August 2014, premised on the basis that the Receivers were not granted an opportunity to be heard on the Plaintiffs' Notice of Motion application dated 28th August 2014.Consequently, the Honourable Justice Ogolla, stayed this Honourable Court's orders granting the Plaintiffs access to the farms.

[7] By yet another letter dated 24th November, 2014, the Plaintiffs' Advocates wrote to the Receivers' Advocates requesting the Receivers to provide the financial accounts of Karuturi Limited for purposes of presenting the same before the Annual General Meeting of Karuturi Global Limited, the Plaintiffs' parent company, in order to facilitate the offer, issue and allotment of 400,000,000 equity shares through the Bombay Stock Exchange. The aim of this exercise was to raise over USD 7 million to discharge the Plaintiffs' indebtedness to the Defendant Bank through internal mechanisms.It is the Plaintiff's submission that both the above mentioned requests went unanswered and thus the actions of the Receivers and Defendant Bank in this regard are tantamount to callously clogging the Plaintiffs' right to redeem their properties, and more so, reeks of gross *mala fides*.

[8] According to the Plaintiffs, therefore, the issues before this Honourable Court are:

i. **Whether the Receivers have a duty to account to the Company;**
ii. **Whether the right to redemption can be clogged;**
iii. **Whether this Honourable Court's Order of 11th June, 2014, ought to be discharged.**

[9] On whether the Receivers have a duty to account to the Company in receivership, the Plaintiffs urged the following. Clause 18 of the Debenture dated 8th December, 2010, as well as Clause 18 of the Further Debenture dated 10th January, 2013, both provide:

> **"Every Receiver shall be the agent of the Company and the Company alone shall be liable for his acts, default and remuneration…". (emphasis added)**

According to ***Halsbury's Laws of England, Volume 39, Fourth Edition,*** at paragraph 938, a receiver appointed out of court has a duty to account as agent, and a receiver of the whole or substantially the whole of the assets of a company appointed on behalf of debenture holders is under a statutory duty to account. The Plaintiff forcefully argued that, it is trite that receivers are

agents of the companies in respect of which they are appointed. See **Lochab Brothers vs. Kenya Furfural Company Limited & Others [1983] KLR 257, Lubega v Barclays Bank (U) Limited [1990-1994] EA 294 (SCU).**

[10] Consequently, as such agents of the company, it reasonably follows that under the law of agency, the receivers have an equitable duty to account to the Plaintiff Companies. See the learned authors in ***Bowstead& Reynolds on Agency, 18th Edition***at page 240. See also the case of **Smiths Ltd v Middleton, [1979] 3 All ER 842**, where it was held that a receiver appointed under a debenture providing for him to be the agent of the debtor company, in practice ran the company on behalf of its directors and was, therefore, answerable to the company for the conduct of his affairs. That being so, the receiver was under a duty to keep full accounts, that is fuller than the abstracts of receipts and payments required under Section 372 (2) of the UK 1948 Companies Act, and to produce those accounts to the company when required to do so.

[11] The Plaintiffs submitted further. Blacket-OrdV.C in **Smiths Ltd v Middleton, [1979] 3 All ER 842** at page 846, cited the words of Jenkins LJ in **Re B Johnson & Co (Builders) Ltd, [1955] 2 All ER 775** at page 790 thus:

> **"…whereas a receiver and manager for debenture-holders is a person appointed by the debenture-holders to whom the company has given powers of management pursuant to the contract of loan constituted by the debenture and as a condition of obtaining the loan, to enable him to preserve and realize the assets comprised in the security for the benefit of the debenture-holders. The company gets the loan on terms that the lender shall be entitled, for the purpose of making their security effective, to appoint a receiver with powers of sale and of management pending sale, and with full discretion as to the exercise and mode of exercising those powers. The primary duty of the receiver is to the debenture-holders and not to the company. He is receiver and manager of the property of the company for the debenture-holders, not manager of the company. The company is entitled to any surplus assets remaining after the debenture debt has been discharged, and is entitled to proper accounts." (Emphasis added)**

[12] It was further observed in **Medforth v Blake, [1999] 3 All ER 97**, that a receiver managing mortgaged property owes duties to the mortgagor and anyone else interested in the equity of redemption. The duties include, but are not necessarily confined to, a duty of good faith. In exercising his powers of management, the primary duty of the receiver is to try and bring about a situation in which interest on the secured debt can be paid and the debt itself repaid. Subject to that primary duty, the receiver owes a duty to manage the property with due diligence. Also in **Gomba Holdings UK Ltd and others v Homan and another, [1986] 3 All ER 94**, it was held that a receiver's duty to provide accounts or other information to a debtor company was not restricted to his statutory obligations under the Companies Act 1985. The extent of the receiver's obligation to provide additional information was to be deduced from the nature of the receivership and a company's right to such information depended on showing that the information was needed to enable the board of directors to exercise its residual powers or to perform its duties. Any right which a company had to obtain information from the receiver was qualified by the receiver's primary responsibility to the debenture holder, which entailed that the receiver was entitled to withhold information where he formed the opinion that disclosure would be contrary to the interests of the debenture holder in realizing the security. The Court in **Gomba Holdings UK Ltd and others v Homan and another, [1986] 3 All ER 94**, at page 99, further observes:

> **"…the fact that the board may need information in order to exercise the company's right to redeem. It seems to me at least arguable that the right to redeem gives rise to a right on the part of the company to ask for sufficient information to make it effective. If the company has no way of finding out which assets have been sold and which remain to be redeemed, the right may in practice be incapable of exercise."**

[13] The primary duty of a receiver is to get in and, as necessary, realize sufficient of the company's assets and undertaking to satisfy the outstanding debt of the creditor on whose behalf he has been appointed. He is under an obligation to keep and produce to the company proper accounts.The Plaintiffs humbly submitted that their request for audited accounts and access to the Companies flower farms is not contrary to the interests of the debenture holder. In any event, the request serves as furthering the interests of the debenture holder as the Plaintiffs have sourced international investors, on more than one occasion who were interested in purchasing the Plaintiffs' indebtedness to the Defendant Bank. But, despite the Receivers duty to the Plaintiffs to provide proper accounts of the company, they have failed, on numerous occasions, to provide the accounts as and when requested by the Plaintiffs to do so.An agent is under an obligation to keep an accurate account of all transactions entered into on his principal's behalf and he must be constantly ready at all times to produce to the principal, all books and documents in his hands relating to the principal's affairs. If he fails to keep and preserve correct accounts, everything is presumed against him.

[14] According to the Plaintiffs, it is worth noting that the Receivers have intimated that their obligation to account only lies with the Registrar of Companies pursuant to the provisions of section 353 of the Companies Act, Cap 486.The Plaintiffs do appreciate that the duty to account may not be anchored in statute but it is the Plaintiffs submission that since the Receivers are also agents of the Companies in law, it reasonably follows that there is a duty in equity on the Receivers to provide accounts otherwise. This is a court of equity and the Receivers' attempt to seek refuge behind the provisions of the Companies Act, will not be of any assistance.

[15] The Plaintiff also submitted that Section 89 of the **Land Act, 2012**provides that any rule of law, written or unwritten, entitling a chargee to foreclose the equity of redemption in charged land is prohibited.Equity gives a mortgagor the right to redeem the mortgaged property after the contractual date for redemption has passed and the legal right to redeem has been lost. The courts have always been astute to protect fully the right to redeem. As Lord MacNaghten stated in **Noakes& Co Ltd v Rice, [1900-3] All ER 34**, at page 37,

> **"Redemption is of the very nature and essence of a mortgage as mortgages are regarded in equity. It is inherent in the thing itself, and it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption."**

The courts have struck down anything that threatens the integrity of the equity of redemption and anything that restricts the right of the mortgagor to redeem the mortgage. This principle of protection was summarized in **Biggs v Hoddinott, [1895-9] All ER 625**, where RomerL.J. at stated:

> **"There is a principle that … on a mortgage you cannot, between the mortgagor and mortgagee, clog, as it is termed, the equity of redemption so as to prevent the mortgagor from redeeming payment of the principal, interest and costs."**

[16] Based on the above submissions the Plaintiffs asserted that by the Defendant Bank denying the Plaintiffs' access to the financial information sought, the Defendant has clogged the Plaintiff's right to redeem the mortgage, since the Plaintiffs have endeavoured to find ways to clear their indebtedness to the Defendant. Nevertheless, the Plaintiffs' efforts were stuttered at every turn by the unwillingness of the Defendant, crucially, to comply with the directions given by this Honourable Court, and second, by a hidden agenda being carried out by the Receiver and Manager.The Plaintiffs do acknowledge that the Receiver's duty, first and foremost, is to the debenture-holder. The interest of the debenture-holder is the realization of the security. However, in the matter herein, the Defendant and the Receiver and Manager have frustrated the Plaintiffs' efforts of seeking to find a means to clear their indebtedness with the Defendant.The Plaintiffs' efforts in finding potential international investors who were interested in buying the indebtedness to the Defendant, as well as the Plaintiffs' parent company's efforts to raise the sum owed through

issue of shares on the Bombay Stock Exchange were both frustrated by the Defendant's refusal to co-operate and facilitate the Plaintiffs' request for information and access. The Plaintiffs submitted that by their action and or inaction, the Defendant and the Receiver and Manager have deliberately clogged the Plaintiffs' equitable right of redemption.

[17] They addressed the request by the Defendant that Court's Order of 11th June, 2014, to be discharged. They submitted that the Defendant's Notice of Motion application dated 17th December 2014 is on the basis that since the Plaintiff Companies are making losses, then the injunctive orders of 11thJune 2014 should be discharged. It is pertinent to note that since **August 2014**, the Plaintiffs have endeavoured to redeem the suit premises and discharge their indebtedness to the Defendant Bank. However despite the Plaintiffs gallant efforts, the Defendants and Receivers have obstinately declined to respond to any of the proposals for settlement. It is trite that the Plaintiffs, if able, can redeem their property at any time before the property is sold. The currentsituation before the court is that the Defendant and Receivers have callously declined to allow the Plaintiffs to redeem the suit premises despite the numerous proposals and requests for accounts made by the Plaintiffs including an offer to have foreign investors buy the Plaintiffs' indebtedness to the Defendant Bank. According to the Plaintiffs there isn't a more classic case of fettering/clogging of a party's equitable right of redemption.In the instant case, the Defendant and Receivers have declined and continue to decline to provide any form of accounts and therefore the Plaintiffs have been left in limbo as to what is still due and owing, if any, and to what extent the Plaintiffs' indebtedness has been discharged. As a reasonable inference the Defendant's application dated 17th December 2014, is not only tainted with gross *mala fides* but flies in the face of all the requests and proposals made by the Plaintiffs. It is noteworthy that the said proposals have never been responded to date.

[18] For those reasons, the Plaintiffs contended that the Defendant due to its callous conduct, is not entitled to the prayers sought and its application should be dismissed with costs. And, that the Plaintiffs application should be allowed so that they can redeem the suit premises. The Orders of 11th June 2014 should also be preserved.

The Defendant's arguments

[19] The Defendant made the following arguments. Their application seeks to have the order made on the 11th of June 2014, in this suit, to be discharged and remove the restraint on the receivers, appointed by the Defendant ("the receivers ") from selling the properties known as LR Nos. 10854/60, 12248/19, 12248/20, 12248/21, 12248/21, 122481/38, 25261 and 25262 and the enterprise consisting of the 3rd Plaintiff ("the suit property"). They urged that an injunction is an equitable remedy and is amenable to being set aside or varied or discharged by the court if its sustenance will be contrary to the ends of justice which it was intended to serve when it was issued.See the case of **Caroline WanjiruWanjihia& another v I & M Bank [2014] e KLR.** There is no dispute that receivers have power to sell off charged assets upon it being ascertained that the company in receivership is making more losses than profits. The Plaintiffs acknowledge and accept this point at paragraph 22 of the affidavit of Pranab Ghosh filed on the 16th of October 2015.The acknowledgement is in keeping with the legal position that common prudence and fairness to a company in receivership requires the receiver to continue business but the duty only arises if, among other points, if the company has funds, as the court will not require the debenture holder or the receiver to dip in his own pocket to sustain the company.**See the *Law of Receivers of Companies* by Gavin Lightman and Gabriel Moss at page 94 to 96.**

[20] Although the Plaintiffs maintain that the company is sustainable, the evidence they have adduced show the contrary. At paragraph 23 of the aforesaid affidavit of Pranab Ghosh, he cites a Due Dilligence Report prepared by Bahama Consulting Limited. A key assumption made in the production will go up upon working capital being injected. The extent of capital requirement needed to turn the company into profitability, according to the plaintiffs,is shown in the corrective action plan that Karuturi Overseas Limited submitted to ICICI Bank marked exhibit **SJ 7** annexed

to the affidavit of Shireesh Jain sworn on the 19th of January 2015.The plan show-;

a. Floods in Ethiopia caused the company a loss of USD 10 Million and further costs of USD 50 Million.
b. With that difficulty, coupled with Euro crisis and other factors, accruals from Kenya were diverted to Ethiopia.
c. The company needs additional funding from Axis Bank and ICICI Bank of up to USD 19 Million to pay "African Lender" AND Kenyan tax authorities.
d. The company would have to sell some of its land in Kenya and another holding known Holleta for which it has already received USD 3 Million. (See page 23 of the report). Interesting that this money has not been utilized to repay the debt.
e. The promoters of the company would raise USD 0.94 Million (See page 21 of the report)
f. Even with this capital investment, the company will still operate at a loss up to the year 2017. (See profit and loss statement at page 42 of the report).

[21] The plaintiffs cannot therefore deny that without substantial capital investment in excess of over 20 Million USD the company's fortunes cannot be turned around and that even with that level of investment there will still be an extended period of losses. The Defendant quipped: Who are the Plaintiffs looking up to meet that capital investment? It was ICICI Bank who is now embroiled in litigation with them and who have appointed a receiver who has advertised the company for sale.Assuming that the Plaintiffs even abandon the recovery plan and stick to what is now deposed to in paragraph 55 (c) of the affidavit of Shireesh Jain filed on 20th of January 2015 , the company will still be in dire straits. The proposal is to raise USD 7 Million through the sale of shares in the Indian Stock exchange. Compare this with the USD 19.8 Million the company said it needed as further loans, USD 7 Million from sale of assets and USD 0.94 advance from promoters, which would still not return the company to immediate profitability, the proposed share sale seems unlikely, to resolve the problems of the company.

[22] The Defendant, has since the receivers wereappointed on the 10th of February 2014, made every effort to support the receivers, in particular by extending a substantial overdraft facility. Statements of account showing this are in the exhibit annexed to the affidavit of AlfornseKisilu filed on the 17th of December 2014. The accounts show that in spite of sales being made, expenses are outstripping them. The accounts detail incoming credits showing sales and expenses and the extent of the overdraft. The Defendant also relied on the affidavits filed by the receivers in this case which I will also consider in my decision. The Receivers also filed submissions without seeking authority of the court. But they simply highlighted on some averments which they thought were important.

DETERMINATION

Issues

[23] Arising out of the two applications, the facts of the case and the eminent arguments by counsels are the following issues:-

a. **Whether the Receivers have a duty to account to the Company. Under this issue, the court will determine whether filing of the statutory form under section 351 of the Companies Act is the only duty to account a Receiver and Manager has under the law. And ultimately, depending on the answer to the head issue foregoing, the court will determine the extent or otherwise of discharge of the duty and obligations of Receiver and Manger of the enterprise concerned.**

b. **Whether the right to redemption can be clogged. This is connected to and will benefit from the findings in(a) above, but it is still a stand-alone issue. Here the law will be the guide and applying the law on the circumstances of the case, the court will determine whether the equity of redemption has been clogged.**

c. **Whether the Order of 11th June, 2014, should be discharged. Under this issue, the court will consider the arguments that the company is running into losses as well those by the Plaintiff that they have been ready, willing and made efforts to redeem the debt but were thwarted by the Defendant and the Receiver and Managers herein. The whole purpose of the order will also be considered.**

Duty to account of Receiver and Managers

[24] From the outset, let it be known that, the law especially on the duties of Receiver appointed by the court, and the one appointed out of court by debenture-holder is no longer seen as disparate. The niche development of the law is found in the difference between mere receiver and ‘’receiver and manager’’. The difference is not a moot issue but a matter of law. ‘’Receivers and Managers’’entails not only receiving rents and profits, or getting in outstanding property, but also carrying on or superintending a trade, business or undertaking of the company. Receiver and Manager will have power to deal with the property, run the business of the company and appropriate the proceeds thereof in a proper manner for the benefit of the debenture-holder first, and of the company, secured creditors and guarantors of the company. Receiver and Manager is an agent of the Company, but stand in a fiduciary relationship with and owes duties to both parties. Given the very nature of the position of Receiver and Manager who has control over the property of the company and is running the enterprise as a going concern as is the case here, doubtless, has a duty to account to the law, the debenture-holder and the company. Similarly, it should not be forgotten that even if the primary duty is to the debenture-holder, where there are preferential or pari pasu secured creditors as well as guarantors of the company, the Receiver and Manager owes a duty not to act negligent with the assets or business of the company. See the case of **Medforth v Blake, [1999] 3 All ER 97**, that, subject to the primary duty to the debenture-holder, a receiver managing mortgaged property owes duties to the mortgagor and anyone else interested in the equity of redemption. And so, must act in good faith in exercising his powers of management as well as manage the property with due diligence. That explains why the law requires that where there are more debenture-holders or creditors who are entitled to appoint Receivers and Managers over the property of a company, the Receivers and Managers must act as joint receiver or appoints one of them to act as a joint receiver for all them. Take also another example where there is a guarantor to the company on which a receiver is appointed outside court; the guarantor will only pay to the extent of the deficiency of the assets of the company. Receiver and Manager owe guarantor that duty. The duty to account by the Receiver and Manager is better understood by looking at the liability to account even for his remuneration. Liability to account attaches to the Receiver and Manager, and may extend after his appointment has lapsed. Accordingly, the duty to account by a Receiver and Manager who has taken control of the assets as well as the entire business of the enterprise is not limited to filing of statutory form with the Registrar of companies. That is just one of the duties of Receiver and Manager. There is more he must do by accounting to the company too on the entire transactions undertaken by him, money received, contracts awarded or performed, debt repaid etc. In appropriate cases, Receiver and Manager may be obligated to preserve the goodwill of the company. As the powers of the Directors of the Plaintiff Companies are paralysed on appointment of the Receiver and Manager, as an agent of the companies, the Receiver and Managers are in law and equity bound to account to the company and the Directors.

[25] The court was faced with almost similar question in the case of **KaplanaShashikant Jai and another vs. Eco Bank Ltd and another [2015] KLR**and it rendered itself in extenso as follows:-

> **Appointment of receiver outside court**
>
> **A profitable discussion in this case should be one which first establishes the effect of appointment of receiver manager by the Bank. The effect of the appointment of receiver manager by the Bank crystalizes the floating charge created in a debenture over the assets of the Company into a fixed charge. The receiver is the agent of the**

company and the powers of the company are just delegated to the receiver so far as regards carrying on business or collecting the assets of the company. On appointment of a receiver, the powers of the directors to deal with the property of the company comprised in the appointment, except subject to the charge, are merely paralyzed. Dr. Kamau stopped there. That is just one part of the law. I will complete the full circle of the law on the point. The way I understand the law is that, despite the appointment of receiver by a bank, the corporate stature and structure of the company remains and the directors are not relieved of their normal statutory duties, although the discharge of those duties becomes extremely difficult or almost impossible without the cooperation of the receiver. Therefore, in law, the directors' statutory obligations are not displaced and they can even use company's name to file suit against the receiver or to challenge the validity of the instrument appointing the receiver or the debenture or mortgage. It should be noted that in some cases, the powers of a receiver manager appointed under a debenture differ from that of an appointment by the court as a receiver appointed out of court is not an agent of the court but of the company or of the debenture holders. On this see *Kerr, on the law and practice to Receivers, sixteenth Edition.* Therefore, other than the fact that powers of the company are delegated to the receiver, the status of the company in a receivership appointed outside court is not disfigured in the manner suggested by Dr. Kamau Kuria. The company will continue to operate under the receiver and cooperation of the directors on all matters which are necessary during the receivership. The receiver acts in the best interest of the debenture holders as well as the company. Any guarantees given for the company's debts prior to or during the receivership are not invalidated by the receivership as they are properly within the purview of carrying on business, collecting assets and repaying of debts of the company. Except, however, the receiver owes a duty to any guarantor of the indebtedness of the company since the guarantor will be liable only to the extent of the deficiency of the company's assets. This will become useful when I will be discussing the giving of accounts by the receiver to the directors and to the guarantor.

[26] See Clause 18 of the Debenture dated 8th December, 2010, and Clause 18 of the Further Debenture dated 10th January, 2013, both provide that:

> **"Every Receiver shall be the agent of the Company and the Company alone shall be liable for his acts, default and remuneration…".**

See also ***Halsbury's Laws of England, Volume 39, Fourth Edition,*** at paragraph 938, on Receivers and Managers'duty as agent of the company to account to the company and all parties interested including guarantors and that failure to so account may elicit an order being made directly to the Receivers and Managers. Similarly, such failure may cause the Receivers and Managers to be ordered to pay costs of any proceedings which may be necessitated by his failure to account. In law, directors may use the name of the company to sue the Receiver and Manager of a company for accounts, removal or other relief. Further insights on the duty to account are found in the literary work by F.M.BReynoldas,***Bowstead& Reynolds on Agency, 18th Edition***at page 240 and the case of **Smiths Ltd v Middleton, [1979] 3 All ER 842.** Receiver and Manager who is in control of the business and assets of the company has a duty to keep full accounts, as well as file statutory abstracts of receipts and payments required under Section 351 of the Companies Act.

[27] There are copious judicial authorities on this issue which I do not wish to multiply except to citeBlacket-OrdV.C in **Smiths Ltd v Middleton, [1979] 3 All ER 842** at page 846, who also cited the words of Jenkins LJ in **Re B Johnson & Co (Builders) Ltd, [1955] 2 All ER 775** at page 790 thus:

> **"…The company is entitled to any surplus assets remaining after the debenture debt has been discharged, and is entitled to proper accounts."**

See also**Medforth v Blake, [1999] 3 All ER 97 (supra)**and **Smiths Ltd vs. Middleton** where it was held that a receiver and manager runs the company as its agent and so is answerable to the company for the conduct of its affairs as well as to keep or cause to be kept full accounts (i.e. fuller than the abstracts of receipts and payments required under s. 372(2) of the 1948 Act) and to produce those accounts to the company.

[28] I have found that the Receivers and Managers of a company have an equitable and legal duty to answer to the company for the conduct of its affairs as well as to keep or cause full accounts to be kept i.e. fuller than the abstracts of receipts and payments required under s. 351 of the Companies Act. I have also held that they owe a duty to the guarantor of the company not to be negligent in dealing with the assets and business of the company in repayment of the loan as the guarantor will only be liable for the deficiency of the assets of the company. This entails that they act in good faith and manage the assets and business of the company diligently as to pay the entire debt or as much as possible, thus absolving or reducing the liability of the guarantor. Guarantors are also involved in this case. I should now determine whether the Receivers and Managers have discharged the said duty to account and to ensure the debt is repaid.

[29] Without doubt, the Receivers and Managers filed the Abstract of Receipts and Payments (Form 223) under section 351(2) of the Companies Act. The Abstract is dated 9th May 2015. The Receivers and Managers filed two affidavits sworn by Ian Lawson Small on 11thSeptember 2014 and 18th November 2014. The Receivers insisted that they are only required to file the abstract under the companies Act and are not obliged to prepare audited accounts or financial statements. Indeed, they have never supplied any to the company despite repeated demands by the directors of the company. From the averments of the affidavits by the Receivers and Managers, they have not prepared or caused to be prepared any books of accounts or financial statements or audited accounts. This is contrary to and in breach of their equitable and legal duty to account. The Abstract filed with the Registrar cannot be derived from nothing but accounting documents, statements and books. Their belief is just misplaced and dangerous practices which I believe has turned receiverships in Kenya into a slaughter house; it literary, in other cases, strangle companies which would easily come out of receivership with just a little diligence and management. See what Ringera J. (as he then was) in the case at **JAMBO BISCUITS (K) LTD. v BARCLAYS BANK OF KENYA LTD. ANDREW DOUGLAS GREGORY AND ABDUL ZAHIR SHEIKH (2003) 2EA 434** stated that;

> **"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 kiss of death to many a business''.**

[30] Fathom even for a moment the following submission by the Defendant:-

> **''The acknowledgement is in keeping with the legal position that common prudence and fairness to a company in receivership requires the receiver to continue business but the duty only arises if, among other points, if the company has funds, as the court will not require the debenture holder or the receiver to dip in his own pocket to sustain the company. See the *Law of Receivers of Companies* by Gavin Lightman and Gabriel Moss at page 94 to 96.**

Again consider these submissions by the Defendant:

> **The Defendant, has since the receivers were appointed on the 10th of February 2014, made every effort to support the receivers, in particular by extending a substantial overdraft facility. Statements of account showing this are in the exhibit annexed to**

the affidavit of AlfornseKisilu filed on the 17th of December 2014. The accounts show that in spite of sales being made, expenses are outstripping them. The accounts detail incoming credits showing sales and expenses and the extent of the overdraft.

See also the affidavit of ALFORNSEKISILU. These disclosures that further substantial funds or substantial overdraft were extended to the company through the Receiver Managersunderpins need for proper accounts and audit of the business and loan repayments; the basis for the further borrowing and how it was applied towards improving the business and repayment of the loan. These questions are important in the law on receivership especially where the Receivers are also Managers of the business of the debtor company.On that basis, discovery of all relevant contracts entered into thereto and accounts will invariably be necessary. Mere bank statements do not suffice. There is no clear account of the further borrowings, what has been repaid and what debt is outstanding in this case. These queries need be fully explored in a full hearing of this case. Receiverships should not be surrounded with mystery or unclear cloud; it must be transparent as it is conducted by an agent of the company. Moreover, as I stated, liability to account may even extend after termination of appointment of Receivers and Managers. Also, for the court or any other party in these proceedings to appreciate the above submission by the Defendant, accounts will be the basis. None has been provided and the Abstract cannot tell any story of the wellness or otherwise of the company.

[31] For emphasis I will give yet another example. All the parties herein are aware of the existence of winding-up cause No 12 of 2013 against the debtor company herein, i.e. Karuturi Limited. The winding-up cause has been mentioned on several occasions because the company had not filed its affidavit due to the fact that the Receivers and Managers have not provided it with statements of accounts or audited accounts. It should be noted that the statutory obligations of the directors are not displaced by the receivership and cooperation of the Receivers and Managers is needed for the directors to fulfil such obligations; for instance auditing or causing auditedaccounts for the company to be done is one such obligation. Matters of taxation and filing tax returns are also relevant statutory duties of the directors which must be satisfied, hence, need for preparation of audited accounts and financial statements.The conduct of the Receivers and Managers herein, on prima facie evidence produced is such that a court of law may be tempted or even impelled to terminate the appointment thereof and appoint a receiver and manger accountable also to the court, or make other necessary orders. But, that request is not before the court now. I am, however, content to and I hereby hold that the Receivers and Managers herein have failed to account to the law, the company, and to guarantors on the affairs of the company, all transactions they have undertaken on behalf of the company, all borrowings subsequent to their appointment, and the extent of repayment of the debt herein. I will now determine whether the equity of redemption has been clogged herein.

Whether the right to redemption can be clogged

[32] This issue is connected with the previous one. Nonetheless, it is a stand-alone issue. I will deal with it as such. The law on equity of redemption is now statutorily expressed in Section 89 of the Land Act, 2012 which prohibits any rule or law, written or unwritten, that entitles a chargee or any other person to foreclose the equity of redemption in charged property.The equitable and legal right of the mortgagor to redeem the mortgaged property is zealously guarded by the law and courts of law. The elaborate provisions in the Land Act on equity of redemption are a testimony of the law that equity of redemption should not be clogged at all by the mortgagor or a Receiver and Manager. See what Lord MacNaghten stated in **Noakes& Co Ltd v Rice, [1900-3] All ER 34**, at page 37 that;

“Redemption is of the very nature and essence of a mortgage as mortgages are regarded in equity. It is inherent in the thing itself, and it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption.”

See also elaboration on the principle of protection of equity of redemption in **Biggs v Hoddinott, [1895-9] All ER 625**, where RomerL.J. at stated:

> **"There is a principle that … on a mortgage you cannot, between the mortgagor and mortgagee, clog, as it is termed, the equity of redemption so as to prevent the mortgagor from redeeming payment of the principal, interest and costs."**

I will not rest there for emphasis before I cite **Medforth v Blake, [1999] 3 All ER 97**, that a receiver managing mortgaged property owes duties to the mortgagor and anyone else interested in the equity of redemption. The duties include, but are not necessarily confined to, a duty of good faith. In exercising his powers of management, the primary duty of the receiver is to try and bring about a situation in which interest on the secured debt can be paid and the debt itself repaid. Subject to that primary duty, the receiver owes a duty to manage the property with due diligence. Also in **Gomba Holdings UK Ltd and others v Homan and another, [1986] 3 All ER 94**, it was held that a receiver's duty to provide accounts or other information to a debtor company was not restricted to his statutory obligations under the Companies Act 1985. The extent of the receiver's obligation to provide additional information was to be deduced from the nature of the receivership and a company's right to such information depended on showing that the information was needed to enable the board of directors to exercise its residual powers or to perform its duties. Any right which a company had to obtain information from the receiver was qualified by the receiver's primary responsibility to the debenture holder, which entailed that the receiver was entitled to withhold information where he formed the opinion that disclosure would be contrary to the interests of the debenture holder in realizing the security. The Court in **Gomba Holdings UK Ltd and others v Homan and another, [1986] 3 All ER 94**, at page 99, further observed:

> **"…the fact that the board may need information in order to exercise the company's right to redeem. It seems to me at least arguable that the right to redeem gives rise to a right on the part of the company to ask for sufficient information to make it effective. If the company has no way of finding out which assets have been sold and which remain to be redeemed, the right may in practice be incapable of exercise."**

[33] The foregoing is the nature of equity of redemption; a safeguard of right to property. No one, including the Receivers and Managers should clog equity of redemption in any manner, either inadvertently or by design. The borrower here is Karuturi Limited. The other plaintiffs are not borrowers. The best they can become is guarantors. For ease of discussion, all of the plaintiffs are chargors with the right of redemption. As it was held in the case of **Gomba Holdings UK Ltd and others v Homan and another, [1986] 3 All ER 94**, at page 99:

> **"…the fact that the board may need information in order to exercise the company's right to redeem. It seems to me at least arguable that the right to redeem gives rise to a right on the part of the company to ask for sufficient information to make it effective. If the company has no way of finding out which assets have been sold and which remain to be redeemed, the right may in practice be incapable of exercise."**

[34] The Receivers and Managers in their affidavit admitted that they received several requests from the debtor company to be allowed access to various documents and financial statements. See letter dated 30th June 2014, 10th July, 2014 and 5th September 2014. These letters elicited no response from the Receiver and Managers. Indeed, the Receiver and Managers in their affidavits filed acknowledged that they received these letters except they averred that they were requesting for documents they have no authority to prepare or provide. I have held that view is misplaced as they have a duty to keep or cause to be kept full accounts of the company. There have been numerous attempts by the company to introduce a prospective investor who would purchase the debt owed. The Receivers and Managers have visibly resisted and or thwarted any such moves which would lead to redemption of the charged property from the Defendant. The major reason they gave in paragraph 13 of their affidavit dated 11th September 2014 is that the receivers are not the owners of the assets of the charged property and cannot therefore enter into any transaction for

sale of such assets. I need not remind that the chargors herein are still the owners of the charged land. Compare and contrast the averment by the Receivers and Managers with thefollowing submission by the Defendant:-

> **There is no dispute that receivers have power to sell off charged assets upon it being ascertained that the company in receivership is making more losses than profits.**

Any eventual sale is to be done in accordance with the law and not at the whims of the Receivers and Managers or to their preferred purchaser. That notwithstanding, from the Receivers and Managers affidavits they are aware that redemption is attained by paying off the debt. But in all the averments of the Receivers and Managers as well as the Defendant, there is insincerity in their quest to sell the enterprise in question because they know too well that by facilitating the purchase of the debt by a prospective investor will result into repayment of the debt and redemption of the securities from the Defendant. Looking at the entire conduct of the Receivers and Managers, and their averments, their intention is not *bona fides* especially when they talk of selling the enterprise for it is not sustainable yet they resist any effort by the directors of the company to introduce a prospective investor of their choice who would pay off the entire debt. Preventing the mortgagor from redeeming payment of the principal, interest and costs is a clog on the right of redemption. In sum, I am reminded what Ringera J. (as he then was) in the case of**JAMBO BISCUITS (K) LTD. v BARCLAYS BANK OF KENYA LTD. ANDREW DOUGLAS GREGORY AND ABDUL ZAHIR SHEIKH (2003) 2EA 434** statedand I hopethe Receivership herein will not result in the complete destruction of the business and goodwill of the company or give kiss of death to the business of and the company herein on account of refusal by the Receivers and Managers to allow redemption of the debt and the properties.The Defendant has not also helped. The fact that the directors may need information in order to exercise the company's right to redeem the property; it seems to me at least arguable that the right to redeem gives rise to a right on the part of the company to ask for sufficient information to make it effective. The company has no way of finding out the status of the company or providing any information or documents to prospective investors who may pay off the debt and enable the plaintiffs to redeem their properties. Therefore, when the Receivers and Managers make it practically impossible for the plaintiffs to exercise their right of redemption, they have clogged the chargor's right of redemption. Accordingly, I find that the Receivers and Managers as well as the Defendant herein have clogged the equity of redemption of the plaintiffs to redeem the charged properties. Before I make my final orders on the Plaintiffs' application, let me determine issue 3 which relate to the Defendant's application.

Whether the Order of 11th June, 2014, should be discharged

[35] Determination of this issue is determination of the Defendant's application. Under this issue, the arguments that the company is running into losses and that the Defendant cannot be expected to dip into its pockets to sustain the company are useful. Other important matters are on clogging of equity of redemption and the conduct of Receivers and Managers herein. All these issues have been discussed and dealt with comprehensively. But for the sake of determining the said application I shall recite the findings of the court. I was content to state as a result of the material before me that; I hereby hold that the Receivers and Managers herein have failed to account to the law, the company, and to guarantors on the affairs of the company, all transactions they have undertaken on behalf of the company, all borrowings subsequent to their appointment, and the extent of repayment of the debt herein.I also made a finding that the Receivers and Managers failed to even facilitate or cause accounts to be taken. They have also consistently resisted any attempts by the Plaintiffs to redeem the charged properties thus clogging their equity of redemption. And now in light of these, has the purpose of the injunction I issued been decimated? I agree with the Defendant that an injunction is an equitable remedy and is amenable to being set aside or varied or discharged by the court if its sustenance will be contrary to the ends of justice for which it was intended to serve when it was issued. See the case of **Caroline WanjiruWanjihia& another v I & M Bank [2014] e KLR.**The injunction that was issued on 11th June, 2014 restrained the Receivers and Managers herein from selling: 1) the charged properties herein namely, a) L.R. No. 10854/60 (Title No I.R. 87312), in the name of Rhea

Holdings Ltd; and b) L.R. No. 12248/19, 12248/20, 12248/21, 12248/38, 25261 and 25262;or 2) the enterprise consisting in the 3rd Plaintiff Company pending the determination of this case. From the result of this ruling, the Receivers and Managers as well as the Defendant have clogged the plaintiffs' equity of redemption and I do not see any signification that they are ready to yield to redemption by the plaintiffs. It seems they are keen on selling off the charged properties and the enterprise without regard to the right of the directors or the plaintiffs to redeem the properties. It seems further loans have been extended and no proper accounts has been rendered. This will further clog equity of redemption by the company as well as the guarantors.The argument that the Defendant cannot be expected to dig into its pockets to sustain a company which is in dire strain will not yield much in the circumstances of this case. On prima facie basis, the reasons and conditions which existed at the time the injunction was issued on 11th June 2014 still subsist. With the subsequent events I have analysed, the need to preserve the assets and the business of the company as well as those for the other plaintiffs is even more deserving.

Orders

[36] In light of the overall impression of the entire circumstances of the case and the applicable law, I make the following specific orders:-

a. **That the Plaintiff's Notice of Motion dated 28th August, 2014 is granted but in the following terms;**

    a. **The Plaintiffs shall be allowed access to the Plaintiffs' entire business enterprise including financial records, in the possession of the Receivers and Managers, for purposes of allowing potential investors an opportunity to assess and inspect the Plaintiffs' financial viability with the view of buying the Plaintiffs' indebtedness to the Defendant Bank.Provided that, the Plaintiff shall give the Receiver and Managers a seven (7) days' notice of their intended visit to the Plaintiffs' business enterprise and properties. The Receiver and Managers shall facilitate the visit and inspection of the Plaintiffs' financial viability for purposes of buying off the debt herein. The Receivers and Managers shall not hinder or in any manner prevent the access by the Plaintiffs' entire business enterprise including financial records, in the possession of the Receivers and Managers for the above purpose. As I stated earlier, these orders are necessary to enable the Plaintiffs exercise their right of redemption that has been clogged by the Receivers and Managers in the most unreasonable manner.**

    b. **The Defendant's Notice of Motion dated 17th December, 2014 is denied. The injunction issued on 11th June 2014 is not discharged. It shall remain as earlier ordered, i.e. until the hearing of the suit.**

    c. **Costs of both applications are awarded to the Plaintiffs.**

[37] But given the circumstances of this case, I direct that parties shall comply with the practice directions of the Division within 30 days and set down the suit for hearing. It is so ordered.

Dated, signed and delivered in court at Nairobi this 14th day of July 2015.

F. GIKONYO

JUDGE