**Fina Bank Ltd v Spares and Industries Ltd**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 10 November 2000

**Case Number:** 51/00

**Before:** Tunoi, Shah and O’kubasu JJA

**Sourced by:** LawAfrica

**Summarised by:** H K Mutai

*[1] Company – Debenture – Power to appoint receiver – Application to remove receivers – Exercise of*

*power in an oppressive manner – Whether court has power to interfere.*

*[2] Injunction – Interlocutory injunctions – Factors to be considered in determining application –*

*Judicial discretion – Interference by an appellate court with lower court’s discretion – Misdirection by*

*Judge in exercising his discretion – Whether the principles governing the grant of interlocutory*

*injunctions had been correctly applied.*

**Editor’s Summary**

In February 1997, the Appellant bank agreed to extend credit facilities in the nature of an overdraft account and a loan account amounting to KShs 75 million to the Respondent company. The loans were secured by a debenture dated 3 July 1997, charges covering several properties valued at KShs 77 million at the material time, and personal guarantees by the company’s directors to the extent of KShs 75 million excluding interest. One of the terms of the debenture provided that if the company was unable to pay the loans as demanded, the bank would, by notice in writing, be able to appoint a receiver and/or a manager of the property and assets of the company. In February 1998, the company required a further injection of cash and requested a further loan of KShs 10 million. The request was granted and the aggregate amount of the loan facilities was increased to KShs 85 million for a temporary period running until 31 July 1998. The company later fell into arrears of repayments and, on 18 October 1999, the bank recalled both facilities by calling upon the company to pay a sum of KShs 88 402 412-32 by 1 November 1999. On 2 November the bank wrote to the company and informed it that two persons were being appointed to act as joint receiver/managers of the company. On 4 November 1999 the company filed suit against the bank seeking a declaration that the appointment of the receivers was null and void and an injunction preventing the bank from interfering with its operations. Simultaneously with the filing of the suit, the company sought, *inter alia*, interim orders removing the receivers from the company’s premises. The application was granted on 25 January 2000 on the grounds that the appointment of the receivers would ground the company and cause it irreparable damage. The bank appealed against the ruling. It was argued on its behalf that the appointment of receivers had been necessitated by the fact that the company’s assets were allegedly being disposed of by its directors and also that the company, having requested and obtained the loan facilities, was obliged to accept the consequences of the contract. The bank also claimed that the principles governing the grant of interlocutory injunctions had not been applied correctly by the Judge. The company for its part, contended that the bank had other substantial securities that it ought to have realised instead of appointing receivers, that it had been making regular repayments of the loan and that it had only fallen into arrears as a result of the high interest rates charged by the bank.

**Held** – (Shah JA dissenting) The real issue to be determined concerned the exercise of judicial discretion in the granting of temporary injunctions and whether there was sufficient material before the Judge to justify the grant in this instance. The conditions for the grant of an interlocutory injunction were (i) that the Applicant had to show a *prima facie* case with a probability of success, (ii) the injunction would not normally be granted unless the Applicant stood to suffer irreparable injury or loss which could not be adequately compensated by an award of damages, and (iii) if the court was in doubt, the application would be decided on the balance of convenience; *Giella v Cassman Brown* [1973] EA 358 followed. The issue as to whether the interest was unconscionable or arbitrary was one to be dealt with at trial. An appellate court would interfere with the lower court’s discretion only if it had not been exercised judicially; *Mbogo v Shah* [1968] EA 93 followed. Though a debenture holder had a right to appoint a receiver and was under no duty to refrain from doing so if it might cause loss to the company, the court had the power to interfere if there was no basis on which the right could be exercised or if it was being exercised oppressively; *Madhupaper International v Kerr* [1985] LLR 2396 (CAK) and *Nyaga v Housing Finance Company of Kenya* [1987] LLR 2187 (CAK) considered. There was nothing on the record to show that the Judge had exercised his discretion improperly or misdirected himself on the principles to be applied. The appeal would therefore be dismissed. **Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Giella v Cassman Brown and Co Ltd* [1973] EA 358 – **F**

*Madhupaper International Ltd v Paddy Kerr and others* [1985] LLR 2396 (CAK) – **C**

*Mbogo and another v Shah* [1968] EA 93 – **F**

*Nyaga v Housing Finance Co of Kenya* [1987] LLR 2187 (CAK) – **C**

*Sargent v Patel* [1949] 16 EACA 163

***United Kingdom***

*Clarion Ltd and others v National Provident Institution* [2000] 2 All ER 265

*Cuckmere*