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

[2000] 1 EA 52 (CAK)

**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

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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)

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***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 Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949

*Potters Oils Ltd* [1986] 1 WLR 201

**Judgment**

**O’KUBASU JA:** This is an appeal against the ruling of the High Court (Mulwa J) delivered on 25

January 2000 pursuant to a chamber summons application in which the Respondent herein (Spares and

Industries Limited) sought and obtained the following orders:

“(1) …

(2) That the Defendant and its purportedly appointed receiver and manager Mr Vijay Chhotalal Malde and

Mr Subhash Chandra Girdharlal Devani be and hereby Restrained whether by themselves, agents,

servants or otherwise howsoever from interfering, dealing with or closing down the Plaintiff’s business

in any manner whatsoever until the hearing and final determination of this suit.

(3) That a mandatory injunction do issue compelling the alleged receiver Mr Vijay Chhotalal Malde and

Mr Subhash Chandra Girdharlal Devani to vacate the Plaintiff company’s business premises with

immediate effect.

(4) …”.

The dispute herein is between Spares and Industries Limited (the Plaintiff in the superior court) and Fina

Bank Limited (the Defendant in the superior court).

Having been dissatisfied by the ruling of Mulwa J the Appellant, Fina Bank Limited (hereinafter

referred to as “the Bank”) now comes before this Court seeking an order that the said ruling be set aside.

Mr *Fraser* for the Appellant submitted that the Respondent asked for loan facilities and obtained the

same and hence it must accept the consequences of the contract.

In my view the dispute herein is the normal bank client relationship. Spares and Industries Limited

(herein referred to as “the company”) applied for loan facilities from the bank which request was granted

upon certain conditions – I would say usual bank-client conditions in transactions of this nature. The

loans designated as “overdraft account” and “loan account” were secured by a debenture dated 3 July

1997. In addition to the debenture the loan facilities were secured by a charge covering certain properties

and personal guarantees by the directors of the company. It would appear that the relationship between

the parties was good until 2 November 1999 when the bank wrote to the company demanding payment of

all the outstanding amounts failure to which the bank would appoint receivers under the terms of the

debenture. As a result of that

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letter, the company filed this suit against the bank. The main grounds upon which this suit was brought

were as follows:

“1. The power contained in the debenture to appoint receivers had not become exercisable.

2. A ppointment of receivers will occasion the Plaintiff irreparable damages.

3. No true copies of the accounts were supplied to the Plaintiff.

4. T he appointment of the receivers was not made in good faith”.

The Learned Judge of the superior court having considered all that was urged before him came to the

conclusion that the company was entitled to the orders sought in its chamber summons application. In his

ruling, the Learned Judge stated *inter alia*:

“The appointment of the receiver in this case will no doubt have the effect of grounding the company. This is

unnecessary as the Bank can at the end of the day recover its money from the realisation of the securities it is

holding. The grounding of the company would have grave consequences which would constitute irreparable

damage to the company. I therefore find that under these circumstances an injunction should issue”.

It should be pointed out that in this appeal it is that ruling on interlocutory application which is being

challenged. The issue is whether the decision by the Learned Judge was correct in view of the material

before him. If I understood Mr *Fraser*’s argument well, I think he was of the view that the principles or

conditions for the grant of interlocutory injunction as set out in *Giella v Cassman Brown and Co Ltd*

(1973) EA 358 were not followed. We know these conditions. First an applicant must show a *prima facie*

case with a probability of success. Secondly, an interlocutory injunction will not normally be granted

unless the applicant might otherwise suffer irreparable injury or loss which would not adequately be

compensated by an award of damages. And thirdly, if the court is in doubt, it will decide an application

on the balance of convenience. These should have been the guiding principles in this matter.

In his arguments before us, Mr *Wagara* stated that perusal of the accounts showed that every month

there was payment and that the company was asked to pay KShs 90 million within two hours. It was Mr

*Wagara*’s contention that there was no justification in appointing the receivers.

It should be pointed out that in this appeal we are dealing with the interlocutory application which

was granted by the superior court. In the main suit, the company is challenging the appointment of

receivers and hence will be asking the superior court to declare that appointment illegal, null and void.

The issue of interest (as to whether it was unconscionable or arbitrary) will be dealt with during the main

trial. We cannot, in my humble view make any final conclusions on these issues as to do so would

amount to deciding the issues to be agitated in the main suit. In granting the interim injunction, the

Learned Judge was exercising judicial discretion. Facts were placed before him and he came to the

conclusion that an injunction was appropriate remedy albeit only temporary. In *Giella v Cassman Brown*

*and Co Ltd* (*supra*) Spry Vp stated (at 360D): “I will begin by stating briefly the law as I understand it.

First the granting of an interim injunction is an exercise of judicial discretion and an appellate court will

not interfere unless it be shown that the discretion has not been exercised judicially (*Sargent v Patel*

(1949) 16 EACA 163)”.

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And in *Mbogo and another v Shah* (1968) EA 93 Sir Charles Newbold P put it thus:

“[a] Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied

that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at

a wrong decision or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the

exercise of his discretion and that as a result there has been misjustice”.

In the present appeal the Learned Judge considered the state of accounts which was being disputed by the

company and was not in a position to make any final determination on this issue. Mr *Wagara* has argued

before us to the effect that the bank lumped all the accounts together and made a demand for

KShs 90 million. Mr *Wagara* pointed out that large payments had been made to the overdraft account but

the bank never took these payments into account. All these issues were raised in the superior court and it

was upon the Learned Judge to satisfy himself that a case for temporary injunction had been made. He

was not required to make a final finding on the issues as such finding can only be made after the

conclusion of the main suit.

In this judgment I would only confine myself to the issue of judicial discretion by the Learned Judge

and whether the material placed before him were sufficient for the grant of an injunction. The company

filed that chamber summons application in the superior court due to fears it sensed as a result of the

appointment of receiver by the bank. These fears were set out in the grounds in support of the

application. These grounds were as follows:

“(a) That the purported appointment of a receiver and manager by the Defendant is premature and unlawful

as the power to appoint contained in the debenture has not become exercisable.

(b) The purported appointed receiver and manager are interfering with the business and trading of the

Plaintiff’s company.

(c) The purported appointment of the receiver and manager will occasion the Plaintiff irreparable and

incalculable loss which cannot be adequately compensated in damages.

(d) The Plaintiff has not been supplied with a true account of its indebtedness by the Defendant.

(e) The alleged appointment of the receiver and manager is bona fide contested by the Plaintiff in this

suit”.

Having considered the material placed before him the Learned Judge was satisfied that either all or some

of the above grounds had been proved and hence granted the injunction. In his view and relying on the

authority of *In re Maskelyne British Typewriters Ltd* [1898] 1 Ch 133 he thought that this was

appropriate case in which the court had to use it inherent power to intervene. The other reason why the

Learned Judge thought, that he had to interfere with the appointment of the receiver was that in his view

the power to appoint a receiver, was exercised oppressively and that there was no basis for doing so on

the part of the bank. In so doing the Learned Judge relied on the decision of this Court in *Nyaga v*

*Housing Finance Co of Kenya* [1987] LLR 2187 (CAK) in which this Court observed: “Where a party

has a statutory right of action the court will not usually prevent that right being exercised except that the

court may interfere if there was no basis on which the right could be exercised or it was being exercised

oppressively”.

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The Learned Judge also took into account the fact that a mandatory injunction could only be granted in

exceptional circumstances and in his view this case presented exceptional circumstances and hence he

went ahead and granted the mandatory injunction prayed for in the chamber summons application.

Having considered the material placed before the Learned Judge and having regard to the manner in

which he dealt with the issues can it be said that he was clearly wrong in exercise of his judicial

discretion? In my view, the Learned Judge cannot be faulted in his exercise of judicial discretion. It is my

view that the Learned Judge was perfectly entitled to grant the application. The arguments and authorities

cited in the course of the arguments by counsel before us would certainly be relevant during the hearing

of the main suit. Here, we are concerned with the narrow issue relating to the grant of interlocutory

injunction. Whether the appointment of receivers was null and void would be a matter to be agitated in

the main suit. I think that the balance of convenience dictated that a temporary injunction ought, to be

granted.

In view of the foregoing, I would dismiss this appeal, confirm and restore the order of the Learned

Judge made on 25 January 2000 and award costs of this appeal to the Respondent. I agree with the orders

proposed by Tunoi JA whose judgment I read in draft.

**TUNOI JA:** The main issue in this appeal is whether the right by the Appellant to appoint a receiver had

become exercisable under the terms of the debenture dated 3 July 1997, which was issued pursuant to the

agreement on credit facilities between the Appellant and the Respondent.

The Appellant, on or about 6 February 1997, agreed to grant to the Respondent a term loan of KShs

20 million and an overdraft of KShs 55 million. As security the Respondent would create in favour of the

Appellant firstly, legal charges over LR Numbers 209/3467, 209/3803, 37/724, 209/11894, 209/10544/16

and Kisumu Block 11/80 all valued at KShs 77 million; secondly, a debenture for KShs 75 million over

all the assets of the Respondent, and, thirdly, a joint and several guarantee for a similar sum by the two

directors of the Respondent company.

Both facilities attracted such rate of interest as the Appellant in its sole and absolute discretion may

decide from time to time but without any prior notice to the Respondent. Repayment was on demand but

the Respondent was initially allowed to liquidate the loan facility by 35 equal monthly instalments of

KShs 335 000 and a final instalment of KShs 8 275. Late payments would attract additional interest of

6% per annum over and above the reigning rate.

The debenture contained the usual power in favour of the debenture holder to appoint a receiver and

manager of the property charged, which was exercisable after the principal moneys became due and

payable by way of lawful demand. It is the Appellant’s case that the Respondent was indebted to the

Appellant in the sum of KShs 90 505 556-02. It made demand for immediate payment and on failing to

comply the Appellant exercised its power under the debenture and appointed two receivers and

managers. This appointment apparently galvanised the Respondent into action and it filed suit and

summons on 3 November 1999, claiming an injunction to restrain the Appellant from, *inter alia*, dealing

with or closing down the business and to compel the receivers and managers to vacate the premises.

The Respondent argued before Mulwa J that the appointment of the receivers had not become

exercisable and that their appointment would occasion the

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Respondent irreparable loss and damage. Moreover, it was averred, that no true copies of the accounts

detailing the loan had been supplied to the Respondent. It was further contended that the securities

securing the facilities outstrip the amount borrowed and that in any case they should have been sold

instead of resorting to the mover the Appellant did. The Respondent sought to show that it had been

making regular and constant payments and would have not been in arrears were it not for the exorbitant

rates from time to time reaching the peak rate of 37% per annum.

The Learned Judge held that the loss suffered by the Respondent was due to the interest rates and not

mismanagement. Only a year before receivership the Appellant had increased the loan facility and was

satisfied with the operations of the company. The Learned Judge held that the Appellant in appointing

the receiver exercised its power oppressively and without any basis. He held further that this was

tantamount to grounding of the operations of the Respondent. It was unnecessary as the Appellant could

at the end of the day recover its money from the realisation of the securities it is holding. It is from this

decision that this appeal was lodged.

This basis of the submissions of Mr *Fraser*, who appeared for the Appellant, was that a default under

the terms of the debenture had occurred and interest and its rate being the only issue in dispute between

the parties, the Learned Judge gravely misdirected himself in granting a mandatory injunction.

The Respondent concedes that it is now in arrears of several instalments but argues that the interest

rate the Applicant is charging is oppressive, was being increased at short intervals, and contract between

the parties the frequency of the increases make the Appellant’s action oppressive and inequitable.

Mr *Fraser* correctly pointed out that the relationship between the parties is based on contract and that

the appointment of receivers and managers is one of the contractual remedies available to the Appellant

for the Respondent’s default and the Appellant should not be hindered from exercising it without good

cause. He maintained that the Appellant is contractually entitled to appoint a receiver to protect its own

interest including the right to take possession of the affairs of the Respondent’s company.

The Learned Judge was of the view that the circumstances leading to the appointment of the receivers

attest to the contention that the mover was not for the benefit of the Respondent. Mr *Fraser* submits that

the Learned Judge was wrong*.* In *Re Potters Oils Ltd* [1986] 1 WLR 201 it was held that a debenture

holder who has a right to appoint a receiver is under no duty to refrain from exercising its rights because

doing so might cause loss to the company. This principle was applied by this Court in *Madhupaper*

*International Ltd v Paddy Kerr and others* [1985] LLR 2396 (CAK). Mr *Fraser* so far is right.

However, it is also correct law that where a party has a statutory right of action the court will not

usually prevent that right being exercised except that the court may interfere if there was no basis on

which the right could be exercised or it was being exercised oppressively. See *Nyaga v Housing Finance*

*Co of Kenya* [1987] LLR 2187 (CAK).

The Respondent contends that it had made substantial payments to the Appellant before the

appointment of the receiver and manager. It claims it had paid KShs 63 million. Further, it was engaged

in business as importers and distributors for industrial and agricultural machinery spares and general

hardware and

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has established an expensive network within the Republic of Kenya worth KShs 210 million. These

averments were not seriously challenged. This being an interlocutory appeal it is not possible for this

Court and the court below to resolve conflicts of evidence. The Respondent’s assertion may well be true.

If this is correct then the Learned Judge cannot be faulted when he held that the action taken by the

Appellant might not have been made in order to enable it to recover its money.

It is also clear from the statements of accounts that the Respondent was making repayments up to 2

November 1999, a day before the receivership, lending support to the observation by the Learned Judge

that there was no mismanagement on the part of the Respondent so as to warrant the appointment of the

receivers and managers.

I am of the view that the grounds of appeal canvassed by Mr *Fraser* require us to pronounce on

intricate and complicated points of law which have not had the benefit of adjudication by the Learned

Judge. Moreover, issues relating to repayments by the Respondent, mismanagement and securities cannot

be properly determined in this interlocutory appeal without the benefit of a trial.

The issue of receivership is an emotive one and I understand why the Respondent had to resort to

litigation. It destroys the business. It is expensive. The appointment of receivers and managers may not

necessarily improve the financial position of the business. These, in my view, are matters for

consideration as to whether to grant a temporary injunction or not. I am satisfied that all these

observations were in the mind of the Learned Judge when he accepted to the application for injunction.

Indeed he acted in accordance with the principles laid down in *Giella v Cassman Brown and Co Ltd*

[1973] EA 358 and came to the correct decision. I find no ground to fault him as he had exercised him

discretion correctly and judicially.

It is my view also that the Appellant had adequate security for its loans without replying on the

security given by the debenture. The allegation that they were either overvalued or undervalued was a

matter for trial.

The upshot of this is that I find no fault or misdirection in the ruling of the Learned Judge. I would

dismiss this appeal with costs. I would order that the receivers and managers appointed by the Appellant

do vacate the Respondent’s business premises forthwith. They are also restrained from interfering,

dealing with in any manner or closing down the Respondent’s business. They shall render accounts of the

business. This should be done within 30 days hereof. The superior court is directed to set down the

hearing of the suit on a priority basis.

As O’kubasu JA agrees, these shall be the orders of the Court.

**SHAH JA (DISSENTING):** The Appellant, Fina Bank Limited (hereinafter referred to as “the bank”),

being dissatisfied with the ruling and the resultant order of the superior court (Mulwa J) delivered and

made on 25 January 2000, appeals to this Court against the whole of the said ruling. The Respondent,

Spares and Industries Limited (hereinafter referred to as “the company’), had raised monies from the

bank. The loans designated as “overdraft account” and “loan account” were secured, *inter alia*, by a

debenture (“the debenture”) dated 3 July 1997. The amount lent by the bank on the overdraft account was

KShs 20 000 000 whereas the amount agreed to be lent by the bank for the loan account was to reach up

to KShs 55 000 000.

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In addition to the debenture, the facilities are secured, firstly, by a first charge in favour of the bank

covering various properties, namely, LR Number 209/3467, LR Number 290/303, LR Number 37/7243,

LR Number 209/1194 and another property all valued at the material time, at KShs 77 000 000. The

debenture is a general debenture for KShs 75 000 000 in favour of the bank covering all assets of the

company. Additionally the directors of the company have executed joint and several personal guarantees

for repayment of the loans to the extent of KShs 75 000 000 excluding interest.

One of the terms of the debenture is that in the event of the company being unable to pay the loans as

demanded, the bank would by notice in writing appoint any person to be a receiver or receiver and

manager or receivers and managers of the property and assets of the company charged or agreed to be

charged. The modality of the appointment of receivers and managers is spelt out in clause 16 of the

debenture and clause 17 thereof spells out the powers of receivers and managers.

It appears that the company was in need of further injection of cash and by its letter dated 3 February

1998 the company requested of the bank a further loan of KShs 10 000 000 as to increase the aggregate

credit facility to KShs 85 000 000. The bank agreed to increase the extra facility sought for a temporary

period unto 31 July 1998. The loan account was reduced from KShs 20 000 000 to KShs 15 000 000 and

the overdraft account limit was increased to KShs 75 000 000. Despite the changes the aggregate amount

was increased, therefore, to KShs 85 000 000. I will revert to the terms of this further facility later.

The relevant terms of the credit facilities granted in 1997 and as set out in the bank’s letter of 6

February 2000 addressed to the company were as follows:

(a) Interest would be charged at such rate as the bank in its sole and absolute discretion may decide

from time to time. Such interest was to be computed on daily balances with monthly rates and

payable at the end of each month. The initial interest rate was 31% per annum but was subject to

change at any time without prior notice.

(b) The facilities were repayable on demand, but without prejudice to the bank’s right to recall the

facilities at any time, the bank agreed to allow the company to repay the loan account in 35

monthly installments of KShs 335 000 each and a final instalment of KShs 8 275 000.

(c) The facilities were subject to review every twelve months.

(d) In the event of delay or default in payment of interest or any repayment of principal on the

respective due dates interest would be charged at 6% extra on the amount in arrears from the due

date to the date of payment.

(e) The company accepted all the terms and conditions set out by the bank in its said letter of 6

February 1997. The said letter was signed by both the directors of the company. The company

made good its agreement to execute charges in favour of the bank over LR 2098/3467, LR

209/3803, LR 37/724, LR 209/11894 and LR 209/10544/16. The proposed charge over land parcel

number Block 11/80 Kisumu was not given on account of some technical hitch over the title to

Block 11/80 apparently resulting from delay over sub-division thereof. The charge over LR

209/8275/70 was executed after the agreement of 10 February 1998.

As pointed out earlier the agreement of 10 February 1998 catered for granting of extra but temporary

facilities in the sum of KShs 10 000 000 up to

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31 July 1998. The agreement of 10 February 1998 confirmed that the securities in favour of the bank

were those already executed, including the debenture. In addition Bando (K) Limited, a company

associated with the company, was to provide a corporate guarantee. The terms of repayment after

execution of the agreement dated 10 February 1998 were as follows:

“Both facilities are repayable on demand. However without prejudice to our (the banks) right to recall the

facilities at any time we are agreeable to allow you to repay the term loan in successive monthly instalments

of KShs 670 000 each inclusive of interest beginning from next month. The overdraft facility is renewable

subject to annual review”.

The parties also agreed then that the company would not avail itself of the overdraft facility of

KShs 15 000 000 from Victoria Commercial Bank Limited. The bank withdrew its consent to cede, *pari*

*passu*, the general debenture charge to Victoria Commercial Bank Limited so that the question of the

company seeking credit facilities from that other source was no more relevant.

The company, it appears, fell into arrears of repayments and the bank by its letter of 18 October 1999

recalled both the facilities. The bank called upon the company to pay a sum of KShs 88 402 412-32 by

1 November 1999 threatening to take legal steps against the company in the event of non-payment. The

guarantors were also informed of their liability to the bank in the event of non-payment.

Although according to the agreements between the parties the bank was not supposed to inform the

company of changes in the rates of interest the bank from time to time informed the company of

fluctuations in the rates of interest at time diminishing and at times increasing.

By its letter of 15 July 1998 the bank had drawn the company’s attention to the repayment schedule

not being adhered to by the company. As at 14 July 1998, according to the bank the loan account had an

outstanding balance of KShs 15 055 914 and the overdraft account had an outstanding balance of

KShs 76 023 000-32. The bank demanded an immediate payment of KShs 7 000 000 to regularize the

accounts. By its letter of 3 September 1998 the bank again drew the company’s attention to non-payment

of instalments and the exceeding of the overdraft limit. By its letter of 22 January 1999 the bank sought

confirmation from the company to the effect that as at 31 December 1998 the amount still outstanding the

loan account was KShs 17 822 779. The company confirmed that position as correct by counter-signing

that letter. By another letter of the same date the bank sought confirmation from the company to the

effect that the overdraft account as at 31 December 1998 amounted to KShs 64 147 652-82 in debit. The

company confirmed that position as correct by signing that letter also.

The bank, it appears, was earlier becoming concerned about the manner in which the company was

being run and sought explanation in that regard from the company by its letter of 6 August 1999. The

bank was concerned about diversion of working capital funds, outstanding debtors, use of proceeds of

sales and erosion of the capital base.

I revert to the letter of 18 October 1999 by which the bank recalled the facilities. The bank reminded

the company of the 18 October letter by its letter of 2 November 1999 and informed the company that it

was about to exercise its power to appoint receivers over all its properties, assets, undertakings and

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rights under the powers conferred upon the bank by the debenture and the bank appointed Messrs Vijay

Chhotal Malde and Subhash Chandra Girdharlal Devani as joint receivers and managers.

On 4 November 1999 the company filed suit in the superior court seeking, amongst other reliefs, a

declaration that the “purported appointment of receivers is illegal null and void and also an injunction

restraining the bank, the receivers, their agents and servants from interfering with the company’s business

operations and activities”. Simultaneous to the filing of the suit the company lodged an application by

way of a chamber summons seeking orders to restrain the receiver/managers from interfering, dealing

with or closing down the company’s business in any manner whatsoever until the hearing and final

determination of the suit. The company also sought an interim mandatory order for removal of the

receiver/managers from the company’s premises. The application was certified as urgent by the superior

court and finally came up for hearing before Mulwa J on 16 December 1999. The application was

vigorously opposed. On 25 January 2000 Mulwa J allowed the company’s application. He made the

following orders:

“1. That the Defendant and its purportedly appointed receiver and manager (*sic*) Mr Vijay Chhotal Malde

and Mr Subhash Chandra Girdharilal Devani be and are hereby restrained whether by themselves,

agents, servants or otherwise howsoever from interfering, dealing with or closing down the Plaintiff’s

business in any manner whatsoever until the hearing and final determination of this suit.

2. T hat a mandatory injunction be and is hereby issued compelling the alleged receiver (*sic*) Mr Vijay

Chhotalal Malde and Mr Subhash Chandra Girdharilal Devani to vacate the Plaintiff Company’s

business premises with immediate effect.

3. T hat the costs shall be in the cause”.

It is against these orders that the bank is appealing. For the purposes of this appeal it is relevant to point

out that the receiver/managers vacated the company’s premises in obedience to the court order and the

bank applied to this Court for their reinstatement in the company’s premises. That was by civil

application number 25 of 2000. This Court allowed the bank’s application and stayed the order of the

superior court granting the Respondent the said mandatory injunction pending the outcome of the bank’s

intended appeal against the company. This Court also reinstated the said receivers and managers. So the

situation now obtaining is that the company is being managed by the said receivers and managers.

At the hearing of this appeal Mr *Fraser* who appeared for the bank took the Court through the history

of the dealings between the parties leading up to the beginning of the litigation, which history I have

already set out. Mr *Fraser* pointed out that the company had admitted that the amounts due to the bank

were repayable on demand, and that there was no denial of indebtedness and that the company was

challenging the interest rates charged by the bank. Mr *Fraser* also pointed out that under the agreement

between the parties the bank was not obliged to give any notice to recall the loan before appointing

receivers and managers; nevertheless the bank did so by its letters of 18 October 1999 and 2 November

1999. The bank he argued, was concerned as it appeared to the bank that the assets of the company were

being eroded, directors were taking out the company monies and the company’s liabilities were rising.

The bank’s concern was that the directors were allegedly “milking” all the

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company’s resources and disposing of the assets. The company’s trade creditors were on the increase.

There was no serious attempt to reduce the indebtedness and the payments being made were not

substantial enough. The debt, he urged, was admitted by way of confirmation to the bank’s auditors

which fact I have already alluded to.

It was pointed out that the company had agreed to pay, as shown in clause 2 of the debenture,

additional interest by way of penalty on all moneys and liabilities from time to time due or payable at

rates not exceeding the maximum permitted by law. It must be noted that the two letters of intent also

confirm this position. Mr *Fraser*’s argument on the issue of interest itself and the additional interest

charged by way of penalty resulting from non-payment of instalments was that there was no oppression;

that the company had knowingly entered into the contracts in question; that the rates of interest

fluctuating from time to time between 26% per annum to 34% per annum were within the normal rates

interest charged by the bank.

Mr *Wagara* appeared for the company in this Court. He also appeared for it in the superior court. The

company’s argument in the superior court as pointed out by the Learned Judge was that the bank had

other substantial and sufficient securities exceeding the amounts borrowed and that the bank ought to

have sold the securities instead of appointing receiver/managers. The bank’s stand in the superior court

was parallel to the stand it took in this Court, that is to say that the financial position of the company

indicated, at the material time, that the company had been making considerable losses in its operation as

confirmed by the observations made in its balance sheet as at 30 November 1999 which observations

were based on the company’s trading profit and loss accounts for the year 1998. The Learned Judge

appreciated the position and in that regard he said:

“What is clear from these accounts is that the accumulation of interest on the borrowed money which in

1997/98 stood at KShs 41 127 million makes it impossible to service the loan with a gross profit of

KShs 15 262 million. These observations do not indicate mismanagement of the business on the part of the

Plaintiff (the Company) rather they show that the problem is interest rates. The Plaintiff has sought to show

that it was up to the time the receivers were appointed (was) making payments and that if it were not for the

interest rates it would have been up to date with its payments. In other words it is questioning the interest rates

charged by the Defendant (the Bank) but clause 2 of the debenture gives the power to charge interest at such

rates as the Bank may think fit. The debenture forms a contractual document between the parties and this

provision can only be changed or altered like any other contract under certain conditions. In the absence of

any proof that this contractual relationship should be rescinded this provision for interest remains valid. As to

whether the right to appoint the receiver had become exercisable one has to turn again to the document which

has created the present relationship between the parties and that is the debenture clause 16 of the debenture

allows the Defendant the lender to appoint a receiver and or receiver manager when the security becomes

enforceable in case there is a breach of any of its conditions. In this case the default is based on the failure by

the Plaintiff to repay the loan when called upon to do so under clause 13 of the debenture which lists a

number of conditions if defaulted by the Plaintiff would entitle the calling up of the entire loan without

demand”.

The Learned Judge correctly directed himself when he said that the relationship between the parties was

contractual and that unless that contract was rescinded it remained valid. The Learned Judge was also

right in thinking that the interest rates probably put the company in difficulties as regards the repayment

of the

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loans. But that is a moral issue. Parties are bound by the terms of their contract and it is not formally the

business of the court to spell out a contract other than the one in issue unless there are circumstances that

warrant recision of the contract. There is no suggestion by the company that the terms of the debenture

are not binding on it. The company’s complaint is that the interest rates and penalty rate are onerous.

Having executed the debenture with full knowledge of the consequences following therefrom the

company cannot be heard to say that some of the terms thereof are onerous. That factor does not even

entitle the company (there is no such prayer) to avoid the debenture. Commercial transactions in this day

and age are entered into with full knowledge of the probable consequences. Lawyers are consulted before

such transactions are consummated and in this particular instance there is no suggestion that the bank had

exerted any undue influence on the company or its directors. It knew that it was borrowing huge sums of

money. It knew, also, that the loans carried interest payable along with repayment of the principal sums.

The company cannot be heard to say that the bank ought, first, to realize the other securities. It is for

the creditor to decide what mode to adopt for recovery of its dues or for protection of its interest. In

general a debtor cannot tell the creditor how the creditor ought to go about collecting its dues.

The Learned Judge having, at first, directed himself properly as already pointed out, misdirected

himself in concluding that the increased facility of KShs 10 000 000 granted by the bank to the company

indicated that the bank was happy with the performance of the company. The additional facility was a

temporary one and the letter of 10 February 1998 (earlier referred to) says so. As often happens in such

transactions and dealings, loan facilities are increased or decreased for business efficacy.

The Learned Judge also misdirected himself, in concluding that the company was making payments

up to 2 November 1999 confirming therefore that there was no mismanagement of the company as to

warrant the bank to take over management from the company. Mr *Wagara*’s stand in this Court was

somewhat different. His argument was that the company was regularly paying the instalments on the loan

account and that the overdraft account was not in arrears. The loan account (number LN 4210) opened

with a debit entry of KShs 20 000 000 on 3 March 1997 and stood (in debit) at KShs 19 165 314 as at 2

November 1999. It shows that eight installments of KShs 670 000 each were paid by the company over a

period of 32 months in addition to some eleven payments of over KShs 800 000 each. The credit transfer

entry of KShs 1 317 203 on 16 February 1998 was not a payment. It was credited to the loan account and

debited to the overdraft account. If the repayments set out in clause 7 of the first letter of intent dated 6

February 1997 were adhered to, the loan account would have been in an extremely healthy state. Yet it

was not, as, obviously the repayments were erratic and irregular.

The overdraft account (number CC 1764) which started with a debit entry of KShs 800 on

28 February 1997 ended up with a debit figure of KShs 61 600 205-87. The overdraft account earmarked

at Industrial Area branch (number 474), opened on 1 July 1998 stood as at 5 November 1999, at a debit

figure of KShs 9 689 739-15.

Mr *Wagara* departed somewhat from his arguments as advanced before the superior court as well as

before this Court in civil application number 25 of

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2000. In this Court he emphasized that payments made by the company to the bank exceeded KShs 60

million as at the date of the appointment of receiver/managers. He argued that only a sum of KShs 30

million could be outstanding whereas the bank demanded a sum in excess of KShs 90 million. With

respect to Mr *Wagara* that is too simplistic a way of asserting that the bank had no right or business of

appointing the receiver/managers. It is common ground that the first facilities availed by the bank to the

company amounted to KShs 75 million. Taking interest thereon at the rate (say) of 30% per annum the

amount even on simple interest basis would come in three years, to KShs 150 million odd. Add to that

the further sum of Shs 10 million advanced in 1998. Payments amounting to KShs 60 million could in no

way, by any arithmetical calculations, be calculated to satisfy the debt.

As per calculations made by the company’s own accountants, Messrs Ashwin Brothers, total interest

on the three amounts, as charged by the bank up to 1 November 1999 amounted to KShs 65 865 953.

They also show that the bank has charged in addition to the agreed interest, penalty rate interest, totaling

KShs 685 244. The dispute element can only relate to the penalty rate of interest charged as penalty is

generally challengeable.

I am afraid Mr *Wagara*’s contention that the bank has charged exorbitant rates of interest does not

hold water. The company is bound by the rates of interest it agreed to pay. The transactions were

between a willing borrower and a willing lender and as already pointed out there is no suggestion of

coercion, fraud, undue influence etc.

Mr *Wagara* went further by arguing that in the face of the payments of approximately KShs 60 000

000 made by the company there was no justification for appointing receiver/managers; that it was not in

the interest of the bank to so appoint them; that the prevailing circumstances in the country do not justify

appointment of receiver/managers. These arguments are, again, too simplistic. There is no legal basis for

such arguments. The debenture gives the bank an unfettered right to appoint receiver/managers at any

time after the loan has become repayable. As the bank is contractually entitled to appoint

receiver/managers to protect its own interests it does not lie in the mouth of the company to say that the

appointment may not be beneficial to the bank. As between the company and the bank, the bank has the

right to take possession of the company’s assets once the loan has become repayable. The bank is under

no duty to refrain from exercising its rights merely because to exercise them may cause loss to the

company or its unsecured creditors. The receiver/managers owe a duty of care to the company but this

duty is qualified by being subordinated to the protection of the bank’s interests. It was stated by Salmon

LJ in the case of *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 at 965H: “If the

mortgagee’s interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give

preference to his own interest”.

It must be noted that the principle enunciated in the *Cuckmere Brick Company* case has been

consistently followed by our courts. For example see the case of *Madhupaper International Ltd v Paddy*

*Kerr and others* [1985] LLR 2396 (CAK). Mr *Wagara* invoked the equity jurisdiction of this Court by

his arguments as regards the high interest rates charged as a result whereof, he said, the company fell into

arrears. It is clear beyond peradventure that save for those special cases

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where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s

function to allow a party to escape from a bad bargain. Thus the jurisdiction of equity does not extend to

relieving a party from his contract when the nature of his mistake (assuming it be a mistake) went not to

the contract’s subject matter or terms, but only to its commercial consequences and effect.

In this case the alleged onerousness of the interest rates (if it were indeed the case given the rates of

interest all banks in Kenya charge) related not to the terms of the contract but merely to its potential for

commercial exploitation. Such onerousness (if at all) cannot be characterized as a mistake or

misunderstanding relating to the subject matter of the contract (the debenture). What the company is

trying to do is to obtain release from what it calls high rates of interest calling such rates as oppressive.

What the Learned Judge did was to fall into a serious error by considering the matter before him from

the standpoint of a sympathiser. Whilst it is human to so feel, the function of the court is to enforce what

is agreed between the parties and not what the court thinks ought to have been fairly agreed between the

parties. I agree what was stated by Rimer J in the case of *Clarion Ltd and* others *v National Provident*

*Institution* [2000] 2 All ER 265 at 281J; he said:

“The thrust of NPI’s complaint is simply that is made a bad bargain from which it now wants to be released. It

is, however, of the essence of business transactions that each party is bargaining in his own interest and for his

own benefit and that each has to look after his own interests and that in most cases neither owes any duty of

care or disclosure to the other. It is inherent in such a system that there will he those who will make bad

bargains, but that is the risk which in my view each bargaining party must be assumed to be willing to take

and which the law must be regarded as having allocated to him”.

The Learned Judge in my view, fell into error when he said that “the appointment of the receivers in this

case was not for the benefit of the bank”. When the right to appoint receiver/manager has crystallized it is

not for the court to decide for whose benefit such appointment is. At the risk of repetition I must say that

the court must leave parties to their bargain, good or bad.

The Learned Judge relied upon a passage in *Halsbury’s Laws of England* (3 ed) Volume 6 paragraph

969 to say that a power given in a debenture is fiduciary power and if not made for the benefit of the

debenture holders but with a view to the benefit of the company or third persons the court will interfere

and appoint its own receiver. What the Learned Judge missed out was that the paragraph (969) refers to

power given for appointment of a receiver in debenture of a series.

In the end result and without going to all grounds of appeal advanced on behalf of the bank, I would

allow this appeal and set aside the orders made by the superior court on 25 January 2000. I would

confirm the orders for the re-entry of the receiver/managers into the premises of the company as made by

this Court in civil application number 25 of 2000. The receiver/managers will act in accordance with the

terms of the debenture. I would grant to the Appellant the costs of this appeal as well as costs of the

company’s application in the superior court dated 3 November 1999 and lodged on 4 November 1999.

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As this litigation involves substantial sums of money and as some pertinent issues are raised I think it

would be in the interests of both parties to bring on the suit for trial at the earliest possible date.

For the Appellant:

*K A Fraser* instructed by *Hamilton Harrison and Mathews*

For the Respondent:

*J O Wagara* instructed by *Makhecha and Co*

**Gachiengo**