THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 7 OF 1998

DAVID MPANGA AND ANOTHER:: PLAINTIFF

— versus —

ROLIAT PROPERTY AGENCY LTD:: DEFENDANT

BEFORE:- HON. THE PRINCIPAL JUDGE - MR. JUSTICE J.H. NTABGOBA

RULING

This is an application by Chamber Summons brought under 5.352 of the Companies Act, Cap.85 of the Laws of Uganda and Order 34A Rule 6(r) of the Civil Procedure Rules. Subsection (1) of S.352 of the Companies Act provides: -

> " A receiver or manager of the property of a Company appointed under the powers contained in any instrument may apply to the Court for directions in relation to any particular matter arising in connection with the performance of his functions, and on any such application the Court may give such directions, or may make such order declaring the rights of persons before the Court or otherwise, as the Court thinks just".

Order 34A rule 6(r) simply directs the manner in which an application under S.352 of the Companies Act aforementioned takes.

The applicant number 1 David Mpanga is the receiver appointed by M/S. Development Finance Company of Uganda Ltd (DFCU) under a mortgage executed between the said DFCU and M/S. Beaton Bakery & Confectionery Ltd (the second applicant).

The respondent, M/S. Roliat Estate Agency Ltd, was t4be landlord to the second applicant when the said second applicant was put under receivership by the first applicant, under the aforementioned debenture. The second applicant was indebted to the respondent in respect of rents which had fallen into arrears. The respondent was still holding some property of the second applicant and the respondent has been denying the first applicant access to such

property. The first applicant advised the respondent to submit its claim against the second applicant to the receiver as Creditor for settlement, should there be sufficient funds in the estate of the second applicant. The respondent wanted to go straight for the property of its creditor, the second applicant.

When this application came before me the applicants were seeking orders, inter alia, that this Court gave:-

(a) Directions that the respondent be restrained from obstructing and/or interfering with the lawful management and receivership of the second applicant;

(b) Directions to be made by Court in regard to the notice made by the respondent in the New Vision dated 12th August 1998 alleging that property belonging to the second applicant was removed from the respondent's premises under very ambiguous circumstances and that the receivership of the Company was "irregular";

(c) Orders that the respondent retracts the false and unfounded statements made in the said Notice in the New Vision of 12th August, 1998;

(d) Any other Orders or directions declaring the rights of the applicants as this Honourable Court may think just;

(e) Costs and incidental to this application be paid by the respondent.

At the commencement of the hearing the Counsel for both parties made a consent order for the Court to endorse as a pre-emptive measure which would be adhered to by both parties. The consent order dated 11th November 1998 states:-

"THIS matter coming for mention on this 11th day of November, 1998 before the Honourable Principal Judge in the presence of Christopher Bwanika (Counsel for the Applicants) and Kiyemba-Mutale (Counsel for the respondents),

IT IS ORDERED by Consent that:-

(a) The respondent undertakes not to obstruct or interfere with the lawful management and receivership of the second applicant until the hearing and final disposal of the main applications pending before the Principal Judge.

(b) The respondent presents its claims to the first applicant for consideration.

(c) Costs shall be in the cause".

The consent order was signed by both Counsel and counter-signed by the Principal Judge(the trial judge). Consequently, the application was fixed for a full hearing on 11/1/99.

At the commencement of the hearing, Mr. David Matovu, learned Counsel for the respondent raised what he termed a preliminary objection and stated that its determination would finally determine the matters in controversy. He argued that the debenture pursuant to which the first applicant was appointed a receiver of the second applicant was defective and therefore illegal and, therefore, the appointment of the receiver was unlawful. Counsel relied on the cancellation of the word "April" and its replacement by the word "July" appearing in the opening words of the debenture at page one which reads:-
"THIS DEBENTURE is made the 4th day of July One Thousand Nine Hundred and Ninety Eight…".
Counsel argued that the debenture must have been executed in the month of April and that it must have been presented to the Registrar of Companies later than the 2 days period stipulated in 6.96 of the Companies Act which provides for a debenture or charge to be registered within 42 days of its execution. Counsel alleged that instead of

applying to Court to extend the period within which the debenture should be registered (pursuant to S.102 of the Companies Act) the first applicant must have cancelled the month of April and replaced it with the month of July; and that he must have presented the document to the Registrar of Companies to be registered on 24/7/89.

Although I understood Counsel Matovu to be alleging forgery or fraud on the part of the first applicant (and this appeared also to be the understanding of Mr. Bwanika learned counsel for the applicants).

Mr. Matovu vehemently denied having alleged fraud or forgery on the part of the first applicant. With due respect to Counsel, when he alleges that the word "April" in the debenture was cancelled and replaced with the word "July" in order to avoid having to apply for extension of time under S.102 of the Companies Act, and so as to Secure registration of the debenture without first having to apply for the extension, he is alleging that the first applicant committed fraud and or forgery. And it is trite law that any fraud or forgery alleged shall be specially pleaded and specifically proved by evidence. Assuming therefore that the first defendant had committed forgery and or fraud, as counsel for the respondent implies, must have specially pleaded them and he would have been expected to adduce evidence in proof thereof. His failure so to do would be sufficient for the Court to disallow him to make the allegations of fraud and or forgery. But as I have said, my finding is that there was no deliberate cancellation of the word "April" and its replacement with the word "July" so as to avoid an application for time extension under S.102 of the Companies Act. At any rate, no proof has been made to that effect. The position seems to me to be that the debenture was truly executed on the 7th day of July 1989 and registered with the Registrar of Companies on the 3rd day of August, 1989 which was within the period of 42 days as stipulated in S.96 (l) of the Companies Act. The Certificate of Registration of the debenture (Annexture "Z1" of the David Mpanga's affidavit in Rejoinder) bears this conclusion witness. The Certificate not only shows that the debenture was registered on 3rd August, 1989, but it also bears registration number 6328 dated 3.8.89 in its top right hand corner.

Surely, if the debenture had been executed a way back on 4th April, 1989, as counsel for the respondent argues, it would have been impossible for the Registrar to give it a 3rd August, 1989 registration number without tampering with the document and it is such tampering that should have been proved by the respondent. The fact that the Registrar accepted for registration the debenture without querying its validity is, to me, prima facie evidence that he

accepted its validity and there seems to be no reason for me to impute on the Registrar any ill motives of accepting an invalid document for registration. In any case, Section 99 of the Companies Act provides that the Certificate of registration of a charge or mortgage under 5.96(1) shall be conclusive evidence that the "Requirements of this Part of this Act as to registration have been complied with".

Come to think about it, in the absence of challenge of the Validity of the instrument by the Registrar of Companies or by the Company that was placed under receivership, which would be better suited to challenge the receivership, what locus standi has the respondent to impugn the validity of the debenture and therefore of the receivership? The respondent is or was only holding the property of the Company under a receivership.

It can resort for its indebtedness against that Company (the applicant) for payment by submitting its claim, as a creditor, to the receiver (the first applicant). In fact the respondent has already acknowledged that fact by signing a consent judgment under which it undertook to submit its claim for payment to the receiver. It cannot be allowed to renege on its consent. It must stick to it and I order that it shall submit its claims to the receiver for settlement pursuant to the rules governing receivership. Accordingly, I also order that the respondent desists from interfering with the work of the receiver.

I have read the rest of the orders or directions of this Court being sought by the applicants. I refer, in particular to prayers (b) to (d), inclusive, contained in the Chamber Summons application. I take note of the complaint contained in the affidavit of the receiver deponed on 27th August 1989. I appreciate the complaint that the notice which was published in the New Vision newspaper by the respondent is damaging to the operations of the receivership. It casts aspersions on the exercise,
and is capable of discouraging would be customers of the first applicant against buying the property of the second applicant.

The respondent is therefore ordered to retract its publication. It must publish the retraction in a very distinct space of the newspaper in which it published its discouraging and damaging innuendos. I so order. I also order that the respondent pays to the first applicant the costs of these proceedings.

J.H. NTABGOBA PRINCIPAL JUDGE 3/2/99