

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 38 OF 2004

**EDU COMPUTERS (T) LTD.....APPLICANT/PLAINTIFFS
VERSUS
TANZANIA INVESTMENT BANK LTD.....RESPONDENT/DEFENDANTS**

R U L I N G

KALEGEYA, J:

The Plaintiffs/Applicants pray for an order, among others,

“That this Hon. Court may be pleased to issue Temporary injunction restraining the Respondent or its agent from interfering the business of the Applicant until finalisation of the main suit.”

The application emanates from a suit filed by the Plaintiffs praying for, among others, judgment and decree against the Defendants as follows:

- “1. The declaratory order that the Plaintiff has never breached the credit facility agreement.*

- 2. That the receiver Manager be ordered to stop from conducting the activities of the Plaintiff*
.....”

The above in turn is premised on the following undisputed facts.

In June, 2002, the Plaintiffs/Applicants secured an overdraft facility of shs.13 million from the Defendants/Respondents. The facility was to expire after 12 months. The Defendants having operated its account satisfactorily, the facility was enhanced to shs.16 million on 16/11/2003. Conditions and terms remained the same. Among other securities was a debenture on Plaintiffs' assets.

Sometime this year (2004), the Defendants appointed a receiver and Manager of Plaintiffs' assets.

This act could not be stomached by the Plaintiffs hence the filing of the suit simlutenously with the present application.

Both in the supporting affidavit of Gladys Mary Busyanya and submissions, the Plaintiffs/Applicants represented by Mr. Kimwangana, Advocate, urge that the Defendants/Respondents have appointed the Receiver and Manager prematurely because they had not defaulted in the facility servicing and that the act has caused/will cause irreparable loss which cannot be compensated monetarily while they have a chance of success in the main suit, making reference to **Giella vs Cassman Brown and Company Ltd [1973] EA 359**.

On the other hand, the Defendants/Respondents, represented by Mr. Msuya, Advocate, insist that the Plaintiffs/Applicants are in breach of the facility Agreement in that by June, 2004, their account was in debt balance of over shs.16 million and that this entitled the Defendants/Respondents to exercise their remedies under Article IX of the credit facility Agreement and

clause 8 of the debenture Agreement. On principles which guide the Court in issuance or otherwise of a temporary injunction the Defendants/Respondents made reference also to **Giela case**, adding **I.A. Kaare versus General Manager, Mara Cooperative Union [1984] Ltd [1987] TLR, 17; Tito Andrew Mziray vs Nuhu R. Kachenje, Civil Case No. 41 of 2003 (DSM Registry, unreported) and Shinyanga Regional Trading Co. Ltd and another versus NBC [1997] page 78**. Detailing, the Defendants/Respondents urged that regard being had to the terms of the Debenture Agreement the present application is not “bonafide”; that no evidence has been offered to show that the operation of the business by Receiver & Manager would lower their (Plaintiffs) goodwill and that in any case what is sought to be barred has already taken place hence prayers sought cannot issue.

Now, for the merits.

Principles of law which guide courts in granting or otherwise of a temporary injunction are now well settled and **Giela case** aptly exposes the same.

Firstly, there should exist a serious triable issue between the parties. Secondly, there should exist a likelihood of the matter terminating in applicant’s favour. Thirdly, it should be established that if the injunctive order is not issued the applicant would suffer irreparable loss that cannot be compensated in monetary terms. And fourthly, and lastly, it should be established that on a balance of convenience the applicant stand to suffer more if the prayer is refused than would Respondent if it is granted.

Now, applying the above principles to the facts at hand, with respect to Mr. Kimwangana, not a single one has positively been established.

I am saying so because by their letter dated 29/6/2004 not only do they admit default but also, they (Defendants) promised to pay a substantial part of the liability by the end of July, which promise however they never kept. In part, the said letter reads:

“Date June 29th 2004

*Managing Director,
Tanzania Investment Bank,
P.O. Box 9373,
DAR ES SALAAM*

Dear Sir,

RE: ACCOUNT NO 04600000327 – 01:

Reference is made to our verbal conversation held in your office on 28th June 2004 with the Undersigned on the above subject matter.

Your may wish to note that in our discussion we came into understanding that our company deals with promoting and Teaching of Computers knowledge three (3) stations. i.e.

- 1. Forodhani Secondary Schools in Dar es Salaam*
- 2. Tarime Teachers College in Tarime Region and*
- 3. Butimba Teachers College Mwanza.*

*In order to operate the three (3) projects above the company was assisted to get funds from our account to the tune of Tshs.13,000,000/= on 27th June 2002. **The outstanding amount by***

now is almost 16,520,000/= as of today although the company has tried to its level best to repay the loan see our bank statement on the said Account.

However sometimes in the year 2003 one of our directors i.e. Joseph Edmund Hamis (Managing Director) started misappropriate company funds to the tune of Tshs.25,826,000/=.

The company has reported the matter to the Police and the matter is under a strong Investigation. You may refer to MUS/RB/1484/2004.

You may wish to note that the Company has lost a very big amount of money which could be used to repay the loan.....
.....
.....

In that regard we have to pay a total of Tshs.12,000,000/= by the end of July 2004 when the collection of fees exercise complete.

Thirdly, the Management of our Company request your good office to assist the Company to have a new account for the collection of the debts. And also you may appoint or assign one of the two Directors i.e. Tessema A. Melaku and Gladys Mary Busyanya to be responsible directly in the two above centers i.e. Tarime and Butimba TTC to collect and deposit the funds to the new Account, which will be opened by your bank.

Further, more the bank should inform the Principal of the two colleges so that they may be Cooperative to the whole exercise so that the former Managing Director Mr. Joseph E. Hamis can not further misappropriation of funds. For easier of communication we request your good office in case of only information or queries to communicate to either the undersigned or Glayds M. Busyanya.

Lastly but not least, we assure you that our aim is to repay the loan to the bank.

Therefore we are ready to round table any time to have discussion on how to carry this exercise smoothly.”

And clause 8 of the Debenture deed provides:

“Debenture Holder may, at any time after the principal moneys hereby secured shall have become payable, appoint by writing any person or persons whether an officer or officers of the Debenture Holder or not to be a receiver and/or manager or joint receivers and/or managers”,

while clause 9, in part, has the following:-

“The receiver and/or manager so appointed shall be the agent of the Company and the Company alone shall be liable for his acts and defaults and remuneration and he shall have authority and be entitled to exercise all or any of the powers hereinafter set forth in addition to and without limiting any general powers conferred upon him by law:-

- (a) To enter upon and/or take possession of collect and get in all or any part of the property and assets hereby charged.”*

And, under article 8 and 9 of the Credit facilities Agreement, failure to pay indebtedness when due or perform as per agreement is a default for which the bank (Respondent) would be entitled to declare the principal of the facility then outstanding to be due and payable immediately.

The totality of the above does not expose any triable issue nor any likelihood of success (although full evidence is yet to be adduced) by the Plaintiffs in the controversy. They unreservedly admit default and liability. Again, on irreparable loss and whether the order sought can now issue, as rightly impressed by the ^{defendants} Plaintiffs, the receiver and manager has already been appointed and therefore there is nothing to be barred on that aspect apart from the absence of proof of the existence of irreparable loss. Appointment of the receiver and Manager upon default is clearly provided for by the parties' agreement. I can detect no spec of divergency from the same. And, I should add that the four conditions have to be established as a whole and not part thereof.

For reasons stated, I decline to grant the prayers sought. The application stands dismissed with costs.

L.B. KALEGEYA
JUDGE

Delivered

L.B. KALEGEYA
JUDGE
9/9/2004

1,445 words

I Certify that this is a true and correct
of the original order Judgement Rulling
Sign *M. M. M. M.*
Registrar Commercial Court Dsm.
Date 9/9/04