

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: WAKI, WARSAME & KIAGE, J.J.A)

CIVIL APPLICATION NO. NAI 63 OF 2018 (UR 55/2018)

BETWEEN

COMMERCIAL BANK OF AFRICA LIMITED APPLICANT

AND

WARDPA HOLDINGS LIMITED 1ST RESPONDENT

CO-OPERATIVE BANK OF KENYA LIMITED 2ND RESPONDENT

LEAKEY'S AUCTIONEERS 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

PATRICK KANGETHE NJUGUNA 5TH RESPONDENT

EQUITY BANK LIMITED 6TH RESPONDENT

KINJUNJE GARDENS LIMITED 7TH RESPONDENT

MARGARET WAMBUI KANG'ETHE 8TH RESPONDENT

(An application for injunction pending the hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Okong'o, J) dated 19th December, 2017

in

*ELC No. 941 of 2016 consolidated
with ELC No. 947 of 2016)*

RULING OF THE COURT

The matter before us raises an interesting, but also perplexing, scenario. It involves three of the country's top banks - Equity Bank Ltd (**Equity**), Commercial Bank of Africa Ltd (**CBA**) and Cooperative Bank of Kenya Ltd (**Co-op bank**) - who appear to have been caught up in an intricate web of a fraudulent syndicate hatched by their

mutual customers. In the process, the banks are staring at a possibility of losing hundreds of millions of shillings of customer funds. The syndicate, we are told, has also hit other banks in the country, and it is perplexing that none of the perpetrators has been subjected to the criminal process. Perhaps it is a measure of how high the country has soared in the corruption index.

The syndicate in this matter appears to have worked like this:

On the 8th April, 2010, Patrick Njuguna (**Patrick**), Edward Njuguna (**Edward**) and George James Kireru Kangethe (**George**), all trading as "Patrick Kangethe & Sons", went to Co-op bank and borrowed about Ksh.166 million. They gave out as security for the borrowing, the original Title to land parcel No. Dagoretti/Riruta/2289 (**Plot 2289**) measuring approximately 0.2 hectares (half acre), which was registered under the Registered Land Act in the name of Patrick on 29th August, 1997. A legal first charge was duly registered against the Title on 10th September, 2010, and there were no other encumbrances on the Title. They have in their possession, the original documents.

Subsequently, on 23rd October, 2012, another original title for plot 2289 registered in the name of Wardpa Holdings Ltd (**WHL**) was obtained by the Directors of WHL. The Directors are Edward, George and one Gladys Njeri Kangethe. They went to CBA on 24th March, 2013 and borrowed about Ksh.100 million on the security of that Title and a legal charge was registered against the Title on 23rd January, 2014. According to CBA, appropriate searches were carried out and there was no evidence of any other previous charge on the Title. They retain the original documents.

On 23rd May, 2014, yet another original Title for plot 2289 was obtained in the name of Kinjunje Gardens Ltd (**KGL**) whose Directors are Patrick and his wife Margaret Wambui Kangethe (**Margaret**). They proceeded to Equity on 9th December, 2014 and borrowed Ksh. 200 million and a legal charge was registered against the Title on 23rd January, 2015. Like CBA, Equity says it carried out searches and found no evidence of prior encumbrances on the Title. They also retain the original documents.

As correctly found by the trial court, *'all the loans that were advanced on the security of plot 2289 were advanced to people who knew each other or were related and were working together in pursuit of the said loans'*. It is also apparent that without the complicity of the office of the Chief Land Registrar, the transactions on plot 2289 would not have taken the trajectory they did.

The borrowers never repaid the loans. That is why Co-op bank called in the loan and on 20th May, 2016 instructed **Leaky Auctioneers** to advertise plot 2289 for sale in exercise of the bank's statutory power of sale, to recover the amount due in excess of Ksh.195 million. Patrick, Edward and George tried to block the sale by seeking an injunction in **Mombasa HCC No. 50 of 2014** but they were unsuccessful. The sale was re-advertised and that is when Equity and CBA realized that it was the security given to them that was being sold. Equity filed suit in the Environment and Land Court (ELC) (**No. 941 of 2016**) against KGL and its two directors (Patrick and Margaret), Co-op bank, Leakey's auctioneers, and the Chief Land Registrar. CBA also filed case **No. 947 of 2016** against WHL, and one of the directors (Patrick), Co-op bank, Leakey's auctioneers and the Chief Land Registrar. They both asserted that the intention by Co-

op bank to sell the property was illegal, null and void since they never gave their consent for creation of any charge on the property besides theirs; and that the charge held by Co-op bank was on a fake and parallel Title. They basically sought an order for injunction to restrain Co-op bank from selling plot 2289 pending the hearing of the suits. Both suits were consolidated and applications for temporary injunction under **Order 40** of the Civil Procedure Rules were heard together.

Upon considering the applications under the principles set out in *Giella vs Cassman Brown & Co Ltd [1973] EA 358*, the trial court, **Okongo, J.**, found no reason to stop Co-op bank from exercising its statutory power of sale and set it free to proceed with the auction. The court expressed the view that if any Charges were created on fraudulent fake titles, then those were the Charges created by CBA and Equity since the Charge in favour of Co-op bank was first in time. The other titles did not exist when Co-op bank registered the Charge and it could not therefore be parallel to the other Charges. *Afortiori*, the trial court posed, it would be absurd to suggest that Co-op bank should have sought the consent of CBA and Equity before registering its Charge. The rights of CBA and Equity were thus secondary to those of Co-op bank. The court concluded thus:

"Having carefully considered the evidence before me, I am not persuaded that Commercial Bank and Equity have a prima facie case with a probability of success against Coop Bank. I am unable to see any reason why Coop Bank should be stopped or delayed from exercising its statutory power of sale which has arisen. Commercial Bank and Equity have put forward a very strong and persuasive argument that since there is apparent evidence that Patrick Njuguna, Margaret Wambui Kangethe (Wambui), Wardpa and Kinjunje were involved in the fraudulent creation of parallel

title deeds for the suit property, it is necessary that the sale of the suit property be stopped pending the hearing of the suit at which the court would be able to determine the validity of the various titles held by the parties. Whereas I am in agreement with the contention by Commercial Bank and Equity that there is a high likelihood that the persons mentioned above fraudulently with collusion of the Land Registrar created parallel title deeds for the suit property which they used to defraud Commercial Bank and Equity of hundreds of millions of shillings, there is no evidence that the transaction between Coop Bank and Patrick Njuguna was affected by the alleged fraud or that Coop Bank was involved. I am not persuaded that the charge in favour of Coop Bank may be nullified at the trial of the suit at the instance of Commercial Bank and Equity. This is because, there is no dispute that Patrick Njuguna was the registered owner of the suit property as at 18th August, 2010 when he charged the property in favour of Coop Bank and when the said charge was registered on 10th September, 2010. There is also no dispute that Coop Bank has not discharged that charge and that its statutory power of sale has arisen."

The trial court further held that CBA and Equity would not suffer irreparable loss which cannot be compensated by an award of damages. Such loss was quantifiable and there was no evidence that Co-op bank was incapable of compensating it.

It is those findings that aggrieved CBA which is the only intended appellant in the interlocutory appeal. Pending the filing and hearing of the intended appeal, CBA applies afresh under **Rule 5 (2) (b)** of the Rules of this Court for the following order:

"2. That this Honourable Court be pleased to issue an Order of a injunction restraining the Respondents whether by themselves, agents, servants or anyone acting at their behest or otherwise howsoever from in any way disposing, selling, alienating, transferring, advertising for sale by public auction or selling by private treaty or otherwise dealing in any manner with the Property known as L. R Number Dagoretti/Riruta/2289 situate in Nairobi and registered in the name of the 1st Respondent and charged to the Plaintiff and/or under a purported parallel Title registered in the name of the 5th Respondent and Charged to the 2nd Respondent

pending the hearing and final determination of an intended appeal."

CBA is, of course, at liberty to make such application because, in dealing with **Rule 5 (2) (b)**, this Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this Court. See **Ruben & 9 Others vs Nderitu & Another (1989) KLR 459**. The Court's discretion in granting or refusing to grant the injunction is also wide and unfettered but it is for the applicant to satisfy the Court, not only that the intended appeal is arguable, even on a solitary issue, but also that unless the order sought is granted, the success of the intended appeal would be rendered nugatory. See **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others [2013] eKLR**.

Learned counsel for CBA, **Mr. William Kibaiku**, urged us to find that the intended appeal raised serious issues on the exercise of the trial court's discretion. It will be argued that the finding that the Charge of Co-op bank was "first in time" was erroneous since all the three charges were on different original Titles on the same parcel of land which were fraudulently obtained; that the finding was erroneous that the title held by Co-op bank was genuine when a search certified by the Chief Land Registrar proved otherwise; that CBA was an innocent chargee who played no part in the fraud and deserved equal protection as Co-op bank; and that it was an error to make final findings on fraud at an interlocutory stage.

On the nugatory aspect, counsel urged that CBA was as much a victim of the syndicate as Co-op bank and Equity and all should have an equal opportunity of

mitigating the possible loss. The imminent sale of the property before the intended appeal is heard would render the appeal as well as the suit pending before the ELC otiose. In counsel's view, Co-op bank was incapable of paying the damages caused by the transaction.

Those submissions found support from learned counsel for Equity **Mr. David Njoroge**, who simply so stated.

Responding to the application, learned counsel for Co-op bank **Mr. Billy Kongere** submitted that there was no arguable appeal. That is because the suit before the trial court accused Co-op bank of negligence and fraud but none was proved. The fight between the banks was on the exercise of their statutory powers of sale and the trial court correctly found, on a *prima facie* basis, that Co-op bank's powers were not affected by the alleged fraud. There was therefore a proper basis for exercise of discretion. As for the nugatory aspect, counsel submitted that there was nothing to show that Co-op bank could not compensate after the sale, if it was ultimately found wrongful. Counsel referred us to various authorities in support of his submissions.

We have considered the application fully. The intended appeal challenge the exercise of judicial discretion. We cannot obviously delve into the merits of the trial court's decision as that lies in the province of the appellate court and we would loath to embarrass it. That Court will examine and determine whether the trial judge misdirected itself in law, whether it misapprehended the facts; whether it took into consideration matters which it ought not to have taken into consideration or considered those it should not have; or whether the decision as a whole was plainly wrong. See *United India*

Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd [1985] eKLR. For purposes of the application before us, we think the argument that the discretion was based on a misapprehension of the facts and that final findings of fact were made in an interlocutory application are not frivolous arguments, whether or not they are successful in the end.

What about the nugatory aspect? As stated in the case of *David Morton Silverstein vs Atsango Chesoni [2002] eKLR*, whether or not an appeal will be rendered nugatory, "*the court must bear in mind that each case must depend on its own facts and peculiar circumstances.*" At times it will depend on whether or not what is sought to be stayed is reversible and whether damages would be a reasonable compensation. The cases of *George Njenga Kagai vs Samuel Kabi Njoroge & Another [2016] eKLR*, *Francis J. K. Ichatha vs Housing Finance Company of Kenya Ltd [2005] eKLR* and *Jopa Villas LLC vs Overseas Private Investment Corporation & 2 Others [2010] eKLR* were particularly cited by counsel for Co-op bank in support of the latter proposition.

As stated earlier, the circumstances surrounding the dispute between the three banks are fraught with fraud which neither of the banks may be strictly responsible for. They all believed they held a first Charges on plot 2289 and retained the original Title for the property. There is no clarity on how the three original Titles were obtained or how consents were obtained from the local Land Control Board for validation of the Charges. The principle of "*first in time*" may well be called to question in the circumstances. Furthermore, the huge amount of money given out in loans does not belong to the banks but to their customers. There is, in our view, considerable interest

by a large bank customer base, if not general public interest, and therefore the need for circumspection. We are inclined, in the interests of justice to find that the success of the intended appeal would be rendered '*worthless, futile, invalid or trifling*' if we do not grant the order sought.

It follows that the application is meritorious and we grant it. In order to ensure expedition of the matter, we limit the life of the order to three months within which the intended appeal shall be filed, heard and determined. It may only be revived thereafter by an order of the Court and for sufficient reason being shown. The costs of the application shall abide the result of the intended appeal.

Orders accordingly.

Dated and delivered at Nairobi this 28th day of June, 2018.

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR