



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

COMMERCIAL APPEAL NO. E051 OF 2020

LUZIKI HOLDINGS LIMITED.....APPELLANT/APPLICANT

-VERSUS-

ELIJENSONS INVESTMENT LIMITED.....1ST RESPONDENT

NATIONAL BANK LIMITED.....2ND RESPONDENT

(Being an Appeal from the entire Ruling and Order of the Chief Magistrate's Court at Milimani in CMCC No. 5578 of 2016 delivered by Hon. A.M Obura (Mrs) (SPM) on the 9th day of September, 2020).

RULING

1. The Appellant/Applicant (hereafter 'the Appellant') has approached this court by way of a Notice of Motion dated 28th September, 2020. The application is filed under the provisions of **Order 40, Order 42 Rules 6(1) and (6), Order 51, Section 1A, 1B, 3, 3A, 63(e) and 79G** of the **Civil Procedure Act** and all the enabling provisions of the law. The main prayers for determination are:

1. THAT this honourable court be pleased to issue a temporary injunction restraining the 1st and 2nd Respondents, their agents, servants or any other persons acting on their behalf from registering, completing or perfecting the sale and transfer of House No. 61 L.R. No. 13324/61 located at Akiba Bellevue Estate South C Nairobi on the basis of a purported auction that happened on 21st July 2020 or any other date pending hearing and determination of this appeal filed herein.

2. THAT costs of this application be provided for.

2. The Application is supported by the grounds on the face of it as well an Affidavit sworn on 28th September, 2020 by **FREDRICK KIMEMIA KIMANI**, the Appellant's director. He deposes that on 9th September 2020, the trial court delivered a ruling in which it dismissed the Appellant's application for enjoinder to the suit as an interested party and for grant of temporary orders of injunction stopping the transfer, taking possession of, leasing, transferring of **L.R. No.13324/61 Akiba, Bellevue Estate, South C** (hereafter 'the suit property'). He contends that the Appellant is aggrieved by the said decision because it had demonstrated that it bought the property by way of private treaty and paid a deposit of Kshs. 6,500,000/= then took possession and had already commenced serious renovations and remodeling of the same.

3. It is deposed that the Appellant has already lodged an appeal against the decision which appeal has overwhelming chances of success. He avers that in the meantime however, the Appellant remains exposed as the 2nd Respondent (hereafter 'the Bank') may at any time transfer the suit property to a third party by virtue of an illegal auction that took place on 21st July, 2020 during the pendency of the application for injunction. It is further contended that unless the injunction sought is granted, the Appellant will suffer prejudice as the property will change ownership and the Appellant will be evicted from the premises thus rendering the appeal nugatory.

4. It is also deposed that such an eventuality would cause grave injury to the Appellant that cannot be adequately compensated in the event the appeal succeeds. Finally, it is deposed that the application has been filed without undue delay.

5. The 1st Respondent supports the application.

6. The bank opposed the application by way of a Replying Affidavit sworn on 5th October 2020 by **NANCY ONYANGO**, the Senior

Manager in charge of Remedial and Recoveries within the Credit Collections & Remedial Department. She deponed that vide letter of offer dated 11th November, 2014, the Bank agreed to grant the 1st Respondent an overdraft facility in the sum of Kshs. 7,000,000/=. The facility was to run for twelve (12) months and was secured by a legal charge over the suit property together with other joint and personal guarantees executed by the 1st Respondent's directors. However, the 1st Respondent defaulted on the overdraft facility and the bank proceeded to issue Statutory Notices demanding payment of the outstanding arrears.

7. She averred that the 1st Respondent, through various letters dated 9th June 2015, 15th February 2016 and 13th July 2016, admitted its indebtedness and made a payment proposal.

8. She deposed that on 16th December 2016, the 1st Respondent filed an application for injunction in the trial court seeking to stop the sale of the suit property by auction but the same was dismissed in a ruling delivered on 8th May 2018. Thereafter, 1st Respondent sought a review of the ruling but the same was also dismissed on among other grounds, that it was yet to clear the undisputed sum despite seeking time to do so back in 2016.

9. She contended that since there were no injunctive orders in place, the Bank proceeded to advertise the suit property for sale by way of auction. However, in February 2020, the 1st Respondent approached the Bank to settle the outstanding the amount including interest. In good faith, the bank suspended the scheduled auction and agreed to the 1st Respondent's proposal of an immediate deposit of any amount and the balance of the sum of Kshs. 5,000,000/= on or before 10th March 2020.

10. It was deposed that as at 6th April, 2020, the 1st Respondent had not complied with the proposal but the Bank granted the 1st Respondent a further and final extension of two weeks but still there was no compliance. As such, the Bank proceeded to advertise the property for sale by auction which was scheduled to take place on 21st July, 2020.

11. She stated that on 17th July, 2020, the Bank was served with an application filed by the Appellant, who was unknown to the bank, seeking injunction to stop the intended sale of the suit property. Since there were no interim injunction orders granted pursuant to the said application or a date for hearing of the same, the Bank went ahead with the auction and sold the suit property to the highest bidder.

12. It is deponed that despite both the Appellant and the 1st Respondent being aware of the intended auction of 21st July, 2020, the same having been advertised in the Daily Nation on 6th July, 2020, neither party turned up for the auction to outbid the other potential purchasers. She stated that the Appellant and the 1st Respondent did not inform the Bank of the sale they entered into and further, the Appellant chose to file its injunction application at the last possible minute which application was heard and dismissed for failing to satisfy the threshold in ***Giella vs. Cassman Brown***.

13. Further, she averred that the Court was shocked to learn of an illegal sale agreement dated 11th May, 2020 was entered into in secret between the Appellant and the 1st Respondent without the Bank's consent yet the bank holds a Charge over the suit property and, was in the process of exercising its statutory power of sale over the property. She stated that to that end, the purported sale was not only void, but the same could not bar the Bank from exercising its statutory power of sale. The Appellant's actions of paying a deposit, taking possession and remodeling the suit property are null and void having been done in breach of the Charge Instrument and without the Bank's consent.

14. Further, it is contended that that the Memorandum of Appeal is frivolous and does not raise even one arguable ground of appeal capable of the court's consideration nor does it have any reasonable prospects of success since the trial court rightly found the Appellant to be an unnecessary party to the suit. Additionally, that the trial court noted that it could not grant injunction orders in a vacuum as the substratum of the suit, being the suit property, had been spent.

15. She further deposed that the present application is another attempt to deceive the court and a connivance with the 1st Respondent to stop the Bank from registering the Transfer of the suit property to the third party being the highest bidder and at the same time keep the Bank from monies rightfully owed to it. She noted that the 1st Respondent is supporting the application to avoid settling the debt and to enrich itself through the illegal sale.

16. Finally, it was asserted that based on the aforestated the Appellant has failed to demonstrate that it has met the basic threshold for the grant of an order of injunction.

Submissions

17. The application was prosecuted by way of written submissions. Both the Appellant and the bank's written submissions are dated 8th October, 2020.

The Appellant's submissions

18. The Applicant submitted that its intended appeal is not frivolous but is arguable as evidenced by the grounds raised in its Memorandum of Appeal. It submitted that the trial court failed to take into consideration the distinct stake it had in the case, having bought the suit property innocently on the word of the 1st Respondent that it had agreed with the Bank on the balance to be paid. The Applicant further contended that the bank had declined to disclose to the 1st Respondent the account to which the money was to be deposited to after acquisition of the bank by KCB bank which closed previous accounts. It argued that the trial court also ignored the uncontroverted evidence that the Applicant had taken possession of the premises and had readily agreed to deposit the balance of the purchase price to court pending the finalization of the dispute. The Applicant asserted that the trial court failed to make a distinction between the Applicant and the 1st Respondent and this resulted

in the trial court making a determination of the Applicant's injunction application on the basis of the 1st Respondent's previous injunction applications to the detriment of the Applicant.

19. The Applicant further submitted that the trial court misguided itself when it failed to appreciate that the interests of justice would have been served by stopping the intended auction by way of an injunction in light of the fact that it approached the court with evidence of having purchased the suit premises on 11th May, 2020. On that basis, the Applicant submitted that the sale as a result of the auction of 21st July, 2020 was therefore illegal, unprocedural, irregular and thus should be set aside as of right. It further asserted that the procedure was an outright contempt of court process and a calculated attempt to defeat the applicant's injunction application in the trial court. It argued that by filing a response to the said application, the bank submitted itself to the jurisdiction of the court and was therefore estopped by the common law doctrine of *lis pendens* from continuing with the sale until the court rendered a determination on the same.

20. It relied on the decision in **Kenya Commercial Bank Limited Vs. Nicholas Ombija [2009] eKLR** where the court held that an "arguable" appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court. It affirms that its appeal raises meritorious issues on both facts and law which ought to be fully heard on appeal.

21. It was the Appellant's further submission that its appeal will be rendered nugatory if it were to succeed unless the injunction sought is granted at this stage. It submitted that it has led evidence in this court that has already taken possession of the premises and its director currently resides thereon with his family. It asserted that it has also carried out renovation works on the premises which has costed millions of shillings and has accordingly demonstrated that the purported auction was fraudulently undertaken with the full knowledge that the Appellant had already purchased the property. It was thus his contention that losing the suit property will no doubt bring it irreparable harm and prejudice which will possibly not be compensated by way of damages. Reliance was placed on the case of **JM Gichanga v Cooperative Bank of Kenya Limited [2005] eKLR** where the court held that a party should not be allowed to maintain an advantageous position gained by flouting the law just because he is able to pay for it.

22. Further, the Appellant submitted that the present application was filed timeously since the trial court rendered its decision on 9th September 2020 and the present application was filed on 28th September 2020, just two days after filing its appeal. It added that a transfer of the suit property is yet to be undertaken hence its application ought to be allowed in order to preserve the substratum of suit which is the suit property.

The bank's submissions

23. The bank submitted that the Appellant has come to court with unclean hands thus an injunction being an equitable remedy is not available to it. The bank submitted that the Appellant has not revealed to the court that it entered into a secretive private treaty with the 1st Respondent for the sale of the suit property which is charged to the bank. It contended that neither the Appellant nor the 1st Respondent obtained consent from the bank and moreover, not even a cent was paid to the bank to offset the loan. In the premises, the bank argued that the Appellant does not deserve the protection of a court of equity.

24. It relied on the case of **Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR** in support of the principles for the grant of an injunction pending appeal. Reliance was also placed on the case of **Madhupaper International Limited vs Kerr (1985) eKLR** where the court found that it would be wrong to grant an injunction pending appeal in circumstances where the appeal is frivolous or granting an injunction would inflict greater injustice than it would avoid.

25. The bank submitted that it will be wrong to grant an injunction pending appeal in this case because the Appellant's memorandum of appeal is frivolous. It contended that the Appellant failed to establish before the trial court that it was a necessary party to the suit but only sought introduce issues that were meant to complicate the suit in the trial court. It was argued that the Applicant has not established a case against the bank at all as its recourse lies in seeking a refund of the purchase price from the 1st Respondent.

26. Further, the bank submitted that the allegations that it was aware of the illegal sale by way of private treaty is not only false but baseless and without proof. It asserted that, had it been informed of the sale, it would not have rejected the same since the outstanding loan would have been offset. In its view therefore, the Applicant was not an innocent purchaser for value due to the fact that it was aware of the Charge registered against the suit premises.

27. Further, it was pointed out by the bank that the public auction for the sale of the suit property was conducted on 21st October, 2020 in accordance with the law. It submitted that there was no order stopping the auction and further, that the advertisement of the auction was published in the Kenya Gazette on 6th July, 2020, but the Applicant waited until 17th July, 2020 to file its application for injunction. Further, that despite being aware of the date and venue of the auction and despite having an interest in the suit property, the Applicant failed to attend the auction to bid on the suit property.

28. Additionally, the bank submitted that the discretion to grant an injunction pending appeal should be refused where it would inflict greater hardship than it would avoid. It contended that granting the injunction will inflict a greater injustice to the bank as it continues to be kept away from monies owed to it by the 1st Respondent in the face of a well laid down principle that once a property has been offered as security, it becomes a commodity of sale.

29. It was also contended that the Applicant has not demonstrated any loss it stands to suffer that is not repairable by an award of damages from the 1st Respondent if the injunction is not granted. The bank argued that the Appellant cannot claim ownership of the suit property as a bona fide purchaser without notice when in fact it was aware of the charge registered against the title as well as the pending case concerning the suit property. It relied on the case of **Titus Kiema v North Eastern Welfare Society [2016] eKLR** in this respect.

30. Moreover, the bank submitted that the Applicant has failed to show refusing to grant the injunction would render the appeal nugatory. In

its view, the Appellant is occupying the suit property illegally and is seeking this court's intervention to continue with its illegal occupation. The bank urged this court not to aid an illegality and argued that the Appellant having failed to establish an arguable appeal, it is not necessary for the court to consider whether or not its appeal will be rendered nugatory.

31. It was further argued that the court should be guided by the principles in Giella v Cassman Brown Ltd [1973] EA 358. The bank submitted that it has accordingly demonstrated that the Appellant has not established a prima facie case with probability of success since there exists no rights which have been infringed by the bank against it. The bank also stated that the Appellant has not demonstrated how it will suffer irreparable harm since the sale agreement entered into as between the Appellant and the 1st Respondent was prohibited by law hence it cannot suffer from an illegality. Finally, the bank submitted that the Appellant having failed to meet the first two test then the balance of convenience does not tilt in its favour but the bank's.

Analysis and Determination

32. Upon carefully considering the application, the Affidavits both in support of, and in opposition to, the application as well as the parties' respective submissions, I find that the issue for determination is whether the application is merited.

33. **Order 42 Rule 6 (6)** of the **Civil Procedure Rules, 2010** empowers this court to grant a temporary injunction on terms it deems fit so long as the procedure for filing an appeal from subordinate court has been complied with. It provides thus: -

“(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with.”

34. **Section 79G** of the **Civil Procedure Act** provides for the time within which appeals from subordinate courts to the High Court can be filed as follows: -

“Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”

35. In the instant case, the ruling of the trial court was delivered on 9th September, 2020 whilst the Memorandum of Appeal was filed about fifteen days later on 26th September, 2020. To that end, the Appellant duly complied with the procedure for instituting an appeal before this court and thus the court has jurisdiction to entertain the present application.

36. However, as noted by the bank in its submissions, the power to grant an injunction is discretionary and such discretion must be exercised judiciously on the basis of law and evidence (See Mrao v First American Bank of Kenya Limited & 2 others [2003] eKLR). The principles applicable in considering an application for an injunction pending appeal were pronounced by Visram J. (as he then was) in Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR as follows:

“

a. *An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.*

b. *The discretion should be refused where it would inflict greater hardship than it would avoid.*

c. *The applicant must show that to refuse the injunction would render the appeal nugatory.*

d. *The court should also be guided by the principles in Giella v Cassman Brown [1973] EA 358.”*

34. In the locus classicus case of Giella v Cassman Brown [supra], the court set out the conditions necessary for the grant of interlocutory injunctions as follows:

“The conditions for the grant of an interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt it will decide an application on the balance of convenience.”

Whether the Applicant has a prima facie case with chances of success

35. The question of what constitutes a prima facie case was determined by the Court of Appeal in the case of Mrao Limited V First American Bank of Kenya and 2 Others [supra] as follows;

“A prima facie case in a Civil Case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been

infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

36. While adopting the same position the Court of Appeal in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR added that:

"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion..... The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

37. The determination of whether the Appellant has a prima facie case with chances of success in the present application calls for a consideration of the prospects of success of the pending appeal since the ultimate objective is to safeguard the rights of the Appellant in the appeal by maintaining the status quo, if need be.

38. In this case, the undisputed fact is that by a letter of offer dated 11th November, 2014, the bank agreed to advance the 1st Respondent an overdraft facility in the sum of Kshs. 7,000,000/= which was secured by a charge dated 18th November, 2018 Registered over the suit property. It is also not in doubt that the 1st Respondent defaulted on the overdraft facility despite being accommodated for far too long hence the bank proceeded to issue Statutory Notices demanding payment of the outstanding arrears. Consequently, the 1st Respondent sold the suit property to the Appellant by private treaty which sale the bank now contends was illegal as its consent was not sought as by law required.

39. The first issue for determination therefore is whether it was a requirement that the written consent of the bank be obtained before the 1st Respondent proceeded to sell the suit property by private treaty. **Clause 4.1.11** of the Charge states as follows:

"The Chargor will not without the prior consent in writing of the Chargee part with the possession or transfer, sell, assign, lease or grant a license to utilize or otherwise dispose of any interest in the Charged property or any part thereof....."

40. Further, **Section 87** of the *Land Act*, it provides that:

"If a charge contains a condition, express or implied that chargee prohibits the chargor from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar."

41. Similarly, **Section 59** of the *Land Registration Act* provides that:

"If a charge contains a condition, express or implied by the borrower that the borrower will not, without the consent of the lender, transfer, assign or lease the land or in the case of a lease, sublease, no transfer, assignment, lease or sublease shall be registered until the written consent of the lender has been produced to the Registrar."

42. No evidence has been adduced to show that the 1st Respondent expressly sought and obtained the bank's written consent as required by law and the Charge document before the sale by private treaty was undertaken. Further, the Appellant admits that the 1st Respondent brought it up to speed on the status of the suit property at the time of the sale but neither the Appellant nor the 1st Respondent availed any evidence of payment made to the bank, on account of the sale agreement entered into between them, to offset the outstanding debt owed to the bank by the 1st Respondent.

43. Secondly, it is my considered view that although the Appellant may have a beneficial interest in the suit property having purchased it from the 1st Respondent, the said interest is subordinate to the bank's interest as the Chargee. The bank's interest in the charged property overrides any other interest in the property for as long as it remains charged to it. I am guided by the case of Innercity Properties Limited vs. Housing Finance & 3 Others - HCCC No. E030 of 2020 where the court stated as follows when confronted with a similar issue:

"The Interested Parties' case is that they purchased their apartments from the plaintiff and that they have paid the purchase price and are in possession thereof. Quite apart from the fact that they do not have any claim to be litigated against the defendants which would entitle them to an injunction, they have not shown that they have a legal claim against the bank. Since the bank is the chargee, it must give consent to the Plaintiff to sell the property. The Interested Parties have not shown that they received the bank's consent to purchase the apartments or that they paid the Bank any money. Since they have not established a legal claim against the bank, the court cannot issue an injunction in their favour. As was stated in Agriculture Finance Corporation v Lengetia Ltd (Supra),

As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if a contract is made for his benefit and purports to give him a right to sue or to make it liable upon it.

44. Similarly, in the case of Monica Waruguru Kamau & Anor vs. Innercity Properties Ltd. (HCCC No. E035 of 2020) the court in addressing a similar issue stated that:

“even if the third parties were to obtain a beneficial interest in the suit property, the said interest would be subordinate to the 1st Defendant’s interest as Chargee.”

45. Further, the Appellant sought to rely on the doctrine of *lis pendens* to demonstrate the chance of success of his appeal. The Court of Appeal in the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR** held as follows regarding the application of the doctrine:

“As to whether there is any interplay between statutory power of sale and the doctrine of *lis pendens*; the Black’s Law Dictionary defines *lis pendens* as the jurisdiction, power or control acquired by a court over property while a legal action is pending. The Supreme Court of India in the case of KN Aswathnarayana Setty (D) Tr. LRs. & Others v. State of Karnataka & Others [2013] INSC 1069 stated that the doctrine is based on the legal maxim ‘*ut lite pendente nihil innovetur*’ (During a litigation nothing new should be introduced). The doctrine is couched in equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. Our previous land legislation regime expressly embraced the doctrine under Section 52 of the repealed (Indian) Transfer of Property Act (ITPA) 1882 by stipulating that:

“During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.” *Emphasis*

46. Having found that the suit property was illegally and unprocedurally sold to the Appellant, I do not see how the bank could be estopped by the said doctrine from realizing its crystallized statutory power of sale.

47. In the premises, the court is unable to find that the Appellant’s appeal is arguable and/or has any chances of success since doing so would be akin to rewriting the contract between the bank and the 1st Respondent.

Will the Appellants suffer irreparable injury?

48. On this issue, since the 1st Respondent defaulted in repayment of the loan and indeed admitted to its indebtedness to the bank, the question of the Appellant suffering irreparable loss that cannot be compensated by way of damages is neither here nor there. Indeed, once the suit property was charged to the bank as security for the loan facility advanced to the 1st Respondent, it became a commodity for sale in case of default in the loan repayment. In the case of **Andrew Mwanjohi v Equity Building Society & 7 Others [2006] eKLR**, it was held that:-

“Whenever the Applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the charge, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had had the said property evaluated in monetary terms. He had then told the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable, even if the borrower did not pay it.

By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon.

Therefore, if the chargee were to sell off the suit property, the chargor’s loss could be calculable, on the basis of the real market value of the said property.

In a nutshell, sentimental attachment to the charged property should play no role in the matter. So that, if any person felt that he or his family attached great sentimental value to any property, he should never offer it as security.

Therefore, on the basis of the material presented by the plaintiff, I find that he has not persuaded the court that if the court declined to grant an injunction to stop the sale of the suit property, he would suffer irreparable loss.” [Emphasis added]

49. In any case, since the Appellant was not a party to the charge between the 1st Respondent and the bank, its only recourse lie in an action for damages against the 1st Respondent and not against the bank.

In whose favour does the balance of convenience lie?

50. I have no doubt that the balance of convenience tilts against the Appellant. I say so because the Appellant was not a party to the loan agreement and moreover, granting the injunction sought will no doubt occasion a greater inconvenience to the bank since it will continue to be kept away from monies duly owed to it by the 1st Respondent.

Conclusion

51. The upshot is that the Appellants’ Notice of Motion dated 28th September, 2020 is hereby dismissed for lack of merit. The costs of the Application are awarded to the Bank (2nd Respondent). It is so ordered

DATED AND DELIVERED AT NAIROBI THIS DAY OF 21st DECEMBER, 2020.

G.W. NGENYE

JUDGE

In the presence of:

1. *Mr. Ogeri for the Appellant/ Applicant.*
2. *Mr. Githui for the 1st Respondent.*
3. *Ms. Cheruiyot for the 2nd Respondent.*