



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 637 of 2009**

NDUNGU NJAU.....APPELLANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

BEING AN APPEAL FROM THE RULING AND ORDERS MADE ON THE 4<sup>TH</sup>  
NOVEMBER 2009 BY THE HONOURABLE MR. NDUNGU, SENIOR PRINCIPAL

MAGISTRATE IN NAIROBI MILIMANI CMCC 4338 OF 2009

BETWEEN

CHARLES M.K GIKUNDI.....RESPONDENT/PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.....APPLICANT/DEFENDANT

**RULING**

The appellant moved to this court, by way of an appeal dated 2<sup>nd</sup> day of December 2009 and filed on the same date seeking the reliefs mentioned therein.

On the said memo of appeal is anchored an application by way of notice of motion dated 14<sup>th</sup> day of December 2009 and filed the same date. It is brought under section 63 (c) and (e) of the CPA and order XLI rule 4 (6) of the civil procedure Rules. The grounds in support are set out in the body of the application, annextures and oral submissions in court and the major ones are as follows:-

- That the appellant herein filed a suit in the lower court for establishment of rights over land parcel number LR. NO. Nyaki/Mulahankari/635 Meru District.
- The Respondent filed an application to have the suit struck out on account of lack of jurisdiction of the lower court.
- The lower court, decided to decide the issue of jurisdiction as an interim issue but instead of doing so it went a head to strike out the entire suit thus shutting out the appellant from agitating his right save for appeal purposes.
- It is conceded that the appellant became thus aggrieved and filed an appeal No. 637 of 2009 which was later withdrawn.
- The withdrawal of civil appeal No. 639 of 2009 paved the way for the filing of civil appeals No.s 674/2009, 675/2009, 677/2009,673/2009 which had apparently been filed before appeal No. 639/2009 was withdrawn.
- It is their stand that they have an arguable appeal based on the content of the grounds of appeal in the memo of appeal exhibited.

- Contend that this court, has jurisdiction to grant the relief being sought because issues of costs for the withdrawn appeal cannot be used as an excuse to decline the relief sought because there was no order attached to the withdrawal of the said appeal that costs were to be paid for first before any other action could be taken by the applicant.
- That the issue of costs can be sorted out through the taxation process more so when the Respondent has already filed a bill of costs for taxation in the withdrawn appeal.
- While commenting on the Respondents replying affidavit, counsel for the applicant stated that issues relating to the competence of the appeal are prematurely raised as these can only be raised at the stage of admission of the appeal. For now, the court, should grant them the relief they are seeking.

In response counsel for the Respondent has put in a replying affidavit and oral submissions in court, and the salient features of the same are as follows:-

- Concede that the lower court, did not directly decide the issue of jurisdiction but the court, went away to dismiss the suit.
- Concedes that it is true that the issue of jurisdiction goes to the root of the matter and it should have been decided first.
- It is their stand that the appellate court, will have an opportunity to revisit that issue and determine the issue of jurisdiction which will determine the lower court proceedings as well.
- The reason for their raising the issues of jurisdiction was based on the fact that the value of the land subject matter of the proceedings in the lower court, exceeds the value of property that the lower court has jurisdiction to adjudicate over.
- Turning to the issue of granting of injunctions the Respondent argued that the ingredients for granting of an injunction are absent because:-

(i) The lower court proceedings were doomed to fail because they have exhibited existence of the statutory notice, certificate of service of the statutory notice on the applicant, and a bank statement demonstrating that the appellant owed money to it and there is no demonstration by the appellant that they had paid the money owed by them to the Respondent.

- Contend that the applicant has come to court, with unclean hands by reason of the fact that the applicant had filed an appeal 639/2009 and filed a similar application which was served the same date to which the Respondent responded to that application, and when the matter came up for hearing, it transpired that the current appeal had been filed while the withdrawn appeal was already in place and when they were ready to argue the injunctive relief application is when the withdrawn appeal was withdrawn.
- By reason of this conduct on the part of the appellant, the Respondent contends that the current appeal accompanying application is nothing but an abuse of the due process of the court, and it should be dismissed.
- It is their stand that the current proceedings should be stayed until issues in the withdrawn appeal are sorted out.

In response to the respondents submissions, counsel for the appellant reiterated the earlier submission and then had this to add:-

- The respondent's submission that it is correct that the lower court, did not decide on the issue as to whether it had jurisdiction or not fortifies the appellant/applicants assertion that they have an arguable appeal.
- Contend that documents relied upon by the respondent do not demonstrate that the lower court, had jurisdiction.
- The issue for determination by the court, at this juncture is not whether a debt was owed but whether the appeal is arguable or not and therefore an injunctive relief is earned or not.
- Still maintains that the withdrawn appeal no longer exists and issues raised therein cannot form a basis for argument herein.
- Still reiterates that the issue of the current appeal being a nullity cannot be raised at this stage of the proceedings but when the appeal shall have been admitted to hearing.

- Contend that issues of order 24 CPR which relates to withdrawal of suits does not apply to proceedings relating to appeals which are specifically governed by provisions of order 41 CPR.
- Further that the opportunity for the appellate court to interrogate the issue of jurisdiction cannot arise now, but it will arise at the stage of the hearing of the main appeal.

On case law the court, was referred to the case of **FLORICULTURE INTERNATIONAL LIMITED VERSUS CENTROL KENYA LIMITED AND OTHERS (1995-1998) IEA 61 (CAK)** where it was held inter alia that “*the appellate court, had power to entertain points raised for the first time on appeal if such point goes to jurisdiction.*”

The case of **MUHIA VERSUS MUTURA (199) IEA 209 (CAK)** where it was held inter alia that “*the issue of jurisdiction had been raised as ground of appeal and both parties addressed. A question of jurisdiction was a matter which the court, can and could take cognizance of whether or not the matter is raised in argument* **JUNABHAI AND COMPANY LIMITED AND ANOTHER VERSUS EUSTANCE SISAL ESTATE LIMITED (1967) EA 158** followed. The court, of appeal had jurisdiction to deal with the point of law raised notwithstanding the fact that the same was not decided upon by the two lower courts.”

The case of **PELICAN INVESTMENT LIMITED VERSUS NATIONAL BANK OF KENYA LIMITED (2002) 2EA 488 (CCK)** whereby it was held inter alia that “*a court, should not grant an injunction restraining a mortgagee whose power of sale has arisen from exercising his statutory power solely on the ground that there is a dispute as to the amount due under the mortgage.*”

**LAVUNA AND OTHERS VERSUS CIVIL SERVANTS HOUSING COMPANY LIMITED AND ANOTHER (1995) LLR 366 (CAK)** per incuriam. Unless it is plain that fraud or opposition existed, the court, will not interfere with the terms of a contract or the provisions as to interest. **PIPE PLASTIC SAMKOCIT VERSUS NATIONAL BANK HCCC 1076 OF 1996** disapproved. In any case, even if the interest charged was unconscionable the same would only be a dispute as to amount which is not a proper ground for granting an injunction”

Due consideration has been made by this court, of the rival arguments herein in the light of the case law cited and the court proceeds to make the following findings on the same:-

1. It is correctly submitted by the appellant/applicants counsel that the provisions of order 24 CPR dealing with the barring of further proceedings on a subsequent suit filed upon withdrawal of an earlier suit on account of failure to pay costs of an earlier withdrawn suit have no application to an appeal filed following withdrawal of an earlier filed appeal which is anchored on the same grounds or substantially the same grounds. The correct provision of law applicable to appeals is order 41 CPR whose perusal reveals that it does not place restriction on subsequent proceedings where an earlier appeal has been withdrawn, and a subsequent one filed although on the same or substantially the same ground.
2. It has been conceded by the appellant/applicants counsel that the current appeal raises substantially the same grounds as the withdrawn appeal. That notwithstanding, the failure to pay costs on the withdrawn appeal before filing and seeking relief on the current appeal is not precluded by the relevant rules. It is therefore rightly submitted by the appellants counsel that the Respondent is at liberty to pursue costs in the withdrawn appeal independently of the current proceedings.
3. Order 41 rule 4 (6) gives this court, the mandate to issue an injunctive relief, in favour of the appellant if it is so deemed fit. It therefore follows that this court, is properly seized of this matter and can deal with the same and finally determine it on its own merits.
4. The appellant/applicant having come to court, to seek an injunctive relief, he is obligated to bring himself within the

ambit of the ingredients necessary to be established in order to earn an injunctive relief. These are none other than those established by the land mark case of **GIELLA VERSUS CASSMAN BROWN AND COMPANY LIMITED (1973)**

**EA 358** namely:-

- (a) *Establishment of a prima facie case with a probability of success.*
  - (b) *Demonstration that damages will not be adequate compensation.*
  - (c) *Where the court, is in doubt on ingredient land 2 above, it will decide the matter on a balance of convenience of both parties.*
5. This court has applied the above ingredients to the rival arguments herein and it is satisfied that the Appellant/Applicant has demonstrated the existence of a prima facie appeal with a likelihood of success in that both sides agree that the lower court, moved to make a substantive order before deciding whether it had jurisdiction or not on the issue which had been raised by the Respondent.
- (b) It is also in common agreement of both sides that the issue of jurisdiction can be determined finally during the determination of this appeal.
6. There is issue raised as to whether the move to realize the security by the Respondent prompting the filing of the lower court proceedings was rightly done on the one hand and the argument that such necessary procedural steps had been taken before making the said move. These issues go to the merits of the lower court proceedings and the substantive appeal. As such they cannot be ruled upon at this interlocutory stage because in doing so this court would be pre-empting the outcome of the substantive appeal.

For the reasons given in number 1-6 above this court, is inclined to grant prayer (iii) of the application dated 14/12/2009 and filed the same date. But in doing so, the court, has to take into account the interests of both sides in order to ensure that the relief granted is not used by the beneficiary both as a shield and sword against his opponent. This calls for attaching of conditions. For this reason the court makes the following final orders:-

1. Prayer (iii) of the application dated 14/12/2009 and filed the same date is granted for the reason that if with held, the intended appeal will be rendered nugatory as the Respondent would have been given an open charter to realize the security the subject matter of the lower court proceedings which prompted the appeal and if the substratum of the lower court proceedings forming the anchor of the appeal is destroyed, and then the appellant succeeds on his appeal then the resultant relief on appeal in his favour would be an empty shell.
2. To avoid the Appellant/Applicant using the relief granted as a shield and sword against his opponent, prayer (iii) is granted on condition that the Appellant/Applicant moves to ready the appeal for admission within ninety (90) days from the date of the reading of this ruling.
3. In default of number 2 above the injunctive relief shall stand lapsed.
4. Issue of competence of appeal deferred and the same to be dealt with at the admission stage of the appeal.
5. There will be liberty to apply
6. Orders granted in HCCC 674/2009 to operate in HCCA 673/2009, 675/2009, 676/2009 and 677/2009,673/2009.

**DATED, READ AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF FEBRUARY 2010.**

**R.N. NAMBUYE**

**JUDGE**