IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, TUNOI & PALL, JJ.A.)

CIVIL APPEAL NO. 215 OF 1996

BETWEEN

CENTRAL KENYA LTD..APPELLANT

AND

TRUST BANK LIMITED .... 1ST RESPONDENT

TRUST FINANCE LIMITED .... 2ND RESPONDENT

FLORICULTURE INTERNATIONAL LTD. .... 3R RESPONDENT

FIRST NATIONAL FINANCE LTD. .... 4TH RESPONDENT

REGISTRAR OF TITLES .... 5TH RESPONDENT

(Being an appeal from the whole of the Ruling/Order of

Honourable Mr. Justice Mbogholi Msagha dated 24th

April, 1996 in

H.C.C.C. NO. 3590 OF 1995)

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JUDGMENT OF THE COURT

This is an appeal from the order of the superior court (Mbogholi Msagha, J.) made on 24th April, 1996 dismissing an application dated 8th December, 1995 by Central Kenya Ltd (the appellant) for an interlocutory injunction restraining the respondents their servants and agents from interfering with the appellant's possession of the suit property known as L.R. 7705/2 Thika (the suit property) or in any manner alienating or wasting it pending hearing and determination of the said suit.

By its plaint the appellant has alleged that the appellant was at all times the registered proprietor of the suit property; that on or about 17th June, 1993 the first respondent Trust Bank Ltd (Trust Bank) without knowledge or authority of the appellant caused a charge to be registered in its favour on the suit property for the sum of Kshs.15,000,000/= being the sum purportedly loaned to an undertaking known as Katka Island Limited (Katka); that on or about the same 15th June, 1993 Trust Finance Ltd (Trust

Finance), again without the knowledge or authority of the appellant caused registration of a second charge in its favour on the suit property for Shs.30,000,000/=, being the said sum purportedly advanced as loan to Katka; that the appellant had never at any time resolved or authorised any of its directors to seek finances from Trust Bank and Trust Finance either for itself or for Katka; that on 29th April, 1994 the appellant filed H.C.C.C. NO.1597 of 1994 (O.S.) against Trust Bank and Trust Finance seeking a declaration that the purported charges were null and void and they should be cancelled; that on or about 2nd May, 1995 while the said Civil Suit No. 1597 of 1997 (O.S.) was pending, Trust Bank and Trust Finance in the purported exercise of their powers as chargees transferred the suit property to the third respondent, Floriculture International Ltd (Floriculture) whose directors were, at the material time, "linked" with or were agents of the majority shareholder in Trust Bank and Trust Finance to wit one Ajay Shah"; that on 5th May, 1995 Floriculture purported to charge the suit property to the fourth respondent First National Finance Ltd (First National) for Shs.50,000,000/= and that the purported transfer of the suit property in favour of the Floriculture and the purported charge in favour of the First National are unlawful, fraudulent and void ab initio.

In the particulars of fraud of the respondents the appellant has alleged as follows:-

(a)The first and second respondents were fully aware that the validity of the charges in their favour was being contested in court and yet they purported to exercise their powers of sale as chargees to transfer the suit property to the 3rd respondent.

(b)The first and second respondents knew or ought to have known that the appellant had not authorised the suit property to be charged.

(c)The first and second respondents knew or ought to have known that the purported charges had not been duly executed by the appellant and no loan or other financial accommodation had been sought by the appellant for itself or any other person on security of the suit property. They also knew or ought to have known that the purported charges were not signed by the directors of the appellant as required by law. Further they knew or ought to have known that the appellant had not resolved or authorised the loan facilities to Katka and that the appellant was a stranger to the purported charges and the loan facilities.

(d)When the third respondent took the transfer of the suit property from the first and second respondents, it knew or ought to have known of the dispute between the Appellant and the first and second respondents in respect of the suit property.

(e)The fourth respondent also knew or ought to have known of the said dispute and that the transfer by the first and second respondent was of questionable legal validity when it took a charge over the suit

(g)The purpproorpteerdt y.t ransfer as aforesaid of the suit property and the charge thereon were a conspiracy by the respondents to defeat the course of justice and particularly to frustrate or pre-empt the said H.C.C.C. NO. 1597/94 (O.S.).

By its plaint the appellant prayed for a declaration that the charges in favour of Trust Bank and Trust Finance, the transfer in favour of Floriculture and the charge in favour of First National were all null and void and that the Registrar of Titles being the 5th respondent should be directed to remove them from his register.

Margaret Njeri Muiruri, managing director of the appellant by her affidavit sworn on 8th December, 1995 has stated that the appellant had been managed by her as the managing director and her children as directors and that in 1993 she requested her son, Anthony Gachoka (Gachoka), a director of the appellant, to liaise with Agricultural Finance Corporation (A.F.C.) to pay off their outstanding loan and have the suit property discharged from a charge in their favour. "In early mid 1993" Gachoka informed her that the suit property had been discharged by AFC and that the documents of title had been released to him. On 29th November, 1993 she caused a search to be made on the suit property which revealed that the suit property had been discharged by AFC but the aforesaid charges in favour of Trust Bank and Trust Finance had been subsequently registered. In her affidavit she has verified on oath the allegations made by the

appellant in the plaint and has further stated that one Satish Nakar a director of Floriculture was "linked" to a majority shareholder of Trust Bank and Trust Finance and as such he knew or ought to have known of the dispute between the appellant and Trust Bank and Trust Finance about the suit property. Without disclosing the source of her information she has further stated that she verily believed that First National knew or ought to have known that the charges in favour of Trust Bank and Trust Finance and the subsequent transfer in favour of Floriculture were of questionable legal validity. She has further stated that she verily believed that the entire exercise on the parts of the respondents was to defeat the course of justice and frustrate the appellant's prayers in the said H.C.C.C. NO. 1597 of 1994 (O.S.) in which the appellant had obtained an injunction against its eviction from the suit property and Floriculture being dissatisfied with the injunction appealed to this Court in Civil Appeal No. 121 of 1995. On 11th December, 1995 this Court struck out the said H.C.C.C. NO. 1597 of 1994 (O.S.) holding that the superior court lacked jurisdiction on an originating summons to entertain the prayers sought by the appellant. Finally Mrs. Muiruri has stated in her said affidavit that the appellant was "apprehensive" that the respondents would "invade" the suit property and cause the subject matter to be wasted or alienated which would render the appellants suit nugatory. On 24th April, 1996 the superior court (Mbogholi-Msagha, J.) dismissed the appellants application and now that order is the subject matter of this appeal.

The instruments of charge in favour of Trust Bank and Trust Finance although vigorously attacked by counsel for the appellant were never placed before the Judge and they do not form part of the record in this appeal. By paragraph 18 of her affidavit Mrs. Muiruri has said that she had perused the said charges. There is no reason why she should not have been able to produce them. But she does not deny that these charges were executed under the seal of the appellant affixed in the presence of Gachoka, admittedly a director of the appellant and one Shawn Warren Barretto (Barretto) who also described himself as a director of the appellant. In the superior court it was argued that the said charges were not duly executed as Barretto was never a director of the appellant. As such it was submitted that he could not have witnessed the affixing of the seal by or on behalf of the appellant.

By Paragraph 19 of her affidavit Mrs. Muiruri has alleged that the said charges are void in law for want of proper execution by the appellant. It is however not denied that the said instruments are duly registered. The appellant did not produce its memorandum and articles of association which would have shown how the seal of the appellant is to be affixed and whether or not it has been affixed in the manner provided for in the articles of association of the appellant.

Hon. Karua M.P., for the appellant, arguing her first ground of appeal has submitted that the learned judge of the superior court erred in law in treating as evidence the affidavits which were part of the records of previous proceedings and which were tendered to him from the bar.

Trust Bank and Trust Finance did not file any affidavit in opposition of the application in the superior court. They filed only the grounds of opposition. In the course of his submission Mr. Billing, for Trust Bank and Trust Finance, pointed out in the superior court that these respondents had filed 8 affidavits in H.C.C.C. NO. 1597 of 1994 (O.S.) in opposition to the appellant's application for interlocutory injunction. When he attempted to refer to the record of the superior court filed in this court's Civil Appeals No. 121, 122 and 127 of 1995, Mr. G. B. M. Kariuki who appeared for the appellant in the superior court objected that Mr. Billing was not entitled to refer to the said affidavits because the said documents he intended to refer to were in a suit which had been struck out as being incompetent and that he was not aware of the existence of the said other two appeals namely Civil Appeal Nos 122 and 127 of 1995. He further argued that the injunction application should be decided on the affidavits which had been filed either in support or in opposition of the application itself. The learned judge heard both sides on his objection and by his ruling dated 18th March, 1996 overruled the objection and allowed Mr. Billing to refer to the said record. Hon. Karua submits that that caused a miscarriage of justice.

Under section 34 (1) (b) and (d) of the Evidence Act (Cap 80) evidence given by a witness in a judicial proceeding is admissible in subsequent judicial proceedings for the purposes of proving the facts which it states, if (inter alia) the proceeding is between the same parties or their representatives in interest and the adverse party in the first proceeding had the right and opportunity to cross examine and the questions in issue were substantially the same in the first and the second proceedings.

Of course the appellant had the right as well as the opportunity in the superior court, if it so wished, to cross examine the deponents of the said affidavits under Order 18 rule 2 (1) of the Civil Procedure Rules.

Sarkar on Evidence 9th Edition on P.355 on similar provisions (section 33 of Indian Evidence Act) says:

"Although it is necessary that the party against whom the depositions are offered in evidence must have had an opportunity of cross examining the witness yet it is not required that he should have exercised that power. If the party has a right of cross examination at a particular stage of proceeding and there is opportunity of exercising that right, it is equivalent to actual cross examination."

Undoubtedly the earlier proceedings namely H.C.C.C. NO. 1597 of 1994 (O.S.) were between the present appellant and Trust Bank and Trust Finance who were also similarly involved in the subsequent proceedings namely H.C.C.C. NO. 3590 of 1995 and the issue of the validity of the charges in their favour was and is involved in both proceedings. We do not find any force in Hon. Karua's submission that as the earlier suit had been struck out the said provisions of the Evidence Act did not apply. Although the earlier suit was struck out as being incompetent nevertheless it was a judicial proceeding.

We agree with Hon. Karua that counsel for Trust Bank and Trust Finance should have introduced these documents through a formal affidavit on behalf of his clients in the said subsequent proceedings instead of tendering them from the bar.

But as the learned judge afforded full opportunity to Counsel for the appellant to peruse the documents and entertained his preliminary objection before making the documents part of the record of the proceedings before him, in our view this procedural irregularity did not cause any miscarriage of justice. We therefore reject the first ground of appeal.

The second ground of appeal is that the learned judge of the superior court erred in law and fact in failing to find that the allegations of fraud and conspiracy involving Trust Bank and Trust Finance were uncontroverted. As summons to enter appearance has not as yet been served on any of the respondents although the suit was filed on or about 8th December, 1995, more than a year ago, no formal defence has been filed by any of them. Trust Bank and Trust Finance could have formally denied the allegation of its involvement in the fraud or conspiracy by way of an affidavit made on behalf of them in opposition to the application for injunction which as we have already said they have not done. But by not doing so, they cannot be presumed to have admitted the charges against them as the onus to prove the said allegations of fraud and conspiracy lies with the appellant and their right to file any defences have been curtailed by the appellant's refusal to serve the summons upon them.

We will conveniently deal with third ground of appeal along with the rest of the second ground. The third ground is that the learned judge of the superior court erred in law and fact in finding that Floriculture was the purchaser of the suit property for value without notice which finding amounted to making a final determination on the issue of fraud on interlocutory application without giving a chance to the appellant to prove the said allegation.

At page 9 of his typed judgment, the learned judge said:

"For the Plaintiff to succeed in this interlocutory application against the defendants it has to establish a prima facie case with a probability of success further that if it succeeds an award of damages would not be adequate compensation and if the court is in doubt it shall decide the matter on balance of convenience (See Giella vs Cassman Brown & Co. Ltd (1973) E.A. 358 and Application NO. NAI. 140 of 1995 (UR 62/95) Uhuru Highway Development Ltd vs. Central Bank of Kenya and others."

Having made the said correct statement of law, the learned judge proceeded to analyse the prima facie evidence which had been laid before him. At the end of that exercise he posed a question to himself and then answered it thus -

"Going back to the key words that I noted in Paragraph 16 of the plaint one is bound to ask: "are the transactions herein unlawful and fraudulent and void ab initio?" I think not."

Far from making any final determination on the issues before him, the learned trial judge simply made a prima facie finding. As he thought that the transactions in question were not void ab initio, the same could not be recalled and he went on to say in the same breath that no prima facie case existed.

The Judge also said:

"I am of the considered view that the transactions relating to the suit property herein are beyond recall hence no prima facie case exists that can be said will probably succeed?"

The whole tenor of the ruling of the learned judge shows that he did not make any final determination. The appellant will, of course, have its chance to prove the allegation at the trial of the suit. What the learned judge has said is simply that the appellant has not made out a prima facie case for an interlocutory injunction and we think that he was perfectly entitled to do so.

The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case. Mrs. Muiruri has alleged in paragraph 15 of her said affidavit that it was on 29th November, 1993 that she came to know about the charges in favour of Trust Bank and Trust Finance. Even if that was so, she did not express her surprise or write any letters to the perpetrators of the alleged fraud. She did nothing apparently until about five months after she came to know about that very serious alleged felony, she filed the said earlier court proceedings on 29th April, 1994. One would have expected that if there was any truth in her allegations she would have immediately as she came to know about the alleged fraud made a complaint to the C.I.D. for investigation. There is no explanation why she did not do so.

Mrs Muiruri has not raised her accusing finger either at her son Gachoka or at Barretto who, according to her story, were the main players in the alleged fraud and conspiracy.

The beneficiary of the proceeds under the said charges was supposed to be Katka of which her son Gachoka is the chairman and managing director. Neither Gachoka nor Barretto nor Katka have been joined in the proceedings in the superior court. She has also not explained why she left the documents of title to the suit property with her son Gachoka after they were released to him by the Agricultural Finance Corporation. Nor has she explained how her son Gachoka managed to get the seal of the appellant without her knowledge if the appellant had not authorised the suit property to be charged. Apart from alleging that Trust Bank and Trust Finance knew or ought to have known that her son Gachoka and the other man Barretto were not authorised to witness the affixing of the seal of the appellant, she has said nothing specifically which could make the Judge think that there could be complicity of Trust Bank and Trust Finance in the alleged mischief.

We fully agree with the trial judge that conspicuous exclusion of Gachoka and Barretto puts into question the genuineness of the appellant's claim.

There is no specific evidence to show that Floriculture and First National were aware of any dispute or defect in the title of the suit property. Mrs. Muiruri has said in her affidavit that one Mr. Nakar who was a director of the Floriculture was "linked" with Ajay Shah, the majority shareholder of Trust Bank and Trust Finance. That by itself cannot be evidence of Floriculture's complicity in the alleged fraud. Moreover there is no documentary evidence that Mr. Nakar was a director of the Floriculture or how he was "linkIend " Gowviitnhd jMir . PoApjaatyl aSlh avhs. Nathoo Visandjee [1960] E. A. 361 Windham J.A. said at p. 365:

"The effects of these two sections (sections 23 and 32) (brackets provided) of the Registration of Titles Act as I see it, is that subject to the provisions regarding the rectification or setting aside of registration contained in Parts XIII and XIV of the Ordinance and to the exception of fraud or misrepresentation as set

out in section 23 itself, the registration under the Ordinance of a mortgage or charge on land, if duly proved shall be accepted by the courts as conclusive of the validity of the document effecting it, including that which is a pre-requisite of its validity namely its due execution."

In Govindji Popatlal vs Nathoo Visandjee (1962) E. A. 372 Privy Council upheld the said decision of the Eastern African Court of Appeal. Lord Guest (at p.375 letter h) said:

"The certificate of title was in terms of section 23 conclusive evidence of the title of the mortgagee to the property. The charge when registered under section 32 has by section 46 the effect of a legal mortgage which transfers the property to the mortgagee leaving only an equity of redemption to the mortgagor."

It is not in dispute that title to the suit property is registered under Registration of Titles Act. It is not also in dispute that at the material time the suit property was encumbered with said registered charges in favour of Trust Bank and Trust Finance. If the registration of the said charges and their presence on the register was conclusive evidence of the title of Trust Bank and Trust Finance as chargees in the absence of any prima facie evidence of fraud, then the transfer by them of the suit property exercising their statutory power of sale as chargees in favour of Floriculture gave to it an indefeasible title and right to immediate possession and therefore the charge created by Floriculture in favour of First National similarly was conclusive evidence of the suit property being subject to the said charge and First National's title is not subject to challenge. The appellant, it appears, has no right or title left in the suit property unless, of course, it proves at the trial of the suit the substantive ground of fraud or conspiracy to defraud to which First National was a party. We therefore agree with the learned judge that no prima facie evidence was produced before him to show that the appellant had a case with a probability of success. Accordingly the appellants second and third grounds also fail.

Grounds 4 to 8 must also fail because they are closely related to the first 3 grounds which we have rejected.

In the final result therefore, the appeal fails, and it is hereby dismissed with costs.

Dated and delivered at Nairobi this 17th day of December, 1996.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

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

<u>DEPUTY REGISTRAR</u>