IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Cockar, Kwach and Omolo JJ A)

CIVIL APPLICATION NO NAI 140 OF 1995 (65/95)

BETWEEN

UHURU HIGHWAY DEVELOPMENT LTD.....APPELLANT

AND

CENTRAL BANK OF KENYA.....1ST RESPONDENT

EXCHANGE BANK LTD. .....2ND RESPONDENT

KAMLESH M. PATTNI.....3RD RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Mr Justice Ole Keiwua) dated 24th May, 1995 in HCCC No 29 of 1995)

RULINGS OF THE COURT

Kwach JA. Uhuru Highway Development Ltd (UHDL) has brought this application under rule 5 (2) (b) of the Court of Appeal Rules seeking a temporary injunction against the Central Bank of Kenya (CBK) restraining CBK, its servants and agents from selling, alienating by public auction or otherwise disposing of the property known as LR No 209/9514 Nairobi, or in any way enforcing or seeking to enforce the rights of chargee under the charge and guarantee, pending the hearing and final determination of an intended appeal. The application is supported by an affidavit sworn by one Mukesh Vaya who says he is a director and shareholder of UHDL.

On 6th January, 1995, UHDL filed a suit in the superior court against CBK, Exchange Bank Ltd which is in voluntary liquidation (the Bank) and Kamlesh Mansukhlal Pattni (Pattni) said to be a businessman residing and carrying on business in Nairobi, and was at the material time the Chairman of the Bank. The Bank went into liquidation on 22nd October, 1993. UHDL was a customer of the Bank and the Bank owed money to CBK. It is alleged in the plaint that in October 1993 the Bank prevailed upon UHDL to guarantee Shs 2.5 billion of the debts owed by the Bank to CBK and by a charge dated 21st October, 1993 and registered on 31st December, 1993, UHDL executed a charge over its piece of land on Plot LR No 209/9514 Nairobi together with all the buildings and other improvements to secure the repayment of a sum not exceeding Shs 2.5. billion owed by the Bank to CBK. UHDL states further that at the time of the creation of this security there was an agreement or understanding between UHDL and CBK, the Bank and Pattni that the charge created was only a stop-gap arrangement, not to be enforced and the Bank would meet its debt liability to CBK from its own resources. UHDL claims that it was also understood and agreed that the charge would not be enforced without the CBK first resorting to and exhausting its remedies against the Bank and Pattni. All this understanding and agreement not to enforce the security

given to CBK is said to have been oral and not evidenced by any writing.

In paragraph 11 of the plaint UHDL avers that the Charge in question is invalid, null and void and unenforceable on the grounds:

"(a) It is *ultra vires* the objects of the company.

(b) The transaction is beyond the powers of the directors under the articles.

(c) It contravenes the provisions of the Central Bank of Kenya Act.

(d) It is a fraudulent preference to the Central Bank of Kenya over other creditors."

UHDL also challenges the validity of the guarantee. It says further that on 3rd March, 1994, the Bank and Pattni reached an agreement to pay the said sum of Shs 2.5 billion by 3 instalments of Shs 100 million, Shs, 2 billion and Shs 400 million on 4th March, 1994, 31st March, 1994 and 15th April, 1994. The first instalment was paid on 4th March, 1994, but the other two instalments were not paid because, according to UHDL, Pattni was arrested on 31st March, 1994 under the glare of massive publicity which had the effect of scaring off potential financiers who had agreed to lend him and the Bank the money required to meet those instalments. It claims that because Pattni was kept in custody he could not travel abroad to arrange alternative financing. UHDL also challenges CBK's right to appoint a receiver to take over and run the business of hotel (Grand Regency Hotel) which stands on the suit premises. UHDL claims that no demand was ever made under the guarantee and consequently no sum became due from it and that no debenture was ever given by it to CBK. It also claims that the exact amount alleged to be due and payable was never specified.

UHDL further claims that after Pattni had been released from custody he entered into negotiations with CBK which culminated in an agreement dated 29th September, 1994 which contained an acknowledgment and confirmation that CBK owed the Bank a sum of Shs 3.585 billion. UHDL requested CBK to deduct from this amount the sum of Shs 2.5 billion owed to CBK by UHDL under the charge. UHDL's alternative contention was that as there was nothing due from the Bank to CBK, its own liability to CBK under the two instruments had been discharged. CBK did not accept these contentions and proceeded to advertise Grand Regency Hotel for sale together with the movables such as furniture, TVs, videos, kitchen and laundry equipment, central heating, generators etc over which CBK has no charge and whose sale would be illegal and unlawful. UHDL's apprehension that the sale of Grand Regency Hotel was imminent was put this way:

> "(1) The first defendant gave press advertisements seeking bids for Grand Regency Hotel and having received bids from the interested parties, the bidders have now been short-listed and the sale of the hotel is imminent and can take place any moment."

UHDL maintained that it was entitled to a discharge of the charge and return of its deeds because the transaction was null and void and the money secured under the charge and guarantee is irrecoverable. In addition to the injunction the other reliefs sought in the plaint included:

(a) A declaration that the suit charge and the guarantee are null and void and unenforceable.

(b) A declaration that the appointment of the receiver is null and void and should be cancelled and the hotel handed over to the plaintiff.

(c) An order that an account be taken of what has been received by the receiver from the hotel and an order for payment of the amount found so due to the plaintiff;

(d) Damages for trespass against the first defendant and against all 3 defendants for breach of the agreement pleaded in paragraphs 9 & 10.

On the same date, that is to say 6th January, 1995 and simultaneously with the plaint, UHDL took out a Chamber Summons under order 39 rr 1 & 2 of the Civil Procedure Rules and under a certificate of urgency, asking for an *ex parte* order of injunction against CBK to stop the sale of Grand Regency Hotel by public auction or otherwise. In the Chamber Summons UHDL sought 2 further orders as follows:

> "(2) Service upon the defendants be dispensed with, upon grounds that the object of granting the injunction would be defeated by delay as the property may be sold by private treaty in the meantime and time is short to allow of service, filing or opposing and replying affidavits.
>
> (4) The plaintiff be at liberty to file affidavit in reply at any time before the hearing."

These two orders were interesting because the first one implied that there was extreme urgency in the matter, and by the second one UHDL reserved to itself the right to file a further affidavit in addition to the one sworn in support of the application for *ex parte* injunction, and on the basis of which the *ex parte* order was actually sought and obtained, before the hearing of the application *inter partes*. As it turned out both these orders were granted by Githinji J in addition to the injunction and they were largely responsible for the unfortunate developments which have assumed a considerable degree of prominence in the subsequent proceedings before Ole Keiwua J.

The affidavit in support of this application was sworn by Mukesh Vaya. It is an important affidavit and I will read it in full:

> "(1) That I was one of the shareholders and a director at the material time of the plaintiff company and have been authorized by the other directors to swear this affidavit.
>
> (2) That I have read the plaint and confirm its contents as true and correct together with the annextures thereto.
>
> (3) That I have been told by Mr Kamlesh Mansukhlal Pattni and verily believe that had he not been arrested on 18/3/94 he certainly would have succeeded by the end of March 1994 in liquidating the charge debt of Kshs 2.5 billion and his efforts for raising funds were thwarted by the first defendant. After Mr Pattni's arrest the financiers panicked, backed out and hurriedly left the country.
>
> (4) That I have been told by Mr Kamlesh Mansukhlal Pattni and verily believe that on 29/9/94 at the time of executing the agreement he specifically requested the first defendant officials to set off the sum of Kshs 2.5 billion against the money owed by the first defendant to the second defendant to which request they had readily agreed and promised to give discharge of the suit charge.
>
> (5) That unless the sale is stopped which is imminent and can take place any moment the plaintiff will suffer irreparable damages and loss and the property (hotel) which is worth Shs 6 billion is likely to be sold for a song and/or at a throw-away price of Shs 2 billion with a thundering loss to the plaintiff.
>
> (6) That I respectfully submit that if the first defendant gets any wind or clue of this application, the hotel will be disposed off through a private treaty and I request that the application be first heard *ex parte* otherwise the very purpose of the whole exercise will be defeated.
>
> (7) That I am advised by the plaintiff's advocate and verily believe that the plaintiff is not liable on the claim of the first defendant or upon the charge or the guarantee as nothing remains due and payable by the second defendant to the first defendant.
>
> (8) That annexed hereto is a bundle marked "MVI" containing true photostat copies of the charge, guarantee, paper cuttings, consent order, resolution, agreement dated 29.9.94, Articles and Memorandum of Association of Uhuru Highway Development Ltd and other relevant documents."

Among the documens annexed to Vaya's affidavit were copies of 3 cheques drawn in favour of CBK by UHDL. The first, dated 4th March, 1994, was for Shs 100,000,000/=; the second, dated 31st March, 1994, was for Shs 2 billion; and the third, dated 15th April, 1994 was for Shs 400,000,000/-. The letter of 29th September, 1995 from CBK to Pattni was in the following terms:

"Dear sir

Debt due to Central Bank

We refer to the debt of Shs 13.5 billion owed by your bank to Central Bank following the non-delivery of US$ 210 million.

As a further step to repay the outstanding amount, we have both agreed that you will assign and transfer the assets and liabilities of the Pan African Group of Companies to the Central Bank. The Central Bank will give you a credit for Shs 6.3 billion. This is the total of the Shs 4.5 billion overdraft which Pan African Bank had incurred at the Central Bank plus Shs 1.8 billion funds which you deposited, as investors funds, with Pan African Bank.

The status of the debt will now be as follows:

Kshs Million

Undelivered $210 million 13,525

Recovered

Kshs Million Kshs Million

1.Treasury Bills 4,653

2. Forex – C's 1,991

3. National Bank 1,256

4. Transnational Bank 269

5. Export Bank 100

6. Cash 19 8,288

_____ _____

Balance 5,237

Less

1. Charge over hotel 2,500

2. Pan African Bank 4,522

overdraft

3. Pan African Bank

Equity 1,800

_____

8,822

Balance owing to Exchange Bank (3,585)

======

You undertake to provide the Central Bank of Kenya with all the necessary documents, transfers, assignments and board resolutions to facilitate the proper legal and valid transfers of Pan African Group of Companies to the Central Bank

Kindly sign a copy of this letter as acceptance of the above conditions.

Yours sincerely

MICA CHESEREM (GOVERNOR)."

On the strength of Vaya's affidavit, Mr Sharma, on 6th January, 1995 obtained on behalf of UHDL an *ex parte* temporary injunction restraining CBK from selling Grand Regency Hotel or completing by conveyance any sale conducted by auction. The injunction was to remain in force until the hearing of the application *inter partes* on 18th January, 1995 and UHDL was given liberty to file an affidavit in reply at any time before the hearing. It is to be noted that although the injunction was obtained on grounds of extreme urgency on 6th January, 1995, a formal order was not extracted until some 5 days later on 11th January, 1995.

After being served with Githinji, J's order, CBK moved very fast and applied by Chamber Summons under order 39 r 4 of the Civil Procedure Rules seeking an order to set aside the *ex parte* injunction; and an order that UHDL's application be heard *inter partes*. This application was supported by an affidavit sworn by Ruben Mbaine Maraambi, the Chief Banking Manager of CBK. He explained the circumstances in which the debt arose as follows:

"10) That sometime in the cause (sic) of the year 1993 the third defendant purporting to act on behalf of his company the second defendant falsely represented to the first defendant that he would deliver a sum equivalent to US$ 210 million and that an equivalent of Shs 13.5 billion should be released to the third defendant through his company the second defendant in advance.

(11) That although the first defendant released the whole of the said amount through the second defendant neither the second defendant nor the third defendant paid to the first defendant any part of the said sum of US$ 210 million or at all.

(12) That the third defendant falsely procured two foreign banking institutions in the United Kingdom to falsely present non-existent credits in favour of the first defendant allegedly for the said sum purporting to cover their commitment to the first defendant."

Maraambi further deponed that when the fraud was discovered by CBK, the Bank agreed in writing to pay back the money. Pattni procured UHDL to guarantee the repayment of the debt by way of a charge over Plot LR No 209/9514 (Grand Rengency Hotel). When the debt was not paid as agreed, CBK sent a statutory notice to UHDL of its intention to realize its security by a letter dated 7th January, 1994. I will come back to this letter in a moment. Maraambi also denied the allegation by Vaya that the charge was a stop-gap arrangement. He attributed the delay between execution of the charge and its eventual registration to a caveat lodged on the title by a company called Pansal Investment Ltd which we now understand is the majority shareholder in UHDL. He also said that of the 3 cheques issued by UHDL in settlement of the debt, only the first was paid, the other two were dishonoured. He admitted the

appointment of the receiver of the income of UHDL but denied the allegations of interference with the management of the hotel.

Maraambi also depones that in September 1994, the Public Accounts Committee of the Parliament of Kenya called upon CBK to explain the steps it was taking to recover the sum of Shs 13.5 billion which Pattni had fraudulently obtained from CBK. For the purposes of the explanation agreement B dated 29th September, 1994 was then entered into between CBK and Pattni and the latter admitted owing CBK Shs 2.5 billion. Under the terms of that agreement Pattni also undertook to transfer to CBK a number of companies and their assets but he subsequently reneged on this undertaking.

The two applications, one by UHDL for confirmation of the *ex parte* injunction, and the other by CBK to vacate the *ex parte* injunction, were heard by Ole Keiwua, J, who at the end of a prolonged hearing set aside the *ex parte* injunction made in favour of UHDL by Githinji J on 6th January, 1995, and also dismissed UHDL's application for a temporary injunction with costs to CBK. With regard to the *ex parte* order the judge found that UHDL had failed to make a full and frank disclosure of material facts. Among the material facts the judge found to have been cancealed by UHDL were that at the date of the order there were still 5 days to go before the bids were to be opened; it did not disclose and concealed from the judge the fact that 2 out of the 3 cheques which UHDL had issued to CBK in settlement of the debt had been dishonoured; it did not disclose to the judge the letter from the advocates acting for CBK dated 28th November, 1994 addressed to Mr Jim Choge. In that letter Murgor & Murgor Advocates pointed out that Pattni had defaulted on the agreement of 29th September, 1994 as he had failed to facilitate the transfer of the assets of agreed companies to CBK. The assets agreed to be transferred included Pan African Bank in Nairobi and Karachi, Pan African Finance, UHDL, Safariland Hotel Club Ltd with 150 acres of land and Plaza Investments with 20 acres of land at Embakasi. In the letter it was made clear that as a result of Pattni's failure or refusal to perform his part of the agreement the parties reverted back to the position prior to 29th September, 1994. The judge also found that the service of the statutory notice had been concealed by UHDL. He held that the facts which UHDL had concealed, or failed to disclose, were of sufficient materiality to entitle CBK to an order discharging the *ex parte* injunction. He expressed the view that the concealment was deliberate as the facts which were not disclosed were known to UHDL.

In reaching that conclusion, the learned judge had relied on the decision of this Court in the case of *The Owners of the Motor Vessle "Lillian S"*

(Civil Appeal No 50/89) (unreported) where after reviewing a number of authorities including the well known case of *R v Kensington Income Tax Commissioners ep Princess Edmond De Polignac* [1917] 1 KB 486, I said:

> "This rule applies with equal force in Kenya and looking at the substance of the two telexes, I entertain no doubt at all that Caltex failed in its duty to make a full and frank disclosure of material facts and the application by the appellants to set aside the writ and the warrant of arrest of the ship ought to have been allowed because quite clearly the original order made by Githinji J, for the arrest of the ship was improperly obtained."

I had referred to two passages in *Princess Edmond's* case. The first was from the judgment of Warrington LJ at page 509 where he said:

> "It is perfectly well settled that a person who makes an *ex parte* application to the Court, that is to say, in the absence of the person who will be affected by that which the Court is asked to do, is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained. That is perfectly plain and requires no authority to justify it."

The other passage was from the judgment of Scrutton LJ at page 513 where he said:

> "Now that rule giving a day to the commissioners to show cause was obtained upon an *ex parte* application; and it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an *ex parte* statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement."

But the judge did not stop there. Having found UHDL guilty of lack of candour and set aside the *ex parte* order of Githinji J, he then considered UHDL's application for an injunction on the merits to see if UHDL had established a *prima facie* case with a probability of success and whether UHDL would suffer irreparable damage which would not be adequately compensated with an award of damages if the injunction was refused. He considered the submission made by counsel for UHDL that the charge was a stop-gap arrangement never intended to be enforced; and that if it was enforceable, it was not to be enforced until the Bank and Pattni were called upon to pay. He found evidence of the inability of the Bank and Pattni to pay in the two cheques which had been issued by UHDL but which, on presentation, were dishonoured.

The judge also considered the issue of the statutory notice which counsel for UHDL submitted had not been served on it as required by law. The judge rejected this submission because he found as a fact that a notice had indeed been sent to UHDL by registered post to its last known address. He also rejected as baseless the submission made on behalf of the Bank and Pattni that the debt had been fully repaid and for this he relied on the letter of 28th November, 1994 to which I have already alluded. With regard to the consideration whether UHDL would suffer irreparable injury which cannot be adequately compensated by an award of damages, the judge rejected the submission made by its counsel that the building in question is unique and priceless and its value cannot be assessed in monetary terms. He was satisfied that CBK has the capacity to pay any amount of damages that may ultimately be made against it. Since he was satisfied on the first two considerations in *Giella v Cassman Brown & Co Ltd* [1973] EA 358, he did not find it necessary to consider the balance of convenience.

In an attempt to convince this Court that UHDL has an arguable appeal, Mr Sharma filed 56 proposed grounds of appeal on which he will seek to challenge the decision of the judge. On this application the onus is on Mr Sharma to satisfy us that the applicant has an arguable appeal, or an appeal which is not frivolous, and which, if successful, would be rendered nugatory, unless the injunction is granted. As we are not hearing an appeal from the decision of the learned judge as yet, I will not trouble myself with the consideration of the proposed grounds of appeal as I am not required, at this stage, at any rate, to express a concluded view on them. That is the preserve of the bench of this Court that will eventually hear the appeal proper.

The principles which this Court applies when dealing with applications under rule 5(2) (b) of the Court of Appeal Rules have been adumbrated in a number of decisions. In the case of *Stanley Munga Githunguri v Jimba Credit Corporation Ltd* (Civil Application No NAI 161/88) (unreported), the Court restated them as follows:

> "There is a great deal of learning on the principles on which we should base our unfettered discretion and we were referred to a number of decided cases. No two cases are exactly alike and we do not intend to obfuscate the real questions posed for decision in this matter by analysis of the reported cases cited to us on wholly different set of facts. The guiding principles which emerge and are discernible from case law on this subject, are first, the appeal should not be frivolous or as is otherwise put, the applicant must show that he has an arguable appeal, and second, this Court should ensure that the appeal, if successful, should not be nugatory."

Mr Sharma argued the application with consummate skill over a period of 7 days and I will attempt to summarise his submissions to see if he has succeeded in bringing his case within the principles I have

alluded to. The first part of his submissions relate to concealment of material facts. He said that between 6th January, 1995 and 11th January, 1995 when he finally extracted the formal order he had been held up in the Chief Magistrate's Court processing sureties for a client who had been charged with a criminal offence and the matter required his personal attention. He submitted that the three cheques issued by UHDL were among annextures to Vaya's affidavit sworn in support of the application for the *ex parte* order of injunction. Those cheques were indeed annexed to the affidavit before Githinji J but what appears to have been kept from the judge was the fact that 2 of those cheques had been dishonoured. There is nothing on the face of those cheques which could have indicated to Githinji J on sight that those cheques had been presented and dishonoured. The averment in the plaint simply states that following the arrest and detention of Pattni, the Bank and Pattni were unable to meet the second and third instalments. There is absolutely no reference to these cheques in Vaya's affidavit in support of the application for the *ex– parte* order. Nor is there anything on the record to suggest that when counsel appeared before the judge he drew his attention to the fact that those cheques had been dishonoured. That being the case those cheques were left to speak for themselves and there was only one thing they could tell the judge namely that UHDL had paid the debt in full and therefore CBK had no right to exercise its statutory power of sale. If Githinji J had known the true facts I have no doubt at all that he would not have granted the *ex parte* order.

The other material fact concealed from Githinji J was the letter of 28th November, 1994. In the absence of this letter an impression was created, which was false, that both the Bank and Pattni had discharged their liabilities to CBK and consequently UHDL was entitled to a discharge of the charge as a matter of right. This to my mind was a material fact which should have been disclosed to the judge but was not. There was some criticism of the finding by the judge that UHDL knew that there were still five days to go before the bids were opened, but even if this finding can be said to have no factual basis as Mr Sharma claims, I doubt if that alone would be sufficient to dislodge the ultimate finding that UHDL had been guilty of lack of candour. There are still the issues of the two cheques and the letter of 28th November, 1994 to sustain that finding.

There is one other point related to the issue of concealment of material facts which I would like to deal with briefly at this point before passing on to Mr Sharma's other submissions. After UHDL had obtained an *ex parte* injunction on the basis of the affidavit of Vaya sworn on 5th January, 1995, Vaya was permitted under the terms of the order given by Githinji J to swear a further affidavit on 16th January, 1995, after reading the replying affidavit sworn by Maraambi on 12th January, 1995. This was quite irregular under the rules of procedure as I understand them. If there was any need for UHDL to file a second affidavit it could only be called a supplementary affidavit not a replying affidavit and should have been limited only to the clarification of any new matters raised in the affidavit of Maraambi. And permission to swear this affidavit should have been sought after the filing of Maraambi's affidavit and not in advance as was done in this case when UHDL applied for the *ex parte* order. The first affidavit of Vaya was short, only some nine paragraphs. The second affidavit ran into thirty – nine paragraphs. This affidavit raised a completely new case radically different from the case put forward in the earlier affidavit and on the basis of which the controversial order was obtained from Githinji J. This again would seem to me to be irregular and if any authority is needed for this, I can do no better than to quote a short passage from *Halsbury's Laws of England*, Vol 24, 4th edition, paragraph 1112:

> "A plaintiff may not support the injunction by showing another state of circumstances in which he would be entitled to it, but if he has obtained an *ex - parte* injunction which is afterwards dissolved on the ground of concealment of facts, he is not precluded from making another application on the merits. It is no excuse for a party to say that he was not aware of the importance of the facts which have not been brought to the notice of the Court, or that he had forgotten them, but mere ignorance of what a party might have known is not equivalent to concealment so as to amount to improper conduct."

The ease with which undeserving *ex parte* injunctions are being obtained in the High Court these days is a matter of great concern to this Court and I think a stage has been reached when judges should decline to issue them except in very exceptional circumstances.

Mr Sharma's second submission was that the payment made to the Bank and Pattni by CBK of Kshs 13.5 billion was illegal having been made in contravention of the provisions of section 36 of the Central Bank of Kenya Act (Cap 491). That section relates to loans and as I understand it CBK's case is that it did not give a loan to either the Bank or Pattni.

The third submission by Mr Sharma was that under the doctrine of accord and satisfaction, the original debt of Kshs 13.5 billion had been wiped out by the new agreement entered into between CBK and Pattni on 29th September, 1994. Accord and satisfaction is a defence and as the name imports, consists of two parts, accord and satisfaction. There must be something given or done by the defendant to or for the plaintiff which the latter accepts upon a material agreement that it shall be a discharge of the cause of action. The problem I have with this submission at this stage is that there is evidence on record which indicates *prima facie* that the agreement on which it is anchored had been repudiated and, further, there is no evidence that Pattni performed his part of the bargain.

Mr Sharma also submitted that the charge dated 21st October, 1993 is illegal because it did not create a security known as an English mortgage within the meaning of section 58(e) of the Transfer of Property Act, 1882. He claimed that it did not contain a redemption date and the seal of UHDL was affixed in breach of its Articles of Association. All I can say is that the charge contains a certification by Dinesh Kapila, advocate, certifying that he explained to Mukesh Vaya and Pankaj Rana, both Directors of UHDL the effect of section 69(1) and section 100A(1) of the Transfer of Property Act and he expressed himself satisfied that each of them understood the same. What was being explained to the two gentlemen was an English mortgage. That is what the parties intended to create and what appears on the face of it that they created. Mr Sharma also complained that although the charge was executed on 21st October, 1993, it was not registered in the Lands Office until 31st December, 1993. Mr Sharma now knows that CBK is not to blame for this delay. A day after the execution of the charge Pansal Investments Ltd, which is believed to be a majority shareholder in UHDL lodged a caveat against the charge on 22nd October, 1993.

Mr Sharma also complained that CBK did not serve on UHDL a statutory notice of intention to exercise the power of sale under section 69A(1) of the Transfer of Property Act. Under that section the mortgagee is required to give not less than 3 months' notice before selling the property. He submitted that the notice dated 7th January, 1994 addressed to UHDL by CBK's chief legal officer did not comply with the statutory requirements as it referred to a guarantee as opposed to a charge and was in any case sent to a wrong address. That notice seems to me to comply with the statutory requirements in essential respects and as regards the allegation concerning the address, I note that the resolution passed by the Board of Directors of UHDL on 9th August, 1993 authorising the creation of the charge was printed on UHDL's letterhead which gives its address as

> 'ICEA Building 5th Floor
>
> Po Box 40511 Nairobi".

There is also the submission that the directors of UHDL had no power under the Articles of Association to give the guarantee but on the material on the record this has only to be stated to be rejected.

Notwithstanding very cogent and forceful submissions of Mr Sharma, in the ultimate analysis this is simply a suit brought by a chargor to restrain a chargee from exercising its statutory power of sale under a charge given by the chargor as security for a debt guaranteed by it. Default is not, and cannot be denied on the evidence. The statutory notice was served and the judge found this as a fact. As I understand the law, a Court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage – see – *Bharmal Kanji Shah & anor v Shah Depar Devji* [1965] EA 91; The circumstances in which a mortgagee will be restrained from exercising his power of sale are stated in *Halsbury's Laws of England*, Volume 32, 4th edition at paragraph 725:

> "725 When mortgagee may be restrained from exercising power of sale.

> The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into Court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive; but where he was, at the time of the mortgage, the mortgagor's solicitor, the Court will fix a sum probably sufficient to cover his claim. The mortgagee will also be restrained if, upon a subsequent encumbrancer offering to pay off the first mortgage, the mortgagee denies his title to redeem."

Mr Sharma cited many authorities but they were only of marginal, if any, assistance to his case. I would have had to analyse each one of them if this was an appeal and the judge had held a full trial.

Mr Murgor, for CBK, submitted that on the material before the judge, he was justified to set aside the *ex parte* order and to dismiss UHDL's application for a temporary injunction. In his view, UHDL was guilty of lack of candour and had also failed to establish a *prima facie* case with a probability of success. He submitted that both the guarantee and charge are valid and a proper statutory notice had been served on UHDL. In response to the submission by Mr Sharma that damages would not be an adequate remedy because of the character of the building, Mr Murgor reiterated that CBK has the capacity to meet any award of damages that may be made against it. He emphasized that the debt which CBK seeks to recover was not a loan and referred to section 52 of the Central Bank of Kenya Act.

Mr Choge, for the Bank and Pattni, was not heard in this application because he did not file any application to contest the decision of the judge. I doubt if this has caused any prejudice to his clients as Mr Sharma covered them adequately and most competently, if I may say so.

Before I conclude, there is one other matter raised by Mr Sharma, which was not central to his argument, that I think I ought to deal with. He complained that in attempting to realize its security, CBK intends to sell movables (chattels) which it is not entitled to do under the charge, and have been expressly excluded. I think Mr Sharma had in mind clause 7(c) (ii) of the charge which provides:

> "If upon entry by CBK into possession of the charged property or part thereof such property shall contain any furniture or chattels of the chargor which the chargor shall refuse or fail to remove within 28 days of the chargor being required in writing by CBK so to do CBK shall thereupon become and be the agent of the chargor with full authority at the chargor's expense to remove, store, preserve, sell and otherwise dispose of such furniture and chattels as last aforesaid in such manner in all respects as CBK shall think fit provided that CBK shall not sell such furniture and chattels hereunder until after the expiration of one month from the date upon which the chargor was required by CBK to remove them from the charged property as aforesaid,"

It is clear from the charge itself that it covers only the piece of land together with all the buildings and other improvements. It must follow that UHDL's movables and other chattels do not form part of the charged property. It is not clear from the advertisement placed in the issue of Kenya Times of 7th November, 1994, whether or not the movables are also to be sold. It has not been suggested on behalf of CBK that it holds a debenture over the chattels and movables of UHDL. If the original application for injunction had been brought on the basis that CBK was attempting to sell more than it is entitled to under the charge, I would have been inclined to grant the order sought on this motion. But as it is, it challenges the validity of the charge itself which, as I have said, is *prima facie* valid.

It must follow from what I have said so far that Mr Sharma has not satisfied me that UHDL has an arguable appeal which, if successful, would be rendered nugatory if an injunction is not granted. I would accordingly dismiss the application with costs to CBK.

I should like in conclusion to compliment Mr Sharma who appeared for UHDL, on his conduct of the case. It was not an easy, still less an attractive case to present but in his conduct of it, he showed skill, tact and good judgment of a high order.

As Cockar, CJ and Omolo JA also agree this application fails and is dismissed with costs to CBK. Those are the orders of the Court.

Cockar CJ. I have had the privilege of perusing the draft ruling of my Lord Kwach JA. This is an application made under rules 5 (2) (b) and 42 of the Court of Appeal Rules by Uhuru Highway Development Ltd. (the applicant – plaintiff in the suit) seeking for an order restraining the 1st respondent (Central Bank of Kenya – CBK) by temporary injunction until the hearing and final determination of the intended appeal from selling or disposing of the applicant's property known as LR No 209/9514, Nairobi (Grand Regency Hotel – hereafter known as the Hotel).

The relevant facts as per the plaint are that the applicant who is the proprietor of the said plot and of the Hotel erected thereon and is a customer of the 2nd respondent (hereafter referred to as the Bank) which was in liquidation, was in October, 1993, persuaded by the Bank to guarantee payment of Shs 2.5 billion which was a part of the debts owed by it to the CBK which itself was under pressure from its auditors to recover its advances to the Bank, and in pursuance thereof the applicant allowed a charge dated 21st October, 1993, to be registered against the said Hotel to secure to the CBK the repayment of the said guaranteed sum of Shs 2.5 billion. The plaintiff contended that at the time it had been understood, intended and expressly agreed orally between all the parties to the suit that the charge was only a stop-gap arrangement not to be enforced until all the remedies available to CBK against the Bank and the 3rd respondent (hereinafter referred to as Mr Pattni) were exhausted because the amount in the first instance was to be repaid by the Bank from its own resources. In further pursuance of the aforesaid agreements Mr Pattni and his Bank on 3rd March, 1994, agreed to pay the said sum by 3 instalments of Shs 100 million, 2 billion, and 400 million, on 4th March, 1994, 31st March, 1994, and 15th April, 1994, respectively whereof the 1st instalment was duly paid on 4th March, 1994, but the remaining two instalments were not paid because of the arrest of Mr Pattni on 18th March, 1994, which made headline news in the press and scared away the financiers who had offered to provide funds for the 2nd and 3rd instalments.

Prolonged negotiations followed Mr Pattni's release on 29th July, 1994, and, in consequence, an agreement was reached (agreement marked 'A') whereby the CBK acknowledged owing Shs 3.585 billion to the Bank. Pursuant thereto the applicant's the then advocate Mr Choge, called upon the CBK to deduct the applicant's debt of Shs 2.5 billion from the said sum of Shs 3.585 billion and to give discharge of the charge. The CBK has refused to give the discharge although there was nothing now due to it from the Bank. Instead the CBK had through advertisements in the press sought bids for the hotel and the sale was imminent and expected to take place at any moment. The applicant on 6th January, 1995, filed a suit in the High Court seeking *inter alia* an injunction to restrain the CBK from selling the hotel until the final determination of the suit.

Simultaneously with the plaint the applicant filed an application under a certificate of urgency under order 39 r 1 and/or r 2 for an order of injunction to restrain the CBK from selling the hotel as per the above prayer in the plaint. The application is supported by an affidavit of Mukesh Vaya, a shareholder – director of the applicant company, major part of which is based on information he had received from Mr Pattni which he believed. Annexed to the affidavit were press cuttings and relevant documents running from p 16 to p 98.

In the plaint the applicant had also alleged that the charge was invalid, null and void and unenforceable, that no demand was made under the guarantee and that the guarantee never came into existence and/or was void on account of the charge being invalid.

On 6th January, 1995 on these facts before him Githinji, J granted an *ex-parte* injunction stopping the sale which had been deponed as being imminent and fixed a date for *inter – partes* hearing.

Grounds stated in opposition filed on behalf of the CBK on 12th January, 1995, were *inter alia* undue delay in filing the suit, collusion between Mr Pattni and the applicant company in joining Pattni as the 3rd defendant in the suit whereas he had a full beneficial interest in the applicant company, fraudulent concealment of material facts and indefeasibility of the statutory power of sale. On the same day 12th January, 1995 a chamber summons was filed on behalf of the CBK under order 39 r 4, seeking *inter alia*

the setting aside of the *ex-parte* injunction order made on 6th January, 1995. The chamber summons was supported by the affidavit of Reuben Mbaine Maraambi, the chief banking manager of the CBK, in which he deponed *inter-alia* to the following facts:

1. Charge was not a stop-gap arrangement.

2. The existence of two other agreements B and C both dated 29th September, 1994 and executed simultaneously with the agreement A.

3. The dishonouring of 2 of the 3 cheques issued by the applicant in respect of the liquidation of the debt of Shs 2.5. billion by the three agreed instalments.

4. The non-performance of his obligations by Mr Pattni under the said agreements.

5. Demand of payment through the registered letter dated 7th January, 1994.

Mukash Vaya filed an affidavit in response to Mr Maraambi's affidavit. Mr Pattni filed an affidavit in reply to the application of Mr Maraambi's affidavit. Mr Maraambi filed a further affidavit on 23rd February, 1995 and Mr Pattni filed a further affidavit in reply dated 27th March, 1995.

Ole Keiwua J who consolidated and heard both the applications together found that in his *ex-parte* application before Githinji J the applicant had failed in its duty to make a full and frank disclosure of material facts which were "not innocent as those facts were known to the plaintiff (applicant herein)." After allowing the CBK's application to set aside the *ex-parte* injunction order made on 6th January, 1995 the learned judge then continued:

> "Matters do not stop there. The plaintiff's application to confirm the *ex parte* injunction was heard along with the 1st defendant's application. Subject to what I have found with regard to the 1st defendant's application, I am dealing with the plaintiff's application to ascertain if the plaintiff has made out a *prima facie* case with a probability of success."

In my respectful view having set aside the *ex-parte* injunction on grounds of material non-disclosure which was not an innocent act, there was then no need for the learned judge to have proceeded to consider the application on merits. That is what has been stressed in the invariably quoted case on this issue *The King vs The General Commissioners for the Purposes of the Income Tax Act in the District of Kensington ex–parte Princess Edmond De Polignac*, a decision of the King's Bench Division on appeal from a Divisional Court [1917] 1 KB 486 wherein Viscount Reading CJ on pp 495, 496, has said:

> "Before I proceed to deal with the facts I desire to say this: where an *ex parte* application has been made to this Court for a rule *nisi* or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit."

The learned judge would have been fully justified if he had stopped the proceedings at the stage where he made the above finding and had refused to proceed further in considering the application on merit. The applicant would then have been forced to file a fresh application with a full and frank disclosure of all the material facts or to appeal only against that decision. I have laid stress on this issue because the Court of

Appeal has found in numerous appeals and applications made under rule 5 (2) (b) of the Court of Appeal Rules, that the *ex-parte* order of the superior court had been obtained with a fraudulent non-disclosure of material facts. It is expected of the judges of the superior court not to be so liberal in granting *ex-parte* injunctions and, apart from carefully perusing the plaint, the supporting affidavit of the annextures (if any) and assessing carefully the merits disclosed therein they should also attach due weight to delay (if any) in filing the application and the ease or otherwise of effecting service on the other party within the available time. Grant of an *ex-parte* injunction order must be seen as a rare exception rather than a rule.

Having said so I will now revert to where I left earlier. The learned judge considered the application on its merits and found that there were none. The notice of the appeal filed on behalf of the applicant is against the whole of the decision.

With regard to the question of discretion conferred on this Court by rule 5 (2) (b) of Court of Appeal Rules this is what the Court of Appeal stated in Court of Appeal Civil Application NAI 161 of 1988 *Stanley Munga Githunguri and Jimba Credit Corporation Ltd* (unreported):

> "This rule confers an independent original discretion on us and we have to apply our own minds *de novo* on the suitability or otherwise of the relief sought. It is not an appeal from the learned judge's discretion to ours."

And a little while later it continued:

> "No two cases are exactly alike and we do not intend to obsfucate the real questions posed for decision in this matter by analysis of the reported cases cited to us on wholly different set of facts. The guiding principles which emerge and are discernible from case law on this subject, are first, the appeal should not be frivolous or as is otherwise put, the applicant must show that he has an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be nugatory....."

On the issue of whether or not the intended appeal is an arguable one I have to consider evidence relating to fraudulent non-disclosure of material facts and relating to merits. The learned judge had summarized the material non-disclosures as follows:-

> 1. Misrepresentation on the opening date of the bids which on the date of the *ex-parte* order by Githinji, J had some 5 days to go.
>
> 2. Non-disclosure of the bouncing of the applicant's cheques.
>
> 3. The deliberate withholding of the letter of 28th November, 1994, on the repudiation by the Bank and Mr Pattni of the agreement of 29th September, 1994, which was the basis of the applicant's claim of accord and satisfaction and hence of non-liability in respect of the guarantee and the charge.
>
> 4. The concealment of the statutory notice of sale.
>
> 5. The concealment of the consent order which paved the way for the registration of the charge.

I'll now consider the facts relating to each of the above non-disclosures which were put before the learned judge. Starting with misrepresentation as to the opening date of the bids Mr Sharma had rightly pointed out that there was no mention in the evidence produced before the judge that the bids were to be opened on 12th January, 1995. Mr Murgor submitted that he had stated from the bar as a fact the date as being 12th January, 1995, and that Mr Sharma had not denied that as being the date in his submissions to the judge. Mr Sharma had hotly disputed the fact that the date had so been revealed with the result that Mr Murgor drew attention to the original hand-written record of the judge where he had in fact recorded the date as 12th January, 1995, during submissions of Mr Murgor, Mr Sharma had also drawn attention to the fact that 6th January, 1995, was a Friday and so the next working day was 9th January. He also related his

own commitments in connection with criminal charges that had been brought against Mr Pattni and the bail application to be made on his behalf. He had submitted to the trial judge that there had been no press release that bids were to be opened on 12th January, 1995. Before leaving the question of misrepresentation as to the date of the opening of the bids I must comment on the fact that whereas it had been represented to Githinji J that the sale was imminent, the date or even the expected date of the imminent sale had not been disclosed nor even the source of the information of imminent sale except a vague allegation in paragraph 5 of Mukesh Vaya's affidavit. This allegation has to be received against a number of press reports appearing during April, 1994, about the Hotel going into receivership and the likelihood of its sale. Yet by 6th January, 1995, the Hotel had not been sold. What exact information had the applicant obtained by 6th January, 1995 to cause him to conclude the imminence of sale? I shall leave this issue and proceed to the next one which is the non-disclosure of the "dishonoured" cheques.

It is not in dispute that by 3rd March, 1994, an arrangement had been arrived at, without prejudice to the existing rights of the CBK, between Mr Pattni and the CBK under which the CBK agreed to accept liquidation of the sum of Shs 2.5 billion by 3 instalments, in pursuance of which the CBK was given 3 cheques drawn in its favour by the applicant. The 1st cheque dated 4th March, 1994, for Shs one hundred million was duly honoured but the two remaining cheques dated 31st March, 1994, and 15th April, 1994, for Shs 2 billion and Shs 4 hundred million were dishonoured. In the bundle of annextures to the supporting affidavit made up of 73 pages from page 16 to page 98 which also contained a large number of press reports, copies of the three cheques were exhibited on page 77 none of which bore any evidence of having been presented to the bank for payment. However, neither in the plaint nor in the supporting affidavit was the fact of the issue of these cheques by the applicant and two of them subsequently having been dishonoured after being presented for payment was disclosed. What was stated in the plaint and confirmed as true in the supporting affidavit was the agreement of 3rd March, 1994, between Mr Pattni and the CBK whereby the said sum of Shs 2.5 billion was to be paid by 3 instalments; the first one was duly paid but the Bank and Mr Pattni were unable to pay the remaining two instalments because of Mr Pattni's arrest. What matters now is what weight, if any, will the following facts carry in relation to the issue of concealment of material facts and lack of *bona fides* with the Court hearing the appeal:

> 1. Non-disclosure of the issue of cheques and of their being dishonoured in the plaint and the supporting affidavit.
>
> 2. Likelihood of a duty judge – Githinji, J, was the duty judge at the time, noticing the cheques in the bundle of aanextures comprising 73 pages.
>
> 3. If Githinji, J had in fact noticed the cheques in the said bundle of annextures what would have been the likely effect on him of the cheques none of which bore any evidence at all of having been presented for payment.
>
> 4. Did numbers 1 and 3 above constitute an attempt to hide the applicant's admission of liability to pay?

As my decision or express findings on the above issues can cause embarrassment to the Court hearing the appeal I will stop here with merely expressing my view that the existence of the dishonoured cheques tip the balance heavily on merits of the intended appeal in favour of the CBK and their knowledge would have affected the *ex-parte* decision of the superior court.

The next item of non-disclosure is inter-connected with the issue of accord and satisfaction which is one of the basis for the applicant's claim of non-liability. I propose to deal with it later and will now deal with the concealment of and other issues raised in respect of the statutory notice of sale. In paragraph 15 (c) and (d) of the plaint it had been pleaded that contrary to the provisions of the Transfer of Property Act no statutory notice was given before the appointment of the receivers and the CBK had no power under the charge to take over and run the business of the hotel. In sub-paragraph (e) it is pleaded that the precise amount of debt was never disclosed to the applicant. Paragraph 15 of the plaint appears to refer only to annexture on page 81 which is a terse letter of appointment of a receiver dated 15th April, 1994, addressed by the CBK to the directors of the Hotel. There is no other mention either in the plaint or in the

supporting affidavit of any statutory notice of sale having been given or received under the charge nor is there any annexture relating to the same.

The CBK on 7th January, 1994 sent a notice (annexed to Mr Maraambi's affidavit of 12th January, 1995) of demand to the applicant. It is headed "Re Guarantee, Kshs 2,500,000,000/=". The notice consists of two paragraphs the first one of which informs the Hotel of the failure of the principal debtors to pay the debt of Shs 2.5 billion. The second paragraph contains a notice of demand to honour the guarantee within 21 days and in default there is a warning that the CBK, and I quote:

> "We shall proceed to realise such rights as are granted to us by the guarantee executed by yourselves together with the charge against your property known as No IR 36755/1....."

It is claimed on behalf of the CBK that this notice dated 7th January, 1994, constitutes a statutory notice of sale. Mr Sharma challenged its validity on grounds that it was not headed in a manner to show that it was a notice in respect of the charge and it had not specified the period of three months' grace before sale as provided in the Transfer of Property Act.

Section 69 A (1) (a) of the Transfer of Property At (Group 8) is completely silent on the question of how the statutory notice of sale is to be headed or worded on what form is to be used. Further it does not state anywhere that the mortgagor must be warned to pay within 3 months or that if payment is not made within 3 months the charged property will be sold. All that this section with its sub-section has prescribed is that the statutory powers of sale shall not be exercised unless and until a notice requiring payment of the mortgage money has been served on the mortgagor and default has been made in payment of the mortgage money, or of part thereof, for three months after such service.

It would appear, therefore, that the formalities that Mr Sharma had in mind as rendering the notice invalid perhaps may not have any merit. In the notice of 7th January, 1994, the amount is stated and has been demanded and even a warning is given of realizing the same through exercise of rights granted under the charge. More than one and a half years have now passed when the notice was given and the Hotel has still not been sold. All these facts have to be considered when deciding this application on merits.

Mr Sharma said that this notice was not received by the applicant company. A certificate of posting a registered article annexed as MKM 1 to Mr Murgor's affidavit of 17th October, 1995, shows that the letter of 7th January, 1994, was addressed to the applicant at its postal address as Box 40511, Nairobi. Mr Sharma argued that under the charge the only postal address at which the hotel could be served was at its last known postal address in Kenya. The postal address of the applicant was given in the charge as box 20612, Nairobi, and that that was its last known postal address.

We were informed that the charge was prepared by M/s Oraro and Rachier, Advocates, and it may be presumed that the address given in the charge must have been obtained by them from the grant of the title in respect of Plot LR 209/9514 to the applicant dated 1st October, 1978. The address box 40511, Nairobi, is the one given in the letter-head of the applicant company containing a certified copy of an extract from the resolution adopted in the meeting of the Board of Directors of the applicant company on 9th August, 1993, at the registered office of the company and annexed as MKM 2 to the affidavit dated 12th January, 1995, of Mr Maraambi. It is also the address of the applicant company to which the valuation done by Harold H Webb was sent on 4th March, 1994 – annexed as MV1 to the affidavit sworn on 16th January, 1995, by Mukesh Vaya on page 245 of the record. The natural presumption is that the applicant company must have received this report at this address for it to be so annexed to the affidavit.

Clearly box 40511 is the last known address of the applicant.

The facts that the statutory notice of sale is dated 7th January, 1994, and was posted on 10th January, 1994, and the offer by Mr Pattni to negotiate payment by instalments was made on 19th February, 1994, (as stated in CBK's letter of 3rd March, 1994 on page 75 of the record) – that is within three months of the date of notice, and the instalments were agreed by 3rd March, 1994 are not such as will fail to persuade any Court of Appeal on the issue of service of the notice and in consequence also the issue of non-

disclosure of a very material fact. I propose to say no more on the question of validity and service of the statutory notice of sale.

Mr Sharma very strongly, urged that the charge was null and void because the date of redemption was 21st November, 1993, but the charge was registered on 31st December, 1993, from which date it then became effective. In that case the date of redemption, that is 21st November, 1993, that was mentioned in the charge became ineffective with the result that the charge did not contain a valid date of redemption. However, what was concealed from Githinji, J is that on 22nd October, 1993, Pansals Investments Ltd, of which we were informed Mr Pattni was the majority share-holder, had lodged a caveat against the title of the suit land (on which the Hotel is erected) which effectively barred the registration of the charge when it was first presented for registration on 1st November, 1993. By a consent letter dated 15th November, 1993 in HCCC No 5429/1993 (OS) *CBK vs Pansals investments Ltd* (annexture M K M 4 to Mr Maraambi's affidavit page 126 of the record) the said caveat was ordered to be withdrawn and on failure of payment of Shs 1.977 billion + as per an agreement dated 10th August, 1993, the CBK was at liberty to have the charge registered on 31st December, 1993, in respect of the said plot. Pansals (Mr Pattni having the majority share-holder) having thus effectively blocked the registration of the charge on 21st November, 1993, it now ill-becomes for a representation of this nature to be made on behalf of the applicant who had agreed to give security on behalf of the same Mr Pattni and the Bank (named as borrowers in the charge). I propose to leave this issue here for the way the Court of Appeal may decide to apply the law of equity where such a degree of *mala fides* may appear to exist. Mr Sharma pointed out the absence in the charge of a personal covenant to pay which omission be said was evidence that this was not an English mortgage. There is a personal covenant to that effect by the borrowers which Mr Sharma contended was not the same think as a personal covenant by the chargee. Mr Murgor drew attention to the certification at the end of the charge which clearly showed that the charge being executed was an English mortgage. To my mind the intention of the parties is clear and that was that on English mortgage was to be and, as far as the parties were concerned, in fact was so created. What the effect of the omission of a strict personal covenant can be on the validity of the charge as an English mortgage I will leave to the appropriate Court to adjudicate after full submissions on the issue particularly in view of Mr Maraambi's depositions in paragraphs 3, 4, 5, 6, 7, 8 and 9 of this affidavit sworn on 12th January, 1995, which deal with the manner in which Mr Pattni had through the vehicle of his company Pansals Investments Ltd and his senior employee Mukesh Vaya acquired the interest of the late Mohammed Aslam and his companies *inter alia* in the applicant company. Whether in such circumstances the covenant by the borrowers in fact amounted to personal covenant or not perhaps may be gone into in depth before the appropriate Court. To me the charge on the face of it is a valid English mortgage embodying the true intentions of the parties thereto.

That leaves only one of the material non-disclosures to be considered and that is the agreement of 29th September, 1994, and the concealments related thereto, which I will now deal with also on merits. The plaint had referred to only one agreement which formed part of the bundled annextures to the supporting affidavit of Mukesh Vaya. This agreement 'A' showed a balance of Shs 3.585 billion owing from the CBK to the Bank and was one of the causes of action on which the plaint was based and was the basis for lengthy submissions on accord and satisfaction made by Mr Sharma. Mr Maraambi annexed to his affidavit of 12th January, 1995, three agreements executed between the CBK and Mr Pattni on 29th September, 1994, including agreement 'A'. The other two agreements are marked agreements 'B' and 'C'–'C' being a letter from the CBK to Mr Pattni confirming that the latter would have the first option to redeem the Hotel as per the legal charge. Mr Maraambi has explained in his affidavit how Mr Pattni through false representations had during 1993 acquired a debt from the CBK of Shs 13.525 billion. Apart from this sum the CBK between April and July, 1993, released a further sum of Shs 5,782,655,311/ 50cts on written representations from the then Permanent Secretary, to the Kenya Commercial Bank from where Mr Pattni withdrew the whole of this sum either through his Bank (the 2nd respondent) or through some other Bank. In consequence of a query raised by the Auditor General in his report with regard only to Mr Pattni's debt of Shs 13.5 billion + the Public Accounts Committee of the Parliament (PAC) in September 1944 enquired from the CBK, what steps it was taking to recover the said sum of Shs 13.5 billion + from Mr Pattni.

In September, 1993, after Mr Pattni had accepted having obtained Shs 19.308 billion from the CBK in the

manner aforesaid with which sum he had acquired various assets including the Hotel the two agreements 'A' and 'B' were executed. Further for the satisfaction PAC whose enquiries were confined only to the steps being taken to recover Shs 13.525 billion, agreement 'A' was executed by the CBK and Mr Pattni. This showed the assets of Mr Pattni and the manner in which they were to be utilized for the recovery of this particular debt. The total value of the assets being more than the amount of debt, that left a sum of Shs 3.585 billion in favour of Mr Pattni as a debt owing from the CBK. At the same time agreement 'B' was also executed between the CBK and Mr Pattni in respect of mode of repayment of the total debt of Shs 19.308 billion and this agreement, therefore, reflected a debt of Shs 2.522 billion still owing from the latter to the CBK after taking into account all the assets of Mr Pattni that were agreed to be acquired by the CBK. As the total amount of debt was not under enquiry by PAC therefore agreement 'B' was not disclosed to the committee. Mr Maraambi has stated in his affidavit that Mr Pattni had failed to fulfill any of the terms of the said arrangement and agreement and the parties therefore were restored to the status quo prior to 29th September, 1994.

Mukesh Vaya, on behalf of the applicant company, in his affidavit of 16th January, 1995, has deponed to the following effect:

> 1. That the applicant company had no knowledge of the existence of these three agreements 'A', 'B' and 'C'. He first came to learn about agreement 'A' only after its contents appeared in the Weekly Review of 23rd December, 1994. Mr Pattni told him that he had not informed him of agreement 'A' as he did not want to embarrass the CBK. He learnt of the existence of agreement 'B' and 'C' after he perused Mr Maraambi's affidavit.
>
> 2. Mr Pattni had informed him that agreement 'A' was the only authentic and legitimate agreement while the other two agreements ('B' and 'C') were feigned and false and were meant for the consumption of the International Monetary Fund. Mr Pattni also has deponed to that effect.

On the facts which I have analysed above and considered carefully I can only say at this stage that it would strongly appear that the truth lies with Mr Marrambi's account on the question of how the three agreements 'A', 'B' and 'C' came into existence. It would be unreasonable and difficult and against the dictates of ordinary common sense and prudence to accept that Mr Pattni would have agreed to jeopardize his own finances in order to help CBK to be able to satisfy the International Monetary Fund.

On the question of whether or not Mr Pattni had performed his part of the obligation under the agreements it will be noticed that the accounting for funds statement dated 27th September, 1994 (M K M 8 on page 134 of the record) discloses that assets referred to Safariland Club Hotel, Plaza Investments Ltd and Pan African Group had still not been recovered. With regard to the first and second of the aforesaid assets Mr Sharma informed us that these two did not belong to Mr Pattni. That is surprising and unacceptable. Why did Mr Pattni sign the agreements then? The value of these two assets is included to make up the expected repayment of Shs 8.523 billion reflected in agreement 'B' which clearly refers to the assets of that value shown in the accounting for funds statement. Additionally Mr Pattni seems to have decided not to mention this fact of non-ownership in either of his two affidavits. Without going into any further details on whether or not any assets at all have been assigned by Mr Pattni to the CBK, to my mind the fact that there is no dispute that these two assets have not been assigned to the CBK nor is there any evidence that their value in cash or otherwise has been paid to the CBK, perhaps might be found by the appeal court to be enough to reject the part of the plaint based on accord and satisfaction. On the question of merit on the issue of accord and satisfaction I will not say any more.

The final question on this issue that remains to be considered is whether or not the applicant company was aware of the existence of these agreements. In paragraph 17 of the plaint prepared by Mr Sharma it is stated that Mr Choge was the then advocate for the respondent (applicant company). Mr Sharma during his submissions told us that Mr Choge had never acted for the applicant company. He attributed the error to the fact that Mr Pattni had told him that the letters in the correspondence annexed as M K M 11 to Mr Maraambi's affidavit had been written by Mr Choge. He had thought that Mr Choge had been acting for the plaintiff (the applicant company). This correspondence, consisting of six letters exchanged between Mr Murgor and Mr Choge, is on the subject-matter of Re: LR NO 209/9514: The Grand Regency Hotel

which words are boldly typed on top of each letter. Mr Mukesh Vaya in his affidavit sworn on 16th January, 1995, depones in paragraph 25 that this correspondence related to the 2nd and 3rd defendants (the Bank and Mr Pattni respectively). He further depones that neither he, nor the applicant, nor their advocate Mr Sharma was aware of this correspondence.

Surprisingly Mr Mukesh Vaya had decided not to make it clear as to who was the applicant's advocate at the time the letters were written, nor has he categorically denied that Mr Choge was not the applicant's advocate at the time. Further it is clear from Mr Sharma's statement to us and also from paragraph 17 of the plaint which was prepared by Mr Sharma that he had discussed the letters and their contents with Mr Pattni. It is hard to accept that an advocate of Mr Sharma's astuteness and ability did not probe deeper into the mystery of the pre-September, 1994, position referred to in Mr Murgor's letter of 28th November, 1994, the mystery of Shs 5.8 billion due to the treasury and the further agreement dated 29th September, 1994, which had superseded the agreement on which Mr Choge was relying which were referred to in Mr Murgor's letter of 8th November, 1994 and the meaning to be attributed to the following statement in the last paragraph of Mr Choge's letter of 2nd November, 1994:

> ".....as our client would like to take possession and make their own arrangements to operate the Hotel themselves."

Likewise it is not easy to accept that if an advocate of Mr Sharma's caliber had questioned Mr Pattni with only a normal diligence that he would not have extracted from him the full story about the three agreements.

Finally the whole tenor of the correspondence with particular reference to the Hotel, the demand for the discharge and the forwarding of the prepared draft of the discharge for execution, are strong evidence of the fact that the letters were being written also on behalf of or in consultation with and with full knowledge of the applicant. On this evidence it is not likely for a Court to accept the allegation or submission that the applicant had no knowledge of these letters or of the existence of all the three agreements. Both on the questions of deliberate non-disclosure of material facts and on merits I am not on evidence before me persuaded in favour of the applicant.

With regard to the breach of section 36 of the Central Bank of Kenya Act which, Mr Sharma contended, had occurred, all I can say is that the application of the section is confined to transactions which involve granting of loans or advances only. Moneys had and obtained by Mr Pattni were not loans or advances.

As to the claim that the charge was a stop-gap arrangement not to be enforced there is no written or documentary evidence or undertaking to suggest that this was a stop-gap arrangement. In fact in my view facts pleaded in paragraphs 7 and 8 of the plaint are not far from being self-defeating. In paragraph 7 the applicant is claimed to be a customer of the Bank (2nd respondent) and that the Bank had persuaded the plaintiff (applicant) to give the guarantee. The Bank owed substantial sum of money to the CBK. In fact evidence has been produced to show that the Bank went into voluntary liquidation. In the first place it is unbelievable that a bank will seek from its customer a guarantee to secure repayment of a debt owed by the bank to a 3rd party. That would appear to be a fatal step to induce flight of funds from a bank. Further why should the applicant have given a guarantee for the debts of a run-down bank going into liquidation and also allow a charge for the guaranteed sum to be registered against an extremely valuable property of its own? Facts pleaded in the plaint on this issue are not easily acceptable as being truthful account and when considered against the depositions made in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 13 and 15 of Mr Maraambi's affidavit of 12th January, 1995, it becomes clear that the true state of affairs and the factors that led to the applicant giving the guarantee and allowing the charge being registered against its valuable property, are highly likely to be as deponed by Mr Maraambi.

I have considered facts which are relevant to both fraudulent concealment and to the merits of the appeal. Is it an arguable appeal? A definite answer will embarrass the Court which will hear the appeal, but my views which are not binding have been made clear as I considered each of the issues.

On the question of the appeal, if successful, being rendered nugatory if the sale is not stopped, the main

grounds advanced are that the hotel is a unique construction unmatched anywhere in Kenya, providing facilities comparable to those in the best hotels in the world, that if the sale proceeded through bids or a public auction it would be sold at a throw-away price. However, it cannot be denied that the CBK is in a financial position to easily compensate for the true value and all the damages that might have accrued should the need arise. There is no danger of the appeal being rendered nugatory. As I stated earlier I have perused the ruling in draft form of my Lord Kwach, JA. I entirely agree with it. I have also had the opportunity of perusing in draft form the ruling of my Lord Omolo, JA. I entirely agree with it. I fully endorse it and particularly his sentiments with regard to cases involving misuse of public money. I am unable to grant the application for an injunction to stay the sale applied for and in my view it must be dismissed. As my Lord Omolo JA also agrees with my Lord Kwach, JA's and my ruling, the final order of the court shall be as proposed by my Lord Kwach JA in his ruling.

Omolo JA. I also agree. The applicant went before Githinji, J on 6th January, 1995, and pleading urgency. It obtained an *ex parte* injunction. Order 39 rule 3(1) of the Civil Procedure (Revised) Rules, permits the granting of *ex parte* injunctions but it must clearly be understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the judge all the relevant materials, including even material which is against his interest. The basis for this requirement is obvious: it is a universal rule of natural justice that court orders ought to be made only after hearing or giving all the parties an opportunity to be heard. *Ex parte* orders whether they be injunctions or whatever, form an exception to this rule and for a party to benefit from the exemption, there must be a good and compelling reason for it. The affidavit of Mukesh Vaya which was the basis of Githinji J's *ex parte* order was a very short one and strangely, the applicant sought, in advance, the leave of the court to file an additional affidavit if the *ex parte* order was granted to them. I would add my voice to that of my learned brothers that there cannot be any legal authority for obtaining *ex parte* injunction on one basis, and when it comes to the *inter-partes* hearing of the application, a totally different or even a more detailed basis is advanced to support the *ex parte* order. A party who has obtained an *ex parte* order must be able to support that order, at the *inter-partes* hearing, on the very same grounds upon which he was able to obtain it in the first place. I would also agree that the granting of *ex parte* injunctions should be the exception rather than the rule. Ole Keiwua J found as a fact that he applicant obtained the *ex parte* order of injunction by concealing from Githinji J relevant material which it could have been in a position to disclose to the latter learned judge. On the material which was before Ole Keiwua. J I am very doubtful if the applicant will be able to dislodge that finding during the hearing of its intended appeal.

Once the learned judge was satisfied, as he was, that the applicant had obtained the order by concealing other relevant material, he was entitled not to consider the applicant's application any further for the Courts must be able to protect themselves from parties who are prepared to deceive, whatever their motive for doing so may be and whatever the merits of the case might be. A man who is prepared to deceive a Court into granting it an order cannot validly claim that he has a meritorious case and would have been entitled to the order any way. If the case is meritorious, there can be no reason for concealing some parts of it from the Court.

But the learned judge went further and considered the merits of the case, which, as I have said, he was not bound to do. He came to the conclusion that the applicant had not shown to him a prima facie case with a probability of success, but that even if the applicant had succeeded on that score, it had not shown that the Central Bank of Kenya would not be in a position to meet any damages that may be awarded to the applicant. The judge also thought that such damages would adequately compensate the applicant.

I would myself say that this applicant was singularly undeserving of an order of injunction, which it must not be forgotten is a discretionary remedy. The main thrust of the applicant's case on the merits is or was based on what I may compendiously call illegalities as seen by the applicant in the transactions between Mr Pattni and the Central Bank of Kenya. The applicant alleges that certain provisions of the Central Bank of Kenya Act were violated by their transactions; that the charge purportedly created did not conform to the requirements of the Transfer of Property Act and that there had been accord and satisfaction between Mr Pattni and the Central Bank of Kenya.

On the alleged breaches of the law, I would myself say this. Billions of shillings from the public coffers

are involved in the dispute. Even if the alleged breaches of law were to be proved and accepted during the impending trial, I do not know that that would be of any avail to the applicant. How can this applicant be allowed to in effect tell Kenyans:-

> *"Yes I benefitted from your funds to the tune of many billions. But you cannot get back the money from me because it was given to me in violation of the law or laws which you have made to safe-guard the expenditure of such money. I am accordingly entitled to retain the money."*

For this Court or any Court to countenance this kind of argument from a man who has stuffed himself full from public resources would, in my view, be tantamount to giving the court's nod of approval to looters and pilfers from the public till. And I have not the slightest doubt that if this kind of argument were to be allowed by the Courts, there would not be wanting Kenyans who, for their own personal benefit, would be perfectly prepared to corruptly induce public officials to violate the various laws under which they operate in order to gain from such violation, safe and secure in the knowledge that they will be able to retain the gains so obtained by simply pleading the illegality of their acquisition. There would be no valid reason for this Court to give security and comfort to such people. On the contrary, the Court must make it abundantly clear to them that they may well be choked into disgorging themselves of whatever public resources have been acquired in violation of the rules laid down by the public through their Parliament. I agree with the orders proposed.

Dated and delivered at this 14th day of Nairobi July, 1995 .

A.M COCKAR

.....

JUDGE OF APPEAL

R.O KWACH

.....

JUDGE OF APPEAL

R.S.C OMOLO

.....

JUDGE OF APPEAL

I certify that this is a true copy of theoriginal.

DEPUTY REGISTRAR