IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AKIWUMI, TUNOI & SHAH, JJ.A.)

CIVIL APPEAL NO. 126 OF 1995

BETWEEN

UHURU HIGHWAY DEVELOPMENT LIMITED …….....APPELLANT

AND

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

EXHCNAGE BANK LIMITED (IN

VOLUNTARY LIQUIDATION)…….....…….2ND RESPONDENT

KAMLESH MANSUKHLAL PATNI ……..…….3RD RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Justice Ole Keiwua) dated 24th May, 1995

IN

H. C. C. C. NO. 29 OF 1995)

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JUDGMENT OF TUNOI JA.

This is an appeal against the ruling of the High Court of Kenya at Nairobi (Ole Keiwua J) given on 24th May, 1995 whereby the learned judge declined to grant an interim injunction sought by the appellant for an order to restrain the first respondent (hereinafter referred to as "the Central Bank") from selling by public auction as advertised or otherwise howsoever at any other time, or by completing by conveyance or transfer of any sale concluded by auction or otherwise of its leasehold property LR No 209/9514 popularly known as the Grand Regency Hotel ("the Hotel") until the hearing and determination of the suit it instituted against the three respondents. The upshot of the High Court's refusal was that the hotel was in immediate danger of being sold by public auction or by private treaty and hence the unsuccessful application before this Court made under rules 5(2)(b) and 42 of the Court of Appeal Rules by the appellant for a temporary injunction until the hearing and final determination of this appeal.

The averments in the plaint dated 6th January, 1995 were to the effect that during October, 1993 the second respondent, the Exchange Bank Limited which is in voluntary liquidation (hereinafter referred to

as “the Exchange Bank”) prevailed upon the appellant to guarantee Shs 2.5 billion of debts owed by the Exchange Bank to the Central Bank and by a charge dated 21st October, 1993 and duly registered on 31st December, 1993 the appellant charged its property LR No 209/9514 together with all buildings and improvements erected and being thereon to secure the repayment of a sum not exceeding Shs 2.5 billion owed by the Exchange Bank to the Central Bank. It was further averred in the plaint that at the time of giving the charge was always understood, intended and expressly agreed orally between the appellant and all the respondents that the said charge was only a temporary stop-gap arrangement not to be enforced and the Exchange Bank would meet its debt liability to the Central Bank from its own resources in due course. The appellant claims that it was also understood and agreed that the charge would not be enforced without the Central Bank first resorting to and exhausting its remedies against the Exchange Bank and the third respondent, Kamlesh M Pattni, a Nairobi businessman who was at the relevant time the Chairman of the Exchange Bank (hereinafter referred to as “Pattni”.)

The gravamen of the appellant’s suit seems to lie in paragraph 11 of the plaint and I reproduce it in full:

> 11. “The said charge dated 21st October, 1993 is invalid, null and void and is unenforceable for the following reasons.
>
> (a) It is *ultra vires* of the objects of the company.
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> (b) The transaction is beyond the powers of the directors under the articles.
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> (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.”

The appellant further alleges that on 3rd March, 1994 Pattni and the Exchange Bank reached an agreement to pay the said sum of Shs 2.5 billion by three instalments of Shs 100 million, Shs 2 billion and Shs 400 million on 4th March, 1994, 31st March, 1994 and 15th April, 1994 respectively. The first instalments of shs 100 million was duly paid but before the second instalment was effected Pattni was arrested on 18th March, 1994. The arrest, it is said, made headlines in the papers; and, as a result willing financiers and lenders were scared away. Consequently the remaining instalments did not materialize. It is averred that the efforts of Pattni to meet his commitments were frustrated by his arrest and detention and the Central Bank refused to give him further time to look for alternative sources as demanded by him in his letter of 14th April, 1994. The appellant has termed the appointment of the receiver by the Central Bank on 15th April, 1994 null and void because no demand was ever made under the guarantee; it gave no debenture to the Central Bank; no statutory notice was given before the appointment of the receiver as required by the relevant provisions of the Transfer of Property Act and because the precise amount owed by the appellant was imprecise.

The appellant further alleges that Pattni was charged with the theft of Shs 13.5 billion along with other accused persons and after his release on 29th July, 1994 he got engaged in a prolonged negotiations with the officials of the Central Bank which negotiations culminated in an agreement dated 29th September, 1994 resulting in acknowledgement and confirmation that the Central Bank of Kenya owed the sum of Shs 3.585 billion to the Exchange Bank. The appellant then called upon the Central Bank to appropriate and pay themselves the sum of Shs 2.5 billion out of the sum of Shs 3.585 billion in satisfaction of the appellant’s debt of Shs 2.5 billion and give discharge of the charge. Despite demand and several reminders the Central Bank has refused so to act and has embarked on the course of selling the Hotel, machineries, furniture and other moveables over which there existed no charge. It had given press advertisements seeking bids for the Hotel, and, having received bids from interested parties, the bidders had been short listed and the sale of the Hotel was imminent and could take place at any moment.

The appellant was apprehensive of the move and in order to forestall it, it filed suit on 6th January, 1995. On that very day it sought and obtained *ex-parte*, an interim order of injunction against the Central Bank to stop the sale of the Hotel. The order that was granted by Githinji J is as follows:-

> "I am satisfied that the suit raises weighty and complex grounds and that the subject matter of the suit is a very valuable property. I allow the application and grant a temporary injunction in terms of prayer 1 of the application until the hearing of the application *inter partes* on 18/1/95. Orders as per paras 2, 3 and 4 of the application. Costs in the cause."

Though the Court had jurisdiction to grant an *ex-parte* interim injunction even though it is ultimately discovered that the application may not be meritorious such grant is mandated by order 39 rule 3(1) to be based on reasons to be recorded by the judge otherwise the object of granting the relief of injunction would be defeated. It is doubtful whether the ruling made by Githinji J did incorporate any recorded reasons at all.

At the *inter-partes* hearing of the summons the learned judge (Ole Keiwua, J) dealt with two matters, one by the appellant to confirm the *ex-parte* injunction granted by Githinji J and, the other by the Central Bank to vacate it. The record of the proceedings presented before us shows that copious arguments supported by legal authorities were presented before him. The learned judge considered the applications in some depth and his ruling showed that he gave the matter a great deal of thought. He held himself bound by the rule-making case of *Giella vs Cassman Brown & Co Ltd* [1973] EA p 358 in which he relied and put to himself three questions namely, first: Did the appellant show a *prima facie* case with a probability of success? To answer this question the learned judge examined agreements "A", "B" and "C" which were all made and entered into on 29th September, 1994. As far as agreement "A" is concerned, he found no reference to discharging the charge and giving back possession of the Hotel. He held that Agreements "B" and "C" were concealed by the appellant, the Exchange Bank and Pattni. He agreed with the submissions by the Central Bank that if agreements "B" and "C" were disclosed they would have shown that Pattni did agree to transfer to the Central Bank the Hotel with other assets the subject matter of agreement "B". In such circumstances, he held, a Court would not restrain the Central Bank as the Hotel would have been the security for the Central Bank if those agreements had been honoured. He found that the facts in agreements "B" and "C" were known to Mukesh Vaya, one of the shareholders and a director of the appellant who was the deponent of the affidavit in support of the application for the interim injunction and that if the correspondence exchanged between the counsel for the Central Bank and M/s Choge & Company, advocates, were disclosed to the Court, no injunction would have been granted. The learned judge found non-disclosure of the statutory notice, the appellant's two dishonoured cheques and the opening of bids. He held, therefore, that the appellant had failed to present a *prima facie* case with a probability of success.

The answer to the second condition: namely whether the appellant would suffer irreparable loss, if the application was denied, seems to have posed no trouble at all to the learned judge. The appellant's contention is that the Hotel is a unique building and to that extent no amount of money can adequately compensate for its uniqueness; and, that its disposition would cause it irreparable injury. In his opinion, the Central Bank has the ability to pay such damages and had shown the ability to do so in the event it is ordered to pay any compensation. The negative answer to these two questions entitled the learned judge to exercise his discretion against the appellant.

Mr Sharma, counsel for the appellant, has urged this Court to discard *Geilla's* case and adopt the *American Cyanamid Co vs Ethicon Ltd* [1975] 1 All ER 504 which, he submitted, had better and superior reasoning and has recently been followed in most of the commonwealth countries including Australia. The gist of the American *Cyanamid's* case is to reject the first principle in *Giella's* case and to treat the whole matter as one of serious matters to be argued on convenience. It was Mr Sharma's contention that if a balance of convenience arose to be considered, the assessment thereon of the court below would have been in favour of the appellant. The learned judge thought that the *Giella's* case was binding on him under our doctrine of *stare decisis*.

The common law doctrine of precedent is to the effect that each Court in the judicial hierarchy is bound by the principles established by prior decisions of courts above it in the hierarchy. The Court of Appeal for Kenya is, with certain qualification, bound by its own prior decisions and though not absolutely binding on the Court itself, the decisions of the Court of Appeal bind lower courts. In deciding upon the need to overlie previous decisions the Court always bears in mind the need for certainty in the law and the

element of reliance. Recently in the University don's case *Eric V J Makokha & 4 others vs Lawrence Sagini & 2 others* Civil Appeal No 20 of 1994 (unreported) a bench of five judges of this Court said:-

> "It was also argued for the applicants that in view of the shortness of time that elapsed between the handing down of the *Nyamogo* decision, we should decline to depart from it. For this, we were referred to the decision of the English House of Lords, in the case of *Secretary of State for Social Services, Hudson vs Sainz* decided in 1971.
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> In that case, the House in a split decision of 4 to 3 held that a modified practice it introduced in 1966 in which the House laid down rules to when it may depart from its previous decision should be followed. But we prefer the speech of Viscount Dilhorne that if a previous decision was clearly wrong it is easier to decide that a recent case should not be followed than one which has stood for a long time."

In the case of *Wairimu Mureithi vs City Council of Nairobi* Nai CA 5 of 1979 (unreported) Madan JA said:-

> "The former Court of Appeal whose main judgment was delivered by Mustafa, JA, with whom Wambuzi, P, and Law, VP (as they were then respectively) agreed, said in *Abdul Salim and others v okong'o and others* Civil Appeal No 44 of 1975 (unreported) that the conditions for the grant of an interlocutory injunction were well settled then in East Africa, and he could see no reason to depart from them. They were stated in *Giella v Cassman Brown and Co Ltd* [1973] EA 358 at 360. Mr Gachuhi for the appellant referred us to the decision of the English House of Lords in *American Cyanamid v Ethicon* [1975] 1 All ER 504. Mustafa JA also said in *Abdul Salim* (supra) that the decision to the contrary in *American Cyanamid* case did not alter the situation here". According to Mustafa JA.
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> "The conditions are (1) the probability of success (2) irreparable harm which would not be adequately compensated for by damages and (3) if in doubt, then on a balance of convenience".

In order to elucidate the position further from my point of view, I would respectfully borrow the following words from the speech for Lord Diplock in *American Cyanamid Co v Ethicon Ltd* (supra) (1975) AC 396 at pp 406 and 408 with which I see no cause to differ:-

> "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial ..... If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

In my view, Mr Sharma has not made out a strong and substantial case not only against the correctness of the decision in *Giella's* case but also against its continued application in Kenyan Courts. Moreover, there were no reasons to reject its application in this case and it is doubtful whether the consideration of balance of convenience would have swayed the eventual holding of the learned judge who, in my judgment, applied the principles enunciated in the *Giella's* case correctly in the determination of the application before him.

Mr Sharma did not argue the grounds of appeal necessarily in the order in which they are listed or individually. Grounds 1, 2 and 3 basically deal with the issue as to whether the learned judge erred in holding that the appellant withheld material information from the duty judge. It is not in dispute that the appellant's two cheques which were not effected or which bounced were not laid before the learned judge. If they had been, the letter of 3rd March, 1994 would have come to light. In that letter it is seen that Pattni had asked for the Central Bank's consideration of an arrangement to settle part of the debt due to it by instalments and that an amount of Shs 2.5 billion is secured by the charge over the Hotel. The charge over it would have been discharged unconditionally subject to payment being made in three

instalments on the following dates:-

4th March, 1994 Shs 100,000,000/=

31st March, 1994 Shs 2,000,000,000/=

15th April, 1994 Shs 400,000,000/=

Total Shs 2,500,000,000/=

The Central Bank would be given post-dated cheques to cover the above instalments and upon full encashment a duly executed discharge, original guarantee and original title documents would be released to the appellant. If any instalments was not made on the due date, then the total balance of the outstanding amount of Shs 2.5 billion together with interest would become immediately due and payable and the Central Bank would be at liberty to sell the Hotel. Appended on the said letter is the acknowledgment of the terms by Pattni, the cheque numbers and his signature. Further, the letter dated 28th November, 1994 from Messrs Murgor & Murgor to Jim Choge, advocate, if it had been exhibited to Githinji J, no doubt, he would have realized that Pattni was in breach of the agreement dated 29th September, 1994 in that he had not facilitated the transfer of enumerated assets to the Central Bank. The effect of this rescission was reversion of the status prior to 29th September, 1994. The learned judge (Ole Keiwua J) was, in my view, correct to hold that the concealment and failure to disclose the above documents were of sufficient materiality to entitle the Central Bank to an order discharging the *ex-parte* injunction. His conclusion was inevitable since he considered and correctly relied on the decision of this Court in the case of *The Owners of The Motor Vessel "Lillian S"* (Civil Appeal No 50/89 (unreported). Mr Sharma's submissions on grounds 1, 2 and 3 must therefore fail.

Formidable submissions were made by Mr Sharma and Mr Rebello, counsel for Pattni, that the learned judge failed to consider and hold that agreement "A" was the real and the binding one whereas "B" was meant for the overseas consumption and that it was conditional contract, not genuine, not to be acted upon, but only a smoke screen to hoodwink the International Monetary Fund and the World Bank. Plainly speaking, what the counsel are saying is that the Central Bank, the appellants, the Exchange Bank and Pattni were knowingly engaged in a deceitful game and when things turned sour, they sought the blessings of the High Court, to help some of the parties to literally get away with their obligations to repay what is legally due to the banker of the Government. No Court of law in this country can sanction such an illegal transaction which is unashamedly admitted. These submissions must be rejected and so are grounds 19, 20, 21, 22 and 23 of the appeal.

It is submitted under grounds 40, 41 and 42 that the learned judge failed to appreciate that the original loan of Shs 13.5 billion advanced by the Central Bank to the Exchange Bank was illegal and thus irrecoverable because the Exchange Bank was not a specified bank. Under section 28 of the Central Bank of Kenya Act (Cap 491 of the Laws of Kenya) the Central Bank may engage in foreign exchange transactions only with (a) specified banks and (f) any other person or body of persons whom the Minister, on the recommendation of the bank, may, by notice in the gazettes, prescribe for the purpose of this section. Under section 36 of the same Act the Central Bank may grant loans or advances for fixed periods not exceeding six months to specified banks which pledge credit instruments and negotiable securities as security for such loans or advances. Section 2 of the Act defines specified bank as a licensed bank within the meaning of the Banking Act which is specified by the Central Bank for the purposes of the Act. The Exchange Bank was licensed to conduct a banking business in Kenya on 1st August, 1991. Its licence is number BK 32. On 13th April, 1992 it was certified a specified bank and issued with a Certificate of Specification No 071. On the face of it, but subject to trial in the superior court, the transaction between the parties herein were legal under the Central Bank of Kenya Act.

Grounds 25 to 33 of the memorandum of appeal challenge various aspects of the charge. Mr Sharma has argued that the charge was not an English mortgage which alone would entitle the Central Bank to exercise statutory power of sale and that it was a nullity not having been properly executed by the chargor. He averred that the guarantee and the charge to secure the repayment of Shs 2.5 billion was

likewise null and void, unlawful and unenforceable. He submitted that sections 58 and 69 (a) of the Transfer of Property Act were totally misconstrued by the learned judge to the prejudice of the appellant. In the alternative, he contended, even if the charge and guarantee were held legal the statutory power of sale cannot be exercised without 3 months statutory notice of sale which was never given. A casual perusal of the charge shows that the last three pages of the charge contain a certification by Dinesh Kapila, advocate, certifying that he had explained to Mukesh Vaya and Pankaj Rana, both directors of the appellant company the effect of sections 69 (1) and 100A (1) of the Transfer of Property Act and he was satisfied that each of them understood the same. What was being explained to the two directors was an English mortgage whose salient features were that a mortgagee shall have power when the mortgage - money has become due and payable to sell by public auction or by private contract the mortgaged property as the mortgagee thinks fit. The certification further states that the mortgage-money shall be deemed to have become due whenever either the day fixed for payment thereof has passed. To cap it all the two directors appended their signatures and confirmed that they "have read and had explained to us the above sections and confirm that we understand the same." The charge which was created by the parties was an English mortgage for all intents and purposes. The learned judge was correct in assuming that it was valid and to that extent he is not faulted. The detailed and persuasive submissions made to us by Mr Sharma over a week on its validity may have been misplaced since this was not an issue before Githinji J. It suffices to say that Mr Sharma should not lose hope altogether since the issue of validity may still be raised during the pending trial.

However, the appellant, the Exchange Bank and Pattni had benefittted from the loan or the advance from the Central Bank and they had covenanted under the charge to repay the money. They cannot now take advantage of what may amount to a technicality. In the case of *Harshad Ltd vs Globe Cinema Ltd and others* [1960] EA 1046 an issue arose whether a mortgagor and sureties can repudiate liability as the mortgage was not signed by the mortgagee. Sheridan J said at page 1049:-

> "This issue arises from the fact that the mortgage is signed by the defendants only and not by both the mortgagor and mortgagee in accordance with the form of mortgage set out in the eleventh schedule to the Registration of Titles Ordinance. Section 114 provides that the proprietor of any land under the operation of the Ordinance may mortgage the same by signing a mortgage thereof in the form set out in the eleventh schedule. Section 209 provides that any variation in the forms contained in the schedules, not being matters of substance, shall not affect their validity or regularity. For myself I would be inclined to regard this form merely as a guide and as not being on a par with the imperative form required for a bill of sale.
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> Mr Russell submits that as the plaintiffs advanced all the money at once and were not under any obligation to make future advances, there was no binding covenant on them which would need their signature. Normally the Registrar of Titles would require both signatures as set out in the form but once the mortgage is registered then surely the rights which are conferred by s 51, s 96 and s 125 proceed to flow. It would defeat the whole purpose of the Ordinance if, in the absence of fraud, a litigant could go behind the fact of registration on a technicality such as this. Here the defendants have acted on the mortgage and although the form is statutory and not contractual I am unable to agree that they can now repudiate their liability on the ground that the plaintiffs did not sign the mortgage."

The decision in the above case is relevant and fully applicable in this appeal. This Court said in the celebrated case of *Stanley Munga Githunguri v Jimba Credit Corporation Limited* NAI CA No 144 of 1988 (unreported) that:-

> "Oral argument was addressed to us by counsel on both sides in great detail for two full days. Having listened to the submissions in support of and in opposition to these grounds, we cannot help the observation that both counsel put a lot of industry into the preparation and argument of this appeal. The many decided cases referred to in argument, is ample illustration of this. But we regret to say that it was a waste of mental effort as we cannot pronounce on those contentions without usurping the jurisdiction of the trial court, although we have definite views of our own on the validity or otherwise of those contentions."

A lot of water has flowed under the bridge since the ruling the subject matter of this appeal was made. The plaint has since been amended and the Central Bank has filed a counterclaim. No doubt many issues raised in this appeal but not conclusively resolved by this Court will again be tested during the trial when the parties may call witnesses and take evidence. Because of the magnitude of the subject matter of the case and the many interwoven "mysteries" rampant in the transaction, especially as to why this country's Central Bank found it fit to enter into three distinct agreements on the same day with the same parties conveying contradictory obligations, it is my sincere hope that the parties may secure an early hearing date in the superior court.

This Court in its ruling dated 14th July, 1995 has pointed out that the charge covers only the piece of land together with all the buildings an other improvements. The moveables and other chattels do not form part of the charged property. Pall J has since ordered that the moveable assets lying in or upon the charged property shall not be released until the determination of the suit and the counterclaim. It is quite obvious from the submissions made before us that the parties may not easily agree as to what properties constitute moveable assets, fixtures etc. That observation of this court and the order of Pall J have afforded the appellant a breathing time, in effect an injunction by default.

I am grateful to all the counsel for their research and great industry and for the interesting and persuasive submissions they made to us. They should not be downcast if I did not deal with a good many of their authorities.

I am of the view that the ruling of the learned judge (Ole Keiwua J) must be affirmed. I fully agree with the judgments of my Lords Akiwumi JA and Shah JA (which I had the advantage of reading the draft forms) that this appeal fails and is dismissed with costs to the Central Bank.

JUDGMENT OF AKIWUMI, J . A.

This is an appeal from the ruling of Ole Keiwua J delivered on 24th May, 1995. In that ruling, he set aside the ex parte injunction granted on 6th January, 1995, to the appellant which is a company known as the Uhuru Highway Development Ltd, to restrain the 1st respondent which is none other, than the Central Bank of Kenya, which I shall refer to as "the CBK", from selling by public auction or otherwise, disposing of the prestigious Grand Regency Hotel which I shall refer to as "the hotel" and which belongs to the 2nd respondent, that is to say, the Exchange Bank Limited at the time in voluntary liquidation and which I shall refer to as "the Bank", until the hearing of the application inter partes on 18th January, 1995. The suit was filed by the appellant on 6th January, 1995, and simultaneously with it, the appellant's application for the ex parte injunction. The suit itself, has yet to be determined.

After the inter partes hearing before Ole Keiwua J, he in his ruling of 24th May, 1995, set aside the ex parte injunction granted to the appellant on 6th January, 1995, and dismissed the appellant's application for an injunction. The two reasons for his ruling were firstly, that the appellant had, when applying for the ex parte injunction, concealed material facts from the High Court judge and secondly, on the merits of the application itself, that the appellant had not shown that it was deserving of the injunction it sought. After filing a notice of appeal against this ruling, the appellant sought from this court interim stay of the ruling of Ole Keiwua J until its appeal was disposed of. In the course of the hearing of this application for stay, this court, differently consituted from its present composition hearing this appeal, went into the details of the relationship and business dealings between the appellant and the CBK, the Bank and the 3rd respondent the businessman Kamlesh Pattni who was the chairman of the Bank, in order to determine whether the appeal was an arquable one and also whether the appeal would be rendered nugatory if the interim ruling sought was refused. This court not being satisfied that these two conditions had been fulfilled, refused to grant the order sought.

The present appeal to a large extent, deals with matters that were arqured during the application for an inferim stay of the ruling by Ole keiwua J, but one must be careful as far as possible in dealing with this appeal, not to pronounce on the dispute between the parties on its merits. After all, the suit is still pending in the High Court and to express concluded views on the merits of the dispute in this interlocutory appeal,

would hamstring a decision on them by the High Court. (See Stanley Munga Githunguri vs. Jimba Credit Corporation Ltd Civil Appeal No. 144 of 1988 (Unreported). Whilst this admonition should be borne in mind when considering the merits of the dispute between the parties within the context of the inter partes hearing of the application for injunction, on issues for instance, relating to the interpretation of the agreements between the appellant or the Bank and the CBK, the legality of the charge on the hotel, the application to it of the Transfer of Property Act, and the legality of loans if any, granted by the CBK to the Bank or Patti and similar issues, the same would not apply as to whether the ex parte injunction was valid or not, whether it had been properly obtained, or whether the injunction had been properly refused.

In its plaint, the appellant set out the basis of its suit which can be summarised as follows. The appellant was a customer of the Bank which in turn, owed money to the CBK. Curiously, and contrary to what one would normally expect to happen, the Bank which what is more, was soon to go into voluntary liguidation on 22nd October, 1993, prevailed upon its customer the appellant, and the appellant which itself, was not then in the best of financial health, also curiously, succumbed to the Bank's entreaties, to quarantee the Bank's collosal debt of 2.5 billion shillings to the CBK by way of a charge dated 21st October. 1993, only a day before the Bank's own voluntary winding up, on the hotel, in favour of the CBK.

It was to emerge in subsequent pleadings filed in support of the appellant's application for the ex parte injunction, that pattni, describing himself as "Secretary/Director" of the Bank, had by Gazette Notice No. 5325 dated 14th October, 1993, convened a meeting of creditors to consider the resolution adopted by the Directors of the Bank on 22nd October, 1993, for its voluntary windings up. Apart from the apparent inconsistnecy between the date of this notice calling for a meeting that was to consider a resolution which had as it were, been passed in advance on 22nd October, 1993, the actual resolution which is dated 22nd October, 1993, was signed by Pattni as "Chairman" this time. This is a foretaste of the ubiquitous and leading role of Pattni in the circumstances surrounding the whole suit.

To go back to the plaint, it was averred in paragraph 9 thereof, that it was orally agreed between all the parties to the suit that the charge was "only a temporary stop-gap" not meant to be enforced and which would give the Bank more time to pay what it owed the CBK which was at the time, under pressure from its Auditors to recover the 2.5 billion shillings from the Bank. How such a ruse would placate the Auditors of CBK is not clear. Furthermore, it was agreed as set out in paragraph 10 of the paint, that the CBK would not enforce its rights under the charge unless it had first, exhausted its remedies against the collapsing Bank which was in liquidation, and Pattni who, it had not been exposed in the plaint, as personally owing any money to the CBK. The plaint went on to assert that in any case, the charge was for what may appear to be the self serving and somewhat desperate reasons set out in paragraph 11 thereof, null and void and unenforceable. It is instructive to look at these reasons briefly. They are that the charge was ultra vires not only the objects of the appellant but also the powers of its Directors, but who is to be blamed for this, and that the charge which contravened the provisions of the CBK Act, was also a fraudulent preference by the appellant in favour of the CBK over other creditors.

The plaint continued, that as a result of the agreements referred to in its paragraphs 9 and 10, and inspite of the allegation that the charge was unenforceable, Pattni and "his Bank, Exchange Bank Limited now in Liquidation" agreed on 3rd March, 1994, to pay to the CBK the outstanding sum of 2.5 billion shillings in respect of which, the charge had been given, in three instalments of 100 million shillings, 2 billion shillings and 400 million shillings on 4th March, 1994, 31st March, 1994, and 15th April, 1994, respectively, and which were the dates of the related post dated cheques issued by the appellant and which were delivered by Pattni to the CBK. After the payment of the first instalment, Pattni was arrested on 18th March, 1994. This drove away those whom Pattni had hoped would give him or the Bank money to pay the remaining two instalments which were as a result, unpaid. Even the request by Pattni in his letter of 14th April, 1994, to the CBK to be given time to make other arangements was refused by the CBK. It is convenient at this stage, to draw attention to certain undisputed facts that affected this part of the plaint. It is not true that it was the Bank and Pattni which reached an agreement to repay the 2.5 billion shillings in three instalments. According to the affidavit by a Mr. Vaya who was at the time, a Director of the appellant, in support of the appellant's application for the ex parte injunction, what really occurred is contained in a letter from the CBK addressed to pattni dated 3rd March, 1994, annexed to Mr.

Vaya's supporting affidavit. In that letter, which was in reply to one from Pattni dated 19th February, 1994, in which he sought permission to liquidate the nearly 6 billion shillings owed by the Bank to CBK in ten instalments, it was proposed by the CBK to Pattni at least in respect of the 2.5 billion shillings secured by the charge, that the CBK would discharge its charge on the hotel only if the 2.5 billion shillings would be paid in the three instlaments already described. Pattni on his part, was required to give three post dated cheques drawn on his own account with a reputable domestic or foreign bank. As witnessed by his advocate at the time, Mr Dinesh Kapila, at the bottom of the aforesaid letter of 3rd March, 1994, Pattni accepted these conditions and gave three post dated cheques, photocopies of which, were annexed to Mr. Vaya's supporting affidavit. But these were cheques drawn not on the account of Pattni, but rather on the account of the appellant itself. Of these, one was signed by Mr. Vaya as one of the signatories. Apart from the fact that, far from being as stated in the plaint, an unsolicited agreement between the Bank and Pattni to pay the instalments, it was an agreement that was extracted from Pattni. There is also here, a most extraordinary situation whereby, not only had the appellant, the customer of a bank on the brink of collapse, charged its precious hotel and perhaps its only valuable asset, for the huge sum owed by the Bank or Pattni to the CBK, but had also given its own cheques to meet the instalments. The only explanation for this is that Pattni, rather than the Bank which was in its last throes, had substantial interest in and control over the appellant. But another mischief which the plaint indulged in and which was to be perpetuated in Mr. Vaya's supporting affidavit, was the undisclosed fact that the last two instalments had not been paid because the related cheques which the appellant itself, had issued, had been dishonoured upon presentation. These were the cheques which Pattni had successfully persuaded the CBK by his letter of 29th March, to the CBK, also annexed to Mr. Vaya's supporting affidavit, to postpone their presentation until 15th April, 1994, because Mr. Taheri the Chairman of the appellant was going abroad to complete re-financing arrangements is different from the reasons given for this in the plaint. The role that the dishonoured cheques played in the non payment of the instalments was clearly a matter which the appellant wished to conceal even though its very own cheques were the ones that had been given to meet the instalments and which had been dishonoured. What the appellant on the other hand, wanted to project in its pursuance of the ex parte injunction, was a scenario wherein, not it, but rather somebody else and who better than the collusively made defendant Pattni, was the one whose efforts to meet the instalments due, had been trarted by the CBK.

And now back to the plaint. It was also alleged that the appellant really owed the CBK nothing since by an agreement dated 29th September, 1994, the 2.5 billion shillings which the Bank owed the CBK and in respect of which, the appellant had charged the hotel, was to be set off against 3.585 billion shillings which the CBK owed the Bank, but that it was the CBK which had, despite several reminders, refused to discharge the charge and had rather sought bids and short-listed bidders for the sale of the hotel as well as the moveables therein. The appellant sought in its plaint the following reliefs: an Injunction to restrain the CBK from selling the hotel, a declaration that the charge was null and void, various orders against the CBK, damages against the CBK for trespass and lastly, damages this time, damages this time, against all the defendants that is to say the CBK,the Bank and Pattni for breach "of Agreement as contained in paragraphs 9 and 10 hereof". I have already discusses the contents of these paragraphs and can only say that nowhere in the plaint is any averment made that the Bank and or Pattni had breached the "agreement" referred to therein, which with respect to paragraph 9, was that the charge was meant to deceive the world, or how this had been achieved. In my view, the application for ex parte injunction at least, against Pattni is akin to an abuse if the process of the court prompted by Pattni himself. This is fortified by the revealing paragraph 35 of the second affidavit of none other than Mr. Vaya himself, dated 16th January, 1995, in which, as may now be expected of him, he selectively explains how the appellant came to apply for the ex parte injunction when he should also have made reference to the filing of the suit itself. This paragraph which also reveals the subservient role of the appellant and the dominant and controlling rule of Pattni in all the dealings with the CBK leading to, and the very institution of, the suit, is in somewhat imperfect English, as follows:

> "That the 3rd Defendant was incarcerated on a trumphed up charge of theft on 26th October, 1994 and he hoped against hope to be released on bail and be able to resume his negotiation with the Central Bank of Kenya, I have been so told by the 3rd Defendant and verily believe. His rejection of bail application on 5th January 1995 proved to be the last straw on the camels back of his patience.

> He gave us the "go ahead" on 5th January 1995 and went straight to court on 6th January 1995 and secured our injunction."

Filed simultaneously on 6th January, 1995, with the application for the ex parte injunction, was a Certificate of Urgency which was intended to justify the hearing of the application during the High Court Christmas Vacation. This Certificates did not disclose any grounds of urgency. All it said, without giving any information or details as to when the sale of the hotel would take place, was that:

> "…. The said application concerns injunction to restrain the Defendants from selling L. R. No. 209/9514, Nairobi (Grand Regency Hotel)"

But no matter. Consistent with the Certificate of urgency but otherwise, with the plaint, the application farcically sought an ex parte injunction against all the defendants, when only the CBK was the one trying to, or which could, dispose of the hotel under the charge, from selling by public auction or otherwise, the hotel and the moveables therein, or from enforcing the guarantee given by the appellant. According to paragraph 2 of the application, service upon the defendants, without giving any details as to why the matter was that urgent:

> "Was to 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 mean time and time is short to allow for service,……"

The appellant sought in advance, liberty to file an affidavit in reply and in paragraph 5 of the application, it was stated baldly that:

> "the application is urgent be dealt with during vacation".

Mr. Vaya's supporting affidavit seems ironically to rely with respect to important issues, on what he had been told by Pattni which he verily believed to be true. These were that Pattni had told him that had he not been arrested and which made possible financiers to think twice, he would have paid off the 2.5 billion shillings and further, that his efforts to raise funds had been thwarted by the CBK. Here we have Mr. Vaya deliberately concealing the fact that his company the appellant, was the very one which had issued the three cheques to meet the agreement instalment already referred to, and photocopies of which cheques, he and annexed to his supporting affidavit well knowing that two of them which did not show this on the face of them, had actually been dishonoured on presentation. This in my view, was part of the scheme to conceal material facts from the High Court judge and to mislead him into thinking if he saw them, that the cheques had nothing to do with the failure to meet the instalments or the threatened sale of the hotel by the CBK under the charge. The other information from pattni which Mr. Vaya verily believed, was that when Pattni signed the agreement dated 29th September, 1994, which can only be the letter of that date annexed to Mr. Vaya's supporting affidavit, he had specifically requested the CBK and which had agreed , to set off the 2.5 billion shillings against what the CBK owened the Bank and to discharge the charge. It is not specified whether this request by Pattni which was alleged to have been accepted by the CBK, was in written or oral from. But it is clear from that letter that Pattni agreed in settlement of accounts between himself, and the CBK that not only would the 2.5 billion shillings which was the subject of the charge be credited to the appellant and, what follows was not disclosed in Mr Vaya's supporting affidavit, that the assets and liabilities of the Pan African Bank would also be transferred to the CBK, and this is important, that Pattni would, to give effect to this transfer, provide all necessary documents, assignments, and board resolutions to facilitate the "proper legal and valid transfers of the Pan African Group of companies to the Central Bank"." Needless to say, the fact that Pattni did not comply with this condition was not mentioned by Mr. Vaya in his supporting affidavit. The fact also that Mr. Vaya had a copy not only of this letter but also of the one of 3rd March, 1994, already referred to, shows, to my mind, that at the time of making his supporting affidavit, he must have been aware of other relevant letters signed by Pattni but which he concealed from the court. I shall come back to this later on in this judgment.

In his supporting affidavit, Mr. Vaya then went on in paragraphs 5 and 6, the only paragraphs in this

affidavit which could be prayed in aid of the immediate exercise of the High Court judge's discretion to hear the application ex parte, to make the bald assertions that unless the sale of the hotel which was imminent and could take place at any time, was stopped, the appellant would suffer irreparable damages as the sale would be at the throw away price of 2 billion shillings, and that if the CBK got wind of the application, the hotel would be disposed of by way of private treaty. The only evidence produced to support the imminent sale of the hotel by public auction, private treaty or otherwise, was an advertisement dated 7th November, 1994, annexed to Mr. Vaya's supporting affidavit, in which, three well known estate agents in Nairobi had invited bids for the sale of the hotel. The hotel and its facilities are described in glowing terms and it is hardly likely that it would have been sold at the throw away price of 2 billion shillings. However, this advertisement does not support the appellant's bare assertion that there was any immediate danger of the hotel being sold or otherwise, disposed of right away, and a few days delay in giving notice to the CBK would defeat the object of the injunction, particularly having regard to the fact that the appellant can be said to have known of the advertisement some two months before it made its application.

Paragraph 6 of Mr. Vayas supporting affidavit which stresses the point that if the CBK got wind of the application, the hotel would be sold and the object of the application defeated, also fortifies the imperative requirement which is now well settled law, that in an application for an ex parte injunction where the party against whom the relief is being sought, does not have the opportunity of being heard, the applicant, in this case the appellant, must make full and Frank disclosure of all facts known to it or which should have been known to it had all such enquiries as are reasonable and proper in the circumstances been made. (See judgment of Balcombe L. J. in Lloyds Bowmaker v Britannia Arrow Holdings P. L. C. (Larens, third party) [1988] 3 ALL E. R. 178 at 193. This principle of law is also a good reason why, as I shall refer to later, the court should record its reasons for deciding to hear the application ex parte.

Then in the Last paragraph of his supporting affidavit, Mr. Vaya threw at the High Court judge a bundle of documents eighty two pages in all, and comprising as deponed in that paragraph:

> " …true photostat copies of the Charge, Guarantee, Paper cutting, Consent Order, Resolution, Agreement dated 29th September,1994, Articles and Memorandum of Association of Uhuru Highway Development Limited and other relevant documents."

Who can be expected at the hearing of such an urgent application to read and fully comprehend each and every one of these eighty two pages? This mischievous method of introducing a vast number of pages of documents some of which are described and some not, and without specifying which parts of the affidavit they relate to, can only have been intended to add confusion to the matter before the High Court judge, to conceal material facts from him and hopefully, to mislead him. For instance, the cutting from each of the three English dailies namely, the Standard, Nation and Kenya Times refer to two cheques issued by Pattni in payment of the instalments, having been dishonoured and as a result of which, the CBK had the hotel into receivership. But Mr. Vaya more than anybody else, knew very well that the cheques had been issued by his company the appellant, and not Pattni or the Bank and the intention must have been to perpetuate the false scenerio given in the plaint, the application and Mr. Vaya's supporting affidavit, namely,that the failure to meet the instalments had nothing to do with any dishonoured cheques issued by the very appellant itself, and that its hands were clean. Apart from this, there were included in the bundle, correspondence which could have easily been identified and made referable to particular paragraphs of Mr. Vaya's supporting affidavit but which were deliberately not done. Some of these show that Pattni had asked for the postponement of the presentation of the two cheques not because the charge was null and void and unenforceable, but because arrangements were afoot to raise the outstanding 2.5 billion shillings. And also that Pattni must have had a substantial stake not only in the appellant itself, but also in its hotel. This correspondence consist of Pattni's letters to the CBK dated 29th March, and 14th April, 1994, and those the CBK to Pattni and signed by him as agreeing to their contents, dated 3rd and 30th March, 1994, which show that the CBK was threatening to exercise its statutory right of sale under the Charge and which fact Mr. Vaya concealed in his supporting affidavit.

And so, what occurred when the application for the ex parte injunction came up for hearing? It came

before Githinji J on 6th January, 1995. Mr. Sharma appeared for the appellant and according to the record of the proceedings, he, without referring to any evidence to support his statement, said that the CBK was going to selling the hotel at any time and without giving any reason to show that the object of granting the injunction would be defeated by delay, asked that an ex parte injunction be issued and be heard inter partes on 18th January, 1995. The learned judge aware of the fact that he must first decide whether he should hear the application ex parte, and purporting to act under the only applicable rule of procedure namely, 039 r 3 (1) of the Civil Procedure Rules, made the following order:

> "Application to be heard during vacation is granted as prayed in paragraph 5 of the application as I am satisfied that the purpose of the injunction will be defeated if the application is served. I order that application be heard ex parte in the first instance."

Before considering this order, it will be necessary to set out the provisions of 039 r 3(1) which was introduced into the law by L. N. No. 16 of 1985 to replace the then wider and more equivocal rule which was seen as an easier devise for obtaining ex parte injunctions. The provisions of 039 r 3(1) are the following:

> "Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application ex parte."

It is clear from 039 r 3(1) that in order that a court may hear an application ex parte, it must satisfy itself, and the reasons for doing so must be recorded, that the object if granting the injunction would be defeated by the delay in not hearing the application ex parte, but requiring that it be served and heard inter partes. Such reasons which should be recorded, would be in this case, for instance, that the hotel was about to be sold right away and that a few days delay in serving the application on the CBK will be of no help, indicating the evidence supporting this assertion, and that it would be impossible to serve the CBK in time, so that the application could be heard inter partes before it became too late, here also, indicating the supporting evidence. The order of Githinji J, I fear, does not contain his recorded reasons for his being satisfied that the purpose of the injunction would be defeated by the delay involved in serving the application on the CBK. His granting of the hearing of the application "as prayed in paragraph 5 of the application" which Mr. Sharma has urged was sufficient, will not do at all. It is not a reason for the learned judge being satisfied that the purpose of the injunction would be defeated by the delay. He was saying nothing more than that he would grant the prayer as sought in paragraph 5 of the application, which cannot be a reason for his being satisfied that he should hear the application ex parte. To my mind, the recording of reasons by the learned judge why he should hear the application ex parte, is mandatory and the learned judge, having failed to record his reasons as required by 039 r 3(1), could not, and should not, have gone on to hear the application ex parte and to grant the temporary injunction. This order was invalid, had no legal basis and is therefore of no legal effect. I have been unable to find any Kenyan authority for this proposition but to my mind, the provisions of 0 39 r 3(1) are clear and unambiguous. I am, however, aware of the Indian case of Amiya Prosad v Bejoy Krishna AIR 1981 Calcutta 351, which is of persuasive value. The effect of the provisions of the then Indian Civil Procedure Code namely, 0 39 r 3 and the ones that they had replaced which in both cases, are the same as our existing 0 39 r 3(1) and that which they replaced in 1985, were considered in that case where the appellant had obtained on the grounds of urgency, an ex parte injunction restraining the defendant from undertaking certain functions. Maitra, J. then held as follows:

> "Mr. Das Gupta has made a short submission. It has been contended that previously the law was the same in this respect because in urgent matters injunction could not be issued in the defendant's absence without strong and grave reasons. The Case of R. H. Baddam v. Dhunput singh in [1897] I can WN 429 at p. 431 has been cited to show that an injunction cannot be issued in the defendant's absence unless there are strong and grave reasons. This has since been clarified in Rule 3 of 0 39 of the Code of Civil Procedure. A proviso has been added that where it is proposed to grant an injunction without giving a notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay. This mandatory provision has not been complied with. The learned Munsif gave no reasons to bring this case within the exception provided for in the aforesaid Rule 3 of 0. 39 of the Code. Moreover, in

> the facts of the case, there is no reason to hold that in view of the urgency of the mater and specially when the object of granting injunction would be defeated by delay, the interim order of injunction was required to be issued. Since that was not done, an illegal order has been passed. Since the order is illegal, it is not necessary to enter into the merits of the case."

It can also be said from my analysis of Mr. Vaya's supporting affidavit, that there was even no evidence before Githinji J on which he could be satisfied that there was any immediate danger of the hotel being sold or otherwise, disposed of and that delay of a few days in giving notice of the application would defeat the object of the injunction. For this reason also, the ex parte injunction should not have been granted.

All that Mr Vaya deponed to in this regard, was the bald and unhelful statement in paragraph 5 of his supporting affidavit 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 shillings 6 billion is likely to be sold for a song and/or at a throw away price of shillings 2 billion with a thunderous loss to the plaintiff."

As already noted, the advertisement for the sale of the hotel annexed to Mr. Vaya's supporting affidavit sand other documents also thereto, annexed, do not support the only principle upon which the ex parte application if heard, could have been granted that is to say, that the sale or other disposition of the hotel was not only imminent but also that a few days delay in giving notice of the application to the CBK would defeat the object of this injunction. In the result, the ex parte injunction granted on 6th January, 1995, should for this reason, be set aside. I derive considerable comfort for this from the decision of the Court of Appeal for Eastern Africa in the case of Noormohamed Janmohamed V Kasamali Virji Madhani [1953], 20 E. A. C. A. 8, where the same issued was considered with regard to the then existing wider and equidoval rule of procedure which has been replaced by the present and more stringent 0 39 r 3 (1). The rule that was replaced is in the following terms:

> "The Court shall in all cases except where it appears that the object of granting the injunction would be defeated by the delay, before granting the injunction, direct notice of the application for the same to be given to the opposite party."

In the case of Noormohamed case (supra), the court of Appeal for Eastern Africa held that although the purpose of a temporary injunction was to preserve the status quo, in order to justify the immediate issue of a temporary injunction ex parte, there must be evidence of an immediate danger to property by sale or other disposition and that the onus of proving good cause for dispensing with notice of an application for temporary injunction rested upon the applicant. When dealing with one of the main grounds of appeal before that court namely, that the injunction should not have been granted ex parte, Sir Newman Worley (Vice President) in his leading judgment had this to say:

> "In the instant case, the respondent's summons did not contain any reference to rule 3 nor any application for an order dispensing with notice and the only paragraph of his affidavit which could be prayed in aid of the immediate issue of an injunction is paragraph 10 which contains the bald assertion that the furniture, goods and effects are in danger of being wasted or wrongly sold in execution ….Before us Mr. Kapila conceded that the only justification for asking for an immediate injunction was to protect the furniture and other chattels. In my view there was no admissible evidence before the Judge on which he could be satisfied that there was any immediate danger of these being sold or otherwise disposed of and that delay of a few days in giving notice to the appellant would defeat the object of the injunction …….. That ground alone would suffice to have tht injunction set aside, but I should perhaps briefly express my view on the other main ground."

The appellant having obtained the ex parte injunction, the application finally came before Ole Keiwua J for inter partes hearing. This was heard together with grounds of opposition filed by the CBK which included one that the appellant and its Director, Mr. Vaya, had concealed material facts from the High

Court in its application for the ex parte injunction, and the CBK's application together with a supporting affidavit sworn to by Mr. Marambi, the Chief Banking Manager of the CBK, to set aside the ex parte injunction obtained by the appellant. The appellant, it would be remembered, had also cunningly, suspiciously in anticipation, and contrary to the spirit of an application for an ex parte injunction, obtained, together with the ex parte injunction, leave to file an affidavit in reply which to my mind, indicates that Mr. Vaya well knew that he had not disclosed all that he should have done in his supporting affidavit and was deliberately laying in wait for Mr. Marambi's affidavit before making his next move.

Upon the filling and service of Mr. Marambi's affidavit, Mr. Vaya filed his second affidavit. An affidavit in reply was filed by Pattni which as can now be expected, was in support of the ex parte injunction that had been granted to the appellant. Indeed, in his affidavit he stated that he agreed with the plaint and the contents of Mr. Vaya's affidavit. He also expressed the legal opinion that the charge was not enforceable since it contravened various sections of the Transfer of Property Act.

When the inter partes hearing came before Ole keiwua J, he had to determine first whether the exparte injunction should be set aside on the grounds that it had been obtained by concealing material facts from the judge who had granted it. He came to the conclusion that this was so and gave instances to illustrate this some of which, I have already identified as follows. The appellant misrepresented the basis of the immediate sale or disposal by other means, of the hotel which could not bear delay of a few days so that the CBK could be given notice of the ex parte application. Whilst Ole Keiwua J founded this on the fact that bids for the purchase of the hotel were to be opened by 12th January, 1995, and that Mr. Vaya must have known of this, I would simply say that Mr. Vaya had no evidence to show, and he knew it, that the sale of the hotel was not so immediate as to exclude a delay of a few days so that notice might be served on the CBK, and that in concealing this, his supporting affidavit was not full and Frank. As I have already stated, this is crucial to the granting of the ex parte injunction. The fact that the appellant well knew the position on the ground at the time and did not produce as any evidence to support this, but hoped that it might be overlooked by not settling out frankly and fully the true position, made him guilty of concealing a very material fact. In other words, if the appellant had no evidence as it did not show that it had, that the sale would take place immediately and could not brook a delay of a few days to serve notice on the CBK, this position should not have been hidden as was done in Mr. Vaya's supporting affidavit. What was concealed, involved the crucial issue whether if the ex parte injunction was not granted, the object of the injunction would be defeated. In my view, the concealment of material facts as to whether the hotel would be disposed of immediately or after a few days, or at an unknown time, was by itself, sufficient to cause the ex parte injunction to be set aside. The studied concealment in the plaint and in Mr. Vaya's supporting affidavit that the CBK had wrongfully decided to exercise its right of sale under the charge because two instalments had not been paid, without disclosing that this was because the very appellant's own two cheques had been dishonoured, could only have been intended to hide from Githinji J a state of affairs which if he had known, would have made him to refuse granting the ex parte injunction. Things were made worse by annexing to Mr. Vaya's supporting affidavit, photocopies of the cheques involved before their presentation, and which did not show on the face of them, that had been dishonoured so that if Githinji J happened to notice them, he would get the impression that so far as the appellant which had made the ex parte application was concerned, the issue of dishonoured cheques did not arise. The cunning was perfected by including in the numerous annextures to Mr. Vaya's supporting affidavit, news paper cuttings which contained reports that the CBK had appointed a receiver to manage the hotel because Pattni's and not the appellant's cheques, had been dishonoured. Thus, if Githinji J happened to read the newspaper cuttings he would form the impression that so far as the appellant itself, was concerned, even if the cheques intended for the payment of the amount due under the charge had been dishonoured, they were not the appellant's cheques. To my mind, this deception which concealed material facts from Githinji J was also by itself, sufficient to justify the setting aside of that ex parte injunction granted by him.

Apart from the foregoing, Ole Keiwua J identified other instances of concealment of material facts by the appellant which in his view and which I agree, justify the setting aside of the ex parte injunction. But I need only draw attention to some of these which also by themselves, justify the setting aside of the ex parte injunction on the grounds that the material facts were concealed form Githinji J. It was the appellants' case that on 29th September, 1994, by the letter of that date, a copy of which was annexed to

Mr. Vaya's supporting affidavit and which I shall refer to as "agreement A", the CBK had admitted that it owed the Bank 3.585 billion shillings and it was agreed that the 2.5 billion shillings owed by the Bank which was secured by the charge, would be set off against that amount and the charge discharged. Inspite of this and being called upon by Mr.Choge, advocate for Pattni in his letter of 2nd November, 1994, to the CBK to discharge the charge, the CBK had not only failed to do so but had rather embarked on a course of selling the hoteland the moveables therein. Mr. Vaya's supporting affidavit also relied on these facts. However, a careful examination of the agreement A reveals a somewhat different story. In accounting for the 13.525 billion shillings owed by the Bank to the CBK, 8.288 billion shillings were credited to the bank leaving outstanding 5.237 billion shillings. When the 2.5 billion shillings represented by the charge over the hotel, and the overdraft and equity of the Pan African Bank in the amounts of 4.252 and 1.800 billion shillings respectively, were also taken into account to the credit of the Bank, the balance found owing to the Bank by the CBK came to 3.585 billion shillings. But this was of course, and the plaint and Mr. Vaya's supporting affidavit were deliberately silent on this, dependant on Pattni's undertaking in order to make sense of agreement A, to provide the CBK with all necessary documents to facilitate the legal and valid transfer of the Pan African Group of companies to the CBK.

Further more, contrary to what was alleged in the plaint and Mr.Vaya's supporting affidavit, the one who had promised to take action under agreement A which was endorsed by Pattni as having agreed to its contents, was not the CBK but Pattni himself.

Turning now to Mr. Choge's letter of 2nd November, 1994, which was addressed to Mr. Murgor, the advocate of the CBK, and a copy of which Mr. Vaya had, what was concealed from Githinji J was the important reply to that letter. Mr. Choge's letter was to the effect that the accounts between the Bank and the CBK having revealed a final balance of 3, 584,601,028 billion shillings owing to the Bank, the 2.5 billion shillings which was the subject of the charge, should be set off against this and the charge discharged. For good measure, he included in his letter, a discharge to be executed by the CBK. This letter lead to Mr. Murgor's letters of 8th and 28th November, 1994 to Mr. Choge to the effect that agreement A had been superceded by another agreement also of 29th September, 1994, which I shall refer to as "agreement B", which dealt with a larger amount inclusive of the 13.525 billion shillings, than that under consideration in agreement A which to my mind, supports the notion that agreement B had subsumed and replaced agreement A. In agreement B, Pattni agreed that he owed the CBK 13.525 billion shillings arising from the non delivery of 210 million dollars to the CBK and 5.8 billion shillings due to the Treasury making a total of 19.308 billion shillings. A total credit of 16.786 billion shillings was given to Pattni leaving 2.522 billion shillings still owing by him to the CBK. Out of this total credit, 8.523 billion shillings represented five assets listed in agreement B which Pattni undertook as a condition precedent to being credited with that amount, to assign and transfer to the CBK by providing it with all the documents necessary to facilitate their legal and valid assignment and transfer to the CBK. The assignment and transfer by Pattni has not taken place of these assets which are the Pan African Bank in Nairobi and Karachi; the Pan African Finance; Uhuru Highway Development Ltd that is to say, the very appellant itself, which owns the Grand Regency Hotel, and which clearly indicates Pattni's control if not ownership, of the appellant and the hotel; the Safari Land Club Hotel Ltd together with the 150 acres that it owns; and Plaza Investments together with the 20 acres of land that it owns at Embakasi.

Of course, if agreement B had been disclosed to Githinji J and had been told that the assets to be assigned and transferred by Pattni to the CBK had not taken place, he would, I am sure as Ole Keiwua J was, not have granted the ex parte injunction. The fact that some of these assets might have been in liquidation is immaterial. I also find it incredible as deponed in Mr. Vaya's second affidavit, that although he was aware of Mr. Choge's letter of 2nd November, 1994, he did not know, or cared to find out anything, about the replies to that letter and agreement B which was the subject matter of those replies.

The principle which is sometime s known as the principle of R V Kensington Income Tax Commissioners, ex p. Princess Edmond de Polignac [1917] 1 KB 486 is well known and has been consistently applied in this country. In this court's recent decision in the case of The owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited Civil Appeal No. 50 of 1989, Kwach JA in his judgment in that case, put it beyond doubt that the principle in the Kensington Income Tax Commissioners case

(supra) applied with equal force here. I need only refer to the following passage from the judgment of Warrington LJ in that case at P.509 quoted with approval by Kwach JA, which sets out the principles:

> "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 may have already obtained by him. That is perfectly plain and requires no authority to justify it."

In the "Lilian S' case Kwach JA also considered the more recent authority of Brink's MAT Ltd v Elcombe [1988] 3 ALL ER CA 188 in which the Kensington Income Tax Commissioners case (supra) had been applied and in which Slade LJ had emphasised the penal nature of the principle in this way:

> "Nevertheless, the nature of the principle, as I see it, is essntially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly in heavy commercial cases, the borderline between material facts and non material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the Rv Kensington Income Tax Comrs principle as a tabula in naufrage, alleging material non-disclosure on sometimes rather Slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience."

In his leading judgment in the Brink's MAT case (supra) at 193-194, Ralph Gibson LJ dwelt comprehensively on non disclosure and its consequences which deserve to be fully set out as follows:

> "In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following .
>
> i. The duty of the applicant is to make a 'full and fair disclosure of all the material facts': see Rv Kensington Income Tax Comrs, ex p princess Edmond de Polignac [1917] 1 KB 486 at 514 per Scrutton LJ. (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the Kensington Income Tax Comrs case [1917] 1 KB 486 at 504 per lord Cozens-hardly MR, citing Dalglish v Jarvie [1850] 2 Mac & G 231 at 238, 42 ER 89 at 92, and Thermax Ltd v Schott Industrial Glass Ltd [1981] FSR 289 at 295 per Browne-Wilkinson J. (iii) The applicant must make proper inquiries before making the application: see Bank Mellat v Nikpour [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller Order in Columbia Picture Industries Inc v Robinson [1986] 3 All ER 338, [1987] Ch 38, and (c) the degree pf legitimate urgency and the time available for the making of inquiries: see Bank Mellat v Nikpour [1985] FSR 87 at 92-93 per Slade LJ. (v) if material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains …an ex parte injunction without full disclosure is deprived of an advantage he may have derived by that breach of duty ……' see Bank Mellat Nikpour (at 91) per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case. (vi) Whether

the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceive, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded'; see Bank Mellat v Nikpour [1985] FSR 87 at 90 per lord denning MR. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

> '…. When the whole of the facts, including that of the original non-disclosure, are before it, [the court] may well grant such second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosure.'
>
> (Se Lyods Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party) [1988] 3 ALL ER 178 at 183 per Glidewell LJ.)
>
> [His Lordship referred to the evidence and matters of non-disclosures and continued:]

For my part , therefore, on the evidence before Judge White I would have held that the defendants had demonstrated material non-disclosure so that the plaintiffs were, within the principles to which I have referred, in mercy before the court, that is to say liable to have the order set aside on that ground. Nevertheless, I have no doubt whatever that on the facts of this case, if the additional information had been before Roch J, the order would still have been made by him at once and on the same terms. [His Lordship considered the additional information placed before Alliot J and stated that there was nothing in the further evidence to affect the conclusion which he had reached. His Lordship continued:] For these reasons therefore, I would allow the plaintiffs' appeal against the order of Alliott J, and I would dismiss the defendants' appeal against the order of Judge White."

All these including the effect of non disclosure and its consequences as comprehensively set out by Ralph Gibson LJ in his leading judgment in the Brink's MAT case at PP 193- 194, and the additional that was adduced before him, were all issues which, as cam be seen from his ruling, Ole Keiwua J fully considered before coming to the conclusion with which I agree, that the Mr. Vaya's supporting affidavit deliberately failed to make a full and fair disclosure of material facts indeed, concealed them as a result of which, Githinji J was misled into granting the ex parte injunction.

But Ole Keiwua J did not end there, he went on to consider the merits of the inter partes application and came to the conclusion that it was undeserving of being granted and for this reason also, vacated the ex parte injunction. In doing this, the learned judge applied the correct legal principles namely, those set out in the celebrated case of Giella v Cassman Brown & Co. Ltd (1973) EA 358 which has so far withstood the test of time. It is the leading authority in this country, on the circumstances in which a temporary injunction would be granted and until it is overturned which it has not, it will retain its present stand in our law. The Giella case set down three important principles namely that in order to support the grant of a temporary injunction an applicant must show a prima facie case with probability of success and even when this has been shown, an injunction will not normally be granted unless the applicant will otherwise, suffer irreparable injury which cannot be compensated for in damages. But if the court is in doubt and only then, will it decided the application on a balance of convenience. It can be said straight away, that Ole Keiwua J was in no doubt and so based his decision on the first two principles. It is therefore necessary to consider how he applied these two principles and in doing this, I bear in mind that the merits of the suit are yet to be determined at a full hearing. The learned judge held that the appellant had not shown a prima facie case with a probability of success because far from the charge being a stop gap, and I find it difficult to understand what the appellant meant by this, it appears that the CBK had made in plain in its letter of 3rd March, 1994 to Pattni that it would only discharge the charge on the hotel upon the payment of the 2.5 billion shillings in the three instalments and in respect of which, Pattni gave to the

CBK the three cheques issued by the appellant. This would hardly have happened if the charge was mainly a stop gap. It must also be remembered, and this he would not have done if the charge was merely a stop gap, that in his letter of 19th February, 1994, to which that of the CBK of 3rd March, 1994, was its reply, it was Pattni himself, who to avoid the charge on the hotel being realised, had pleaded with the CBK to allow the 2.5 billion shillings to be repaid in ten monthly instalments which was not acceptable to the CBK which had as a compromise, proposed the settlement of the debt in three instalments which Pattni accepted. The appellants' case during the inter partes hearing that it owed nothing to the CBK seems to have been demolished by the letter from Mr. Murgor of 28th November, 1994, which I have dealt with in another context. Whether the charge was legal or not is a matter that will be determined at the trial of the suit but it seems to me, that it cannot now be sid that it was illegal or that the steps taken under it were wrong. The futile attempt by the appellant to say that it had not received the statutory notice given under the charge which had been sent by reqistered post to the last known address of the appellant which had been given to the CBK by none other than the famous Mr. Vaya, was also exposed. It could certainly not be said at this stage under these circumstances, that the appellant had shown a prima facie case with a probability of success. But would the appellant suffer irreparable harm which cannot be compensated for in damages. I would say no, because the CBK is obviously in a position to do so, even if the very scanty valuation of the hotel by Herold well & Partners annexed to Mr. Vaya's secnd affidavit and assessed at 69 million dollars or 4,530, 139, 700.50 billion shillings is anything to go by. It must not be forgotten that it is the very same CBK which, without even waiting fort the 210 million dollars which Pattni had promised to deliver to it, had paid him in advance its equivalent in shillings. The lerned judge found no difficulty not only in refusing to confirm the ex parte injunction but also in dismissing the application with costs. This is what has prompted the appeal to this court which was inundated unnecessarily with 59 grounds of appeal. They relate to two main grounds namely, that there was no basis for the learned Judge holding that there had been non disclosure of material facts before Githinji J which would justify the setting aside of the ex parte injunction and secondly, that the learned judge erred in holding that a prima facie case with a probability of success had not been established by the appellant and that the CBK could adequately compensate the appellant in damages for any loss that it might suffer if the hotel were sold. It was suggested that the authority, the Giella case (supra) was not good law, but this has only to be stated to be rejected. I have considered the grounds of appeal and I fear that I find no merit in them. It is well settled, as was held in the case of Mbogo and another v Shah [1968] EA 93 which has been applied on numerous occasions by this Court, that it will not:

> "interfere with the exercise of the discretion of a judge unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misinjustice".

In my view, the learned judge exercised his discretion properly and in accordance with the correct legal principles in setting aside the ex parte injunction and in dismissing the application for injunction. He cannot be criticised on any of the grounds contained in the foregoing holding in the Mbogo case (supra). If I had not come to the conclusion that the learned judge was right in his ruling, I would have dismissed the appeal as I had indicated earlier in this judgment, on the grounds that the ex parte order was without any legal basis and null and void and that there was no evidence before Githinji J on which be could be satisfied that there was any immediate danger of the hotel being disposed of and that a delay of a few days in giving notice of the application, would defeat the objection of the injunction. I would dismiss the appeal with costs. As Tunoi and Shah, JJ.A. agree, that shall be the order of the court.

JUDGMENT OF SHAH J.A.

The hearing of this appeal proper started at 3.00p.m. on 2nd October, 1995 after two applications were disposed of. The first one was by Mr. Murgor on behalf of the first respondent (hereinafter referred to as "CBK"). Mr. Murgor urged us not to grant a right of audience to the third respondent (hereinafter referred to as 'Mr. Pattni). We overruled Mr. Murgor.

Mr. Rebelo appearing for Mr. Pattni then applied for leave to adduce additional evidence by way of affidavit sworn by Mr. Pattni. That application was argued on 31st October, 1995, 1st November,1995

and the morning of 2nd November, 1995. At 3.00p.m. on 2nd November we dismissed Mr. Rebelo's application and stated that the reasons for such dismissal would be given in due course. We have now done so.

The hearing of this appeal proper started as pointed out by me at 3.00p.m. on 2nd November, 1995 and was heard on 6th, 7th, 8th, 9th, 10th, 13th,14th,15th, 16th and 17th days of November, 1995, that is for a period of 10 days plus. The appeal was argued with conviction and vigour on part of all counsel.

The proceedings in the superior court started by way of a plaint filed on 6th January, 1995. This was during the Court Christmas vacation. It does not appear that the plaint as well as the accompanying application for an ex-parte injunction was filed in some hurry. The certificate of urgency in support of the ex-parte application was based on the "grounds that the said application concerns injunction to restrain the defendants from selling L.R. No. 209/9514, Nairobi (Grand Regency Hotel)." I will hereafter refer to the suit property as "the Grand Regency". The certificate of urgency does not set out the date upon which the Grand Regency was to be sold but in the affidavit in support of the application the deponent says that the sale was imminent. Imminent means "Impending threateningly, hanging over one's head" as per shorter Oxford Dictionary 3rd Edition 1952 reprint. The meaning of the word"imminent" still obviously remains the same to-day.

On 6th January, 1995 Githinji J. agreed to hear the application ex-parte during vacation and proceeded to grant an ex-parte injunction restraining defendants (not just CBK) whether by itself (sic), or its (sic) servants or agents, or auctioneers or advocates or otherwise howsoever, from selling the Grand Regency which was subject of a charge dated 21st October, 1993. He also made orders against the defendants stopping them completing any conveyance in respect of the Grand Regency.

What the learned judge (Githinji J.) did not do was to record reasons for granting the injunction ex-parte in terms as set out in order 39 rule 3(1) of the Civil Procedure Rules which sub-rule reads:

> "3(1) where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application ex-parte."

The learned judge perhaps may have had in mind the requirement of the said Order 39 rule 3(1) but the record does not show that <u>he recorded the reasons</u> (emphasis mine).

The learned judge then proceeded to grant a temporary injunction in terms of prayer 1 of the application which as I have pointed out restrained all defendants (not just CBK) in terms of prayer 1 of the Chamber Summons dated 5th January, 1995 until 18th January, 1995.

What was before the learned judge by way of affidavit evidence was the affidavit itself (that of Mr. Mukesh Vaya) marked as one composit exhibit.

Speaking for myself I do not at all doubt Mr. Sharma's statement from the bar that the learned judge had stated that he would need time to study the application before he could make any orders. Mr. Sharma's standing at the bar is immaculate and I would not doubt his statement from the bar.

But the issue that arises is: could the learned judge have grasped the substance of the weighty application before him whilst he must have had (as vacation judge) many other matters that day before him? I keep in mind that 6th January, 1995 was a Friday, a day when some litigants rush to court to stop auction sales which may well be taking place next day. It is unfortunate that some litigants (who merely wish to gain time) come to court almost on the last day and some judges in the superior court grant injunctions even out of sympathy and without regard for strict formal and legal requirements of granting of ex-parte injunctions. These requirements are fully set out in the well known cse of Janmohamed v. Madhani (1953) E.A.C.A. 8 by the then court of Appeal for Eastern African and I think it would not be out of place if I were to quote the fourth and fifth holdings at page 8 of the said report:

> "(4) The onus of proving good cause for dispensing with notice of application for a temporary

injunction is upon the applicant.

(5) Save in exceptional circumstances an injunction will not be granted unless there is a likelihood of "irreparable injury", viz substantial injury which cannot be adequately remedied or atoned for by damages."

The later introduced rule 3(1) of Order 39 of Civil Procedure Rules emphasizes this decision by implication and I would venture to suggest that these principles must be strictly followed.

It would, in my view, have done no harm to any one at all if the learned judge (Githinji J.) would have asked the applicant (appellant), hereinafter referred to as UHDL, to serve CBK which is about 5 minutes walk from the Law Courts Building on Friday for an inter-parte hearing on say Tuesday 10th January, 1995. If such course was adopted CBK could have easily appeared through counsel and would Probably have agreed to delay any sale of Grand Regency if it was contemplating selling or finalizing any such a sale at that time.

I am not unmindful of the fact that finalization of sale of such a property as the Grand Regency cannot be done in a hurry especially when the charge is on landed property and not movables therein. Movables in a 5 Star hotel (which the Grand Regency admittedly is) are not such as which the proposed buyer would not want to go with the proposed sale. UHDL was aware of there being no charge in respect of such movables and Mr. Vaya says so in the supporting affidavit, that is to say, the movables are not charged.

Having said all this I turn to relevant facts which I will as of necessity interperse with some views. Exchange Bank Limited (EBL) owed monies to CBK. The amount owed was US Dollars 210 million. CBK released to EBL a sum (in Kenya Shillings) equivalent to US Dollars 210 million. Whether it was for use by Pattni as opposed to EBL is not a material point at this stage. At least as at 10th August, 1993 EBL was indebted to CBK in the sums of Kshs.9,931,115,400/= plus a further sum of Kshs.45,320,557/30 as per Mr. Pattni's letter of the sum date addressed to CBK on letter-head of EBL. Mr. Pattni and EBL were attempting to repay these sums as stated in the said letter of 18th August, 1993.

Mr. Pattni in that letter undertook to pay to CBK the sum of Kshs.1,977,623,171/= "through sale to CBK of the sum of U.S. $20,000,000/= (U.S. Dollars twenty million only)" and he further agreed to secure the said debt by way of charge over the Grand Regency.

The charge was prepared and is dated 21st October, 1993. This charge was not immediately registered as Pansal Investments Limited (Pansal) a company which has an interest in the Grand Regency filed a caveat dated 22nd October, 1993 (underlining mine) against the title of the Grand Regency.

This Caveat was withdrawn by Pansal by way of a consent letter filed in H.C.C.C. No. 5429 of 1993 (O.S.) which case was between CBK and Pansal. This consent letter, signed by Mr. Oraro for CBK and Mr. Bhailal Patel for Pansal states where relevant:

"2 That in default of payment by the Principal Debtor of all the amount due and owing to the Applicant under the agreement dated 10th August, 1993 being the sum of Kshs.1,977,623,171/= together with interest thereon as agreed, under the agreement aforesaid the applicant (CBK) to be at liberty to register the charge on 31st December, 1993 against Land Reference number 209/9514"

It was as a result of the said consent letter and of course consent order by court, emanating from that consent letter that the charge was registered on 31st December, 1993.

The history then takes a different turn. On 7th January, 1994 CBK purported to send a letter to UHDL at ICEA Building, 5th Floor,Kenyatta Avenue, Nairobi.

It would be convenient at this stage to set out the acquisition by or on behalf of Mr. Pattni of companies owned by late Mohammed Aslam which included Pan African Bank Limited, Safariland Club Limited, the Grand Regency and all interests of late Mr. Aslam in various companies which had shares in Pan

African Bank Limited and Pan African Finance Limited namely Razfar Holdings Limited, Plaza Investments Limited, Kenplaz Management Services Limited and Trisis Holdings Limited.

The articles of agreement of sale of the said assets (hereinafter referred to as "PAB Assets") were signed on 25th January,1993. Pansal acquired PAB Assets at a price of 14 (fourteen) million US Dollars and Pansal was to take over the indebtedness of Safariland Club Limited and Pan African Bank Limited (PAB). It appears that PAB owed large sums of money to CBK, in the region of KShs. 4.5 billion (four and a half billion Kshillings).

Mr. Pattni in his affidavit in reply reffers to the said agreement of 25th January, 1993 as having been made "for the sole purpose of providing a protective cover as well as for covering up the financial messes occasioned by CBK whilst managing the Pan African Group of companies". He then proceeds to say that he did not "cause CBK to transfer any debt from the Aslam family on (sic) the Pan African Group of Companies save for the purposes intent and spirit which led to the signing of "MMK1". "MMK1 is the agreement of 25th January, 1993.

This agreement is a document in writing prepared by M/s Kilonzo & Company, advocates. In my view such an agreement cannot simply be brushed aside as Mr. Pattni would want to have it. The agreement even provides for settlement of disputes by arbitration under the rules of International Rules of Arbitration. Whilst the agreement is executory it is capable of performance.

It is trite law that the contents of a seriously drafted agreement cannot be washed away by simple allegations to the effect that the same was merely "an eye-wash". The vague reference to "purposes. Intent and spirit" cannot override a solemn agreement.

Mr. Pattni denies that he entered into any contract with CBK for delivery of US $210 million or its equivalent in Kenya Shillings. Despite such denial UHDL relies on the agreement dated 29th September, 1994 ("Document A") which is in the form of a letter addressed to Mr. Pattni by CBK and is signed by Mr. Pattni as having been accepted as correct. In fact it is a document heavily relied upon by UHDL to show that UHDL is not liable to CBK(in respect of the guarantee and the charge) as, as UHDL puts it, there is no debt due by EBL to CBK and that CBK owes a sum of SHS.3,585,000,000/= to EBL. Such being the case (as per UHDL) UHDL does not have to redeem the charge.

There is no suggestion that Mr. Pattni was coerced into signing document A.

On 29th September, 1994 yet another agreement (in form of letter addressed to Mr. Pattni by CBK) was entered into between CBK & Mr. Pattni. Mr. Pattni by virtue of that agreement (referred to as Document'B') agreed that an alleged treasury debt of Shs.5,783,000,000/= be added on to CBK debt thereby increasing EBL's indebtedness to CBK to KShs.19,308,000,000/=. At this stage I am not convinced (save for what I would soon say) that the said debt of Shs.5,783,000,000/= can be so added. It is stated that that is the debt owed by Goldenberg International Limited (GIL) to the Treasury. It is not for me to decide this point at this stage and in fact that sum is part of the criminal charges against GIL and others. Neither EBL nor UHDL are concerned with the pending criminal case and it would be quite wrong for me to make any reference derogatory or good in respect thereof.

Again on 29th September, 1994 CBK by its Governor Mr. Micah Cheserem gave to EBL first option to "redeem the Grand Regency as per the legal charge". In this letter the Governor noted that EBL or Pattni are pursuing export compensation claim amounting to around shs. 2.1 billion with accrued interest from customs department. The Governor stated in this letter that the balance of Shs.2.5 million will be off-set against the provision already made.

How the three letters came to be written on the same day has been attempted to be explained by Mr. Marambi (for CBK) and this is now he puts it in paragraph 32 of his affidavit sworn on 12th day of January, 1995:

> "32. The first defendant (CBK) agreed with the third defendant (Pattni) as follows:

(a) For the purposes of the steps being taken to recover the Shs.13.5 billion as required by the Public Accounts Committee if he (Pattni) assigned his interest in Pan African Group of Companies including the charge over the Hotel (the Grand Regency) he would be left with a credit balance of Kshs.3,585,000,000/=

(b) The said balance would be appropriated towards payment of the further sum of shs. 5,793 billion which was not before the Public Accounts Committee and the third defendant having assigned his interest in:

(a) Pan African bank Nairobi & Karachi;

(b) Pan African Finance;

(c) The Grand Regency Hotel Limited;

(d) Safari Land Club Limited together with 150 acres it owns;

(e) Plaza Investments Limited together with 20 acres if (sic) owns at Embakasi. The third defendant (Mr. Pattni) would still owe a sum of Shs. 2 billion 522 million to the Central Bank of Kenya being moneys due and owing to the first defendant (EBL) held on behalf of the Government of Kenya being monies due and owing to the first defendant (CBK) held on behalf of the Government and the people of Kenya."

The reason why the issue of the said sum of KShs. 5,783 billion was not brought up before the Public Accounts Committee was given by Mr. Pattni. In his affidavit sworn on the 16th day of January,1995 Mr. Pattni says that "MMK12" (Document 'B') was not a document for the purposes of explanation to the Public Accounts Committee;neither it was a final agreement. Mr. Pattni goes on to say:

"The first defendant (CBK) did after 29th September, 1994 attend several proceedings before the Public Accounts Committee but never produced the aforesaid document; in fact "MMK9" (Document 'A') was final and conclusive agreement and R. M. Marambi's evidence before the P.A.C. proves the same. At all times "MMK12" was overtaken by save for the circumstances the purpose object and spirit it remained intended for and taken prior to the execution of 'MMK9' (Document 'A').

It is all very well to say what Mr. Pattni said. The fact remains that Documents A, B and C are contemporaneous. Document B is adding to document A. It only adds the said sum of Kshs.5.783 Billion and (as signed by Mr. Pattni himself) shows that EBL was indebted to CBK (after taking into account the said sum of Kshs.5.783 Billion) in the sum of KShs. 2 Billion 522 million (Shs.2,522,000,000/=). In my view it (Document B) goes to show that Mr. Pattni treated EBL, UHDL, PAB Group as all under his control. He was the Chairman of EBL. He was through Pansal controlling UHDL. He was through EBL and other companies the purchaser of interests in PAB group of companies. To me it is quite clear that he was the brains behind all these deals and all the companies in question danced to his tune. I see it no other way. He was freely signing away all the assets referred to. Why would he do that? Lord Denning says in the case of Wallersteiner vs Moir (1974) 8 ALL E. R. 217 at page 237

"It is plain that Dr. Wallersteiner used many companies, trusts, or other legal entities as if they belonged to him. He was in control of them as any "one-man company" is under the control of one man who own all shares and is the Chairman and managing director. He made contracts of enormous magnitude on their behalf on a sheet of notepaper without reference to any one. Such as a contract on behalf of the Rothschid Trust to buy shares for Pounds 518,766 15S. or to vary it; or a contract on behalf of Stawa AG for a Commission of Pounds 235,000. He used their moneys as if they were his own. When money was paid to him for shares which he himself owned beneficially, he banked it in the name of IFT of Nassau. Such as the Pounds 50,000 for the shares in Watford Chemical Company Limited...."

What does Mr. Pattni do in this case. He freely signs on the same day Documents A and B. He was as I have said the chairman of EBL. He was through Pansal controller of the Grand Regency. He had acquired the interests in PAB Group of companies which interest he purported to transfer to CBK on 29th September, 1994 despite the fact that PAB Group of Companies that is Pan African Bank Limited and Pan African Credit Limited was since 19th August, 1994 in liquidation. The liquidation was Deposit Protection Fund Board of which Board the Governor of the CBK is the chairman.

Although Mr. Pattni's connection with UHDL is denied it is Mr. Pattni who handed over UHDL's three cheques totalling KShs. 2.5 billion to CBK on 3rd April , 1994. Again it is Mr. Pattni who agrees with what CBK says in its letter of 3rd March, 1994 addressed to Mr. Pattni (in his capacity as chairman (I would imagine) of EBL. He agrees that if the sum of Kshs.2.5 billion is not paid on due date (by 15th April 1994) CBK would be at liberty to sell the Grand Regency. Mr. Pattni always negotiated extension of time as regards the stopping of proposed sale of the Grand Regency. See his letters of 29th March, 1994 and 14th April, 1994 addressed to The Governor CBK. Pansal is the purchaser of Pan African Bank assets and these assets were in control of Mr. Pattni at all material times. He stated in his letter of 10th August, 1993 (addressed to the Governor of CBK) that the balance amount of KShs.1,977,623,171/= shall be secured by a first charge over the Grand Regency and the Charge was prepared engrossed and registered.

The thrust of the argument on behalf of UHDL (as already stated by me) is that as CBK is owed no money by EBL and as the position is to the contrary (that is EBL is owed moneys by CBK) there is no obligation on part of UHDL to pay the sums secured by the charge. It must be recalled that both, Documents A and B are signed by Mr. Pattni. Both refer to exactly same figures save for GIL moneys. It cannot therefore be stated that one only of the said documents is to be binding. It of course suits UHDL to say that only Document A is binding. I will now turn to the Grounds of Appeal. The first twelve Grounds of Appeal refer to non-disclosure of material facts at the time the ex-parte order was obtained.

Whilst Mr. Murgor has valiantly attempted to extend the extent of non-disclosure I will confine myself to what the learned judge in the superior court confined himself to. The learned judge considered the following:

> (a) The urgency factor relied upon by UHDL was misrepresented as to obtain the ex-parte order of 6th January, 1995.
>
> (b) Agreement 'A' (Document'A') has no reference to discharging the charge and giving back the possession.
>
> (c) Documents B and C were concealed at ex-parte stage. If these were disclosed Githinji J. may not have granted the said ex-parte order.
>
> (d) Correspondence between advocates of CBK and Mr. Pattni was not disclosed. If it was disclosed Githinji J. could not have granted the said ex-parte order.
>
> (e) Statutory notice dated 7th January, 1994 was not disclosed. Had it been disclosed Githinji J. would not have granted the said ex-parte injunction.
>
> (f) The fact of dishonoured cheques was not disclosed. Had that fact been disclosed Githinji J. would not have granted the said ex-parte injunction.
>
> (g) It was implicit that if there was real urgency UHDL's advocate would not have taken 5 days to have the formal order granting the ex-parte injunction drawn up.

There can be none and there is no doubt about the proposition that any party seeking an ex-parte order must come clean, candid and with all facts to court. Nothing must be kept from court. This is because the other side is not there and the court has to go by what is before it.

There is merit in the learned judge's comment that certificate of urgency was not explicit. The property was advertised for sale on 7th November, 1994 in the National Dailies and International magazines. The fact of opening final bids on 12th January, 1995 was also placed in the daily press. UHDL as the most affected party had Mr. Vaya to apply for an injunction in November. He (Vaya) does not do so until he is given the go-ahead by Mr. Pattni. Mr. Vaya should have consulted UHDL's lawyers in November, but he waits until he gets the go-ahead from Mr. Pattni. This is also yet another example of Mr. Pattni calling the shots as Dr. Wallersteiner did in Wallersteiner vs. Moir (supra).

Document 'A' was placed before Githinji J. But not Document 'B'. It is alleged that Mr. Vaya was not aware of existence of Documents B & C. He is aware of A. It is clear because it suits him. It is all very well to say that Mr. Pattni is a secretive man, a silent sufferer and a sincere person. Why should Mr. Pattni who gives the go-ahead to sue hide Document 'B'. Clearly because it does not suit him. If Mr. Sharma was aware of the existence of Document 'B' he could have easily distinguished the effect of Document 'B' from Document 'A'. It is obvious that B was not disclosed to court or to Mr. Sharma for an ulterior motive.

Whilst Document A does not talk of discharging the charge I am not persuaded that there was any material non-disclosure in that respect. Read as it is, that document shows that as CBK was in fact allegedly indebted to EBL, UHDL was not bound to redeem the charge.

Correspondence between advocates of CBK and Mr. Pattni's advocates (such as is on record) tend to show that CBK was complaining about not having obtained transfer of PAB assets and Mr. Choge (for Mr. Pattni) was seeking a duly executed discharge of charge and payment by CBK to his (Mr. Choge's) client of the sum of shs. 1,084, 601,028/=. This sum obviously comes from Document 'A' speaking for myself I would not put much emphasis on non-production of such correspondence, save to say that it may have led Githinji J. to believe that there was a serious dispute about UHDL's right (then) to redeem the Grand Regency.

As regards the alleged non-disclosure of statutory notice dated 7th January, 1994 I have a lot to say. This notice was sent by registered post to P. O. Box 40511 Nairobi which is the post Office box number used on the certified copy of an extracted from resolutions adopted in the meeting of the Board of Directors of UHDL held at 6.00 p.m on 9th August, 1993 at the registered office of UHDL. At first, attempt was made to say that was not UHDL's post box number. Later it transpired that it was late Mohamed Aslam's post office box number. UHDL was a project of Late Mohamed Aslam. Attempt was also made to say that P.O. Box 40511 is used by many others. No particulars were provided.

As the record stands one of the last known postal addresses of UHDL is P.O. Box 40511. It also come out during the course of the hearing of this appeal that half of the 5th Floor of ICEA Building was in possession or control of Late Aslam's companies including UHDL.

The Interpretation And General provisions Act Cap 2, Section 3 (5) says:

> Where any written law authorities or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered letter, a letter containing the document, and, unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of the post"

The proof of posting the said letter is on record. There is nothing to negate that, save a mere statement that the letter was never received. This is against the background I have already referred to.

It is averred in paragraph 15(c)of the plaint that no statutory notice was given before the appointment of the Receiver as required by the provisions of the Transfer of Property Act.

The charge is dated 21st October,1993. It contains the same post office box number (that is P.0 Box

20632) as that contained in the Guarantee (undated) and the grant to UHDL of that plot on which the Grand Regency stands.

But it is significant that P.O Box 20632 is that of Messrs. Haratius and Rommel Da Gama Rose (who are, as I know, brothers) as shown in the memorandum and articles of Association of UHDL at pages 50 and 56 of the record of appeal, and who (the Da Gama Rose brothers) or at least one of them still use that post box number as per the latest Nairobi postal telephone directory.

Another interesting aspect of this Box number (40511) is that it was the number used by M/s. Harold Webb & Partners in their letter of 9th March, 1994 to UHDL. That letter is annexed to Mr. Vaya's affidavit sworn on 16th January, 1995.

It becomes clearer therefore that P.O Box 40511 is that of UHDL and there is nothing before me to show that that letter was returned unclaimed or undelivered to the sender. I will say that often registered letters are not claimed by addresses and when letters are returned 'unclaimed' the intention on the part of the addressee is simply to ignore it. However there is no evidence that the letter was returned'unclaimed'.

There is no doubt that negotiations for extension of time to pay took place after that letter was written. I can only conclude that UHDL, Mr. Pattni and EBL were aware of the contents of that letter. It is clear that that vital letter was not brought to attention of Githinji J. by Mr. Vaya.

However it is still argued that that letter does not suffice to serve as a proper notice under the Transfer of Property Act. I will revert to this factor when I come to merits of the appeal.

There has been a lot of criticism of the appellant by way of arguments to the effect that the appellant failed to inform Githinji J. that its cheques were dishonoured by non-payment. I refrain from using the word "bounced". That word is not used generally by lawyers. Speaking for myself I accept Mr. Sharma's explanation to the effect that the tenor of his application was to say to Githinji J. that two installments were not paid and that as there was reference to "bouncing" cheques in newspaper cuttings annexed to Mr. Vaya's affidavit. There was therefore no deliberate concealment of dishonour of the two cheques in question totalling K.shs. 2.4 billion. I (for myself) would accept that explanation.

Similarly I would accept Mr. Sharma's explanation as to delay in drawing up the formal order of 6th January, 1995. The two day delay is in the circumstances as narrated by Mr. Sharma is acceptable. He was engaged in having Mr. Pattni's sureties approved and I can well believe it would have been a substantial exercise.

Therefore speaking for myself the most important non-disclosure was as regards the receipt of statutory notice and that of Documents B and C. These non-disclosure could well call for discharging of an injunction granted ex-parte. I reiterate what I said at the beginning of this judgment when I referred to the oft cited case of Janmohamed v Madhani (supra). The principles enunciated thereon ought to be followed.

Mr. Sharma argued that CBK's actions in resorting to the charge straight without invoking other remedies were wrong. There is nothing in the charge to say that CBK must exhaust other remedies it may have. The property is charged (Page14 of charge) to CBK for better securing to CBK the repayment of charge debt interest and all other moneys and expenses hereby intended to be secured by the chargor.

Mr. Sharma then urged the court to hold that the charge is invalid, null and void and unenforceable as it allegedly contravenes Central Bank of Kenya Act (Cap 491). Central Bank of Kenya Act provides in Section 36:

> "36 The Bank (CBK) may grant loans or advances for fixed periods not exceeding six months to specified banks which the following security for such loans or advances:-
>
> (a) The credit instruments referred to in section 35; or

(b) Negotiable securities issued or guaranteed by the Government, subject to the Specifications ands limitations provided for in sections 47, 48 and 49.

Section 35 of Cap 491 deals with rediscounting which I am not concerned with here. I am also not in this appeal concerned with sections 47, 48 and 49 of Cap 491.

Mr. Sharma's objection was that the loan or advance granted to EBL by CBK was contrary to spirit of section 36 of Cap 491 as EBL was not a specified bank under section 2 of Cap 491. It transpired upon questioning by us that EBL was a specified bank with effect from 13th April 1992 and the certificate of specification was withdrawn on 23rd day of September, 1993.

It is a matter of surprise for me that CBK's advocate did not bring out this straightforward and simple fact in the superior court or before the other bench of this court when a Rule 5(2) (b) (Rules of this Court) application was heard. It is only when councel's attention was drawn to the fact that EBL's name cannot feature in cap 491 (last amended in 1984) copy in Laws of Kenya as EBL did not probably exist in 1984. That turned out to be true and it was shown that EBL was at all material times a specified bank. There being no illegality in CBK paying out equivalent of US Dollars 210 million to EBL it does not fall for me to decide if a party an alleged illegality can take advantage of its own illegality by way of defence. It is clear that payment was made during the subsistence of EBL's period of 'specified' existence. It is also clear that CBK did its best to secure repayment of the sum of KShs.13.5 billion or US Dollars 210 million.

Mr. Sharma then argued that the charge was void as it was ultra vires the powers of directors of UHDL to enter into such a contract. One look at the Memorandum of Association of UHDL confirms (Article 5) that one of the objects for which the company was established was:

"To lend money to and guarantee or give security for the performance of the contracts or obligations of any company, firm or person, and the payment and repayment of the capital and principal of, and dividends, interest or premiums payable on, any stock shares and security of any company, whether having objects similar to those of this company or not, and to give all kinds of indemnities and without prejudice to the generality of the foregoing in particular to give such guarantees in favour of or otherwise assist any holding company or subsidiary for the time being of the company or any other company associated with the company."

There is no doubt therefore that the charge is given intra vires the powers of the director of UHDL.

The next issue Mr. Sharma took was that the charge was a fraudulent preference to CBK, as a creditor as opposed other creditors. Such preference if any, which I do not see, does not make the charge a nullity. The resolution to create a charge was passed on 9th August, 1993, more than six(6) months prior to the date (19th August,1994) EBL was placed in liquidation. The mechanics of drawing up the charge, time taken and delay occasioned as a result of Pansal's cavat do not cease to make the charge per se a fraudulently preferred debt over other creditors. No other creditor of UHDL has appeared to say that his interests have been jeopardized.

A point which both counsel overlooked was the powers of directors to make contracts. S.34 of the Companies Act provides specifically that

"34(1) Contracts on behalf of a company may be made as follows:

(a) A contract which if made between private persons would by law be required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied;

This section of Cap 486 goes to show straight away that the directors who enter into such contracts cannot rely upon their alleged non-competency to enter into such contracts including contracts which need to be in writing.

I revert to the alleged fraudulent preference. No particulars of fraud are pleaded.

It is clearly pointed out in Palmer's Company Law Volume 1, 22nd Edition at Paragraph 81-79 9Page 929) that:

> "For a transaction to constitute a fraudulent preference, it must appear that the transaction took place within six months of the commencement of the winding up, and that the dominant motive in the mind of the company, acting by its directors, was to prefer the creditor."

No such dominant motive as is referred to in Palmer's Company Law is shown to exist in the minds of Messrs Vaya & Rana. It is for the purposes of this appeal an afterthought, quite clearly. See Re Jackson and Bassford [1906] 2 Ch. 467. In that case the company agreed to issue a debenture to Jackson, who had guaranteed the company's overdraft but delayed issuing the debenture until the eve of insolvency. Also see Re: Eric Holmes (Property) Limited [1965] Ch. 1052. The material time therefore in my view is the date when UHDL resolved to charge the Grand Regency and not the date of the charge.

Mr. Sharma then laid emphasis on the charge itself. He argued that the charge was not an English mortgage in that there was no absolute transfer of the Grand Regency to CBK and that no certain date of payment was indicated; also that the words "due and payable" were omitted and only word used was "payable."

The charge in question is a charge in respect of land, title whereof is held under the provisions of Registration of Titles ACT (Cap 281) (RTA). Therefore the Transfer of Property Act of India as amended in Kenya in 1959 applies to the charged property. In the recitals in the charge there is clear mention of consideration for the charge that is forbearance from insisting on immediate payment. CBK was agreeing to forbear from insisting an immediate payment by EBL if EBL provided a security which security EBL provided through UHDL. There is a covenant to repay by 21st November, 1993.

Although the charge was not registered until 31st December, 1993 (for reasons as pointed out by me earlier) the charge once registered takes effect from the date of registration . R.T.A. was amended in1989 to add a sub-section to section 32, the intendment whereof is clear. Upon Registration any contract (and a charge is a contract) takes effect from the date of charge. It is therefore not proper to say that there is not date of redemption. That argument cannot prevail in view the express provisions of whole of new section 32 of R.T.A.

Clause 1 (b) of the charge provides that CBK could after demand in writing made chargor (UHDL) all moneys which shall or may for the time being be owing.

The argument as regards there (being in the charge) no conveyance of the charged property to CBK does not hold water. The charge is under RTA and in clause 5(at page 714 of the charge) it is stated:

> "For the better securing to CBK the payment of the charge debt interest and all other moneys and expenses hereby intended to be secured the chargor DOTH HEREBY CHARGE the piece of land.....to CBK."

In respect of properties held under RTA there can be no conveyance. Conveyance can only be in respect land held under Government Lands Act. It would be wrong to "convey" a property held under RTA.

There is also the clearest reference to the effect of sub-section (1) of Section 69 and sub-section (1) of Section 100A of the Transfer of Property Act 1882 of India as incorporated therein by the Indian Transfer of Property Act (Amendment) Act 1959 and both Messrs. Vaya and Rana confirm that they have been explained and understand the effect of those two sections. The explanation was given by Dinesh Kapila Esquire, an advocate. It does not now lie in the mouths of Mesrs. Vaya and Rana to say that the charge was not an English mortgage. I t is clearly an English Mortgage and after expiry of redemption date CBK is entitled to demand full sum secured by the charge.

Mr. Sharma referred to the mortgage document which was the subject-matter in case of Bhatt v Ajeet Singh & Another [1962] E.A. 54. It was in respect land under Government Lands Act and not RTA and 'conveyance' is the proper word to use in respect of a mortgage in respect of such land (GLA). In fact the holding in Bhatt vs Ajeet Singh & Another reads:

> "The instrument was an English Mortgage within the definition in para (e) of S.58 of the Indian Transfer of Property Act, 1882; the clause in the mortgage providing that upon default in payment of the principal sum or interest as required by the mortgage, or upon failure to fulfil any obligation of the mortgage, the entire loan then owing should become payable, and did not remove it from the ambit of para (e) of S.58 ibid.

In the present case payment was due. Attempts to pay the sum in question were made. Two cheques were dishonoured. Interest due was not paid. Clearly there was right to sell the charged property accrued to CBK. Mr. Sharma further urged that if it was an English Mortgage and if a notice was actually given the notice was not a three month notice as stipulated by the Transfer of Property Act (TPA) .The relevant section of TPA states:

> "69 A. (1)A. A mortgage shall not exercise the statutory power of sale unless and until-
>
> (a) Notice requiring payment of the mortgage money has been served to the Mortgagor or one or two or more mortgagors, and default has been made in payment of the mortgage-money, or part thereof, for three months after such service; or
>
> (b) Some interest under the mortgage in is arrear and unpaid for two months after becoming due; or
>
> (c) there has been a breach of some provision.....,other than and besides a covenant for payment of the mortgage money or interest thereon".

It is clear that if interest is due for over two months and not paid notice is not required. In this case no payment whatsoever of interest has been made to-date.

This sub-section does not provide that the chargor or mortgagor must be told"unless you pay within three months the property will be sold." It simply means that after giving of notice the mortgagee or chargee must wait for three months before proceeding to sell.

I have already pointed out that the charge amounted to an English mortgage and that a notice demanding payment under the charge was duly sent. It was even acted upon by UHDL, EBL & Mr. Pattni seeking more time.

There is no magic in the non-use of word 'due' money can only be payable when due. I see no fundamental contravention which Mr. Pattni Sharma referred to.

Yet another factor which no one has considered is that interest is due and payable. When interest (which is not compounded into principal sum as is the case here) is payable by the chargor and not paid for two months the need to give notice to sell does not arise. The charge clearly states that the sum of Shs.2.5 billion is payable together with interest, see page 29 the charge.

Clause 7 of the charge states:

> "(a) That the charge debt and interest hereby secured shall immediately become payable without demand and the statutory power of sale of CBK shall forthwith become exercisable without any further or other notices:-

It is surprising that none of the counsel have addressed this court on this point which cannot be clearer.

Although the charge (at page 2) thereof refers to the sum of shs.2.5 billion (KShs. 2,500,000,000/=) in the

recital in the body of the charge the borrower's covenant is to pay that sum together with interest and other charges as pointed out earlier by me and reference to payment or other charges is also at page 4 of the charge.

Reference to Mr. Marambi not alluding to the non-return or return by post office of the letter of demand is misplaced in that it is for the addressee to rebut the presumption of receipt of a letter mailed by registered post.

I come now to the all important Document'A' as this document, dated (as earlier pointed out) 29th September, 1994 comes into existence after appointment of liquidator by CBK. Such appointment amounts to equivalent of a court winding up. There was no power in the liquidator, or Mr Pattni or the shareholders Pan African Bank, without consent of court to give credit to EBL in the sum of Shs.6,322,000,000/=. How CBK agrees to reduce EBL's indebtedness to CBK in the sum of KShs.4,522,000,000/= (Pan African Bank Overdraft) without the consent of court is not understood. Similarly reduction of EBL's liability to CBK in the sum of KShs.1,800,000,000/= in respect of Pan African Bank Equity is not understood. These assets (if assets, if any and if they may be referred to as assets) were not in control of EBL or Mr. Pattni, at that time that is 29th September, 1994.

Therefore arithmetically it becomes clear that document'A' properly construed (that is minus items 2 & 3 under heading "less") points out that even at that stage EBL is indebted to CBK in the sum of approximately KShs.2,737,000,000/=. So in the end Document 'A' on which UHDL heavily relies does not help it.

In any event there being no power in Mr. Pattni or EBL to transfer PAB assests to CBK (on account of already appointed liquidator) the figures of Shs.4,522,000,000/= or Shs.1,800,000,000/= have no relevance. As pointed out by me CBK is still owed by EBL and/or Pattni a sum of Shs.2,737,000,000/= plus Shs.2,500,000,000/= in respect of charge over the Grand Regency.

I have endeavoured to set out answers to all relevant points taken by Mr. Sharma and I must point out these points were painstaking taken.

When he opened up arguments on law Mr. Sharma asked us to follow the principles in American Cyanamid Co. vs Ethicon Ltd. (1975) 1 ALL e.r. 504. The House of Lords in England in that case decided that it was for the purposes of an interlocutory injunction, not necessary for applicant to establish a prima facie case and that it was upon the court to consider whether on balance of convenience interlocutory relief should be granted provided claim was not frivolous or vexatious, that is that there was a serious question to be tried. Mr. Sharma wants courts to depart from the principles as established in the oft cited case of Giella vs Cassman Brown & Company Limited [1973] E.A. 358.

Mr. Sharma referred to the recent decision in Trouistik Union International & Another v. Mbeya & Another, Civil Appeal No. 146 of 1990 in which a five judge bench of this court unanimously overruled the ratio decidendi of the majority judgment in the case of Hintz v Mwakima (1982-88) 1 KAR 430. Majority judgment in the said Hintz case had decided that Letters of Administration were not necessary to ground a claim under The Law Reform Act of Kenya. In the Trouistik Union International case this court said this:

"In Income Tax V.T (1974) EA 546 Spry Ag. V P, speaking for the court said:

> "I would also remark that where it is intended to ask this court to reverse one of its own decisions, the President should be asked to consider convening a bench of five judges although a bench of three has some powers' (underling mine)

It is but correct to say that a bench of three judges of this court, in an appropriate case, can reverse an earlier decision in a previous case. See Dodhia v National & Grindlays Ltd and Another [1970] E.A. 195. In that case the predecessor of this court held that the Court of Appeal, while it would normally regard a previous decision of its own or that of Privy Council binding, should feel free both in Civil and Criminal

cases to depart from such decisions when it appears right to do so (emphasis mine). However in that case as there was a minor matter of construction and not of any principle the court did not depart from the decision of privy council. At page 199 of Dodhia case Sir Charles Newbold P. said:

> "For these reasons I am satisfied that as a matter of judicial policy this court as the final Court of Appeal for Kenya, Tanzania and Uganda, while it would normally regard a previous decision of its own as binding, should be free in both Civil and Criminal cases to depart from such previous decision when it appears right to do so. It will, of course, exercise this power only after careful consideration of the consequences of doing so and the circumstances of the particular case. I would not seek to lay down any more detailed guide to the circumstances in which such a departure should take place as the matter would be best left to the discretion of the court at the time it was up for consideration."

The principles propounded in Giella v Cassman Brown have stood the test in Kenya since at least 1973 and to depart from the same would mean a wholesale change. Are the Cynamide case principles applicable or practicable here? That is the main question.

In E.A. Industries vs Trufoods Ltd. [1972] E.A. 420 the predecessor of this court did state the need for finding of a prima facie case. See page 422. The court then considered the issue of balance of convenience. Spry V.P. said:

> "In my opinion the judge was clearly wrong in holding that there was no likelihood of appellant company succeeding. I think a prima facie case has been shown but I am not prepared to say that the outcome is so certain one way or the other that the application ought not be decided on the balance of convenience."

The predecessor of this court in Abel Salim & Others v Okong'o & Others [1976] K.L.R. 42 declined to follow the Cynamide case principles and Mustafa J.A. (as he then was) stated:

> "I am of the view that the conditions for the grant of an interlocutory injunction are well settled in East Africa, and I can see no reason to depart from them. These are stated in Giella v Cassman Brown & Co. Ltd. [1973] E.A. 358 at 360. The decision of the House of Lords to the contrary in American Cynamide Co. v Ethicon Ltd [1975] 1 ALL E.R. 504 does not alter the situation here."

I hope I will be forgiven for not referring to all authorities which Mr. Sharma so painstakingly cited to try to get the court agree to follow the Cynamide case principles. I will only make passing reference. In the case of Donmar Productions v Bart & Others [1967] 2 ALL E.T. the chancery judge Ungoed - Thomas J. stated that a strong prima facie case or a probability must be established.

Copyright cases stand on their own.

Most of the Indian authorities cited by Mr. Sharma make reference to a prima facie case. There is some reference to arguable case but majority of those authorities still refer to prima facie case with a probability of success. These are Chandulal v Municipal Council of Delhi (1978) A I R 174 and Narian v U. P. State Electricity Board [1982] A I R 14. It is clear Indian Courts have been somewhat divided on the principles applicable.

Here we must consider circumstances peculiar to our own jurisdiction. If the requirements for grant of interlocutory injunctions were made less stringent almost all work to be done by the superior court would be towards grant of such injunctions. I see no reason to depart from Giella case principles and I am afraid I must decline to apply Cynamide case principles in Kenya.

Each case must stand on its own peculiar facts. No two cases can be exactly alike and all that I have said so far applies to the facts of this particular case, as the same were before the superior court.

I have no doubt in my mind that the principle enunciated in the celebrated case of Saloman v A Salomon

& Co Limited [1897] A.C. 22 stands good. A limited liability company is a separate and distinct entity from its director or directors. What I have pointed out earlier simply amounts to this: the court can, if necessary, lift the corporate veil, to find out who is the person behind the Company to establish if it was the Company's act as dictated by the director who certainly has a right to make contracts on behalf of the company as shown in section 34 of our Companies Act (Cap 486).

The next issue of importance is Accord & Satisfaction. Was the original contract brought to an end by any accord and satisfaction. I have already pointed out that Mr. Pattni was in no position to hand over assets of PAB Group of Companies to CBK on 29th September, 1994. There is no acceptable evidence of accord and satisfaction. It is true that a proper accord and satisfaction (even if the consideration is executory) could bring a contract to an end.

The case of Githunguri v Jimba Credit Corporation, Civil Appeal No. 144 of 1988 (unreported) stands on its own. There were at least four weighty arguments upon which a stay (under Rule 5(2) (b) of the Rules of this Court) was granted in Civil Application No. NAI 161 of 1988 and in the appeal itself this court ventured to differ from the opinion of the learned judge in the superior court. There the corporation was admittedly in contravention of section 10(1) the Banking Act (Cap 488) amongst other issues.

Similarly the Banhill Plaza case stood on its own facts.

Shields J. in the case of Bank of India v Madhwani H.C.C.C. (Mombasa) No. 544 of 1989 (unreported) found that loan given in contravention of the Exchange Control Act was not recoverable. I am not too sure that I agree with that decision but I need not say any more. Here the illegality relied upon turned out to be a red herring as already pointed out.

I have already stated why Document 'A' was not consumable.

In referring to Mr. Sharma's submissions I have covered, albeit indirectly, Mr. Murgor's submissions. I would deal in particular with the issue of powers of this court in hearing an appeal against the exercise of discretion of the learned judge in the superior court. This court will not interfere with the exercise of such discretion unless it is satisfied that the learned judge misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice. See Mbogo & another v Shah [1968] E.A. 93.

Whilst the learned judge in the superior court did not go into great lengths in answering all points raised, I am of the opinion that in the end he arrived at a correct conclusion.

Still an issue eventually will arise for determination by the Superior Court. Can a man take advantage of his wrong if one was to assume that CBK gave monies to EBL illegally. The latin maxim is "Nullus Commodum Capere Potest De Injuria Sua Propria" which means "No man can take advantage of his wrong." Does Equity allow a statute to be made an instrument of fraud (if there is such fraud)? This issue will fall to be decided assuming there is any fraud or illegality.

Mr. Rebelo for Mr. Pattni supported Mr. Sharma's arguments. I have already covered what Mr. Rebelo argued in regard to non-disclosure of facts. I have put the effect of non-disclosure as favourably to the appellant as I can. We have already stated earlier that Mr. Pattni was not behind bars when he could have attempted to easily give evidence of further affidavit.

Mr. Rebelo criticized CBK for being instrumental in detaining Mr. Pattni whenever the issue of the Grand Regency came up. I would not comment further. The Grand Regency is charged to CBK. CBK is charged with the responsibility of taking care of public moneys. I t has to act to put matters right. What happened to Mr. Pattni was as a result of charges brought against him. This incarceration was by court orders and not by CBK. The Courts are to administer justice according to law and if the court insists on stringent conditions of bail I cannot comment. It is not a matter for me to comment on.

After all is said and done there is one factor I cannot overlook. The charge is properly registered. It was registered for good consideration. It is a written document. It needs to be in writing. It cannot be said that there was an oral agreement to consider it as other than what it is. See Jinabhai & co. v Estace Sisal Estates [1967] E.A. 53. In that case even the original draft of agreement was held inadmissible, being evidence of negotiations. The position here is even on a stronger footing. It cannot be stated that a properly executed registered charge was not what it was supposed to be.

Attempt was made to show that CBK cannot pay any damages if the appellant eventually succeeds in the suit in the superior court as CBK would need authority of Parliament. CBK is an independent body capable of running its own affairs within the framework of central Bank of Kenya Act.

Speaking for myself I cannot compare the Grand Regency to a monument like the TAJ MAHAL as UHDL would like to put it. The Taj Mahal, the best known Mausoleum on earth was in memory of wife of Emperor Shah Jehan and it took 21 years to build at a cost which almost bankrupted the treasury of the great Mogul Empire. I do not see how another hotel like the Grand Regency cannot to be put, or even better.

I would dismiss this appeal with costs.

Dated and delivered at Nairobi this 1st day of December, 1995.

P.K TUNOI

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR