IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Cockar, Omolo & Tunoi JJ A)

CIVIL APPEAL NO. 125 OF 1993

BETWEEN

I.C.KAMAU NDIRANGU.....APPELLANT

AND

COMMERCIAL BANK OF AFRICA LIMITED.....RESPONDENT

(Appeal from ruling and order of the High Court of Kenya at Nairobi (Mr Justice Akiwumi) dated 4th June, 1993,

in

HCCC No 1803 of 1985)

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JUDGMENT

The appeal before us arises from the twin decisions of the superior court given in two applications which were heard by it simultaneously. In order of time there was the application filed by the respondent in the superior court on 8th December, 1992, seeking *inter alia* an order to restrain the appellant from selling or otherwise disposing of the latter's plot of land LR No 12241 or any part thereof until the determination of the suit. The second application was filed by the appellant later on 25th January, 1993, before the same Court under order 44 rule 1 for a review and setting aside of the judgment entered in favour of the respondent on 29th June, 1987.

Briefly the relevant facts are that the appellant charged to the respondent (hereafter referred to as the Bank) his plots of land by way of security for a loan of about Shs 10,000,000/- which the Bank advanced him. The plots of land are LR No 12241 (hereafter referred to as the suit land), LR Nos 12239, 12240 and the eleven sub-divisions being LR No 12565/6/8/9/11/25/30/31/33/44 and 47 and LR No 12565/61. On 21st June, 1985, the appellant filed a suit in the superior court in which it prayed *inter alia* for:

2. A declaration that the Bank was not entitled so to sell or fore-close the said plots until accounts between the appellant and the bank had been properly settled.

3. A declaration for release of the title deeds of the said eleven sub-divisions to the appellant and for damages for wrongful retention of the titles thereof.

An application seeking an interim injunction to restrain the Bank from selling any of the said charged plots of land was filed simultaneously. Annexed to the replying affidavit of 19th August, 1985, filed by the bank was a letter dated 4th November, 1983, from the appellant to the Bank's advocates in which the appellant admitted being indebted to the Bank in the sum of Shs 8,068,002/70 cts. The application was dismissed. This was followed by the Bank filing its defence and a counter-claim in the sum of Shs 11,056,937/35 cts against the appellant in respect of which the appellant's said plots had been mortgaged to the Bank. Thereafter, the appellant took out various chamber summonses and eventually on 3rd February, 1987, he once again applied for an interlocutory injunction to restrain the Bank from selling the said mortgaged plot. On 12th February, 1987, a consent order was recorded which, apart from referring the examination of all the accounts between the parties to M/s Cooper & Lybrand, Accountants & Auditors, ordered the status quo to be maintained except that the sub-divisions of LR 12565 only may be sold by the Bank and further:

"That the sale of LR 12241 be and is hereby stayed. The plaintiff (appellant herein) be and is hereby at liberty to procure the sale of LR 12241 for a higher price than 4 million within the next 60 days and the proceeds of sale of the said plot to be deposited with the defendant (Bank) and that condition to be stipulated in the agreement for sale by the plaintiff (appellant herein)"

After the accountants submitted their report the appellant filed an application to have the report set aside while the Bank made an application to strike out the appellant's suit and to enter judgment for the Bank on its counter-claim. In his ruling dated 29th June, 1987, relating to both the applications, Akiwumi, J (as he then was) declined either to strike out the plaint or to act on the accountants' report on the ground that it offended the Rules of Natural Justice. But he entered judgment for the Bank for Shs 8,068,002/70 cents which the learned judge held, on the available affidavit evidence, the appellant had admitted owing to the Bank. On 1st July, 1987, the appellant filed a notice of appeal against the ruling and on 7th August, 1987, he obtained a stay of execution of the judgment.

The facts detailed hereafter have a bearing on the appeal against the order restraining the appellant from selling or otherwise disposing of the suit land. Going back to the consent order made on 12th February 1987, it will be recalled that, *inter alia*, the sale of the suit land had been stayed and the appellant given 60 days to sell the suit land for a price in excess of Shs 4,000,000/-. The consent order had also provided for "a liberty to

apply". The appellant had been unable to sell the suit land at a higher price within the prescribed period. Following the ruling of 29th June, 1987, the Bank on 17th August, 1987, transferred the suit land to a 3rd party for Shs 4,000,000/-. When the appellant's application seeking *inter alia* the setting aside of the sale came up before the Court, Akiwumi, J (as he then was) naturally was not amused by this violation of the stay that had been granted by the consent order. Treating it as a contempt of the court he nullified the sale on 2nd June, 1988, and the Court of Appeal unanimously confirmed the order of the learned judge on 26th June, 1992. But the title deeds of the suit land which had been charged to Barclays Bank who had lent the money to the 3rd party (the purchaser) to buy the suit land were, upon the nullification of the sale of the suit land, and on demand being made by the appellant, released by Barclays Bank to the appellant. Thus, to put it bluntly, the appellant obtained possession of the title deed of the suit land free of any charge without having re-paid the substantial loan due and the Bank found itself deprived of a valuable security without the substantial amount of money that it had advanced on it having been repaid. That prompted the application from the Bank filed on 8th December, 1992, for an order to restrain the appellant from selling or otherwise disposing of the suit land pending the determination of the suit. The learned trial judge granted the application. At the same time, he also rejected the appellant's application filed on 25th January, 1993, for a review and setting aside of the judgment entered on 29th June, 1987. These two orders form the basis of the appeal before us.

There are eleven grounds of appeal of which ground 1 to 6 relate to the dismissal of the appellant's application for review of judgment and grounds 7 to 11 relate to the granting of the bank's application for an injunction to restrain the sale of the suit land. With regard to grounds 1,2 and 3, Mr Gatonye, for the appellant referred to the two main reasons which had persuaded the learned judge to rule against a review. The first reason that had been relied upon was the filing of the notice of appeal on 1st July, 1987. The

judge had found that according to order 44 rule 1(i)(a) of the Civil Procedure Rules, the review application was available only in respect of a degree or order from which an appeal is allowed but from which no appeal has been preferred. Therefore, in this case as a notice of appeal had been filed and was still in existence no right to an application for review lay. Mr Gatonye submitted that the judge had erred because in the first place the notice of appeal had been withdrawn by a letter dated 22nd January, 1993, addressed to the Deputy Registrar of the High Court and copied to the Deputy Registrar of the Court of Appeal of Kenya. We would observe that there is no provision either in the Civil Procedure Rules or in the Court of Appeal Rules which allows a notice of appeal, once filed in the

Court of Appeal, to be withdrawn in this manner *viz*: by writing a letter to the Deputy Registrar of the High Court and/or the Deputy Registrar of the Court of Appeal. We would, however, draw attention to rule 82(a) of the Court of Appeal Rules which provides that if a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and shall, unless the Court otherwise orders, be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

However, Mr Gatonye is on a much stronger pitch in his other reason which is supported by a decision of this Court in Civil Appeal No 122 of 1992 *Yani Haryanto v ED &F Man (Sugar) Ltd* (unreported) that a mere filing of notice of appeal did not constitute preferment of an appeal. The learned judge had clearly erred in holding that the appellant had by virtue of order 41 rule 4(4) of the Civil Procedure Rules preferred an appeal by filing his notice of appeal. Order 41 rule 4(4) of the Civil Procedure Rules is confined only to the purpose of staying execution.

The other reason which had persuaded the learned judge to dismiss the review application was the absence of sufficient reason and also that the application had been made after 51/2 years which, in his view, was an inordinate delay. In Mr Gatonye's view inordinate delay was a relative term. Whether the delay amounted to an inordinate one or not depended on the circumstances or reasons which caused the delay. His explanation for the delay was that their firm had come on record on 23rd December, 1991. After studying all the issues involved they had advised the appellant to "withdraw" the notice of appeal. There was a great amount of difficulty in getting the typed record of proceedings from the Court. The protracted litigation had also contributed to the delay. However, we note that even the present advocates of the appellant took two years to file the application for review. These reasons do not hold any water. The learned judge was not satisfied, and nor are we, that the delay of over 51/2 years, which, it cannot be disputed, is an inordinate delay, has not been satisfactorily explained.

In support of grounds 4 and 5 of the appeal, Mr Gatonye contended that the real issue was the finalisation of the accounts between the parties. There were special circumstances to be gone into which the learned judge did not do before he rejected the application. The counter-claim was for a bigger amount than the amount of judgment. The balance of the counter-claim was, therefore, still in issue to be finalised after a proper hearing. Mr Gatonye, also urged that the letter of admission of debt dated 4th November, 1983, had been written by the appellant under duress. The

first paragraph of the letter had referred to an agreement having been arrived at between the parties. That was an agreement that the Bank would supply a detailed account to the appellant. That was not done. So on 8th November, 1983, the appellant wrote to his advocate informing him that he was revoking the letter of admission dated 4th November, 1983, and on 10th November, 1983, his advocate, Mr Oweggi, wrote to the bank's advocates, M/s Hamilton Harrison & Matthews, informing them of the revocation. Other issues which Mr Gatonye submitted the judge ought to have considered but had not done so, were that at the time the appellant wrote the letter of 4th November, 1983, he was unaware that the Bank in fact had received to the credit of the appellant a sum of about Shs 7.5 million from the Coffee Board of Kenya whereas the Bank had told the appellant that it had received a sum of about Shs 5.8 million only from the Board. That subsequent to the writing of the said letter of admission but before the judgment of 29th June, 1987, was entered the Bank had sold the eleven sub-divisions for a sum of about 2.2 million shillings but had not informed the Court of the same prior to or during the hearing of the application which had resulted in the judgment on admission.

We reproduce below the letter of admission dated 4th November, 1983:

4th November, 1983

“M/s Hamilton Harrison & Matthews

Advocates

ICEA Building

Nairobi

Attention of K A Fraser, Esq

Dear Sirs

Commercial Bank of Africa Ltd

I refer to the conversation your Mr Fraser had with my lawyer, Mr Mark Oweggi of this afternoon. As therein agreed between you, I write to you as hereunder:-

In consideration of your client, Commercial Bank of Africa Ltd taking over the Agricultural Finance Loan and thereby stopping the scheduled auction of my properties known as LR No 12240 Nairobi, on 7th November, 1983, (at 11.00 am).

I admit that I owe your said client hereinafter only referred to as CBA as of 20th September, 1983, a total of Shs 8,068,002.70 together with the total loan and interest to Agricultural Finance Corporation plus interest at bank rates from 21st September, 1983. In addition, I agree I owe costs in the various pending Court cases between myself and CBA.

I hereby agree to give to CBA first charges on my three main plots together with the 11 titles, these are:

LR Nos 12239

12240

12241 Nairobi together with the 11 title (deed plans) being LR Nos 12565/8, 9, 11, 25, 30, 31, 33, 44, 47 and 61 and LR Nos 12585/6, (a certificate of title held by you).

I agree I will be responsible for the costs of these charges.

I also agree and undertake to execute the said first charges by Wednesday 9th day of November, 1983, at 4.00 pm.

Yours faithfully

Signed;

IC Kamau Ndirangu

Cc Mark Oweggi, Esq

Advocate

Shankardass House

There is no hint or suggestion in paragraph one of this letter that the agreement referred to therein was an agreement that the Bank was going to supply a detailed account to the appellant. The agreement that the appellant mentioned in this letter is the one that is detailed in the subsequent paragraphs *viz*: the consideration, the indebtedness of the appellant to the Bank as at 20th September, 1983, admitted and accepted

at Shs 8,068,002/70 cents, the further loan and interest that the Bank was to advance by way of clearing off the appellant's indebtedness to the Agricultural Finance Corporation in order to stop the sale of plots No 12239 and 12240 arranged by the latter to take place on 7th November, 1983, the details of the properties including the aforesaid two plots to be charged by way of security to the Bank, and the charges to be executed by 9th November, 1983, at 4.00 pm. Apart from this agreement there is absolutely no other agreement, explicit or implicit, referred to in the 1st paragraph of this letter.

With regard to the submission that the letter had been written under duress we on our own evaluation of the letter and the circumstances do not detect any existence of duress. The whole transaction is a normal one where a loanee who has borrowed from two parties, on being pressed to pay off by one party, arranges with the other party to take over the whole loan. As to the rest of the submission relating to the error in the amount actually paid by the Coffee Board and the actual amount credited to the account of the appellant and the amount received by the Bank after the sale of the eleven sub-divisions the position, apart from these claims not having been deponed in any replying affidavit when the relevant application was being heard, is that despite the judgment that has been entered in the admitted sum, quite a substantial part of the counter-claim still awaits the trial. The proper place and time to have the Court to decide on these issues would be at the trial.

In our view, the reasons advanced by Mr Gatonye do not constitute sufficient reasons that ought to have persuaded the learned judge either to over-look the inordinate delay which was not satisfactorily explained or even otherwise to have allowed the application for review. The learned judge was right in rejecting this application.

We now come to grounds 7 to 11 of the appeal which are directed against the injunction order restraining sale of suit land granted by the learned judge. These grounds complain that:

1. The injunction order is oppressive

2. There was no evidence that the Bank would suffer irreparable damage.

3. That the balance of convenience was against the grant of the injunction.

4. There was no cause to attribute *mala fides* to the appellant.

With regard to the issue of irreparable damage and balance of convenience Mr Gatonye submitted that when considering the principles laid down in

the case of *Geilla v Cassman Brown & Co Ltd* [1973] EA 358 the judge should have divorced his mind from the manner in which the appellant had come into possession of the freed title of the suit land. The judge had also completely ignored the fact that apart from the suit land two other plots of land still mortgaged to the bank which were LR No 12239 being 61.65 acres in area and LR No 12240 being 58.414 acres in area had, according to the appellant's valuers' report, a market value of Shs 60 million and Shs 53 million on 12th and 18th March, 1983, respectively. The bank's valuers on 18th August, 1987, had assessed the "residential" values of LR No 12239 and LR No 12240 at Shs 6.5 million and Shs 6.3 million and the auction reserve price at Shs 5.2 million and Shs 5 million respectively and on 22nd February, 1991, had assessed the open market and forced sale value of LR 12239 alone at Shs 23.3 million and Shs 17.5 million respectively.

Had the judge considered these valuation reports he would not have been able to resist the conclusion that the security provided by these two valuable properties was more than adequate to cover the counter-claim of Shs 11,056,937/35 cts as at 21st August, 1985, with further interest at 14% per annum from 10th July, 1985, calculated on daily basis together with interest at court rates.

There was, therefore, no likelihood at all of any irreparable damage being done even if no injunction order existed restraining sale of the suit land or any part thereof. In fact the balance of convenience, on such considerations, would have weighed heavily in favour of the appellant.

We have carefully considered the submissions made by Mr Gatonye. However, we are unable to differ from the views of the learned judge that whether or not these plots of land are of a value to be sufficient to meet the total indebtedness to the Bank the fact remains that it was the appellant himself who made the suit land and its title deed subject matter of the main suit and they must remain so until the suit is disposed of.

Before we proceed further on this issue, we must consider the facts which led the learned judge to make uncomplimentary observations on the conduct of the appellant which amounted to a finding of *mala fides*. After obtaining the title deeds of the suit land, freed of any charge by a fortuitous twist of events, from Barclays Bank who had advanced a loan to the purchaser in the nullified sale of the suit land, the appellant commenced steps to complete the sub-divisions of the suit land which, in fairness to him, had always been his ultimate intention from a much earlier time. The exercise of sub-division of the suit land had commenced a few years

before the suit was filed. It is not clear upto what stage this exercise had reached when, following the confirmation by the Court of Appeal on 2nd June, 1992, of the nullification of the sale of the suit land executed by the Bank in contempt of the order of the court, the appellant, on finding that the suit land had by a twist of events been freed of the charge to the bank, obtained the title deed from Barclays Bank by August, 1992, after threatening it with legal action and with the knowledge that the mortgage debt due to the Bank had not been paid.

Prior to that after filing a notice of appeal against the judgment entered on 29th June, 1987, on the admitted amount and obtaining a stay of execution of the said judgment on 7th August, 1987, the appellant did not take any steps to file the appeal. Then 51/2 years later after the Bank filed an application on 8th December, 1992, for an order of injunction to restrain sale of the suit land by the appellant, the latter on 25th January, 1993, filed the application for review of the judgment entered on 29th June, 1987, after filing a letter, a day earlier, in the High Court registry purporting to withdraw the notice of appeal filed on 1st July, 1987.

In the meantime by 9th October, 1992, after having obtained certificates of title in respect of 20 of the 57 sub-plots of the suit land the appellant by 4th December, 1992, had advertised the sub-plots for sale. The valuation reports produced by both parties agree that the value of each of the paid sub-plots in its present unserviced state was Shs 600,000/=. The learned trial judge, who had a detailed familiarity with all the facts relating to this litigation, had, and in our view with justification, found these acts of the appellant tainted with *mala fides*.

Apart from what we have stated above the appellant displayed *mala fides* on his part right from the beginning. The availability of the financial assistance from the Bank had stopped the impending sale, scheduled for 7th November, 1983, of his property by Agricultural Finance Corporation. Immediately thereafter on 8th November, 1983, he revoked his earlier letter of 4th November, 1983, to the Bank in which he had confirmed his indebtedness. We have already dealt with this letter fully. We on our part unhesitatingly endorse the learned judge in his views with regard to the existence of *mala fides* in the appellant's actions.

Having dealt with the question of *mala fides* fully we now come back to the question of the likelihood of irreparable loss to the Bank and the consideration of the balance of convenience from where we broke off earlier. The position as at 9th October, 1992, was that there was no impediment to the sale and transfer of

these sub-plots being executed by the

appellant. In fact that is why the appellant had caused them to be advertised for sale. This development when reviewed against the background that the suit land had been freed of the charge that had been registered in favour of the Bank as the lender without the debt having been cleared, placed the Bank in an extremely unenviable position with the prospects of a heavy financial loss despite the fact that the loan had in the first instance been safely and soundly secured by way of a normal and duly executed and registered charge over the suit land. That was an unheard of and an unthinkable development in what was an otherwise a perfectly normal mortgage transaction. In such a situation we now wish to state emphatically that no Court of law in Kenya will allow a legally indefeasible right to be frustrated in such a manner. And that, we are satisfied to note, was the tenor throughout the ruling of the learned judge.

Against the background detailed above it will be observed that there is no merit left in the appellant's complaints about absence of evidence that the Bank would suffer irreparable damage or that the balance of convenience was against the grant of an injunction. It would be naive to expect that had the Bank not acted and obtained the injunction order there would have been any sub-plots left registered in the name of the appellant. The probability of an irreparable loss to the Bank was very real. The learned judge had considered all the pros and cons before he decided on balance of convenience to grant the injunction. On the issue of irreparable loss and balance of convenience we agree with the conclusions of the learned judge.

On the issue of oppressiveness the thrust of Mr Gatonye's submission is that on account of the injunction order the appellant was being deprived of putting his own property to some beneficial use. Even if the 20 sub-divisions for which certificates of title had been issued were allowed to be sold the remaining portions of the suit land together with the other two plots LR 12239 and LR 12240 would be more than adequate in value to secure the amount and interest due to the Bank. The injunction had brought to a standstill all the business activities of the appellant related to his properties. Even his family was suffering because of the hardship imposed by the injunction. The appellant needed some funds to re-activate his business and to help his family.

With all due respect to this emotional appeal to the sentiment, we must observe that complicated developments that have already taken place involving the suit land do not permit this Court to let the legal position of the interest of either party as it stands today to be tampered with by such considerations. The Bank on account of its contempt of court order has

by a twist of events lost its security which was guaranteed by a legally executed mortgage. Fear of loss of a substantial part, if not the whole, of the mortgage debt had thereby become a reality. The appellant, taking undue advantage of the situation, had reached the point of disposing of the whole of the suit land through sale of its sub-divisions with full knowledge of the fact that the mortgage in respect of the suit land had not been paid. It was only the grant of the injunction order which restrained him from proceeding with the contemplated sales. His actions have also brought his *bona fides* as well as his ultimate intentions into a serious doubt. We are, therefore, unable to put any value on this aspect of Mr Gatonye's submissions. The mortgage covered all the various properties of the appellant and accordingly there was no legal basis upon which the appellant could unilaterally and without the consent of the Bank decide to sell the security, released of the charge in such circumstances, on the ground that the remaining security was sufficient to cover the indebtedness to the Bank. Having now considered all the grounds of appeal and the submissions so tenaciously made and maintained by Mr Gatonye on behalf of the appellant, we have come to the conclusion that this appeal must fail and we, therefore, dismiss it with costs.

Dated and Delivered at Nairobi this 19th day of January 1994.

A.M.COCKAR

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JUDGE OF APPEAL

R.S.C.OMOLO

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JUDGE OF APPEAL

P.K.TUNOI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR