



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Kwach & Cockar JJ A)

CIVIL APPLICATION NO. 181 OF 1994 (85/94 UR)

BETWEEN

- 1. SOLOLO OUTLETS LTD.....1ST APPLICANT**
- 2. CYPERR PROJECTS INTERNATIONAL LTD.....2ND APPLICANT**
- 3. CYPERR ENTERPRISES LTD.....3RD APPLICANT**
- 4. S.K.JIRONGO.....4TH APPLICANT**

AND

- 1. NATIONAL SOCIAL SECURITY FUND.....1ST RESPONDENT**
- 2. POST BANK CREDIT LTD.....2ND RESPONDENT**
- 3. DEPOSIT PROTECTION FUND BOARD.....3RD RESPONDENT**
- 4. EWAN A. DAVIDSON.....4TH RESPONDENT**
- 5. DAVID MUTISYA.....5TH RESPONDENT**

(Application for an injunction pending the lodging and hearing of an intended appeal from the ruling of the High Court of Kenya at Nairobi (Justice Shah) dated 5th September, 1994

in

HCCC No 914 of 1994)

RULING

This is an application under rule 5(2)(b) of the Court of Appeal Rules brought by Sololo Outlets Ltd (Sololo), Cyperr Projects International Ltd (Cyperr Projects), Cyperr Enterprises Ltd (Cyperr Enterprises) and S K Jirongo (Jirongo) seeking a number of orders against National Social Security Fund (the Fund), Post Bank Credit Ltd (Post Bank), Deposit Protection Fund Board (the Board), Ewan Alexander

Davidson and David Mutisya both of whom will hereinafter be referred to as “The Receivers”

The orders sought by the applicants to whom we shall hereinafter refer to collectively as “the plaintiffs” against the 5 respondents (the defendants) are:

- (1) That Post Bank, the Board and the Receivers be restrained by a temporary injunction from selling, alienating, disposing of, or otherwise dealing in any manner with specified properties in purported exercise of any rights of chargee or debenture holder under any charges or mortgages and debentures created by the plaintiffs or any other parties in favour of Post Bank or the Board in purported enforcement of debentures dated 23rd March, 1993 and 21st July, 1992 pending the hearing and final determination of an intended appeal.
- (2) That the Fund be restrained from selling or otherwise disposing of or in any manner interfering with the title to the properties LR No 209/9101 and LR No 209/9103 Nairobi until the hearing and final determination of the intended appeal.
- (3) That the Receivers be restrained from being or remaining or continuing to commit trespass upon the premises of Cyperr Enterprises on the 16th floor of Anniversary Towers on plot LR No 209/9744, Nairobi.
- (4) That costs of the application abide the result of the intended appeal.

The application is supported by the affidavit of Jirongo sworn on 7th September, 1994 and on other grounds set out in the Notice of Motion. The properties in respect of which the first order is sought are 23 in number and are contained in a schedule attached to the Notice of Motion.

On 23rd February, 1993, Sololo and the Fund entered into an agreement in writing under which Sololo agreed to develop plots LR No 209/9101 and LR No 209/9103 Nairobi belonging to the Fund by constructing thereon 100 maisonettes, 320 residential flats, a nursery school, a health center, a shopping complex with a recreation center for residents and a primary school. The purchase price, which was expressed to include the value of land, was Shs 1,200,000,000/=. Clause 2(i) of the agreement states that 50% of the purchase price was paid to Sololo before the two plots were transferred to the Fund; 40% was to be paid on production of a certificate of completion issued by the architect in charge of the construction and the balance of 10% was to be paid 6 months after the delivery of certificate of completion and upon production by Sololo of a final certificate of completion. Provision was also made for escalation and fluctuation of prices. The agreement also contained other terms with which we are not concerned in this application. Under a memorandum of understanding between the Fund and Post Bank, the latter was designated a disbursing agent for payments to be made by the Fund to Sololo under the agreement.

As so often happens in building contracts, the parties fell out when Sololo demanded payment far in excess of the agreed consideration and before the project was completed on the pretext that the cost of materials had fluctuated as a result of the devaluation of the Kenya shilling. Matters came to a head when on 26th May, 1993, the Managing Trustee of the Fund wrote to Sololo terminating the agreement and directing Sololo to hand over the site and all materials to agents appointed by the Fund.

On 2nd July, 1992, Post Bank opened an account for Cyperr Projects at its Parliament Road branch with a credit of Shs 20,000/=. The statement of account shows that as at 30th April 1993, this account was overdrawn to the tune of Shs 20,803,198/85. On 14th September, 1992, Sololo also opened an account at the same branch of Post Bank with a credit of Shs 7,000/=. By 31st May, 1993 this account was overdrawn to the extent of Shs 1,686,397,302/50.

The overdraft which was extended to Cyperr Projects by Post Bank up to a maximum of Shs 50,000,000/= was secured by a debenture dated 21st July 1992 under the terms of which Cyperr Projects charged in favour of

Post Bank all its immovable properties and all the chattels specified in the schedules together with its

assets undertaking and goodwill. There is no specific immovable property specified in the first schedule but the chattels charged are shown in the second schedule and comprise the plant and machinery and motor vehicles to a total value of Shs 39,964,884/=. Jirongo also gave a personal guarantee in favour of Post Bank for this debt.

The overdraft or loan given to Sololo by Post Bank up to a maximum of Shs 1,000,000,000/=: was secured by a debenture dated 23rd March, 1993, over all the undertaking, goodwill, property and assets of Sololo. This loan was also personally guaranteed by Cyrus Jirongo and Davy Koech as directors of Sololo. Both these debentures gave Post Bank the power to appoint a receiver and manager in certain circumstances. Apparently, following default on the part of Sololo and Cyperr Projects, the Board did on 15th July, 1993 appoint Davidson and Mutisya as Receiver and Manager of the undertakings of Sololo and Cyperr Projects exercising the powers of appointment contained in the two debentures. The Board made this appointment under section 35 of the Banking Act (Cap 488) following its own appointment by the Governor of the Central Bank of Kenya by a letter dated 20th May, 1993 as the statutory liquidator of Post Bank, a financial institution licenced to carry on financial business under the Banking Act. The Board was directed on the authority of that appointment to take into its custody all assets books and common seal of the institution; recover any sums or property owned by the institution; realize all assets acquired by any officer or any other person using the institution funds; determine and settle the list of creditors/depositors and debtors; ascertain suits filed against the institution and prepare a report to be filed in Court; and pay dividends to creditors where the liquidator realized adequate funds for the purpose. In the discharge of its responsibilities as liquidator, the Governor's letter expressly stated that the Board would be subject to the jurisdiction of the High Court as provided in section 35 (6) of the Banking Act.

On 8th March, 1994, some eight months after Sololo and Cyperr Projects had been placed under receivership, the plaintiffs instituted an action in the superior court against the defendants. The plaint runs into some 35 paragraphs and seeks in all some 18 reliefs against various defendants. The plaintiffs challenged the appointment of the Receivers by the Board. They alleged that the Board acting together with the Fund and Post Bank through the use of threat of violence, coercion and duress procured the plaintiffs and other companies associated with them, to mortgage or charge to the Post Bank whilst in liquidation their properties and to execute debentures upon the assets of the plaintiffs and such other parties to secure the refund to Post Bank of money paid as the purchase price and development under

the agreement between Sololo and the Fund. It is further alleged that the threats complained of were made between July and October 1993 by officers of the Criminal Investigation Department of the Kenya Police on the premises of the advocates acting for the Fund and Post Bank. Sololo admits having been paid a total of Shs 900,000,000/= by the Fund through Post Bank under the agreement. According to Sololo, the project was 75% completed and the purchase price had fluctuated to Shs 2.5 billion, and Sololo had asked to be paid this amount but the Fund refused.

Sololo also alleges that in February 1993, Post Bank sought to convert the moneys paid by the Fund to Post Bank for the benefit of Sololo into a loan. Sololo also says that on 23rd March 1993, Post Bank through misrepresentation, deception, trick and economic duress procured Sololo to execute in its favour a debenture to secure a refund to it of all the money which had been passed on to Sololo either directly from the Fund or on the authority of the Treasury. Sololo contends that this debenture is null and void. Sololo also says that in February/March 1993 the Fund failed to provide further advances to enable the construction to proceed as provided in the agreement as a result of which work on the site stopped. On the termination of the agreement on 26th May, 1993, the Fund dispossessed Sololo of the site and took its materials valued at Shs 180 million and some machines. They also complained that following their appointment by the Board on 15th July, 1993, the Receivers took possession of Cyperr Enterprises' offices on the 16th floor of Anniversary Towers, an act which, according to the plaintiffs, amounted to trespass. Cyperr Projects denied owing Post Bank any money at the time of the appointment of the Receivers.

Against the Fund, Sololo sought judgment for Shs 2.5 billion; a declaration that Sololo holds a vendor's *lien* on plot LR No 209/9103 and plot LR No 209/9101 in respect of its unpaid claim of Shs 2.5 billion; a declaration that the Fund holds the said development in trust for Sololo; and against Post Bank a

declaration that the debenture dated 23rd March 1993 in favour of Post Bank is null and void.

Sololo, Cyperr Projects and Cyperr Enterprises sought a declaration that the purported appointment of the Receivers by the Board as Receivers and managers of the undertaking of Sololo and Cyperr projects on 15th July, 1993, was null and void; a declaration that possession and occupation of Cyperr Enterprises premises at Anniversary Towers was an act of trespass; an injunction to restrain the Receivers from committing trespass on the said premises; and damages.

Against Post Bank and the Board the plaintiffs sought a declaration that the charges/mortgages and debentures executed by the plaintiffs and other parties between July and October, 1993 in favour of Post Bank as security for alleged indebtedness by Sololo or Cyperr Projects were null and void; an order that Post Bank do discharge all the charges mortgages and debentures and hand over to Sololo all the documents of the titles involved; and damages.

Cyperr Projects claimed against the Fund, the Board and the Receivers an order for the release of the equipment to it; damages for wrongful detention of Cyperr Projects' goods from 29th May 1993 until delivery together with interest thereon at 28% pa. Cyperr Enterprises claimed against the Board and the Receivers general damages for trespass and loss of profits occasioned by such trespass.

Jirongo on his part sought a permanent injunction to restrain the Fund, Post Bank and the Board and their servants and agents from intimidating, molesting or otherwise harassing him. Sololo, Cyperr Projects and Cyperr Enterprises sought a permanent injunction to restrain the Fund, Post Bank and the Board and their servants and agents from interfering with their businesses or properties or coercing them to charge or transfer their properties to them. And, of course costs of the suit.

The Fund filed a defence on 31st March 1994 denying all the claims made against it by the plaintiffs and also raised a counter-claim against Sololo and Jirongo in which it sought to recover special damages amounting to Shs 1,970,857,953/85 and general damages for misrepresentation. Post Bank also delivered a defence on 24th March, 1994 denying all claims against it. The Board filed a defence on 7th April, 1994 denying all the plaintiffs' claims. The Receivers' defence was filed on 25th March, 1994 and they also denied all the claims made against them by the plaintiffs.

On 8th March, 1994, simultaneously with the filing of the plaint, the plaintiffs took out a chamber summons expressed to be under order 39 rule 1 of the Civil Procedure Rules, section 35 of the Banking Act and section 228 of the Companies Act, seeking among other orders, leave to institute a suit against the Board; that Post Bank, the Board and the Receivers be restrained from selling 23 named properties; that the Fund be restrained from selling plots LR No 209/9101 and LR No 209/9103; that the defendants, their servants and agents be restrained from intimidating or blackmailing Jirongo and from procuring him and other plaintiffs to charge their properties to Post Bank; that the Receivers be restrained from committing trespass on the premises of Cyperr Enterprises; that the

Board and the Receivers be restrained from interfering with the plaintiffs' businesses; that Post Bank, the Board and the Receivers be restrained from acting on the debenture dated 23rd March, 1993 and on the debentures executed in favour of Post Bank by Cyrot Ltd, Kipa & Sons Ltd and Cyperr Enterprises, until the suit is heard and determined.

This application was supported by the affidavit of Jirongo who was said to be the Executive Chairman of Sololo, Cyperr Projects and Cyperr Enterprises. The affidavit in reply on behalf of the Fund was sworn by Hope Maguwa Mwashumbi, the Fund's Legal Officer. She confirmed that the properties plot LR No 209/9101 and Plot LR No 209/9103 were duly transferred and registered in the name of the Fund but denied the allegation by Jirongo that this was done prior to the payment of the full purchase price. She reiterated that by the time the transfer was made, Jirongo and Sololo had been paid more than Shs 900,000,000/=, a sum which she estimated was more than enough to pay for the purchase price of both properties and far in excess of the actual value of the works carried out. She also deponed that under the terms of the National Social Security (Amendment) Act, 1987, neither the Permanent Secretary at the Treasury nor the Permanent Secretary in the Office of the President, in the absence of formal approval of

the Fund's Board, had any authority to commit the Fund in the manner alleged by Jirongo.

Post Bank's replying affidavit was sworn by Alderton Samwel Garama. He deponed, *inter alia*, that Cyperr Projects borrowed Shs 50,000,000/= from Post Bank as a banker of Cyperr Projects and the said borrowing was secured by a debenture executed under seal on 21st July, 1992. He also said Sololo asked for a loan of Shs 1,200,000,000/= from Post Bank against the security of a debenture and charge executed on 23rd March, 1993. He denied the allegations by Jirongo of deception, trickery, economic duress and coercion. He denied the averment by Jirongo that Cyperr Projects did not owe Post Bank any money.

The replying affidavit filed on behalf of the Board was also sworn by Alderton Samwel Garama who deponed that on 20th May, 1993 Post Bank was placed under liquidation pursuant to the provisions of section 35 of the Banking Act and that Sololo was truly indebted to Post Bank in the sum of Shs 1,686,397,302.50 as at 31st May, 1993 and Cyperr Projects was indebted to Post Bank in the sum of Shs 21,244,960.60 at the same date, both sums having been guaranteed by Jirongo. He annexed the relevant statements of account as evidence of the indebtedness of Sololo and Cyperr Projects to Post Bank. Ewan Davidson swore a replying affidavit on behalf of the Receivers. He deponed that they lawfully took possession of the

premises on the 16th floor of the Anniversary Towers which were being occupied by Sololo and Cyperr Projects. He attached documents which in his opinion were conclusive proof that Sololo and Cyperr projects occupied and carried out their business from those premises.

On 7th April, 1994, an application was filed on behalf of the Board under section 228 of the Companies Act for an order that the suit instituted by the plaintiffs be stayed or struck out. It was supported by an affidavit sworn by Alderton Samwel Garama in which he deponed, *inter alia*, that since Post Bank was placed under liquidation pursuant to the provisions of section 35 of the Banking Act, Part VI of the Companies Act applied to the liquidation, with the result that the plaintiffs were obliged to obtain the leave of the High Court before they could institute or proceed with any action against Post Bank. He deponed that the suit against Post Bank was brought without such leave being obtained.

An application was also filed by Post Bank on 6th May, 1994 under order 6 rule 13(1) of the Civil Procedure Rules seeking to strike out the plaint as against Post Bank on the ground that it was scandalous, frivolous, intended to delay a fair trial of the suit and otherwise an abuse of the process of the Court. And finally, there was the application by the Receivers filed on 6th May, 1994 under order 6 rule 13(1) seeking to strike out the suit on the same grounds.

All these 4 applications were heard together by the judge and on 5th September, 1994, he delivered his ruling in which he dismissed the application made by the plaintiffs and granted the applications made by Post Bank, the Board and the Receivers. The plaintiffs having filed a notice of appeal under rule 74 of the Court of Appeal Rules, now apply to this Court under rule 5(2)(b) for the orders to which we have already alluded, pending the hearing and final determination of the intended appeal. In essence, the plaintiffs are seeking the same reliefs the judge refused to grant them.

The judge considered first the application by Post Bank to strike out the suit. He treated it under order 6 rule 13(1)(b), (c) and (d) which allows the Court to admit affidavit evidence. He found as a fact that Post Bank had advanced Cyperr Projects Shs 50,000,000/- on the security of a debenture lawfully made and registered on 21st July, 1992. The judge had before him a statement of account which indicated that as at 31st May, 1993, Cyperr Projects owed Post Bank a sum of Shs 21,244,960.60. He found a clear admission of this indebtedness in two letters, the first dated 19th May, 1993 from Cyperr Projects to Post Bank, the first paragraph of which reads:

"We are aware of the above facility currently standing at about Shs 21 million inclusive of your interest".

The second letter is also from Cyperr Projects addressed to M M Ombogo & Company Advocates and is dated 15th July, 1993. It reads:

“We are in receipt of your letter dated 8th July, 1993 on the above captioned subject.

We have noted the contents but disagree with the figure in question. According to our records, our company owes Post Bank Credit about Shs 20,000,000/- and not Shs 50,000,000/- as stated in your letter.

Be advised that we are doing all we can to settle the account.

Yours faithfully

Cyperr Projects International Ltd

S K Jirongo Chairman

The judge also found that the power of appointment of receivers contained in the debenture was validly exercised and rejected the allegation by Cyperr Projects that the appointment of the Receivers had been made as a result of a malicious conspiracy between Post Bank and the Fund. On that basis the judge struck out Cyperr Projects' claim against Post Bank as well as its claim against the Fund except as regards the claim for damages.

The judge considered the provisions of section 35 of the Banking Act and section 241 of the Companies Act and dismissed the contention by Sololo, Cyperr Projects and Cyperr Enterprises that the appointment of the Receivers under the debenture was void. He held that the Board as a statutory liquidator stepped into the shoes of Post Bank (the institution in liquidation) and appointed the Receivers in terms of the debenture. There was evidence before the judge that Sololo had received a total of Shs 900,000,000/- from the Fund and a sum in excess of Shs 1,000,000,000/- from Post Bank in two separate and completely unrelated transactions.

The Sololo debenture is dated 23rd March, 1993 and marked for Shs 1,000,000,000/-. The suit to have this debenture declared null and void was not filed until 8th March, 1994, almost a year later. Receivers under this debenture were appointed on 15th July, 1993. The claim to have this

debenture declared null and void was based on an allegation by Jirongo that its execution had been procured by use of force, coercion and duress. The judge found no evidence of protest by Jirongo between the dates of execution of the debenture, the appointment of the Receivers and the institution of the suit. During that period the judge found as a fact that Jirongo was represented by advocates and not one of them protested about the alleged harassment. He rejected as baseless the allegation by Jirongo that the police had turned the premises of Kilonzo & Company Advocates into a police station to trick him into executing the debenture on the misrepresentation that it was required to cook the books of Post Bank, so that Post Bank could be given a clean bill of health by the World Bank and the International Monetary Fund.

The judge also noted that the debenture in question was executed by Sololo under seal and by Jirongo and one Davy Koech in the presence of Mr Kamotho Waiganjo, an advocate. For these reasons, the judge refused to accept these allegations as true at interlocutory stage for the purposes of the application for a temporary injunction. He rejected them outright. Having arrived at the conclusion that the appointment of the Receivers by the Board was valid, the judge, struck out prayer 2(a) in the plaint by which Sololo, Cyperr Projects and Cyperr Enterprises sought a declaration that their appointment was null and void.

The judge also considered prayer 3(a) in the plaint by which all the plaintiffs sought a declaration that the charges, mortgages and debentures executed by the plaintiffs and other parties between July and October 1993 in favour of Post Bank as security for debts owed to Post Bank by Sololo and Cyperr Projects were null and void. The judge felt he could not make orders in favour of parties not before the Court. He felt the same way about prayer 3(b) by which the plaintiffs sought an order for the discharge of those securities.

The judge further held that the plaint as drawn contained an incurable misjoinder of several and unrelated

causes of action which would make a fair trial of the action virtually impossible. Sololo's claim is based on an agreement it entered into with the Fund and payments made thereunder. The claim by Sololo against Post Bank is based partly on a debenture executed by Sololo in favour of Post Bank. The judge found no connection between the debenture and the Fund or Cyperr Projects, Cyperr Enterprises or Jirongo. The claim of Cyperr Projects is based on a loan advanced to it by Post Bank, on the security of a debenture in respect of which the Receivers had been appointed, and which has nothing at all to do with the Fund or the Board or Cyperr Enterprises or Jirongo. Cyperr Enterprises'

claim is only one of trespass against the Receivers and does not concern either Jirongo or Cyperr Projects or Sololo or the Fund. And Jirongo's claim arose out of the way he alleged he was treated after Post Bank was put in liquidation and is based on the assumption that he was the prime mover behind all these companies.

The judge noted that the Board had been joined as the liquidator of Post Bank which should not have been done because it is improper to sue a company in liquidation and the liquidator at the same time. The judge felt that the magnitude of the misjoinder and nonjoinder of causes of action between unrelated parties was so serious that he could not attempt to put it right by exercising his discretionary powers under order I rr 9 & 10 of the Civil Procedure Rules. He refrained from taking the drastic step of striking out the plaint but instead he adopted the course taken by Bennet, J in the case of *Yowana Kahara & Others v Lunyo Estates Ltd* [1959] EA 319, and ordered the suit stayed with leave to the plaintiffs to file proper separate suits and awarded the defendants the costs of the suit.

In case he was found to be wrong, the judge went on to consider the effect of filing the suit against Post Bank, the Board and the Receivers without first obtaining leave of the court. He held that under section 228 of the Companies Act leave has to be obtained before a suit is filed against a company, such as Post Bank, which is in liquidation. Section 228 of the Companies Act provides:

"228. When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the Court may impose."

For this reason, the judge ordered to be struck out all the claims by the plaintiffs as against Post Bank, the Board and the Receivers. He in effect held that all those claims were incompetent.

As regards the claim by Cyperr Enterprises for trespass, the judge held that the Receivers were entitled to take and occupy the office premises occupied by Cyperr Enterprises in the legitimate process of taking and collecting the assets of Sololo and Cyperr Projects. The judge accordingly dismissed the application by the plaintiffs for temporary injunctions because he disbelieved the allegation by Jirongo that he had been threatened, coerced or tricked into executing the charges, mortgages and debentures given as security for the debts. His conclusion was that the plaintiffs had not

established a *prima facie* case with a probability of success. The judge also expressed the view that the Fund, as the registered proprietor of the two plots namely LR No 209/9101 and LR No 209/9103, should be allowed to develop them, and even sell them, as any claim which may be brought against the Fund by Sololo or the other plaintiffs cannot be beyond the ability of the Fund to meet. The judge found that under the terms of the agreement the Fund had paid to Sololo a total of Shs 900,000,000/- which far exceeded the value of the 2 plots; and Post Bank had loaned Sololo more than Shs 1,000,000,000/- under a bank/customer relationship.

The basis of the present application as stated in the supporting affidavit of Jirongo sworn on 7th September, 1994, and urged by counsel in argument, is that if the injunctions are not granted, the defendants are likely to dispose of the suit properties and interfere with property rights of the plaintiffs, which actions would render their intended appeal, if successful, nugatory.

In this application, all that the plaintiffs are required to do, is to satisfy the test laid down by this Court in the case of *Stanley Munga Githunguri v Jimba Credit Corporation Ltd* (Civil Application No NAI 161 of

1988)(unreported). They must first show that they have an arguable appeal, and then go on to show that their appeal, if successful, would be rendered nugatory, if the interim relief is denied.

The case for the plaintiffs was argued by Mr Muthoga and Mr Kamau Kuria. We shall deal first with the submissions of Mr Muthoga. Mr Muthoga submitted that in striking out the claims to which we have already referred, and in ordering the suit against the Fund stayed, the judge wrongly exercised his discretion. He argued that these orders have effectively crippled the plaintiffs and left them without any remedy. As we have already stated, the judge felt that the plaint was overloaded with several unrelated causes of action which, in his view, would render a fair trial impossible. At this stage, we are not required to say whether in taking that view he was right or wrong. The judge had been asked by counsel for Post Bank, the Board and the Receivers to strike out the suit altogether but he refrained from doing so, preferring to stay the suit to give the plaintiffs an opportunity to take the necessary remedial measures.

Mr Muthoga also criticised the judge in making a final finding on the validity of the two debentures executed by Sololo and Cyperr Projects. That determination depended in turn on what the judge made of the allegations of threats, coercion, duress, misrepresentation and trickery made by Jirongo against the police to secure the execution of those securities. Jirongo had claimed that the acts complained of had taken place in the premises of

Kilonzo and Company, Advocates, which he alleged had been turned into a police station. It was Mr Muthoga's submission that at an interlocutory stage, the judge should have treated those allegations as *prima facie* true even if denied, as they were in fact denied. He complained that the judge's finding that those allegations were false before a full dress hearing has seriously prejudiced the plaintiffs' case. In arriving at the conclusion that those allegations were false, the judge took into account that it took nearly a year between the happening of those events and the time Jirongo made the allegations for the first time. He also noted that during that period Jirongo was represented by competent advocates who would have raised the matter on his behalf but did not do so. In our view, the judge had very little choice in the matter faced, as he was, with allegations of that nature in an *inter partes* application. Whether in disbelieving Jirongo in what has turned out to be the kingpin in the plaintiffs' claims the judge erred, is not a matter on which we can express a concluded view at this stage. Once those allegations were rejected, there was nothing left on the face of the debentures on the basis of which the judge could possibly hold them to be invalid.

The other point taken by Mr Muthoga was that the judge erred in his interpretation of section 228 of the Companies Act (cap 486) and section 35 of the Banking Act (cap 488). Section 35 of the Banking Act is a special procedure introduced to deal with the liquidation of financial institutions. Section 36 creates the Deposit Protection Fund Board as a statutory liquidator with powers of an ordinary liquidator under Part VI of the Companies Act. Mr Muthoga argued that an application for leave to sue an institution placed in liquidation under section 35 of the Banking Act can be made at any time and in any manner. The judge held that under section 228 of the Companies Act such an application has to be made before the institution of the suit. We have carefully examined these provisions and our provisional view is that Mr Muthoga's contention may be incorrect.

The next point taken is whether the Board as the statutory liquidator can step into the shoes of Post Bank and exercise the power of appointment of receivers given to Post Bank under the terms of the debentures in certain circumstances. The judge held it could, but Mr Muthoga thought it could not. Our own provisional consideration of the relevant statutory provisions and the securities involved suggests that the judge may well be right.

Then there is the issue of charges created as securities for the debts owed by Sololo and Cyperr Projects involving properties, the majority of which belong to persons not parties to the suit and therefore not before the

Court. No evidence was placed before the judge to show who the owners of these properties were. And even before us in this application we have been given a schedule of 23 properties without any indication as to who the owners are. On this point, at least, there can be no room for argument bearing in mind the

very clear provisions of order 1 rule 9 of the Civil Procedure Rules which states:

“(9) No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.

In *Gouriet v Union of Post Office Workers & Others* [1977] 3 All ER 70 at page 100 Lord Diplock stated the position thus:

“The early controversies as to whether a party applying for declaratory relief must have a subsisting cause of action or a right to some other relief as well can now be forgotten. It is clearly established that he need not. Relief in the form of a declaration of right is generally superfluous for a plaintiff who has a subsisting cause of action. It is when the infringement of the plaintiff’s rights in the future is threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future that the jurisdiction to make declarations of right can be most usefully invoked. But the jurisdiction of the court is not to declare the law generally or to give advisory opinions: it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else”. (underlining ours)

The other point canvassed by Mr Muthoga was that neither Sololo nor Cyperr Projects owed Post Bank any money. But the judge had before him clear admissions of indebtedness by the two companies coupled with statements of account indicating the exact amounts owed by Sololo and Cyperr Projects.

Mr Muthoga also criticised the judge in upholding the right of the Receivers to occupy the office premises belonging to Cyperr Enterprises as this company does not owe Post Bank any money. There was evidence before the judge which indicated, *prima facie*, that though those premises were not the registered offices of Sololo or Cyperr Projects they were used by Jirongo to run the operations of those companies. Indeed

Sololo, Cyperr Projects and Cyperr Enterprises had common telephone numbers.

We now come to the claim by Sololo against the Fund. The judge found that the 2 plots on which the development stands, LR No 209/9101 and LR No 9103, are registered in the name of the Fund as proprietor. There was evidence before him that the combined value of these plots did not exceed Shs 40,000,000/- and also that under the agreement Sololo had been paid a total of Shs 900,000,000/- by the Fund for which it had given nothing in return. For these reasons, the judge felt that Sololo was not entitled to an injunction and dismissed its application. The judge felt that any loss Sololo could possibly suffer can be adequately compensated by an award of damages, which he was satisfied the Fund would be in a position to pay.

Mr Kamau Kuria submitted that the Fund had disowned the agreement and if Sololo succeeded at the trial, an order for restitution would have to be made and such a decree would be absolutely useless, if in the meantime the titles had passed from the Fund to third parties. He also submitted that as the titles were transferred in the name of the Fund before the full purchase price was paid, Sololo has an unpaid vendor’s *lien* which ought to be preserved by an order of injunction. It may well be that this is the position, but at this stage, and without the benefit of a trial, we cannot say that the judge was wrong.

Mr Ombogo, for Post Bank and the Receivers, supported the judge’s decision. He submitted that the debentures and other securities were lawfully executed and that the appointment of the Receivers under the debentures was properly made following the failure by Sololo and Cyperr Projects to pay the debts owed to Post Bank. With regard to the claim by Cyperr Enterprises against the Receiver for trespass, he submitted that although the offices were on paper occupied by Cyperr Enterprises as a tenant of Kenya Reinsurance Corporation, there is overwhelming evidence that the offices were the operational base of Sololo, Cyperr Projects and Jirongo himself.

Mr Oraro, for the Board, submitted that the appointment of the Board as liquidator of Post Bank was lawful and in strict compliance with the relevant provisions of the Banking Act and the Companies Act.

Miss Mululu, for the Fund, submitted that Sololo's claim against the Fund based on an unpaid vendor's *lien* has no basis in law as Sololo had been paid a sum of money far in excess of the market value of the 2 pieces of

land and the value of work done on the project and of the materials. It was the collective view of counsel for the defendants that the intended appeal is frivolous and without any prospects of success.

Having considered the material before us and the submissions of counsel, we are far from satisfied that the plaintiffs have established that they have an arguable appeal which, successful, would be rendered nugatory, if the injunctions they seek are not issued. Accordingly, this application fails and it is dismissed with costs.

Dated and Delivered at Nairobi this 29th day of November 1994.

J.E.GICHERU

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JUDGE OF APPEAL

R.O.KWACH

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JUDGE OF APPEAL

A.M.COCKAR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR