



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, PLATT & GACHUHI JJ A)

CIVIL APPEAL NO 68 OF 1986

BANANAHILL INVESTMENT LTD.....PLAINTIFF

VERSUS

PANAFRICAN BANK LTD & 2 OTHERS.....RESPONDENT

(Appeal from the High Court at Nairobi, Schofield J)

JUDGMENT

The plaintiff Bananahill Investment Limited is a limited liability company. It owns a property known as LR 209/572 on Moi Avenue together with the building on it. One of the shareholders of the plaintiff was Peter Joseph Gachathi (now deceased) who holds 49.999% shares. The estate of Peter Joseph Gachathi is administered by the Trustee Department of the Standard Chartered Bank Africa PLC. There is a dispute as to the shareholdings of the second and third respondents.

The plaintiff by its amended plaint filed on April 9, 1986 stated that in September, 1980 the board of directors sought and obtained a loan of Kshs 10,000,000 from Habib Bank Zurich for building and development of the said property. Thereafter, the second and third defendant approached the first defendant for a loan of Kshs 20,000,000 as claimed, for the same purpose of development of the said property. It is alleged that the first defendant proceeded to grant the said loan without the authority or consent of the board of directors. It is alleged by the plaintiff that the said loan of Kshs 20,000,000 was utilised personally by the second and third defendants and was never applied for the purpose of building or developing the plaintiff's company and that the directors of the plaintiff company were never made aware of the transaction relating to the acquisition of the said financial accommodation.

It is further alleged that the second and third respondents falsely and fraudulently proceeded to execute a charge over LR No 209/572 as security for the said loan without advising or seeking consent from the Trustee Department of the Standard Chartered Bank PLC as administrators of the estate of the late Peter Joseph Gachathi.

It is further claimed by the plaintiff that the second and third defendants fraudulently and falsely represented themselves to the first defendant as persons with authority to act for the plaintiff into a large financial liability without the knowledge, authority or consent of the plaintiff company or the Standard Chartered Bank Africa PLC. That the second and third defendants applied the proceeds of the loan unto themselves and refused, failed and/or neglected to effect loan payments thereby exposing the property LR209/572 to sale and disposal under mortgage terms created during the acquisition of the said loan.

Plaintiff further alleges that the first respondent acted negligently and irregularly in failing and refusing to verify the authenticity of the loan application, presented by the second and third defendants and failing to ensure that proper and adequate authority and the approval by the board of directors was made available to the first defendant. The first defendant under the powers of the mortgage concluded a sale by private treaty of the said property for the sum of Kshs 22,000,000. The sale agreement, it is alleged was registered at the land office. The plaintiff states that the property is valued at Kshs 35,000,000 and that the selling price of Kshs 22,000,000 is below the market price.

The plaintiff therefore prayed that the court should grant perpetual injunction restraining the sale and disposal of the said property; a declaration that the defendants are jointly and severally negligent and fraudulent in securing the loan committing the plaintiffs; a declaration that the plaintiff company is not liable to the first defendant in the repayment of a loan irregularly and improperly sought and obtained damages and costs.

The plaintiff obtained an *ex parte* order in the High Court on March 27, 1986 restraining the sale which order was fixed for hearing *inter partes* on April 17, 1986. On April 17, counsel for the plaintiff and counsel for the 1st defendant obtained a consent order for adjournment and for extension of the *ex parte* injunction order to April 22, 1986, then hearing was adjourned to April 28, 1986, when the hearing took place before Schofield J in dismissing the application, the learned judge said that the plaintiff did not satisfy the court that it had made a *prima facie* case for probability of success. Also that the plaintiff will suffer irreparable harm which cannot be compensated in damages. The *ex parte* order made on March 27, 1986 was vacated on April 28, 1986.

The appellant applied to this court under rule 5(2)(b) of the Court of Appeal Rules in Civil Application No 69 of 1986 praying that the court be pleased to grant an injunction pending the hearing of the intended appeal against the dismissal of the application in the High Court before Schofield J . The court (Kneller, Nyarangi, JJA and Gachuhi Ag JA) after hearing argument by the counsel for the parties granted the order on May 8. The court was satisfied that this appeal was not frivolous.

Mr Hira complains that at the time of the hearing of the application in the High Court, the interim injunction order granted by Gicheru J on March, had elapsed. In answer to this I would say that order XXXIX rule 3 of the Civil Procedure Rules forbids the granting of an *ex parte* order of injunction without the other party being served with an application. The same rule allows for an urgent order being granted *ex parte* but for a limited period of 14 days. The application has to be argued and not to remain pending for long.

My understanding of this rule is that it is designed to prevent placing hardship on the respondent. The application must be heard and be determined one way or the other without delay. At times it may not be possible to hear the application within 14 days but procedure allows for such extension of time by the order of the court which is in most cases by consent of the parties with the concurrence of the judge in order to accommodate the parties and the court. In this case the interim order was extended by consent on April 10, 1986 to April 17, 1986 when it was stood over to April 22, 1986. It is not possible from the record to state whether the *ex parte* order was extended further. The hearing of the application *inter partes* took place and was finalised on April 28, 1986 when the application was dismissed and the *ex parte* injunction order vacated.

Whether or not the *ex parte* injunction order had lapsed at the time the hearing took place, does not invalidate the hearing of the application *inter partes*. The appeal to this court is as a result of the dismissal of the application. This court granted, at first, an interim *ex parte* order till the hearing of the application *inter partes* in the Civil Application No 69 of 1986. The application was heard *inter partes* and injunction granted on May 8, 1986 to last till the determination of the appeal.

The case for the 1st defendant is that it was at all times aware that the application obtained a loan of Kshs 10,000,000 from Habib Bank AG Zurich but was not aware of the purpose for obtaining such loan. The 1st defendant admits having granted a loan of Kshs 20,000,000 to the applicant / plaintiff of the security of LR209/572 Moi Avenue. At the time of granting this loan, there was a mortgage over the same

property in favour of Mercantile Finance Company Limited and not Habib Bank A G Zurich for Kshs 12,211,314.65. Part of the loan of Kshs 20,000,000 was used to redeem the mortgage in favour of Mercantile Finance Co Ltd. The first defendant further states that prior to the mortgage, it was dealing with the applicant and was owed money and was entitled to act on the basis of representations made by the directors and shareholders and their representative.

At this point, it is fair to see as to who are the shareholders and directors for the company. According to John Kimani Gachathi, his late father was the main shareholder and Ratilal Shah was to pay for his shares equal to his father's shares. According to John Kimani Gachathi, there is a dispute over this issue particularly as to whether Ratilal Shah ever paid for his shares. The return of allotment is alleged to have been filed after the death of Peter Joseph Gachathi. Some correspondence show that Ratilal Shah had promised to pay for his share but he did not. According to Modadugu Chadra Gupta for the first defendant a search was made at the registry of companies which indicate that Peter Joseph Gachathi was allocated 24,998 shares and Ratilal Khetshi Shah 25,000 shares. The other two remaining shares are subscribers' shares one to PJ Gachathi and the other to BW Gachathi. The directors of the company are Mrs Beatrice Wanjiku Gachathi, Stephen Njoroge Mirie, Winfred Nyambura Gachathi, Secretary Ratilal Shah, Raju Shah and GM Chamungwana Manager, Trustee Department of Standard Chartered Bank Africa PLC as an alternate director. John Kimani Gachathi further states in his affidavit that Mr Chamungwana and himself were appointed bank signatories while Ratilal Shah was responsible for dealings with the contractors. It is further alleged that Ratilal Shah stamped the board meeting into a resolution to borrow Kshs 20,000,000 from the first defendant so that half of that amount would be utilised to pay off the previous indebtedness and the other half would complete the construction of the building. In spite of the protestation of the board meeting Ratilal Shah and his brother Rajukent Shah who by then became directors, mysteriously and without authority or consent of the board meeting acquired a loan on behalf of the plaintiff company of Kshs 20,000,000 from the 1st respondent. The Shahs executed the mortgage. The dispute centres on this act because, when Mr Gupta stated that before granting of the loan, Pan African Bank Ltd was owed money by the plaintiff, that must have been an account operated by John Kimani Gachathi and GM Chamungwana and Ratilal Shah. John Kimani Gachathi and GM Chamungwana do not appear to have been involved in the borrowing of Kshs 20,000,000. In fact the complaint by Mrs Beatrice Wanjiku Gachathi to the Standard Chartered Bank Africa PLC is on the basis that she only knew of the mortgage with Mercantile Finance Co Ltd and not with the 1st defendant and wondered how the mortgage was created and where money went to. Due to this complaint, Standard Chartered Africa PLC commenced investigation. The conclusion of the investigation is not made available to the court.

There also appears from the documents exhibited by the plaintiff in the affidavit of John Kimani Gachathi that relationship between Gachathi's group and the Shah brothers had been strained. They could not hold meetings together. Either board meetings were called off at a short notice or that the Shah brothers would not attend. Mrs Gachathi had to turn to Mr Chamungwana for advice. Gachathi's group complained that they were kept in the dark.

Mr Gupta's affidavit brings in another picture. In November 1983, a loan of Kshs 6,000,000 was to be raised from the respondent on a second charge. The loan was to be sanctioned by Mr Chamungwana. The resolution for borrowing Kshs 20,000,000 posed at a meeting of July 30, 1984 was signed by the Shah brothers. Gachathi's group as well as Mr Chamungwana appear not to have signed the resolution. It stated that it was an extraordinary meeting at which all members of the company were present. This is disputed.

Mr Khaminwa argues that Schofield J having all this information before him was wrong in refusing to grant the injunction. The judge considered only two grounds of the three possible grounds for granting injunction as settled by Spry VP in *Giella v Casmann Brown & Co Ltd* [1973] EA 358. The learned judge stated that the applicant had not made a *prima facie* case for a possibility of success and that the applicant had not shown that it will suffer irreparable harm which cannot be compensated in damages. Mr Khaminwa argues that the judge ought to have considered the other ground of convenience. The Shah brothers have not been served and until they file their defence the truth of the matter will not come out. The case should not be determined on affidavits alone. There is an allegation of negligence and collusion. The amount involved is colossal and the status quo should be maintained. The judge ought to have ordered the suit to proceed expeditiously and an order for substituted service given.

Mr Hira's line of argument is that the respondent was dealing with a limited liability company which executed a mortgage over the property the subject matter of sale. He referred to Indian Commentaries in support of his submission. As far as the respondent was concerned, it acted properly and since the applicant has failed to honour its obligation under the terms of the mortgage, it had to exercise its powers of sale either by public auction or by a private treaty. For this reason the respondent entered into an agreement of sale of the property with Jefro Properties Limited of Nairobi for the sum of Kshs 24,000,000. The argument went further that though the applicant complains that it was not aware of the borrowing, it has not challenged the mortgage for over one year.

The truth of the matter is that the whole matter is not in court. The learned judge in his ruling stated:

"I can find nowhere in the affidavits proof in the way of tangible evidence of any fraud or even negligence by the defendants. It may be forthcoming."

As a matter of pleadings one should not pre-empt his evidence before the trial. The pleading are meant to point out the issues to be determined at the trial. Evidence by way of affidavits in an application for injunction is not complete. Such evidence for showing that the applicant has a case which can justify the granting of injunction to restrain from doing or failing doing something, which, if done failure to do it will cause the plaintiff to suffer irreparable harm. In certain cases, harm caused can be compensated in damages. In other cases, the suit is so obvious that there is no chance of the plaintiff succeeding. There are other borderline cases. In *Giella v Casmann Brown & Co. Ltd* Spry VP settled it as follows.

"If the court is in doubt, it will decide an application on the balance of convenience."

Mr Khaminwa argued vehemently on this ground. He referred to the House of Lords' decision in *American Cyanamid Co v Ethicon Ltd* [1975] 1 AER 504. Madan JA, as he then was, in his judgment in *Wairimu Mureithi v City Council of Nairobi* CA No 5 of 1979 at page 4 referred to this case and referred to the speech of Lord Diplock at page 406 and 408 as reported in [1975] AC 396. The continuation in the paragraph therein referred to, is:

"If on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction."

The property is in the centre of the city currently valued at Kshs 35,000,000 by the applicant and Kshs 22,000,000 by the respondent. Proof of the market value will have to be given at the trial. If the sale is completed before the suit is heard and finalised the applicant might lose this city centre property which might be difficult to replace with another as good with any damages the respondent is ordered to pay and does pay. There is dispute of the value which can only be sorted out on the evidence at the trial. For this reason I feel that the learned judge ought to have considered the third ground that in the case of doubt the application should have been decided on a balance of convenience.

I would allow this appeal with costs. I would set aside the order of the High Court of dismissal of the application and substitute thereof with an order of perpetual injunction restraining the first defendant, its agent or representatives, from selling, disposing off or auctioning the property known as LR 209/572 Moi Avenue Nairobi till the determination of the suit. The applicant will give a written undertaking guaranteed by a bank or an insurance company in damages. The parties should now go to the High Court and seek representation to proceed with the hearing of the suit expeditiously.

Platt JA (Dissenting). I have benefited from studying the judgment of Gachuhi JA but unfortunately I cannot agree in the result. I need not repeat all the facts of this extraordinary story but it will be necessary to concentrate upon the salient and pivotal events. This is an interlocutory appeal against the exercise of

the discretion of the learned judge who refused an interlocutory injunction pending trial. In coming to his decision he was bound by the principles set out in *Giella & Cassman Brown* [1973]EA 358 confirmed by *Abdul Salim vs Okong'o* C A of 1975 which are that the applicant must show a probability of success, that damages would not be sufficient, but that in case there is doubt the balance of convenience must be sought. This court is also bound by these principles, since they emanated from the predecessor of this court whose decisions are usually followed, but more especially because they have been universally followed by all Kenyan courts ever since. Since then there has been the illuminating decision by the House of Lords in *American Cyanamid Co. vs Ethicon Ltd* [1975] 1 All ER, 504 and the appellant preference for it by Madan, JA in *Wairimu Mureithi vs City Council of Nairobi*, CA No 5 of 1979. The gist of the judgment in the *American Cyanamid* case, was decisively to reject the first principal in *Giella's* and to treat the whole matter as one of convenience as if case was a matter of doubt because no decision should have been made at the interlocutory stage. The two approaches therefore overlap as far as the third principle in *Giella's* case is concerned on the question of convenience, and also on the second principle concerned with the question of damages being a sufficient remedy. I have no doubt that it will soon be necessary for this Court to reconsider *Giella's* case in the light of the *American Cyanamid* case, because with respect to all concerned the reasoning would appear to be superior to that in *Giella's* case; but when changes of direction in such matters could be carried out by way of the seemly procedure which is provided for these changes. That procedure has not been called for in this case by the parties, and therefore like the learned judge, it is right that this court should consider the issues which arise on the existing law.

The learned judge made two salient findings. He found no tangible proof of any fraud or negligence on the part of the bank to show *prima facie* that the plaintiff company had shown a probability of success in the main suit. Secondly he held that the disputes were of a financial nature. The plaintiffs had not shown that they would suffer irreparable harm which could not be compensated in damages if the application is refused.

As Lord Diplock emphasised in the *American Cyanamid* case, if damages in the measure recoverable at common law would be an 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 the stage. In this case there are two factors which do not appear to have been noticed by the learned judge.

The first is that though there were financial dealings between the parties, the essence of the suit is that the defendant bank has exercised its power of sale as a mortgagee of the plaintiff company's property. The loss of the property is the matter to concentrate upon. In the case of the sale of immovable property it is a great hardship to lose it, and damages are not usually a suitable compensation. Moreover, the second aspect is that the bank has not stated in any affidavit that it would be prepared to pay damages of the order of Kshs 20,000,000. These days the World Bank is not necessarily a passport for financial liquidity. It may be that this bank is in a strong position but it ought to have appeared in evidence. I would agree that the learned judge was in error on the second principle.

Damages not being a suitable means of compensation, then the first and third principles need to be considered. The learned judge did not consider the third principle, but found the matter closed after considering the first. Let us then see if that was a judicial exercise of his discretion. For if he exercised his discretion according to law and came to a fair decision, then this Court would not normally interfere (*Sargeant vs Patel* [1949] 16 EACA 63, *Wairimu Mureithi* Case *supra*).

The learned judge took a positive view of the situation before him, that there was no tangible evidence of fraud or negligence by the bank. The second and third defendants the brothers Ratila and Rajnikant Shah have not yet been brought into the picture as they have not been served. The applicant submitted that their presence might aid his case. That sounded strange from a party accusing a bank of fraud and negligence. But it is of a piece with the amended plaint. In contravention of Order VI of the Civil Procedure Rules no proper particulars were given of the fraud or negligence alleged. The vague idea was pleaded that the bank was jointly and severally liable for fraud with the two Shahs because the bank did not seek to ascertain from the plaintiff company whether the two Shahs had the authority and consent for the plaintiff

company to commit the plaintiff company to a loan of the order of Kshs 20,000,000. Similarly, negligence was alleged because the bank refused to verify the authenticity of the loan application and in neglecting to ensure that the proper and adequate authority and consent had been given by persons in authority as directors of the plaintiff company. It seems that the plaintiff company alleged that the Trustee Department of the Standard Chartered Bank African PLC as Administrators of the estate of the late Peter Joseph Gachathi, was not advised of the situation.

Peter Joseph Gachathi founded this company in 1973 with a capital of Kshs 20,000 and two original shares were held by Mr Gachathi and his wife Mrs Beatrice Wanjiku Gachathi. The directors were Mr Gachathi and Ratilal Shah. The company appears to have proceeded on the basis of mortgages to the Kenya Commercial Bank in sums of Kshs 4,000,000 and Kshs 350,000 upto 1978. By this time John Kimani Gachathi it seems had become Company Secretary. The capital was raised to £50,000 and now Peter Joseph Gachathi held 24,999 shares, Mrs Gachathi 1 share, and Mr Shah 25,000. In 1980 Peter Joseph Gachathi and the Trustee Department of Standard Chartered Bank African PLC represented by Mr Chamungwana administered his estate. Mrs Beatrice Gachathi became a director first in December, 1979 so did John Kimani Gachathi and Mr Rajnikant Shah joined his brother Ratilal in 1982. Mr Godfrey Chamungwana became an alternate director to Mr Kimani Gachathi. Mrs Gachathi and her son John Kimani Gachathi as well as Winifred and Rosemary Gachathi, who were appointed secretaries, continued in position of prominence it seems from then on. In September 1980, the plaintiff borrowed Kshs 10,000,000 from Habib Bank AG Zurich. A mortgage was given to Mercantile Finance Company for Kshs 10,000,000 in 1983. In September, 1984 the Kshs 20,000,000 was borrowed on mortgage from the Defendant Pan Africa Bank. These matters are all to be found in the company registrar. The director must have known them. They and the Trustee ought to have known them.

As far as the defendant bank is concerned the plaintiff opened up an account with that bank on February 9, 1983 operated by John Kimani Gachathi, Mr Chamungwana and Rajnikant Shah and enjoyed unsecured overdraft facilities of Kshs 1,000,000. This was increased to Kshs 3,000,000 in July 1983 and Kshs 6,000,000 in November 1983. Kimani Gachathi apparently approved of this: (See folio 104). Habib Bank was paid off out of the Mercantile Finance loan (Folio 79). The latter was paid off out of the mortgage money raised from the 1st defendant bank of Kshs 20,000,000. The resolution on Folio 78 supports this loan. It was signed by the two Shahs who were directors. Kshs 12,211,314.65 was paid to Mercantile Finance, and Kshs 6,000,000 was outstanding to the 1st defendant bank, and the balance was left to the plaintiff company. The Gachathi family were involved in the running of the plaintiff company. It is difficult to see how they were not aware of all that happened. How did they think that Mercantile Finance had been paid off? Nothing happened until April, 1985 when Mrs Gachathi began to complain. The trustees put in Lloyd Masika to take over from the Shahs in 1985. By December 1985, the trustees thought that there was not much use continuing with the property unless the leases and income were put on a proper footing. The trustees however later wished to delay sale. The first defendant bank explained that sale was the best way out in March 1986. But the trustees as Chartered Bank were offered the chance to take over the liability. It refused. Lloyd Masika who were managing the property had become a great probability since September, 1985 as the latter to Mr Chamungwana from Ratilal Shah explain (Folio 119). Another Kshs 12,000,000 was required. In these circumstances it seems strange to blame the 1st defendant bank.

First the Gachathi family were directors and often company secretaries and shareholders throughout. They observed the build up of indebtedness.

Secondly this build up involved the first defendant bank in ever increasing sums. Mr Kimani Gachathi agreed to that at least upto Kshs 6,000,000. But indebtedness up to Kshs 10,000,000 has also been agreed.

Thirdly the trustees were involved in this build up of indebtedness. Mr Kimani and Mr Chamungwana were bank signatories. Even Mr Gachathi knew that Mercantile Finance had loaned the plaintiff company money to pay off Habib Bank A G Zurich which according to Mr Ratilal Shah had threatened sale.

Fourthly the plaintiff company benefited in the sum of over Kshs 12,000,000 when Mercantile Finance was paid off. The interest on this loan alone was over Kshs 2,000,000.

Fifthly, the Shahs were directors and well-known to the Pan Africa Bank as such. The company was entitled to borrow money in accordance with the memorandum. There was the company resolution. What should the Pan Africa Bank inquire about? It could act under *Royal British Bank vs Turquand*. It would seem to have been protected.

Sixthly, the plaintiff itself pleads that Pan Africa Bank served Notice of Sale (paragraph 12). It cannot now be asserted in affidavit form that no notice was given. There is no doubt non-payment of capital and interest.

Seventhly, if the plaintiff company wishes to redeem let it do so by paying the outstanding loan. Redemption always means payment.

But no one, not even the trustees, have come forward to redeem. It is noticeable that the trustees have not volunteered any information as to their position. They have not complained. But they knew of the general indebtedness as Mr Shah had told them, and requested more capital. They know of the threatened sale. Pan Africa had told them. It is all very well to advise on applying for an injunction. They had to redeem.

In the light of the facts put before the learned judge, it is my opinion that he acted under the first principle, within the law, reasonably and that therefore he exercised his discretion judicially. That meant that he was not called upon to consider the balance of convenience. On what he was told, there was no evidence of a probability of success. If the plaintiff is to succeed it must sharpen up its case a great deal, and there is no guarantee that it can do so. The situation in this appeal must not be confused with decisions of this court concerning its original jurisdiction under rule 5(2) (b) of the Court of Appeal Rules. In this appeal, there is no ground upon which to interfere.

I agree with Gachuhi JA's interpretation of Order XXXIX of the Civil Procedure Rules.

Consequently I would dismiss the appeal with costs.

Nyarangi JA I entirely agree with Gachuhi JA and notwithstanding that we are differing from the judgment of Schofield J, I feel that I cannot add anything useful.

The appeal is allowed with costs and it is ordered in terms proposed by Gachuhi JA.

Dated and Delivered at Nairobi this 10th day of July, 1987

J.O NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL