IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: WAKI, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 99 OF 2016

BETWEEN

BANK OF AFRICA LIMITED ....APPELLANT

AND

JUJA COFFE EXPORTERS LIMITED..................................1ST RESPONDENT

TSS TRANSPORTERS LIMITED..2ND RESPONDENT

TSS INVESTMENT LIMITED..3RD RESPONDENT

TAHIR SHEIKH SAID AHMED..4TH RESPONDENT

KAAB INVESTMENTS LIMITED.......................................5TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL NO. 109 OF 2016

BETWEEN

TSS TRANSPORTERS LIMITED..1ST APPELLANT

TSS INVESTMENT LIMITED..2ND APPELLANT

TAHIR SHEIKH SAID AHMED..3RD APPELLANT

AND

BANK OF AFRICA LIMITED..1ST RESPONDENT

KAAB INVESTMENTS LIMITED....................................2ND RESPONDENT

(***Being an appeal against the ruling of the High Court of Kenya at Mombasa***

(Lady Justice Njoki Mwangi dated 21st July, 2016

in

Mombasa HCCC No. 57 of 2016)

****

JUDGMENT OF THE COURT

1. The two appeals Nos**. 99 of 2016** and **109 of 2016** were by order of this Court consolidated and heard together under the lead file CA. 99 of 2016. The appellant in CA. 99/2016 is Bank of Africa Limited (hereinafter **"the bank'**), while the appellants in 109/2016 are TSS Transporters Ltd **(TTL),** TSS Investments Ltd **(TIL)** and Tahir Sheikh Said Ahmed **(Tahir).** The appeals arose from an interlocutory decision of the High Court **(Njoki Mwangi J.)** who, on 21st July 2016, granted a temporary injunction on terms, against the exercise of the bank's statutory power of sale. The bank challenges the injunction as a whole, while TTL , TIL and Tahir complain about the condition imposed for grant of the injunction that they deposit Ksh. 2.5 million, which order they seek to be varied or set aside.

2. The background to the interlocutory appeals may be briefly stated. The main suit, which is still pending before the High Court was filed by Juja Coffee Exporters Ltd **(Juja Coffee),** TTL, TIL and Tahir. The three companies have common shareholding and were the brainchild of Tahir, the majority shareholder. Juja Coffee was in the business of purchasing tea in bulk for export to its customers in Egypt and Pakistan. To achieve this, it required hefty Bill discounting and pre-export financing facilities which the bank supplied periodically between 2004 and 2014. As security for the financing, TTL, TIL and Tahir gave out six prime pieces of land in Mombasa, registered in their respective names over which legal charges were registered. Tahir in addition gave personal guarantees and indemnity to the bank. At some point in the year 2009, Tahir's health began to fail him and he entrusted the management of his businesses to three of his children and two brothers- in- law. That is when the businesses began going south.

3. The bone of contention is particularly about three tranches of financing facilities ostensibly provided by the bank to Juja Coffee in the years 2011, 2012, and 2014 at USD 4.5 million, USD 4.5 million and USD 7 million, respectively. The advances were all secured by further charges on the six properties and the personal guarantees of Tahir. But it is claimed that the finances were not given out for the intended purpose; part of it was given out for the unjust enrichment of Kaab Investments Ltd **(KIL)** which was a stranger; there was collusion and fraud between the bank and Juja Coffee or their rogue officers; different rates of interest were unlawfully charged and claimed on the three tranches; the six securities could not be utilized to secure the financing after the enactment of the **Land Act** in 2012; overdraft facilities were loaded on the debt without authority; and that neither TTL nor TIL whose securities were held by the bank had benefited from the finances liberally dished out by the bank to Juja Coffee. The actions of the bank, it is claimed, were careless and irresponsible as it allowed Juja Coffee to overdraw in excess of USD 5.8 million without questioning it on repayment plans, and ended up jeopardizing the equity of redemption of the six securities.

4. For those and other reasons stated in the suit, several orders are sought against the bank declaring, *inter alia,* that Juja Coffee was not indebted to the bank; that TTL, TIL and Tahir were not responsible for the debt; that the actions of the bank were a clog on their equity of redemption; that the six securities be discharged; an order for taking accounts ; and a permanent injunction to stop the bank from alienating, transferring, charging, leasing or in any manner whatsoever dealing with the six properties or any other securities held by the bank in respect to Juja Coffee accounts.

5. The bank denied all allegations of impropriety and pleaded proper and lawful business conduct supported by documentary evidence, including registration of legal charges under the **Registered Land Act** to secure the borrowing. It denied any collusion with Juja Coffee whose affairs it could not micromanage. It had issued and served statutory notices of sale upon failure to pay the outstanding loans, which according to the bank, had been admitted and promises made for repayment but not complied with. The suit was thus an afterthought. KIL similarly denied any wrong doing and asserted that it was carrying out legitimate business with Juja Coffee, hence the payments made to it.

6. Pending the hearing of the suit, the motion seeking a temporary injunction was filed on 6th June 2016 to restrain the bank from demanding payment of the loan facility or exercising its statutory power of sale of the securities. The trial court examined the numerous records before it, expunged the entire affidavit and annexures made by the bank in reply to the motion on account of absence of the seal of a commissioner for *Oaths and Statutory Declaration Rules*, and considered the guiding principles of law applicable. It made findings that:-

> ***i. "The facility dated 3rd December, 2012 was duly executed by two Directors of Juja Coffee, and TTL and TIL as Chargors. The facility dated 28th April, 2014, was duly executed by two Directors of Juja Coffee and TTL,TIL and Tahir as Chargors. Although the facility dated 15th December, 2011 was executed by two (2) Directors of Juja Coffee, no Chargors executed the said document.***
>
> ***ii. Legally binding contracts were entered into between the Juja Coffee and the bank in respect of the facilities advanced on 3rd December, 2012 and 28th April, 2014. The Land Act, Cap 280 came into force on 2nd May, 2012, it therefore follows that the Charges for the facilities for 3rd December, 2012 and 28th April, 2014 were governed by the provisions of section 80 of the said Act.***
>
> ***iii. The issue of whether TTL and TIL gave their consent to charge their properties in properly convened Board meetings and if securities were duly registered or not, can only be conclusively determined by each party being given an opportunity to produce documents in their custody.***
>
> ***iv. The bank statements availed by Tahir show without a doubt that funds were advanced to Juja Coffee by the bank, which were utilized.***
>
> ***v. The documentation availed are inadequate for this court to form an opinion on whether money transfers to KIL were as a result of fraudulent activities or legitimate business transaction between the two parties.***
>
> ***vi. In the absence of proof on the part of the bank that it issued the 3 month statutory notice to Juja Coffee, its right to exercise its power of sale was curtailed by non-compliance. The bank failed to discharge the onus to prove service of the said notices on Juja Coffee.***

vii.The circumstances surrounding this case go further than the issue of issuance of a statutory notice under the Land Act, there are additional issues of the registration and validity of securities and the interest rate applicable to the facilities advanced to Juja Coffee. The applicants have made out a case for the grant of an interim injunction on a balance of convenience".

7. On the basis of those findings the following orders were issued:

"(i) That pending the hearing and determination of this suit the 1st defendant *(the bank)* ***their servants and/or agents are restrained by way of an injunction from alienating, transferring, charging, leasing or in any manner whatsoever dealing with the 2nd, 3rd, 4th plaintiffs'/applicants'****(TTL, TIL, Tahir)* ***assets set out below or alienating, transferring, charging, leasing or in any manner whatsoever dealing with any other securities held by the defendants in respect to the 1st plaintiff's*** *(Juja Coffee)* ***accounts:-***

(a) Plot No. 44 Section XXI Mombasa Island, registered (sic) in the names of Tahir Sheikh Said Transporters Limited;

(b) Plot No. 147 Section XXI Mombasa Island, name of Tahir Sheikh Said Investments Limited;

(c) Plot No. 1654 Section XXI Mombasa Island registered in under the name of Tahir Sheikh Said Investments Limited;

(d) Plot No. 527 and 526 Section XXI Mombasa Island, Registered under the name (sic) Tahir Sheikh Said Investments Limited;

(e) Plot No. 5866 Section XXI Mombasa Island, registered under the name of Tahir Sheikh Said Investments Ltd; and

(f) Title No. Mombasa/Block XXVI/381, registered under the name of Tahir Sheikh Said Investments Ltd;

(ii) The above order is granted on the condition that the 2nd, 3rd and 4th applicants shall deposit security in the sum of USD 2.5 Million in an interest bearing account opened in the joint names of the law firms on record for the applicants and the 1st respondent within ninety (90) days from today's date; and

(iii) The Plaintiffs/applicants are awarded costs of the Notice of Motion dated 6th June, 2016".

The order for depositing USD 2.5 million was subsequently revised on 14th October, 2016 to require a deposit of USD 2 million.

8. The bank challenges those orders in a memorandum of appeal containing 10 grounds but urged as 4 grounds in written submissions filed pursuant to an order issued on case management that all parties file written submissions by August, 2017. Only learned counsel for the bank complied with that order. On the date fixed for the oral hearing of the appeals, notices of which all counsel on record were served with, counsel for the bank, **Mr. Allen Waiyaki Gichuhi,** instructed by M/S Wamae & Allen Advocates, attended and made oral highlights to the written submissions. The Advocates on record for TTL, TIL and Tahir, M/S Balala Abed Advocates, sent **Mr. Said Ali Said** to apply for adjournment. As no valid reasons were advanced for seeking the adjournment and no explanation was made for failure to comply with the order for filing written submissions, the application for adjournment was rejected and the hearing of the appeals proceeded. In the end, Mr. Said made no submissions in support of CA109/2016 or in opposition to CA. 99/2016. For KIL, Learned Counsel **Ms. Moka,** instructed by M/S Hamilton, Harrison & Mathews, simply said there were no orders sought against KIL in the motion and chose to say nothing in respect of the consolidated appeals.

9. Mr. Gichuhi opened by withdrawing the appeal against Tahir, who had passed on during the pendency of the appeals and had not been substituted before the hearing. He then proceeded in CA 99/2016 to, firstly, attack the peremptory striking out of the affidavit in reply to the motion together with the annexures thereto on the basis of non compliance with the *Oaths and Statutory Declaration Rules*. He observed that there was no objection made by any of the parties to the affidavit, no application was made to have it struck out, and no invitation was made to any party to address the court on the matter before the decision was made. According to counsel, there was breach of the rules of natural justice contrary to **Article 50** of the Constitution, and erroneous resort to technicalities contrary to the provisions of **Article 159.** In his submission, the mode of exhibiting the documents was not fatal and the affidavit ought to have been considered. He cited the cases of ***Mutiso v. Mutiso [1984] eKLR, Litein Tea Factory Company Limited & another v Davis Kiplangat Mutai & 5 others [2015] eKLR*** , and ***Mwathi v. Imanene 1982 KLR 323*** in support of those submissions.

10. Secondly, Mr Gichuhi faulted the trial judge for failing to consider material non-disclosure by the applicants and in consequence granting equitable relief to applicants who had unclean hands. The non-disclosure related to the proper execution of borrowing and security documents, admissions of the debt, default in repayment of the loans, and service of statutory notices for recovery of the debt. In his view, non disclosure alone should have disentitled the applicants from an injunction. For this proposition, counsel relied on the case of ***Orion East Africa Ltd v Ecobank Kenya Ltd & another [2015] eKLR.***

11. Thirdly, counsel faulted the trial judge for making the finding that the bank had advanced moneys to Juja Coffee on the strength of duly registered securities, which money had not been repaid and yet, granting an injunction. He submitted that debtors who were persistent defaulters were not entitled to rush to a court of equity for relief on grounds that the charge documents upon which the funds were undoubtedly disbursed were defective or that the securities were unique and valuable. The cases of ***Mrao Ltd v First American Bank of Kenya Ltd & 2***

Others [2003] KLR 125, Coast Brick & Tiles Ltd & Others vs. Premchand Raichand Ltd [1966] EA 154 and ***John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd [2006] eKLR*** were cited in aid.

12. Finally, counsel contended that the trial judge was biased against the bank and favoured the applicants. The claim was based on the procedure adopted by the judge in failing to hear the bank in respect of its affidavit before striking it out, shutting out crucial evidence; granting a stay of the order for deposit of USD 2.5 million and subsequently reducing it to USD 2 million despite evidence shown that the debt due had outstripped the forced value of the securities held by the bank, and the borrowers were not making any effort to pay.

13. In passing, we place no weight on this last submission as it falls short of proper specificity and is in the realm of undue sensitivity and mere suspicion. In our view, the allegation does not meet the test set out in many cases including ***Philip K. Tunoi & Another v Judicial Service Commission & another [2016] eKLR,*** where this Court observed:

> ***"The House of Lords held in R v. Gough [1993] AC 646 that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand. The test in R v. Gough was subsequently adjusted by the House of Lords in Porter v. Magill [2002] 1 All ER 465 when the House of Lords opined that the words "a real danger" in the test served no useful purpose and accordingly held that –***
>
> ***"[T]he question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."***
>
> ***In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer whowill adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias."[Emphasis added].***

14. We have anxiously considered the appeal and the submissions of counsel. As counsel for the appellants in CA 109/2016 did not urge it either in writing as directed by the court or orally after being given the opportunity to do so, the appeal stands dismissed and we so order. As regards CA 99/2016, the bank is essentially asking us to interfere with the exercise of the trial court's discretion. But this cannot be done as a matter of course. It must be based on principles which have stood the test of time and we take them from the ageless case of ***Mbogo & Another vs. Shah [1968] EA 93,*** where the parameters for interference with the discretion of a trial court were delineated, thus:-

> ***"An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."***

15. Madan JA (as he then was) in ***United India Insurance Co Ltd & 2 Others v East African Underwriters (Kenya) Ltd [1985] KLR 898*** also summarized the approach as follows:

> "***The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.***"

16. The principles for the grant of an interlocutory injunction are similarly well settled in another ageless case, ***Giella vs Cassman Brown Co. Ltd [1973] EA 358***, the application of which this Court, in ***Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR*** , summarized as follows:-

> ***"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;***
>
> ***(a) establish his case only at a prima facie level,***
>
> ***(b) demonstrate irreparable injury if a temporary injunction is not granted, and***
>
> ***(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.***
>
> ***These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."***

17. The main issue is therefore to consider whether the trial court properly applied the guiding principles in the ***Giella case***. The trial court was certainly aware of the ***Giella case*** and cited it, without adumbrating the principles at any length. The first principle to consider was whether *a prima facie* case had been established. In the words of Bosire JA in ***Mrao Ltd v. First American Bank Of Kenya Ltd & 2 Others***

(2003) KLR 125

> ***"...It is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter…[it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."***

18. It was, of course, not open to the trial court to make final findings of fact at that interlocutory stage since that would be in the province of the court hearing the main suit. See ***Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR.***

19. We have examined the findings made by the trial court as extracted in paragraph 6 above and are satisfied that most of them were not final in nature, and were made in the context of examining whether a *prima facie* case had been made out. Nevertheless, they were made on the assumption that there was no response by the bank, to the assertions made by the applicants. But the bank had filed a lengthy affidavit in reply supported by 428 pages of a bundle of documents marked ***'BM1"*** which bundle the Commissioner of Oaths endorsed with his stamp on 14th June 2016 for verification. The affidavit, together with the annexures were rejected by the trial court on the basis that it flouted the provisions of **Rule 9** of the ***Oaths and Statutory Declarations Rules*** which states as follows:

> ***"All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification".***

20. The view taken by the trial court was that the provisions of that rule were mandatory, citing the decision of Havelock J. in the case of ***Fredrick Mwangi Nyaga vs Garam Investments & Another [2013] eKLR.*** In that case, Havelock J. was faced with an *"annexure which was not marked at all."* He agreed with Hayanga J. in the case of ***Abraham Mwangi v. S. O. Omboo & Ors, HCCC No. 1511 of 2002*** who applied the construction of **Order 41** of the *Rules of the Supreme Court of England* and stated thus:

> ***"Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear Exhibit marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That makes the affidavit incomplete hence also rejected. That being the case the application fails and is dismissed."***

21. On the flip side, there are several decisions of the High Court which have held that Rule 9 was directory but not mandatory, including by *Ringera*,J, (as he then was), *Nyamu , J*, (as he then was), and *Bauni, J,* in ***Milimani – HCCC No. 462 of 1997, Standard Chartered Bank Limited Vs. Lucton (Kenya) Ltd (unreported); Milimani HCCC No. 26 of 2004, Patrick Thinguri & 1, 006 Others Vs. Kenya Tea Development Agency Co. & Another*** **(unreported);** and ***Geoffrey Makano Asanyo vs. Kenya Agricultural Institute [2004] eKLR,*** respectively. The Judges were of the view that the Oaths and Statutory Declarations Rules are intended to be handmaidens of justice to aid the wheels of justice rather than clog it, and that they should not be a hindrance to delivery of substantive justice.

22. Those decisions were followed by Gikonyo J. in ***Litein Tea Factory Company Limited & another v. Davis Kiplangat Mutai & 5 others [2015] eKLR .*** The facts relating to the impugned affidavit in that case were similar to the case before us. Gikonyo J. observed that *"...the affidavit clearly tendered the exhibits as a bundle and it has referred to the particular exhibits as a bundle. The commissioner, then sealed, marked and identified the annexures as a bundle."* On that basis, the learned Judge held:

> ***"where the exhibit is a report or a composite document made of different parts or materials consisting in other inextricable, incidental or accompanying documents, or a bundle of documents, it should be sufficiently described as such in the body of the affidavit, and, the sealing and the marking of only the cover or the first page of the report or the composite document or bundle of documents will be a sufficient compliance with the Oaths and Statutory Declarations Act and Rules. In any event, at worst, the matter complained of the annexure in question would be a mere irregularity which is a matter of form rather than substance, and such technicalities were deprecated by Article 159 of the Constitution."***

23. It is evident that there has been a difference of opinion in the High Court on the construction of Rule 9 of the ***Oaths and Statutory Declarations Rules.***

There is considerable force in rooting for compliance with procedural rules despite the provisions of ***Article 159*** of the Constitution. As the Supreme Court has reminded us severally, *'Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that* ***"justice shall be administered without undue regard to technicalities."*** In the case of ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR*** the Supreme Court agreed with the dicta of Kiage, JA in ***Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR*** that:

> ***"Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned…"***

24. Ultimately, the Supreme Court has reposed considerable scope for discretion in the courts, on a case by case basis, when it opined thus:

> "***In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent. Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict***

observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of the Constitution."

See ***Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR***

25. In this case, Mr. Gichuhi submits that Rule 9 should be disregarded in view of Article 159 of the Constitution. But that is a simplistic way of approaching the subject. We must examine the facts and circumstances of the case against the provisions of Article 159(2) (d). Having done so, we are persuaded that Rule 9 aforesaid is not peremptory in terms, the employment of the word **'shall'** notwithstanding. Even if it was, there was compliance in this case because the exhibits were produced in one bundle which the Commissioner of Oaths duly stamped and sealed. At all events, there was no objection made to the form or presentation of the affidavit/Exhibits and there were no submissions made by the parties before a decision was made to strike them out. In those circumstances, we agree with counsel for the appellant bank that there was a breach of the rules of natural justice. Furthermore, the case of ***Fredrick Mwangi Nyaga case (supra)*** which the trial court followed was clearly distinguishable from the facts and circumstances of this case. We are persuaded that the trial court misdirected itself or acted on matters which it should not have acted upon, and we are therefore entitled to interfere with its discretion.

26. On our own evaluation, after considering the affidavit in reply together with other documents on record, there is considerable doubt that the applicants had established a *prima facie* case with a probability of success. Even if they had, as the trial court found, it was necessary to consider whether the injury they would suffer if the injunction is not granted, will be irreparable. The law is that if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. That principle does not, of course, apply where there is contumacious breach of the law, since a party cannot be allowed to maintain an advantageous position he has gained by flouting the law, simply because he is able to pay for it. See ***Aikman Vs Muchoki [1984] KLR 353***.The consideration of the second principle in the ***Giella case*** was totally ignored and once again, with respect, it was a non direction which calls for interference with the discretion of the court.

27. The respondents' main arguments appear to be based on impropriety of security documents and not whether any loans were disbursed on the basis of those securities; the accuracy of accounts; and assertions that the securities were unique and irreplaceable. We take the view, however, as this Court did in the case of ***Ecomil Pasag Co. Limited & 2 others v UAP Insurance Co. Limited [2017] eKLR,*** that the properties were offered as security in a commercial transaction and the consequence of alienation was anticipated if there was default. The value is quantifiable and there is no evidence that the bank is incapable of paying the damages if the main suit ultimately succeeds.

28. We may also reiterate what this court stated in the case of ***John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd [2006] eKLR*** that:-

"***The applicant may well in due course make out a case to challenge the calculations of his indebtedness to the bank. He may or may not be successful. The legal issue however is whether the dispute on the outstanding loan can scuttle the exercise by a chargee of its power of sale. On that legal proposition this Court has expressed itself before and we need only refer to*** J.L. Lavuna & others V. Civil Servants Housing Co. Ltd. & Another ***– Civil Appl. No. NAI 14/95 where Kwach J.A. stated:-***

"I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage. The legal position on this point is to be found in Halsbury's Laws of England, Volume 32, 4th edition at paragraph 7255:

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

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive"

The Court observed in the process, that '*a bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it.'* And so it is in this case.

29. We have said enough, we think, to satisfy ourselves that the discretion exercised in this matter must be interfered with. We allow Civil Appeal No.99 of 2016 and dismiss Civil Appeal no. 106 of 2016. We set aside the order issued by the High Court on 21st July, 2016 and substitute therefor an order dismissing the application dated 6th June, 2016. The costs of the appeals shall be borne by the respondents 1, 2 and 3 only, in CA 99 of 2016, the appeal against the 4th respondent having been withdrawn; and by the 1st and 2nd appellants in Civil Appeal No. 106 of 2016.

Orders accordingly.

Dated and delivered at Mombasa this 25th day of January, 2018

P.N. WAKI

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JUDGE OF APPEAL

W. KARANJA

....

JUDGE OF APPEAL

M.K. KOOME

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR