IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & M'INOTI, JJ.A)

CIVIL APPLICATION NO. NAI 135 OF 2017 (UR 103/2017)

BETWEEN

CIENI PLAINS COMPANY LIMITED.....1ST APPLICANT

ANTHONY NJOROGE WAINAINA..... 2ND APPLICANT

IRENE NYAKINYUA NJOROGE.....3RD APPLICANT

AND

ECOBANK KENYA LIMITED.....RESPONDENT

(An application for injunction pending hearing and determination of the appeal against the entire Ruling and Order of the High Court of Kenya at Nairobi (Onguto, J) dated 21st April, 2017 in Civil Case No. 316 of 2016)

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RULING OF THE COURT

1. The notice of motion dated 15th June, 2017 seeks one substantive order under ***Rule 5 (2) (b)*** of the rules of this Court, as follows:

> ***"That this Honourable Court be pleased to grant an order of injunction restraining the Respondent whether by itself, its employees, servants, agents or auctioneers from advertising for sale, selling whether by public auction or private treaty, disposing or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise interfering with the Applicants ownership or title to the parcel of land known as Land Reference Number LR No. Nyeri/Naromoru/1174, LR. No. 5118/22, IR 80731, L.R No. Gakawa/Githima Block 3/Mikumbune/148, L.R No. Gakawa/Githima Block 3/Mikumbune/149 and L.R. No. 36/111/63."***

2. It was taken out by **Cieni Plains Company Limited (Cieni Plains)** and its two Directors after a similar application made before the High Court was dismissed by **Onguto, J.** on 21st April, 2017. The

bone of contention is the issuance of statutory notices on the two Directors for realization of several securities offered by them to **Ecobank Kenya Ltd (the bank)** to secure financial advances made to Cieni Plains in or about the year 2013. The facility granted to Cieni Plains, a general merchant and realtor, was KSh. 240 million in form of a term loan, revolving letters of credit, short term loans and an overdraft. It was secured by a floating debenture over the assets of the company, legal charges over the four properties owned by the two Directors and personal guarantees executed by the Directors. While the floating debenture secured the entire sum of Ksh. 240 million, the legal charges were for various amounts ranging from Kshs 1.2 million to Ksh. 31 million. The securities were duly perfected and registered.

3. Along the way there were agreed variations and reviews of the facility in 2014 and 2015, but ultimately default was made in repayment and the bank served statutory notices under ***Section 90*** of the **Land Act, 2012** in 2016 seeking recovery of Kshs.103,522,033/97. When no response was forthcoming, the bank issued a redemption notice demanding Ksh. 166,745,816/83 as at 18 July 2016. That is when Cieni Plains and the two Directors went to court asserting that the secured facility of Ksh. 240 million had been fully repaid but the bank had unlawfully tacked and consolidated with it another facility aggregating Ksh. 221,542,442/14, which was unsecured. They also claimed that the bank was levying unconscionable and usurious interest rates and penalties which clogged their equity of redemption; that it had breached ***Sections 82, 84*** and **85** of the Land Act when it varied and reviewed the facilities; that the statutory notices were defective and invalid as they were issued contrary to ***Sections 90*** and ***96*** of the Land Act; that the security documents were invalid as the bank had failed to obtain the requisite land control board's consent as required under the **Land Control Act**; that the securities intended to be sold were unique and peculiar; and that the doctrine of *lis pendens* was applicable to the case pursuant to ***Section 106*** of the **Land Registration Act,** No 3 of 2012.

4. The bank, on the other hand, contended that the company and its Directors were recalcitrant debtors who had admitted default in loan repayments and yet dared to oppose lawful recovery. According to the bank, they only paid Ksh. 25 million and another Ksh. 18.5 million against interest accrual of Ksh. 31.5 million leaving a debt in excess of Ksh. 170 million outstanding. It further contended that all its securities were valid and accorded with the law until proven otherwise; that the Land Control Board's consent had been obtained; that the right to tack and consolidate had been expressly reserved in the security registers and the bank was at liberty to tack any additional advances; that the statutory notice was good and valid for all purposes as it had been served upon the principal debtor; that there was no evidence of penal or usurious interest charges but only contractually agreed rates; that a dispute as to accounts cannot form the basis of interfering with the bank's statutory power of sale; that the doctrine of *lis pendens* cannot be invoked to interfere with suits involving mortgages and charges as that would simply stall commercial transactions; and that, in any event, ***Section 52*** of the **Indian Transfer of Property Act 1882** which provided for the doctrine was repealed in 2012, and it ceased to apply in Kenya.

5. The trial court considered the matter under the applicable principles in ***Giella vs Cassman Brown & Company Ltd [1973] EA 358*** and ***Mrao Ltd vs First American Bank Kenya Limited & 2 Others [2003] KLR 123.*** It found in the end, that the nature of the facilities aggregating to Ksh. 240 million entailed a situation where draw-downs can be consistently made and repaid and, therefore, there was no outright evidence of additional lending over and above the secured amount; that there was no necessity of creating further charges or obtaining fresh land control board consents; that the charge documents were continuing securities which allowed Cieni Plains to obtain facilities from the bank from time to time, as envisaged by ***Section 82(1)*** of the Land Act; that all the charge documents provided that no payment would be deemed as discharging the liabilities of Cieni Plains until the bank received all the amounts the security was intended to secure; that there was no reduction or increase or intention to increase or reduce the amounts secured for purposes of ***section 84(2)*** of the Land Act; that the statutory notice was substantially in compliance with ***Section 90*** of the Land Act and there was no demonstration that it caused any prejudice to the debtor; that where it is proved that the interest levied was exorbitant, extravagant and unconscionable, the court had an equitable jurisdiction to relieve parties from such interest, but it was not so proved; and that there is divided opinion from the courts on the applicability of the doctrine of *lis pendens* post the 2012 amendment to the Transfer of Property Act, but the provisions of ***Section 99*** of the **Land Act** which shields the purchaser absolutely, save where he has participated in fraud, would take precedence over the doctrine, which has no place to the current circumstances or to properties sold by a

chargee.

6. The following final orders were made:

> ***"It would not be proportionate to deny the Defendant the right to dispose of the subject property by way of a public sale. The right has both admittedly and apparently accrued. I have not been satisfied that the Plaintiffs have a prima facie case with a likelihood of success and I do not consequently need to interrogate whether they would suffer irreparably if there is no injunction. I decline to restrain the Defendant from exercising its powers under the securities pledged to it by the Plaintiff.***
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> ***73. I find the application wanting on the requisite merits and dismiss it with costs to the Defendant, even though the Plaintiff only met with minimal success. I also order the Defendant to furnish to the Plaintiffs, through the Plaintiffs' counsel a detailed statement of accounts of all the transactions the subject of this suit within 21 days of today."***

It is those findings and order that the applicants seek to challenge on appeal and have manifested their intention by filing the requisite notice of appeal.

7. The orders sought before us may only issue if the applicants satisfy us on the twin principles, firstly, that the intended appeal is not frivolous or is arguable; and secondly, that if the orders sought are not granted, the success of the intended appeal will be rendered nugatory. Those are the age-old principles which were ably summarized in the case of ***Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR*** as follows :

> ***i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See*** *Ruben & 9 Others v Nderitu & Another* ***(1989) KLR 459.***
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> ***ii) The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.***
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> ***iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.*** *Halai & Another v Thornton & Turpin (1963) Ltd****. (1990) KLR 365.***
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> ***iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.*** *David Morton Silverstein v Atsango Chesoni,* ***Civil Application No. Nai 189 of 2001.***
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> ***v) An applicant must satisfy the court on both of the twin principles.***
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> ***vi) On whether the appeal is arguable, it is sufficient if a single*** **bona fide** ***arguable ground of appeal is raised.*** *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd****, Civil Application No. Nai 345 of 2004.***
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> ***vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.*** *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others,* ***Civil Application No. 124 of 2008.***
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> ***viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.***
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> ***ix) The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.*** *Reliance Bank Ltd v Norlake Investments Ltd* ***[2002] 1 EA 227 at page 232.***

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the latter to rebut the claim by evidence. *International Laboratory for Research on Animal Diseases v Kinyua*, ***[1990] KLR 403.***

8. Learned counsel for the applicants **Mr. Peter King'ara,** instructed by M/S Gichuki Kingara & Company, Advocates, was acutely aware of the principles applicable and sought to satisfy us accordingly. He referred to an array of sixteen intended grounds of appeal raised in the motion to persuade us on the first limb that the intended appeal was not frivolous. The more substantial grounds relate to the issue of tacking and the application of ***Sections 82, 83***, and ***84*** of the Land Act in relation thereto; whether the consent of the Land Control Board was necessary in view of the contention that there were two loans, one of which was fully repaid and the other was unsecured; the validity of the statutory notice served in view of the contention that the debt claimed was unsecured; whether final findings of fact were erroneously made in an interlocutory application; and whether the doctrine of *lis pendens* still applies in Kenya despite the repeal of **section 52** of the Indian Transfer of Property Act.

9. On the second limb, Counsel submitted that the bank had already sold one of the properties on the basis of an illegal statutory notice and was intent on selling the rest. The auctioneers had already issued further notices of sale, he observed. In his view, the unique and prime properties were irreplaceable and the intended appeal would be rendered nugatory once they were removed from the jurisdiction of the court. In conclusion, counsel submitted that there would be no prejudice in granting the order since the bank was still holding the securities and was able to realize them if the intended appeal was not successful. Several authorities were relied on, among them: ***Githunguri vs Jimba Credit Corporation Ltd No. 2 (1988) KLR 838 ; Stephen K. Melly & 2 Others vs Ecobank Kenya Limited & Another (2016) eKLR***; ***Kisimani Holdings Limited & Another vs Fidelity Bank Limited (2013) eKLR*** and ***Anne Njeri Mwangi vs Co-operative Bank of Kenya (2013) eKLR***

10. On the other hand, learned counsel for the bank **Mr. Allen Gichuhi,** instructed by M/s Wamae & Allen, Advocates, relied on the affidavit in reply to the motion and submitted that the intended appeal was frivolous because the bank had complied with the order of the trial court and supplied statements of accounts which reveal that there was only one borrowing which was continuous. Counsel accused the applicants of bad faith since they had admitted the debt in the past and sought the indulgence of the bank to pay but failed to honour it. They had indeed authorized the bank to sell one of the securities which it did and credited the proceeds to the loan account, but the account continued to escalate to more than Ksh. 200 million due to further default in agreed repayments. According to counsel, the application did not lie where, as in this case, it was clear that the court was *functus officio* since the auction had taken place; the applicants were guilty of non-disclosure of admissions made in the past and non compliance with promises made; the doctrine of *lis pendens* does not apply to lands registered under the **Registered Land Act**; and that there was no sentimental value attachable to property which had been offered as security in the commercial market. Mr. Gichuhi called for strict terms for clearing the arrears, servicing the debt regularly and providing further security, if the order for injunction was to be granted. He relied on several authorities, among them: ***Mrao Ltd vs First American Bank (2003) eKLR; Coast Brick & Tiles vs Premchand (1966) EA 154; Orion East Africa Ltd vs Ecobank Kenya Ltd & Another (2015) eKLR; John Nduati Kariuki t/a Johester Merchants vs National Bank of Kenya Ltd (2006) EKL.***

11. We have considered the first limb of the principles cited above together with the authorities cited before us and we are satisfied that the issues raised by the applicants are capable of being argued fully before this Court and are certainly not frivolous. We cannot obviously make definitive findings of fact or law at this stage, lest we prejudice the hearing of the main appeal. But it is our view that the issue of the findings made by the trial court at an interlocutory stage and whether they were final or not, the vexing issue of tacking and consolidation of the credit facilities, as well as the applicability of the doctrine of *lis pendens*, among others, entitle us to view the application favourably on this limb, and hold that the intended appeal is arguable.

12. What would happen if we declined to grant the orders sought, and the applicants succeed in the main appeal? That is the second limb. The bank in its affidavit in reply is certainly intent on proceeding with the sale of the properties since, in its view, it is within the law. We would agree with the bank that the plea by the applicants that the properties were unique, prime and irreplaceable is misplaced since there is always anticipation of alienation where properties are offered as security in a commercial transaction. See ***Ecomil Pasag Co. Limited & 2 Others vs UAP Insurance Co. Limited [2017] eKLR.*** Courts are also slow in tying up the hands of a lending institution intending to recover debts owed, especially where a borrower has undoubtedly obtained a large amount of those funds and made full benefit of it. The reason was given in the ***John Nduati Kariuki case*** ***(supra)*** that a bank has no money of its own and it is axiomatic that it uses public funds to trade with. Nevertheless, a balance must be struck to ensure that the undoubted right of appeal and the success of such appeal, are not rendered worthless, futile, invalid or trifling. Each case must, of course, depend on its own facts and peculiar circumstances as stated in the case of David ***Morton Silverstein vs Atsango Chesoni [2002] eKLR.***

13. The bank has, since the filing of this application on 15th June 2017, auctioned **L.R No. Nyeri/ Narumoru/1174,** one of the properties sought to be protected. No injunction can issue in respect of that property as it is overtaken by events and the Court cannot act in vain. Although there was a threat to auction the others after issuance of notice, there is no evidence that the sale of L.R **Nos. Gakawa/ Githima Block 3 Mikimbune 148 & 149. LR No. 5118/22[IR 80731]** and **LR No. 36/111/63** has taken place. We are told in affidavit evidence that some of the properties are fully developed as business and residential premises and are fully occupied by tenants. The ripple effect of the auction will certainly affect more than the applicants whose liability will no longer be limited to the bank but to other numerous claims which may not be easy to fathom.

14. It may well have been appropriate to consider whether damages are an appropriate remedy, but there is a pleading on illegality which begs the question whether a wrong doer is entitled to keep what is acquired contrary to the law simply because he can pay for it. This Court answered the question in the negative in the case of ***Aikman vs Muchoki [1984] KLR 353.*** We shall leave the issue at large for agitation, if at all, in the main appeal.

15. In all the circumstances, we are inclined to view the second limb favourably but only to the extent of granting conditional injunctory relief. Accordingly an injunction shall issue in terms of the prayer made by the applicants, except for **LR. No. Nyeri/Naromoru/1174,** on the following terms:

> (a) The applicants shall, jointly and severally, pay to the credit of the account of **Cieni Plains Company Limited** held with **Ecobank Kenya Ltd**, a sum of Ksh.20,000,000 (Twenty million) within 30 days.
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> (b) The applicants shall deposit the sum of Ksh.100,000,000 (One hundred million) into an interest earning bank account jointly held by counsel on record for the respective parties in any reputable bank in Kenya, within 60 days of this order.
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> (c) If conditions (a) and (b) are complied with, the costs of the application shall abide the result of the intended appeal.
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> (d) If conditions (a) and (b) or any of them are not complied with, this order shall lapse forthwith, without further recourse to court, and the applicants shall bear the full costs of the application.

We so order.

Dated and delivered at Nairobi this 19th day of January, 2018.

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR