IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A.)

CIVIL APPEAL NO. 295 OF 2015

BETWEEN

HOSWELL MBUGUA NJUGUNA

T/A FISCHER AND FISCHER MARKETING CONCEPTS.....APPELLANT

AND

EQUITY BANK LIMITED.....1ST RESPONDENT

SAFARICOM LTD.....2ND RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Kamau, J.) dated 30th June, 2015

in

H. C. C. C. No. 599 of 2010)

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JUDGMENT OF THE COURT

1. In the year 2006, **Hoswell Mbugua Njuguna**, who was trading as **"Fisher and Fisher Marketing Concepts**" (hereinafter, '**the appellant**'), developed what he considered a unique concept of banking. The idea was to encourage low income earners, of about Sh.180 per day or less, to save money by offering them a cheap, easy and convenient system of banking money with a view to future investment thus creating improved domestic savings and investments and ultimately economic stability nationally. He called the concept **"Weka usaidike"** (hereinafter, '**the original concept**').

2. The concept would involve an Account holder, a bank, a mobile telephone service provider, and a Dealer. The bank would freely open accounts for low income earners without seeking deposits. It would then design and print serialized scratch cards of cheap denominations of Sh.100 to 500 which would be sold to dealers stationed in sheds designed and operated in all corners of the country. The dealers would then sell the scratch cards to the account holders who would key in the serial number of the scratch card through a mobile service provider who would be the go between with the bank, to ensure the amount reached the customer's account. There were further details on the interplay between the four main players and the benefits accruing to each of them.

3. In July 2006, the appellant sought to register the manuscript for the original concept under the **Copyright Act 2001** but was informed by the Registrar General that it was not necessary to register since, unlike other intellectual property, all original literary, artistic or musical works reduced to any material form was automatically eligible for copyright protection during the lifetime of the author and 50 years after his death. A voluntary registration process was however being mooted at the time and the appellant was told to await that process. It was in place in the year 2009 whereupon the appellant registered ***"a copyright work in the literary category entitled WEKA USAIDIKE and numbered KCB335."***

4. Before the registration, the appellant had gone to Equity Bank (hereinafter **'the bank')** in August 2006 and presented the details of the original concept to two of its officers with a view to persuading the bank to adopt it. Further meetings were held with the bank over a period of three years up to August 2009 to discuss the concept. The appellant regarded the information given to the bank as ***'Confidential'*** and given in good faith for the sole purpose of negotiating an agreement for the creation and marketing of the concept. He never expected the bank to misuse the information.

5. To his shock and surprise, however, the bank terminated the negotiations at the end of August 2009 without any agreement and created a new product branded **"M-Kesho"** (hereinafter, **'the new concept"** which was launched in May 2010. According to the appellant, the new concept had characteristics identical to the original concept. These included : partnership with a major mobile phone service provider, Safaricom Ltd **(safaricom)**; depositing and withdrawal of money through Safaricom's M-Pesa system; the use of sheds and centres throughout the country; and creation of a main centre at the bank's head office for operations of the new concept.

6. The appellant felt that the bank had stolen his invention, breached his copyright and used the confidential information to unjustly enrich itself to the economic and emotional detriment of the appellant. He went before the High Court in September 2010 and sued the bank. Two years later in January 2013, the plaint was amended to enjoin Safaricom in the suit seeking the following reliefs:

> ***a) An injunction to restrain the Defendant by itself, its servants or agents or otherwise howsoever from using the confidential information of the Plaintiff or any part thereof for any purpose other than for the purpose for which it was supplied, and from using or marketing the Concept branded "M-Kesho" or otherwise exploiting the said information or any part thereof.***
>
> ***b) An inquiry as to damages for breach of confidence.***
>
> ***c) Further or alternatively, an account of all the profits made by the Defendant from the use of the said confidential information of the Plaintiff.***
>
> ***d) An order for the appointment of a receiver to collect and receive all the profits made by the Defendant from the use of the confidential information of the Plaintiff and an order for the giving of proper direction for that purpose.***
>
> ***e) An order for payment of all sums found to be due to the Plaintiff together with interest thereon at court rates.***
>
> ***f) The Defendant be ordered to pay the Plaintiff costs of this suit together with interest thereon at court rates from the date of filing of this suit until payment in full.***
>
> ***g) Any such or further relief as this Honourable court may deem appropriate.***

7. The bank in its defence denied knowledge of registration of any copyright or the finer details of it but admitted that the appellant had approached it with a proposal on the original concept. It was a simple write up proposing the loading of customers' accounts using scratch cards. It was not technologically backed, tested or approved and there was no law at the time allowing agency banking. The proposal was therefore not viable since the bank had more viable and advanced M-Commerce solutions, and the

appellant was promptly informed about this after three meetings with the bank's officials.

8. As for M-Kesho, the bank denied that there was any identical characteristics with the original concept. The only common feature was micro-savings but the two were otherwise totally different products. The bank further explained that due to exponential growth of its customer and deposit base over the years, it resolved to provide its customers with innovative financial products and a range of delivery channels. Because of prevalence of mobile devices, it introduced a mobile solution that enabled its customers to perform banking transactions using mobile phones. That was way back in 2005 when **SMS Banking** was introduced to provide customer services for balance enquiries, forex rate enquiries, requests for mini statements, top up airtime, limited bill payments and access to various alerts.

9. Two years later, in 2007, it introduced another product **" EAZZY 24/7 Benki Yangu Mkononi"** accessed by USSD (*127#) channel and SMS for alerts. The solution was for its existing customers and micro clients within Kenya, East Africa and Southern Sudan. It enabled its customers to enquire about balances, mini statements, block a card, change the mobile pin number, transfer funds or request for cheque books, make mobile bill payments and receive account info alerts. The bank further leveraged on the existing **M'Commerce platforms** including M-Pesa, ZAP, Orange Money, YU cash, and has since achieved several initiatives including M-Pesa Agency, M-Pesa Paybill, M-Pesa ATM withdrawal and M-Kesho. The new concept was initiated in partnership with Safaricom and was approved by the Central Bank of Kenya before registration as a Trademark. It was launched in May, 2010 and by September 2010 it had a subscription base of 679,020 customers.

10. According to the bank, the purported original concept was not original at all and there was nothing confidential about the information sought to be protected. It cited the launch, in 2005, of a full transactional bank account by **Wizzit Bank**, a division of the Bank of Athens in the Republic of South Africa, in which its customers would transact by use of a low-cost mobile phone. Like the South African model, M-KESHO was targeting the unbanked, low income population. The main features of the new concept were: transaction account with the incentive of savings; access to micro credit; money transfer; access to micro insurance; account balance request; and mini statement. The bank denied utilizing any information from the original concept, breaching any confidentiality or copyright and asserted that the suit was misguided.

11. Safaricom filed its defence too, denying any knowledge of the original concept or any of the matters pleaded in the plaint. It asserted that the new concept was developed in partnership with the bank as a normal progression for mobile communication and data services providers to provide platforms for mobile banking services beyond land lines, bank branches and automated teller machines (ATMs). The features in the original concept were therefore not original and there was nothing confidential about information relating to mobile banking. Indeed, other banks in Kenya, like Kenya Commercial Bank and Family Bank, had mobile based solutions in *'KCB Mobi Bank'*, *'KCB Connect'* and *'Pesa Pap'* respectively, which were using the M-Pesa platform to reach their customers. Safaricom suspected that the appellant was jumping onto the band wagon of several other claimants of false innovations of products like Celtel's *Zap,* Safaricom's *M-pesa, Okoa Jahazi* and *M-Kesho,* in the vain hope of financial gain.

12. In reply to the defences, the appellant joined issue with the bank but pleaded that he had no claim against Safaricom.

13. The High Court **(Jean Kamau, J.)** considered the pleadings, the oral evidence and the written submissions filed on all sides and found that although the original concept was a banking model, it was abundantly clear that it was not in the least similar to the new concept. It found 'conclusively and firmly' that M-KESHO was not the product envisaged in the appellant's proposed model of banking. The court further found that there was no evidence whatsoever to show that there was any breach of confidence by the bank or that it used private or secret information for its benefit and to the appellant's disadvantage.

14. The court reasoned as follows:-

"***Although the Plaintiff's idea was a banking concept, it was abundantly clear it was not in the least similar to M-KESHO as he had contended. In fact, the two products were so fundamentally different as was rightly pointed out by DW 1. M-KESHO was connected to a platform owned by the 2nd Defendant that transmitted the financial transaction through technical protocols. The Plaintiff's concept entailed a user scratching a card to reveal a number that would be used to send a text message that would show how much money was deposited in the user's account. PWI admitted during his cross-examination that M-KESHO did not use scratch cards and that his contentions in Paragraph (9) of his Plaint that his concept utilised M-pesa was introduced by his advocates and was not in his manuscript. It was evident from DW 1's evidence that M-KESHO was a partnership between the 1st and 2nd Defendants and entailed several instructions through the M-Pesa sim by a subscriber using a mobile handset in which the user would do particular actions. The subscriber could transfer money from his or her bank account to M-pesa and from M-pesa to his or her bank account. It was the view of the court that the 1st Defendant's failure to present any evidence to show that M-KESHO was an idea borne from Michael Joseph and Dr James Mwangi did not negate the fact that the Plaintiff's and 1st Defendant's products were so distinct in their mode of operation. Indeed, PW 1 admitted during cross-examination that he did not have the technical know-how and that there was software that was to be developed for his concept to become workable. His role was that of a creator of a product. He also agreed with the 1st Defendant's assertions that by 2005, banks had mobile banking and that M-pesa was in existence by 2009. PW 1's assertion that he was the one who brought the idea of sheds to the 1st Defendant was not material in the circumstances of the case herein as he seemed to admit that several other banks had those sheds. The Pre-fab structure that he alluded to on pg 26 of his Bundle of Documents was thus not an original idea that he could purport to have been utilised by the 1st Defendant. In any event, all M-KESHO transactions did not require any sheds to be operated and the 1st Defendant never operated through sheds. Rather, the mobile phone was the medium through which the transactions were being effected in the M-KESHO Product. The court found and held that the Plaintiff did not show that the Model of Banking on pp 17- 31 of his Bundle of Documents that the 1st Defendant breached such confidence. There was no evidence of use of the Plaintiff's material by the 1st Defendant and further, there was no proof that the material was confidential or that the material created an obligation of confidence on the 1st Defendant as was held in the case of Faulu Kenya Deposit Taking Microfinance Limited vs Safaricom Limited [2013] eKLR that was relied upon by the 1st Defendant. In view of the disparity of the concepts, the court found that the Plaintiff's contentions that the 1st Defendant breached the confidence he purported to have bestowed upon it was not sufficiently proven. The Plaintiff's reliance of several cases and that of Fraser & Others vs Thames Television Limited & Others (1984) 1 Q.B. 44 in which it was held that a person who has received information in confidence from another must not take unfair advantage of it or wrongful use or publication of it were clearly distinguishable from the circumstances of this case. The Plaintiff failed to demonstrate that he had a proper cause of action founded on the developing equitable doctrine of breach of confidence."***

15. The trial court also considered the issue of breach of copyright and dismissed it, reasoning thus:-

"Copy rights protect the process in which an idea comes to fruition. It does not protect the idea itself. It is the copying of the process of attaining that idea which is protected. The Plaintiff's idea to assist the "common mwananchi", which was the 1st Defendant's target market, through the use of scratch cards could not therefore be said to have been solely owned by him. Indeed, different people have similar ideas in respect of or about similar issues. It would be creating a dangerous precedent if a person who thinks of an idea seeks to restrain others from entertaining a similar idea in their minds where different methods could be utilised to conceptualise that idea. The Plaintiff failed to show a nexus between his Model of Banking and his claim against the 1st and 2nd Defendants as far as the idea of M-KESHO transactions was concerned."

16. The entire suit was dismissed thus provoking the appeal before us blaming the learned judge for

erring in fact and in law in:-

i) holding that there was a substantial difference between the appellant's concept termed "Weka Usaidike" and M-

KESHO.

ii) holding that there was an averment in the Amended Plaint that the appellant's concept utilized Mpesa when there was no such averment.

iii) finding that the material disclosed to the 1st respondent was not confidential and did not create an obligation of confidence.

iv) finding that the appellant did not have a proper cause of action founded on the developing equitable doctrine of breach of confidence.

v) finding that the appellant could have a cause of action in copyright.

vi) misdirecting herself on the law therefore arriving at a wrong conclusion.

17. In urging those grounds through written submissions which were not orally highlighted, learned counsel for the appellant **Mr. D. Anzala,** instructed by M/s Henia Anzala & Associates, clarified , as he urged grounds ***(v)*** and ***(vi)***, that the cause of action pleaded by the appellant was purely the common law breach of confidentiality. It had nothing to do with breach of copyright and the trial court had no business making references to and findings on copyright. The main grounds on the appeal were therefore grounds ***(iii)*** and ***(iv)*** which we shall revert to shortly.

18. In urging the minor grounds ***(i)*** & ***(ii)***, counsel faulted the trial court's finding of substantial difference between the original concept and the new concept. In his view, both had two essential ingredients -- a bank and a mobile service provider. The new concept came four years after the meeting between the appellant and the bank and its main feature was to transfer money from the mobile phone to the bank. That was similar, if not identical, to the original concept, it was submitted. Counsel observed that the bank failed to produce any document or write up on how the new concept was developed, merely relying on bare assertions that it was developed by the bank and Safaricom. In counsel's view, that supports the claim that the new concept was built on the foundations of the original concept. The trial court appreciated that there was no evidence but nonetheless, went ahead to hold that the new concept was as a result of the innovations by the bank to make it easier for its customers to access financial services. Counsel further submitted that there was no averment in pleadings, as erroneously found by the trial court, that the original concept utilized 'M-PESA". In his submission, such findings were for reversal as held in the case of ***Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 Others [2016] eKLR***.

19. Turning to the main ground, counsel submitted that the circumstances in which the bank received the information from the appellant were confidential and the subsequent use of the information without acknowledging the appellant was in breach of confidentiality. He observed that the appellant went to the bank in good faith to negotiate a business deal; that the bank did not have in place any similar product at the time; the information in the original concept was not in the public domain; and the bank applied the information that came to it through the appellant, updating it to M-kesho. Counsel relied heavily on the cases of ***Fraser and Others vs Thames Television Ltd and Others [1984] 1QB 44*** and ***Saltman Engineering Co Limited vs. Campbell Engineering Co Limited (1948) 65 R.P.C 203*** to buttress this line of argument.

20. In response to those submissions, the bank, through learned counsel **Mr. D. Akhulia,** instructed by M/s Sichangi & Company, Advocates, also filed written submissions which were not orally highlighted. Counsel conceded that both concepts utilize one main channel of communication -- the mobile phone -- to conduct banking transactions. But it was fallacious to argue that the two were not distinct or that one was a derivative of the other, charged counsel. It was in evidence by the bank, which was tested at length in

cross examination, that both products bore fundamental differences: the original concept merely offering the rudimentary process of using scratch cards as a form of money transfer to a bank account, while the other was an elaborate system creating transactional bank accounts capable of handling money transfers, insurance access, and micro credits among other products. According to counsel, the origins and technical functionality of the new concept were adequately presented in oral testimony by the bank's witness who had a wealth of experience spanning many years in the banking and telecommunications sector since 2003. He had worked in senior positions in mobile money transfer platforms with Airtel and Safaricom before working with the bank. The appellant had also made crucial admissions on the differences when he was cross examined. There was enough basis, therefore, for the findings made by the trial court and it was not necessary to present other or further documentary evidence. As to whether there was an averment in the pleadings that the original concept used "M-PESA", it was submitted that the learned Judge did not consider any such aspect whilst analyzing the case before her. The learned Judge was only bringing out the difference in the two products.

21. Finally, on the central issue of breach of confidentiality, counsel contended that the information disclosed by the appellant was not confidential and did not create an obligation of confidence. According to him, the fact that there were no similarities in the two products, was enough to justify that there was no improper use of the appellant's information. In his view, an inference that the information provided by the appellant had been used would only have been feasible if the bank had devised a product that utilized scratch cards to credit bank accounts or sheds to sell them. According to counsel, there was a misunderstanding by the appellant, of the doctrine of confidence and how it differs from copyright and related rights. In his view, Copyright protects the expression, while confidence protects the substance.

23. In this case, he continued, the information provided by the appellant was already in the public domain and could not be said to be confidential. Scratch cards were already in use and banks had began using the mobile phone as a medium of banking in one form or another since the year 2000. The information provided by the appellant was also illegal since the banking guidelines at the time did not allow any form of agency banking and the bank would have faced dire consequences if it had used the information. The illegality thus rendered the confidential character of the information meaningless as did the inability to utilize and actualize it. The cases of ***Wade & Another vs British Sky Broadcasting Limited [2014] EWHC 634 (Ch)*** and ***De Maudsley vs Palumbo [1996] FSR 44*** were cited in aid of those submissions.

24. Neither Safaricom nor its lawyers, **M/s Ochieng Onyango Kibet & Ohaga Advocates** filed any written submissions or showed up at the hearing, no doubt buoyed by the declaration by the appellant that he had no case against them.

25. We have anxiously considered the appeal, as well as the submissions of counsel in the manner of a retrial in order to arrive at our own conclusions of fact and law in the matter. See ***Rule 29*** of the **Court of Appeal Rules**. As we do so, we must accord due respect to, and not lightly differ from, the findings of the trial court which had the added advantage of seeing and hearing the witnesses. Nevertheless, this Court has stated time and again that it will interfere with such findings if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching them. See ***Jabane vs Olenja [1986] KLR 661***. Indeed, an appellate court is not bound to accept the factual findings of a trial court if it appears either that it has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. See ***Mwangi vs Wambugu [1984] KLR 453.***

26. As earlier observed, the cause of action pleaded in this matter, and therefore the issue dispositive of the appeal, is breach of confidence. We must therefore explore what the principle or doctrine is about and ultimately answer the question whether, in the circumstances of this case, the appellant should have succeeded in his claim.

27. As correctly submitted by counsel for the appellant, the law of confidence and confidential information has no statutory underpinning and is based on common law principles. Counsel relied heavily on the case of ***Fraser & Others vs Thames Television Limited & Others (1984) 1 Q.B. 44*** which

distinguished Copyright from Confidence, emphasizing that:

> ***"Copyright law is, in essence, connected with the negative right of preventing the copying of physical material existing in the field of literature and the arts"***. See *Copinger and Stone James on Copyright 12th edn. (1980).*

Copyright is also good against the world generally, protects published as well as unpublished works but not confidentiality, and has a statutory time limit.

28. On the other hand, under the general law of confidence, the information relied upon may be either written or oral. It protects against those who receive information or ideas in confidence but the obligation in confidence ceases the moment the information or idea becomes public knowledge.

29. In the ***Fraser case*** **(**supra), **Hirst, J.** cited the treatise by *Copinger and Stone James* (supra) on the basic principles of the law of confidence stating thus:-

> ***"There is a broad and developing equitable doctrine that he who has received information in confidence shall not take unfair advantage of it or profit from the wrongful use or publication of it. He must not make any use of it to the prejudice of him who gave it, without obtaining his consent or, at any rate, without paying him for it… If, therefore, a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without his consent, express or implied, he will be guilty of an infringement of the plaintiff's rights."***

30. Hirst, J. further considered statements made in the Australian case of ***Talbort vs General Television Corporation Pty. Ltd [1981] P.P.C. 1*** following **Megarry J.'s** decision in ***Coco vs A. N. Clark (Engineers) Ltd. - [1969] RPC 41***, thus:-

> ***"it is clear that an obligation of confidence may exist where there is no contractual relationship between the parties. Where a plaintiff sues, relying upon breach of confidence, he must establish three elements. These are: (1) that the information was of a confidential nature; (2) that the information was communicated in circumstances importing an obligation of confidence; and (3) that there has been an unauthorised use of the information to the detriment of the person communicating it (i.e. the plaintiff)."***

31. Ultimately, the learned Judge held that:-

> ***"…To succeed in his claim the plaintiff must establish not only that the occasion of communication was confidential but also that the content of the idea was clearly identifiable, original, of potential commercial attractiveness and capable of being realized in actuality…"***

32. On the other hand, learned counsel for the bank relies on dicta from **Halsbury's Laws of England 4th Edn. Vol 8 (1)** ***at paragraph 401*** explaining when a party may be held liable for breach of confidence. It must be shown that:-

> ***i) the material communicated to him had the necessary quality of confidence;***
>
> ***ii) It was communicated or became known to him in circumstances entailing an obligation of confidence; and***
>
> ***iii) There was an unauthorized use of the material.***

33. The same treatise also states at ***paragraph 416*** that:-

> ***"There is a limit to the applicability of the equitable tort of breach of confidence in the event the information sought to be relayed to an intended recipient is illegal, immoral or against public policy.***

In the sense the legal maxim of Equity follows the law takes effect."

34. Finally counsel pointed out that the ***Fraser case*** has been modified by the latter English decision of ***Wade & Another vs British Sky Broadcasting Ltd [2014] EWHC (634) Ch.*** which emphasized that the court must look at the similarities between the confidential information and the alleged use of it. According to **Birss J.** in that case, the obligation of confidentiality only applies to information that has the necessary quality of confidence about it. It must not be something which is public property or public knowledge ***(Saltman Engineering vs Campell Engineering Co Ltd (1948) 65 R.P.C 205)***. Furthermore, the information has to be practical and attractive to the end user and be capable of being realized as an actuality.

35. Applying all the above learning to the case before us, we have summarized in paragraph 2 of this judgment the nature of the confidential information relied upon. It is common ground that the appellant approached the bank with that information, intending to market it for adoption by the bank. But the parties never reached any agreement and so there are no terms governing how the confidential information may be used or their respective rights and obligations. As **Megarry, J.** would say:

"In cases of contract, the primary question is no doubt that of construing the contract and any terms implied in it." See the

Coco case (supra).

In the circumstances, we must fall back on the objective appraisal of the record for any words used and conduct exhibited which may lead to the conclusion that the parties did or did not intend any agreement.

36. Was the information confidential? We think it was. ***Gurry***, in his book, *'Breach of Confidence (2nd edn)'* says, at Pg 5-14:

"The basic attribute which information must possess before it can be considered confidential is inaccessibility. Information must not be common knowledge, ie in the public domain. This attribute is fundamental to the action for breach of confidence."

37. Similarly, **Lord Greene MR** in ***Saltman Engineering Co Ltd & Others vs. Campbell Engineering Co Ltd [1963] 3 All ER 413*** said:

"The information, to be confidential must . . . have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process."

38. In the same vein, **Lord Goff of Chieveley** in ***Attorney General vs Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545*** stated:

"I realize that, in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties, often a contract, in which event the duty may arise by reason of either an express or an implied term of that contract. It is in such cases as these that the expressions "confider" and "confidant" are perhaps most aptly employed. But it is well-settled that a duty of confidence may arise in equity independently of such cases; and I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers, where an obviously confidential document is wafted by an electric fan

out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by. I also have in mind the situations where secrets of importance to national security come into the possession of members of the public …" [Emphasis added].

39. In the case before us, the trial court found, and it was readily admitted by the appellant that mobile banking and scratch cards were in the public domain before 2006. To that extent, one may be tempted to find, as the trial court did, that the entire information held by the appellant was not confidential. But that is to take a superficial view of the matter. The appellant had used and applied his mind to the existing public information and developed his own *niche* which he ended up protecting by registration of a copyright. The details of the original concept were not accessible to the public until the decision to discuss them with the bank was made. If the discussions entailed an obligation of confidence, the parties never made it doubly clear by executing some mutual covenants of confidence. Be that as it may, we are persuaded by the authorities cited above, that confidentiality of the original concept was established.

40. Was there unauthorized use of the information to the detriment of the appellant or, put differently, was there breach of the confidential information by the bank? We think not.

Lord Walker of Gestingthorpe in the case of ***OBG Ltd vs Allan, Douglas vs Hello! Ltd (No 3), Mainstream Properties Ltd vs Young [2007] 4 ALL ER 545 at 276*** said that:

"the equitable jurisdiction to restrain… breach of confidence… does not depend on treating confidential information as property, although it often referred to, loosely or metaphorically, in those terms."

41. According to **Cornish, Llewellyn** and ***Aplin*** in their book *'Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights (7th edn, 2010),* the question: *'[h]ow far, if at all, the general right to confidence can be regarded as proprietary… remain[s] obscure'.*

In ***Webster vs James Chapman & Co [1989] 3 All ER 939****,* at 943*,* **Scott, J.** said:

"Calcraft vs Guest and Lord Ashburton vs Pape are examples of two independent and free standing principles of jurisprudence. The former case related to privileged documents and to the scope of the protection provided by legal privilege. The latter case related to confidential documents and to the protection that equity will provide to that category of documents. I think it is important to notice the different principles on which protection of confidential documents on the one hand and privileged documents on the other hand are based.

Once a privileged document or a copy of a privileged document passes into the hands of some other party to the action, prima facie the benefit of the privilege is lost: the party who has obtained the document has in his hands evidence which, pursuant to the principle in Calcraft v Guest, can be used at the trial. But it will almost invariably be the case that the privileged document will also be a confidential document and, as such, eligible for protection against unauthorized disclosure or use."

42. Yet again, in ***Primary Group (UK) Ltd vs The Royal Bank of Scotland Plc [2014] EWHC 1082 (Ch)****,* **Arnold, J.** concluded:

"It follows from the statements of principle I have quoted above that an equitable obligation of confidence will arise not only where confidential information is disclosed in breach of an obligation of confidence (which may itself be contractual or equitable) and the recipient knows, or has notice, that this is the case, but also where confidential information is acquired or received without having been disclosed in breach of confidence and the acquirer or recipient knows, or has notice, that the information is confidential. Either way, whether a person has notice is to be objectively assessed by reference to a reasonable person standing in the position of the recipient."

See also ***Imerman vs Tchenguiz and Others*** *[2010] EWCA Civ 908, [2011] 1 All ER 555*.

43. The onus was on the appellant to prove the infringement it alleged. As this Court stated in the case of ***Sanitam Services (E.A) Ltd vs Rentokill (K) Ltd & Another*** ***(2007) 1 EA 362*****:**

> ***"The burden of proof in matters relating to infringement of industrial property rights lie with those who claim their rights have been infringed. One reason for this position of the law is that, although the protection of intellectual property rights is imperative to provide an incentive to inventors to develop new knowledge and thus, over time, confer dynamic gains to society from introduction of new products, it must be balanced against the danger of reducing current competition through market exclusivity conferred by the protection and therefore lead to a static distortion in the allocation of resources in the economy."***

44. There is no gainsaying that the advent of mobile telephony, which is an aspect of the global information super highway, opened numerous technological possibilities for commercial entities, including banks. It was in evidence that mobile banking in some form or other was already in use in South Africa and the bank in this case already had a viable M-Commerce platform utilizing SMS banking. The mechanics of the original concept has been explained earlier in this judgment and we are persuaded by the evidence given at length by the bank's witness, **Mr. Eric Karobia** that it had limited application as it was untested for security and viability and there was no legal environment to actualize it. The new concept was clearly different, and here we agree with the reasoning of the trial court spelling out the fundamental differences. Considering that mobile telephony banking was in the public domain, there would be no firm basis for rejecting the bank's assertion that the new concept was a logical progression of the technological innovations it had commenced for its customers even before the appellant approached it. There was no cogent proof tendered by the appellant on infringement and it is our finding that the original concept was not used by the bank.

45. It follows from that finding that the appeal has no merit and the prayers sought do not lie. We order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 17th day of November, 2017.

P. N. WAKI

……..…...

JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR