IN THE COURT OF APEAL

AT NAIROBI

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

CIVIL APPEAL NO. 93 OF 2004

BETWEEN

GIRO COMMERCIAL BANK LTD……..……..…..APPELLANT

AND

ECCON CONSTRUCTION & ENGINEERING LTD.…1ST RESPONDENT

WAITHAKA MWANGI……..2ND RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Njagi, J.) dated 17th September, 2003

in

H.C.C.C. No 371 of 2003)

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JUDGMENT OF THE COURT

This appeal raises only one question, namely, how a mortgage instrument under the ***Transfer of Property Act of India, 1882*** (the ***"Transfer of Property Act"***, now repealed), should be signed and attested by a corporation. On 17th September, 2003, ***Njagi, J.*** held that although the 1st respondent company's seal was affixed on a mortgage instrument in the presence of a director and the company secretary, that did not constitute attesting the signing of the instrument. Accordingly the learned judge concluded that the signing of the mortgage instrument by the 1st respondent was not witnessed as required by section 59 of the ***Transfer of Property Act***, and on that basis, issued an injunction restraining the appellant from exercising its power of sale under section 69(1) of the same Act.

Aggrieved by that decision, the appellant lodged this appeal setting out 5 grounds of appeal. At the hearing of the appeal on 17th March, 2014, the parties were of the same mind that the only issue for determination was whether the mortgage instrument was witnessed within the meaning of ***section 59*** of the ***Transfer of Property Act***.

The background to the appeal is as follows. At all material times the 1st respondent was the registered proprietor of the property known as ***LR No 330/823 (Original No 330/440/2)*** situate in Nairobi ("the suit

property"). By a mortgage instrument dated 18th January, 2000 and registered on 2nd February, 2000, the 1st respondent mortgaged the suit property to the appellant to secure a sum of Kshs 2.5 million.

On 30th May, 2003, the appellant, in exercise of its power of sale under the said mortgage sold the suit property by public auction to the 2nd respondent for Kshs 5 million. The 1st respondent was aggrieved by the sale of the suit property, and on 23rd June, 2003 filed a plaint in the High Court for a declaration that the sale of the suit property to the 2nd respondent was null and void and for an injunction to restrain the appellant and the 2nd respondent from interfering with its possession and occupation of the suit property. Contemporaneous with the plaint, the 1st respondent applied by a Chamber Summons for an injunction to, among other things, restrain the appellant and the 2nd respondent from executing or registering any conveyance in respect of the suit property and interfering with its possession and occupation of the suit property.

The grounds upon which those reliefs were sought included that the mortgage was obtained by fraud and coercion; that the same was irregularly executed; that no statutory notice had been served upon the 1st respondent prior to the sale of the suit property; that the auction was conducted in secrecy and that the suit property was sold for a song. By a ruling dated 17th September, 2003, the learned judge found no substance in all the above complaints, save the one pertaining to the signing and attestation of the mortgage instrument. On that basis, he issued the injunction as prayed.

Before us, the parties were heard by both written and limited oral submissions. ***Mr Munyu***, learned counsel for the appellant, started by pointing out that both the ***Government Lands Act, Cap 280*** (now repealed) under which the suit property was registered and the ***Transfer of Property Act***, the then substantive law in respect of land registered under the ***Government Lands Act,*** did not have any express provisions on attestation of instruments by corporations. In his view, this lack of express provision influenced the 2002 amendment of ***section 3*** of the ***Law of Contract Act, (cap 23, Laws of Kenya)*** which now requires all contracts involving disposition of an interest in land to be signed by both parties to the contract and their signatures to be attested. Counsel referred to the definition of the word ***"sign"*** in the Act in relation to a company which is defined to mean the affixing of the common seal of the company in accordance with its constitution or articles of association, ***with no further attestation required***. Counsel invited us to find that it was not the intention of the legislature that the requirement relating to attestation of mortgage instruments in the ***Transfer of Property Act*** should apply to mortgages executed by a company in accordance with its articles of association.

Learned counsel relied on the decision of the High Court in ***KENON LTD VS GIRO COMMERCIAL BANK LTD, HCCC No. 789 of 1999*** in which ***Mbaluto J.*** held that a signature of a company was the affixing of its seal in the presence of the required number of directors, who also acted as witnesses to the affixing of the seal.

Mr Munyu further submitted that by requiring the signatures of the directors who witnessed the affixing of the seal of the company to the mortgage instrument be also witnessed, the learned judge had ignored the fact that the company was a separate legal entity from the directors and had erred by concluding that the directors had signed the instrument as the company and for the company. In his view, the conclusion by the learned judge ultimately produced a legal absurdity, or a decision that was illogical and contrary to sense and reason.

Mr Wetang'ula, learned counsel for the appellant, took a rather equivocal position. In his view, to determine whether or not the mortgage instrument was properly signed and attested by the 1st respondent as required by ***section 59*** of the ***Transfer of Property Act***, the court had to look at the 1st respondent's constitutive documents as set out in the articles of association. Having not perused the articles of association, counsel submitted, the court could not determine whether or not the mortgage instrument was properly signed and attested. ***HALSBURY'S LAWS OF ENGLAND, 3rd ed. Vol. 6, para. 827 and Vol. 11, para. 562*** were relied upon in support of that submission. In counsel's view therefore, the learned judge erred by making a finding on the validity of signing and attestation of the mortgage instrument

without having first examined the 1st respondent's articles of association.

However, learned counsel changed tune somewhat, and submitted that for a mortgage instrument to comply with ***section 59*** of the ***Transfer of Property Act***, it was imperative that it be attested by two witnesses. This, he argued, is a rule of law that must be complied with and that the directors who witness the signing or sealing of the instrument cannot be the attesting witnesses. Counsel relied on ***MULLA ON THE TRANSFER OF PROPERTY ACT, 1882, 8th ed., N.M. Tripathi Private Ltd, Bombay, pages 488-499*** in support of the proposition, though it is noteworthy that the cited passages do not relate specifically to execution of the mortgage instrument by a company. This argument of course begs the question, what is the relevance of falling back on the provisions of the articles of association, if at the end of the day, the signing or sealing of the instrument must ultimately be attested in accordance with the requirements of the ***Transfer of Property Act***?

Learned counsel concluded by reverting back to his earlier submissions and asked us not to make any determination on the validity of the mortgage instrument without the advantage of having seen the article of association of the 1st respondent.

Section 59 of the ***Transfer of Property Act***, the interpretation of which is central to this appeal provides as follows:

> ***"59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."*** (Emphasis added).

The appellant's argument is that the 1st respondent, having signed the mortgage instrument by affixation of its seal and that affixation of the seal having been duly witnessed by one of its directors and the company secretary (two witnesses); that constituted sufficient execution of the instrument under ***section 59*** of the ***Transfer of Property Act***, so that no further attestation by two other witnesses was necessary. The appellant therefore invites us to find that the requirement in ***section 59*** of the ***Transfer of Property Act*** for attestation of the signature by two witnesses is intended to apply to execution of mortgage instruments by natural persons rather than by corporations or legal persons.

The 1st respondent on the other hand, ignoring for the moment the argument based on compliance with the articles of association, invites us to find that even after the company has signed the instrument, to satisfy the requirements of ***section 59*** of the **Transfer of Property Act**, the signing of the instrument must in addition be attested by two witnesses. The 1st respondent thus invites us to find that the requirements of ***section 59*** of the ***Transfer of Property Act*** apply to both a natural person and a company; in either case there must be two attesting witnesses to the signature.

We have before us two decisions of the High Court whose conclusions are diametrically opposed regarding the issue before us. In ***KENON LTD VS GIRO COMMERCIAL BANK LTD*** (supra) the issue of validity of a mortgage under ***section 69 (4)*** of the ***Transfer of Property Act*** was raised. The provision required the mortgagor's signature on the mortgage instrument to be witnessed by an advocate together with a certificate signed by the advocate confirming that ***section 69(1)*** of the Act had been explained to and understood by the mortgagor. In the case before the court, the seal of the company was affixed on the instrument and witnessed by two directors. In addition there was a certificate by an advocate, but the signatures of the two directors were not witnessed by the advocate. ***Mbaluto, J***. upheld the validity of the mortgage instrument in a ruling rendered on 21st November, 2001, holding that it was not necessary for the signatures of the persons who witnessed the affixation of the seal of the company to be attested by another witness. The learned judge reasoned as follows:

> ***"In trying to resolve that question we must bear in mind that what is required to be witnessed by section 69(4) of ITPA is the signature of the mortgagor. That naturally raises the question as to how a body corporate signs or rather executes a document the answer to which is obvious and that is by affixing the seal of the company to the document in the presence of the number***

of directors who the company's articles of association say should witness the seal. The 'signature' of a company is therefore the company's seal to a document in the presence of the requisite number of directors who act as witness to the affixing of the seal. That being the case to require that the signatures of the directors in whose presence the seal was affixed be also witnessed by an advocate is tantamount to requiring that a witness's signature be also witnessed which in my view is an [absurdity]. It is necessary, in this respect, to bear in mind the fact that the appending of the director's signatures to a document is part of the process of execution of a document by a body corporate and the directors themselves who do not sign such documents do not thereby become the mortgagor within the meaning of section 69(4) of the ITPA."

In arriving at the above conclusion, the learned judge stated that in his view, it was debatable whether ***section 59*** of the ***Transfer of Property Act,*** applied to limited liability companies.

In the case giving rise to the present appeal, **Njagi, J**. on the other hand, was of a totally different mind. The learned judge held, as we have already noted, that the mortgage instrument before him was invalid notwithstanding the fact that it was affixed with the seal of the company duly witnessed by a director and the company secretary, because it was not additionally attested by two witnesses as required by ***section 59*** of the ***Transfer of Property Act***. In arriving at that conclusion, the learned judge expressed himself as follows:

"In this instant case, the mortgagor is a body corporate. A body corporate has no body; it can only act through the agency of a human person. In executing any document, it can do so by affixing its seal on the relevant documents in the presence of designated officials. In the absence of any provision to the contrary, every instrument to which the seal should be affixed should normally be signed by a director and countersigned by the secretary or by a second director or some other person appointed by the directors for the purpose. In the case before the court, the common seal of the mortgagor, Eccon Construction and Engineering Ltd, was affixed in the presence of a director, and another director who doubles up as secretary. The signatures of these two company officials were merely for the purpose of the execution of the document by the company. None of those two officials could be said to have witnessed the execution by the company for the simple reason that they were executing the document as the company and for the company. And one cannot be a witness to oneself. That being so, the execution of the document by the mortgagor was not witnessed as required by s. 59 of the Indian Transfer of Property Act at all."

In arriving at that conclusion, ***Njagi J.*** did not refer to the earlier ruling by ***Mbaluto J***. which had reached the contrary decision, albeit in regard to interpretation of ***section 69(4)*** of the ***Transfer of Property Act***.

We shall first dispose of the argument by the 1st respondent that, without looking at the 1st respondent's articles of association, it was not possible to determine whether the mortgage instrument was properly executed. With respect, we do not think there is merit in the argument. Before ***Njagi J***. the 1st respondent did not deny that the mortgage instrument had been properly ***signed*** (that is, the seal of the 1st respondent was affixed to the mortgage instrument and witnessed by two directors). All that it was contending was that its signature had not been ***attested*** as required by ***section 59*** of the ***Transfer of Property Act.*** The articles of association of the 1st respondent were relevant for the purposes of determining whether the mortgage instrument had been ***signed*** as prescribed therein. The 1st respondent accepted that the instrument was properly signed; the question was merely whether, having been properly signed by the company, the mortgage instrument was additionally attested as required by ***section 59***. For that reason we do not find merit in the argument that we cannot determine this appeal without looking at the 1st respondent's articles of association. The signing of the instrument by the 1st respondent was never in issue; the issue was purely the meaning and import of the requirement in ***section 59*** that the mortgagor's signature should be attested by at least two witnesses.

As far as we can discern, the 1st respondent's argument is based exclusively on a textual reading and

literal application of section 59 of the Transfer of Property Act, without any regard to its purpose or the injustice, in the context of the peculiar facts of this case, that a literal interpretation of the provision may occasion.

The requirements in the Transfer of Property Act relating to attestation of mortgage instruments, in our opinion, were intended to protect the mortgagor by introducing a measure of formality in the execution of documents that ultimately could result in the divesture of property rights and interest from one party and transfer or vest the same in a different party. The provisions therefore were intended to ensure that parties to such instruments fully understood and accepted the ultimate consequences of execution of the instruments. Hence the requirement that the mortgagor's signature in the instrument be attested, an act that entails the confirmation, by a witness or witnesses, that the mortgagor has indeed freely and consciously signed the instrument.

As far as signing of an instrument by a body corporate is concerned, the purpose of affixation of the company seal is to establish or prove authenticity, because the whole purpose of the company seal is to execute and authenticate documents. When the seal is affixed onto the document and witnessed by two directors, as was the case in the appeal before us, the effect is that the two directors bear witness to the authenticity of the execution of the instrument by the company and also confirm that the company fully understands and accepts the consequence of executing the instrument.

We would therefore agree with the appellant that the learned judge confused the individual directors who witnessed the affixing of the seal of the company with the company itself, leading to the conclusion that they were executing the instrument ***as the company***. Where an individual signs in his capacity as an officer of the company, it is assumed that it is the company that is signing, not the individual, and his or her signature does not therefore need to be witnessed further. As far back as the 18th century, ***Steward Kyd***, in his ***TREATISE ON THE LAW OF CORPORATIONS, Vol. 1, Butterworths, London, 1793*** stated the principle thus:

> ***"A corporation aggregate, being considered as an indivisible body, cannot manifest its intentions by personal act or oral discourse…the law therefore has established an artificial mode, by which the general assent of the corporation to any act which affects their property, may be expressed. That is by affixing the common seal."***

In these circumstances, to require that the authenticated signature of the company be witnessed further by two other witnesses, amounts, in our opinion, to a preposterous requirement to authenticate that which is already authenticated. Not to mention that the purpose of requiring at least four signatures in the instrument in addition to the company seal is not readily apparent to us, unless of course, the intention is to render cumbersome and slow down business transactions.

In the particular facts of the appeal before us, the 1st respondent does not, even remotely, suggest that it did not comprehend or appreciate the effect of the transaction it entered into with the appellant. As a matter of fact, there was a certificate by an Advocate pursuant to the requirements of ***section 69(4)*** of the ***Transfer of Property Act***, confirming that ***section 69(1)*** of the Act had been explained to and understood by the 1st respondent. All that the 1st respondent is therefore doing is to latch unto some technicality that it hopes will enable it avoid repaying the sums it had borrowed from the appellant, while fully aware of the consequence of default in repayment.

In a case where a transaction has been entered into; money has been disbursed; the instrument in question is sealed with the seal of the company; that seal is authenticated by two directors; there is a certificate by an advocate confirming that the company is fully aware of the effect of execution of the instrument; and the company does not contend that it did not sign the instrument or that it did not know the effect of signing, it would, in our view, be a monumental injustice to hold that the instrument is invalid. It is the kind of injustice that a court, conscious of the principles that underpin the administration of justice under Article 159 of the Constitution, cannot countenance.

We would also like to add that the ***Transfer of Property Act*** is silent on whether ***section 59*** applies both

to natural and legal persons. As we have noted ***Mbaluto, J.*** was of the view that the issue is debatable. In ***COAST BRICK & TILE WORKS LTD & OTHERS VS PREMCHAND RAICHAND LTD & ANOTHER (1966) EA 154***, ***Lord Upjohn,*** speaking for the Privy Council, referred to similar doubts expressed by ***Rudd Ag. C. J.***:

> ***"It also appears from the judgement of RUDD Ag. C. J. that he doubted whether s. 59 applied at all where the mortgage was execute by a company and not by an individual on behalf of the company, and those doubts may be well founded, but no point has been taken thereon, and again their Lordships are prepared to assume that it does so apply."***

It is instructive to note that in some other statutes, the requirement that a signature must be attested, does not apply where the signature in question is that of a company. For example, ***section 58*** of the ***Registration of Titles Act, Cap 281 Laws of Kenya*** (now repealed) requires every signature to an instrument requiring to be registered to be attested by one of the people specified in the section. ***Section 58(3)*** excludes instruments executed by a company under its common seal from the requirement of attestation.

Similarly, ***section 3(3)*** of the ***Law of Contract Act, cap 23 Laws of Kenya***, as amended in 2002 requires all contracts for the disposition of an interest in land to be in writing, signed by all the parties thereto, and attestation of the signature of each party by a witness who is present at the time of signing**.** ***Section 3(6) (b)*** further provides that where the common seal of a body corporate is affixed to the contract in accordance with its constitution or articles of association, no further attestation is required.

These statutes regulate transactions that in many respects are similar to those under the ***Transfer of Property Act***, yet they do not require further authentication of the signature of the company.

We are not convinced that the mortgage instrument executed by the 1st respondent was invalid as found by the learned judge. In the circumstances, we allow this appeal, set aside the order of ***Njagi, J***. dated 17th September, 2003 and substitute thereof an order dismissing with costs the 1st respondent's chamber summons dated 23rd June, 2003. The appellant shall have costs of this appeal. Those are our orders.

Dated and delivered at Nairobi this 30th day of May, 2014.

W. OUKO

JUDGE OF APPEAL

P. O. KIAGE

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

jkc