



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 64 OF 2010

BETWEEN

- 1. LAKE TANNERS LIMITED**
- 2. DAVIS KINYANJUI NDERU**
- 3. HELLEN NJERI NDERUAPPLICANTS**

AND

ORIENTAL COMMERCIAL BANK LIMITED RESPONDENT

(Application for an injunction pending from the judgment and orders of the High Court of Kenya at Nakuru (Maraga, J.) dated 18th March, 2010

in

H.C.C.C. NO. 119 OF 2005)

RULING OF THE COURT

This is application under **Rule 5 (2) (b)** of the *Court of Appeal Rules* for two orders, firstly, an injunction to restrain Oriental Commercial Bank Ltd. (bank) from advertising for sale, selling or interfering with the applicant’s possession of Nakuru Municipality Block 4/20; Kisumu Municipality Block 6/55 and Kisumu Municipality Block 6/327 pending the hearing and determination of an appeal against the judgment of the superior court (Maraga, J.) dated 18th March, 2010 in *Nakuru H.C.C.C. No. 131 of 2005* and secondly, an injunction to restrain the bank from advertising for appointment of receivers or exercising powers of a debenture holder under any of the suit debentures in respect of hotel premises or Nakuru Municipality Block 4/20 until the hearing and determination of the said appeal.

The dispute in the superior court arose when **Delphis Bank Ltd.** (DBL) started the recovery of a debt allegedly owed by first applicant – Lake Tanners Ltd. to the bank by appointment of receivers and realization of Nakuru Municipality/Block 4/20 which were among the properties that secured the

loans. The loans were according to DBL advanced to Lake Tanners between 1980 and 1990 by the Kisumu Branch of the Bank of Credit and Commerce International Ltd. (BCCI) which was incorporated in Grand Cayman Islands Europe. BCCI operated in Kenya upto 1991 when it closed its business in Kenya and transferred its assets and liabilities to DBL – a company formed to take over the business of BCCI (Overseas) Ltd. and which started business as a bank on 9th September, 1991. On 13th September, 1991 a notice dated 5th September, 1991 was published in the Kenya Gazette stating in part:

“TRANSFER OF BUSINESSES ACT (CAP 500).

Notice is given that the business of banking carried on by Bank of Credit and Commerce International (Overseas) Limited (in provisional liquidation) has with effect from 5th September, 1991 been sold and transferred to Delphis Bank Limited which will carry on the said business under the said name and in the same premises”.

Previously on 22nd July, 1991 a winding up petition to wind up BCCI had been filed in Grand Court of Cayman Islands. A winding up order was subsequently made on 14th January, 1992 and liquidators appointed. The winding up order was thereafter made absolute on 22nd January, 1992. On 3rd October, 2003 DBL changed its name to Oriental Commercial Bank Limited.

The alleged loans advanced by BCCI were secured by Debentures, legal charges and personal guarantees signed in blank by Francis Kinuthia Nderu who died in 1996; Andrew Nderu who died in 1994 and Erick Nderu who died in 1997. They were at the material time the directors of Lake Tanners. The current directors of Lake Tanners Ltd. are Davies Kinyanjui Nderu (2nd applicant) and Hellen Njeri Nderu (3rd applicant) who is the 2nd applicant’s mother. At the time DBL appointed receivers on 9th March, 1994 it held five title deeds, namely;

(i) Nakuru Municipality/Block 4/20 registered under the *Registered Land Act* (RLA) in the name of Lake Tanners Ltd. The official search shows that the property was charged on 30th May, 1985 to BCCI to secure Shs.5,000,000 and that on 22nd August, 1990 a further charge to secure Shs.15,000,000 was registered in favour of BCCI. Subsequently on 13th October, 1993 the charge was transferred to DBL. The applicants claim that a Four Star 200 – bed hotel at the heart of Nakuru Town with a conservative value of Shs.100,000,000 has been constructed on the plot.

(ii) Kisumu Municipality/Block 6/327 which is registered under RLA, in the name of Francis Kinuthia Nderu. On 31st July, 1990 the property was charged to BCCI to secure Shs.3,000,000 which charge was transferred to DBL on 3rd November, 1993. The applicant’s claim that there is a commercial building on the plot with a conservative value of Shs.40,000,000.

(iii) Kisumu/Block 6/55 registered under in RLA in the names of Francis Kinuthia Nderu and his wife Hellen Njeri. On 26th January, 1994, the property was charged to BCCI for Shs.3,000,000 which charge was transferred to DBL on 22nd September, 1993.

(iv) Kisumu Municipality/Block 6/56 registered as (iii) above charged to BCCI in 1984 for – consideration – “for BCCI having agreed not to require immediate payment of any existing indebtedness of the chargors” and having agreed to grant “financial accommodation in future” limited to Shs.3,000,000. Applicant’s claim LR No. 6/55 and 6/56 are adjacent and that astride the two plots is constructed a Three Star – 100 – bed hotel valued about Shs.100,000,000/=.

(v) Kisumu Municipality/ Block 12/165 – registered under RLA in the name of Francis Kinuthia Nderu charged to BCCI by a charge dated 3rd December 1983 for BCCI “having agreed at the request of the chargor not to require immediate payment of any existing indebtedness” of the chargor and to grant the chargor from time to time “further financial accommodation” to the maximum of Shs.500,000.

The relevant debentures to secure loans of Shs.3,000,000 and 2,000,000 granted to Lake Tanners are dated 23rd February, 1984 and 28th May, 1985 respectively. By a Deed of Transfer of Actionable Claims dated 29th June, 1992 the liquidator of BCCI transferred to DBL all actionable claims including all bank accounts, Overdrafts, loans and all debts owed to BCCI as 14th August, 1991.

In addition, by a Deed of Transfer of Debenture dated 9th November, 1992, BCCI transferred the two debentures dated 23rd February, 1984 and 28th May, 1985 to secure loans to Lake Tanners Ltd. to DBL. On the basis of the two debentures DBL appointed receivers of Lake Tanners on 9th March, 1994. When the receivers proceeded to the premises of Lake Tanners on the following day, Lake Tanners and two other companies filed *Kakamega H.C.C.C. No. 136 of 1994* which was later transferred to High Court at Nakuru and re-registered as *Nakuru H.C.C.C. No. 119 of 2005*. In that suit Lake Tanners claimed, among other things, that the purported sale of business of BCCI to DBL was irregular and unenforceable and that the transfer of the Debentures and Charges were null and void and unenforceable. The plaintiffs also sought an order for accounts. Francis Kinuthia Nderu and Helen Njeri Nderu subsequently filed *Kakamega H.C.C.C. No. 416 of 1994* challenging the purported transfer of charges to DBL relating to LR Nos. Kisumu Municipality/ Block 6/327; Block 12/165; Block 5/55 and 6/56. That suit was subsequently transferred to Nakuru and re-registered as *Nakuru HCCC No. 131 of 2005*. The two suits were consolidated, heard and dismissed by the superior court save that the superior court found that the charges relating to LR Kisumu Municipality/ Block 6/56 and Block 12/165 were not transferred to DBL and ordered Oriental Bank to discharge and release them. The superior court further reduced the indebtedness of Lake Tanners from Shs.141,300,932.19 as at 19th January, 2005 to Shs.35,256,782 as at 30th April, 2005.

At the hearing of the suit in the superior court, Mr. Obura, learned counsel for the plaintiffs (applicants herein) contended, among other things, that:

(i) The winding up order of Grand Cayman Court was a nullity or ineffectual in Kenya as BCCI breached the mandatory provisions of Section 368 (2) (b) of the Companies Act by failing to deliver a return to the Registrar of Companies within 30 days containing the prescribed particulars relating to the making of winding up order or commencement of such proceeding and also by failing to publish the prescribed advertisement;

(ii) Since by virtue of Section 359 of the Companies Act, the winding up of BCCI should have been made in Kenya the winding up order by Grand Cayman Court should not be recognized in Kenya.

(iii) That the sale and transfer of BCCI to DBL and of the transfer of Debentures and charges was null and void as they were done after the commencement of winding up of BCCI in contravention of Section 224 of the Companies Act.

(iv) The actions of liquidators of BCCI were illegal for failing to publish the fact of their appointment in the Kenya Gazette and by concealing to general public the reasons for winding up order.

(v) The transfer of the Debenture, shares and the transfer between liquidators of BCCI and DBL were void for lack approval in writing by Treasury as prescribed by Section 76A and 77 of the Companies Act respectively.

(vi) The transfer of charges were illegal as the transfers were done by a persons who did not have a valid Power of Attorney registered under to RLA and as chargors did not execute the transfers to acknowledge amount due.

(vii) Since the charge and further charge by Lake Tanners created only a debt liability that would arise from future advances or financial accommodation, the bank had failed to prove that such future advances and financial accommodation were infact granted.

(viii) That there was no proof of indebtedness of Lake Tanners to BCCI and the sum of Shs.11,018,970.83

appearing as opening balance in the statement of 31st august, 1991 was not supported by previous bank statements or documents.

Although the superior court did not agree with most of the issues raised it at least found that **Section 368 (2) (b)** was breached but held that such breach only exposed BCCI to penalties under the Companies Act. The superior court further observed that the witness called by DBL at the trial did not make the disputed entry of Shs,11618,876.83 but nevertheless found the entry correct.

Before the court can exercise its discretion in favour of the applicants, the applicants who have already filed a notice of appeal are required to demonstrate, among other things, that the intended appeal is not frivolous and that unless the orders of injunction sought are granted the intended appeal, if it ultimately succeeds, would be rendered nugatory.

Regarding the merits of the intended appeal, the applicants have annexed a Draft Memorandum of Appeal containing nine proposed grounds of appeal. We reproduce five of them below, thus:

“1.

2.

3. The Honourable trial judge erred in law and in fact in finding that the transfer of assets of BCCI in 1991 to Delphis Bank Ltd. was valid despite clear breach of Sections 224, 368 (2) (b) and other provisions of the Companies Act and Section 85 of the Registered Land Act.

4. The Honourable trial court failed to direct itself that given the patent irregularity and unlawfulness in the winding up process of BCCI, all acts by the Liquidator appointed thereunder were a nullity and of no legal effect as regards the execution of Deed of Appointment of Attorney, Transfer of the charges, Transfer of Debentures, and transfer of Actionable Claims in favour of Delphis Bank, (now Oriental Commercial Bank Limited).

5.

6. (i) The trial court failed to direct itself that the fraudulent

preponderance on the part of the operations of the BCCI should have affected the courts discretion in deciding whether an incomplete statement of account containing a mysterious opening balance of 11 million in August 1991 was credible.

(ii)

(iii)

7. The trial court erred in law in finding that the absence of execution or acknowledgment of the charge debt by the Appellant/chargors did not, invalidate the Transfer of Charge by the liquidators to Delphis Bank Limited.

8.

9. The trial court erred in law in ordering the appellant Lake Tanners Limited to pay to the Respondents Bank a monetary sum of shillings 35,256,782 when no such or any counter-claim was pleaded, sought nor proved by the respondent bank”.

It is not necessary to examine the proposed grounds of appeal in some detail because Mr. Kiragu Kimani, learned counsel for the respondent has graciously conceded that the grounds raise arguable points. It is sufficient to say that having considered the various legal issues raised by the applicants’ counsel at the trial, the decision of the superior court on those issues and having perused the proposed grounds of

appeal, we are satisfied that the applicants have demonstrated that the proposed appeal raises several arguable points of law and fact.

On the question whether the intended appeal would be rendered nugatory if the application is not granted, Davis Kinyanjui Nderu deposes in the supporting affidavit at paragraphs (ix) and (x), thus:

“(ix) If the properties are advertised for sale, it will become increasingly difficult to maintain business trust and customer relations with the Nakuru and Kisumu hotels suppliers of goods and services on account of intended sale of the hotel and associated properties; The two hotels each with a conservative value of over one hundred million shillings, have been operational without interruption since the 80’s and I know they have acquired massive business good will that may become destroyed by one single advertisement of sale of the property.

(x) I know of my own knowledge as a director of the two hotels that they are presently fully booked by various organizations and government agencies conducting seminars, workshops and meetings; these activities will certainly be disrupted and affected by any appointment of receivers or advertisement for sale of the suit properties that are associated with Nderu family”.

On the other hand, Mr. Atul Dave the General Manager of the respondent bank deposes in the replying affidavit, among other things, that the respondent bank is a sound bank and capable of refunding the Shs.35,000,000 odd if the applicants pay over the money to the bank to secure the release of securities. However, it was contended by Mr. Obura at the hearing of the application that the foundation of the respondent bank is shaky, its predecessors BCCI and DBL having collapsed. Mr. Obura further submitted that where the value of the property is very high, it is more equitable to preserve the property.

In **Butt vs. Rent Restriction Tribunal** [1982] KLR 417, this Court held, among other things, that in exercising its discretion whether to grant or refuse an application for stay of execution the court would consider the special circumstances of the case and its unique requirements. In that case, the fact that there was a large amount of rent in dispute was considered as special circumstance. The same consideration applies to applications for injunctions pending appeal whose purpose is to preserve the status quo pending appeal. In **Mukuma vs. Abuoga** [1988] KLR 645, it was recognized, inter alia, that the issue of substantial loss is the cornerstone of jurisdiction under **Rule 5 (2) (b)** and that what is to be prevented is the substantial loss because such loss would render an appeal nugatory.

In this case, not only the initial debt of Shs.11,018,970.84 which because of interest had accelerated to over Shs.141 million in 2005 is seriously disputed but also the legality of the transfer of the debt and the securities to DBL and hence the capacity of the respondent bank to enforce the securities is seriously disputed.

Moreover, if the receivers are appointed for the Nakuru hotel or if the Nakuru hotel and the Kisumu hotel are advertised for sale the hotel business which has taken years to nurture will no doubt be permanently destroyed in the manner stated in paragraph (ix) of the supporting affidavit thereby occasioning the applicants substantial financial loss.

On the other side of the scales, it is unlikely in the event that the application is allowed that, the respondent would suffer substantial loss for it is apparent that the value of the securities in its possession – (valued over 200,000,000) far outstrips the debt as assessed by the superior court.

In the circumstances of this case, we are satisfied that unless the application is allowed, the appeal, if ultimately successful, would be rendered nugatory and that it is just and equitable to grant the orders of injunction.

Accordingly, we allow the application dated 22nd March, 2010 and grant the orders of injunction in terms of prayers (b) and (c) pending the hearing and determination of the intended appeal.

The costs of this application shall be costs in the appeal.

Dated and delivered at Nairobi this 11th day of June, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR