



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: O'KUBASU, WAKI & DEVERELL, J.J.A.

CIVIL APPLICATION NO. NAI. 131 OF 2005 (UR.74/05

BETWEEN

MRS. SURINDER KUMARI MEDIRATTA ..... APPLICANT

AND

KENYA COMMERCIAL BANK .....1ST RESPONDENT

THE REGISTERED TRUSTEE OF

NAIROBI PENTECOSTAL CHURCH/

CHRIST IS THE ANSWER MINISTRIES .....2ND RESPONDENT

COMBINED INDUSTRIES LTD .....3RD RESPONDENT

(An application for injunction pending the hearing and  
determination of an intended appeal against the ruling and  
order of the High Court of Kenya at Nairobi (Mr. Justice  
Azangalala) dated delivered on 9th  
May 2005

in

H.C.C.C. NO. 21 OF 2005)

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RULING OF THE COURT

This ruling arises from an application dated 18th May 2005 under certificate of urgency for an injunction under **rule 5(2)(b)** of the Court of Appeal Rules (the Rules). The applicant Mrs. Surinder Kumar Mediratta (**the applicant**) was the plaintiff in the superior court. The principal relief sought is an injunction prohibiting the first and second respondents either by themselves, servants, agents, auctioneers or otherwise howsoever from selling, disposing or transferring howsoever the applicant's property L.R. No. 209/5535 Nairobi pending the filing hearing and determination of an intended appeal against the ruling and orders of the Hon. Mr. Justice **Azangalala** delivered on the 9th May 2005.

The application was heard on 6th June 2005 and the ruling was fixed for delivery on 8th July 2005. The status quo was ordered to be maintained until then.

The first respondent is the Kenya Commercial Bank Ltd. (KCB). The second respondent is the Registered Trustee of the Nairobi Pentecostal Church/Christ is the Answer Ministries (*the Church*) and the third respondent is Combined Industries Ltd (*CIL*).

The ruling of the superior court appealed against was in High Court Civil Case No. 21 of 2005. In that ruling the superior court dismissed an application for an injunction similar though not identical to the injunction sought in this Court.

We first need to consider whether the appeal is arguable or in other words not frivolous

In his submissions before us learned counsel for the applicant **Mr. Gichuki Kingara** submitted that the transaction at the core of the matter was one in which CIL was the borrower from **KCB** of the sum of Shs.90 million by way of a term loan and US Dollars 2 million by way of a letters of credit as agreed in a facility letter dated 24th January 2000 issued by **KCB** and accepted by **CIL**.

He stressed that the applicant did not borrow a cent from KCB and that she was in the position analogous to that of a guarantor of CIL. The charge over the suit property, if it was valid at all, was, he submitted, best described as a “charge guarantee.” He further argued that the principles relating to the discharge of guarantors applied mutatis mutandis to the applicant.

In particular it was submitted that as soon as KCB lent to CIL more than the amount stated in the charge the applicant was discharged. The only relevant amount stated in the charge would appear to be in **clause 7(m)(c)(vi)** of the Charge which defines the words “the Prescribed Maximum Debt” to mean Shs.212 million.

Mr Kingara submitted that the amount lent to the borrower CIL was well in excess of this amount. He said the total lent to, or covered by, facilities granted to CIL was Shs. 1.4 billion. The first proviso to Clause 1 (c) of the Charge reads as follows:-

***“PROVIDED ALWAYS THAT the total moneys for which these presents constitute a security shall not at any one time exceed the Prescribed Maximum Debit to which shall be added interest ....”***

This may mean that the lender would be in breach of the Charge if it lent more than the Prescribed Maximum Debt or it may simply mean that if more than that amount is lent it will not be covered by the security. This is an arguable point. There is another possible arguable issue relating to the interest rates charged by the Bank.

Having come to the conclusion that there is at least one if not several arguable issues raised by the appeal we are satisfied that the appeal is not frivolous.

The next issue to consider is whether, if no injunction is granted, the applicant is likely to suffer irreparable loss making the appeal nugatory if it succeeds. If there is no injunction restraining KCB from selling the charged property it is indeed likely that it will be sold before the appeal can be heard. Mr. Kingara submitted that the applicant was an elderly lady for whom the property would have sentimental value and damages would not be an adequate remedy. This is not a particularly strong argument given that the applicant has claimed in the Plaint that she negotiated a sale of the property to the Church for Shs.350,000,000/- which however was denied by the counsel for the Church.

We think however there is considerable force for the application of section 52 of the Transfer of Property Act which summarises the doctrine of lis pendens. See ***Mawji v. U.S. International University and another.*** [1976] Kenya L.R. 185.

Having taken into account the submissions of counsel for the applicant and the 1st and 2nd respondents and bearing in mind that the intended appeal is against the decision of the superior court not to grant the interlocutory application for an injunction and is not against the final superior court decision at the substantive hearing, we have come to the conclusion that the application by motion dated 18th May 2005 should be allowed.

We therefore make the following orders:-

*1. An Injunction is hereby issued directed to the first and second respondents either by themselves, their servants, agents, or otherwise howsoever from selling, disposing or transferring howsoever the applicant's property being L.R. Number 209/5535 Nairobi pending the filing hearing and determination of the intended appeal against the ruling and orders of the Honourable Mr. Justice Azangalala delivered on 9th May 2005.*

**2. The costs of and incidental to this application to be in the appeal.**

**Dated and delivered at Nairobi this 8th day of July, 2005.**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**W. S. DEVERELL**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**