IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, TUNOI & LAKHA, JJ.A.)

CIVIL APPEAL NO. 91 OF 1999

BETWEEN

CENTRAL BANK OF KENYA & ANOTHER.....APPELLANT

AND

UHURU HIGHWAY DEVELOPMENT LTD & 4 OTHERS.....RESPONDENT

(Appeal from the order of the High Court of Kenya at Nairobi (Hon Jusctice Oguk) made on the 21st day of April, 1999

in

HCC Suit No 589 of 1999)

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JUDGMENT OF THE COURT

This is an interlocutory appeal by the first two unsuccessful defendants from a decision of the superior court (Oguk J) given on 21st April 1999 whereby the learned judge made some fourteen orders dealing with matters pertaining to and connected with the receivership of the property LR No 209/9514 (the suit property) and issued two injunctive reliefs in the following terms:

(a) “The Central Bank of Kenya be and is hereby restrained whether by itself, its servants, agents or otherwise howsoever from entering, remaining in, save as customers managing or in any other manner whatsoever whether by Joseph Kittony or any other purported receiver, from interfering with the management of the Grand Regency Hotel by the said court appointed receiver, until the determination of this suit”;

(b) “The Central Bank of Kenya by itself, its officers, servants, auctioneers or otherwise, howsoever be and is hereby restrained from selling, auctioning or otherwise howsoever dealing with or alienating LR 209/ 9514 whether by public auction or private treaty or otherwise howsoever until the issue of movables and the receiver’s (Kittony) accounts from the 15th of April 1994 to date is fully determined at the hearing of the suit.”

As against the third defendant he ordered his removal from the possession and custody of the suit property and of any movables or immovable thereof forthwith. The three defendants have now appealed to this Court from the decision of the superior court. The present appeal by the first two defendants and Civil Appeal No 108 of 1999 by the third defendant have, by consent, been consolidated and heard together.

In the appeal proceedings before this Court the first two appellants are bodies corporate with perpetual succession established by section 3 of the Central Bank of Kenya Act (cap 481) and section 76 of the Banking Act (cap 488) respectively whilst the third appellant was until removed the receiver and manager of the Grand Regency Hotel. The respondents are limited liability companies, with registered offices in Nairobi, save that the second respondent is a businessman residing and carrying on business in Nairobi.

By a plaint dated and filed on 22nd March 1999 the plaintiffs commenced proceedings against the defendants for injunction as stated above, the removal of the third appellant and other reliefs related to and concerning the receivership of the suit property. By a Chamber Summons of the same date the plaintiffs have sought interlocutory relief which closely follows the relief sought in the plaint. We are concerned now with the application for interlocutory relief.

After a hearing which occupied some five days, Oguk J delivered, on 21st April 1999, a considered ruling granting the plaintiffs' application and refusing the first two defendants' application for a stay. As we have said the defendants now appeal against these orders.

Looking at the action, the claims made in them by the parties can be summarised as follows. Against both the appellants there are claims for the above-mentioned injunctions to restrain them from selling the suit property and for another injunction aimed at preventing the appellants having the entry or possession of the suit property.

These are based on the grounds that the charge obtained by the appellants over the suit property is void as being in breach of the Banking Act and because of duress. The claim as against the third appellant is for his removal. The first two appellants made an application for a stay of the plaintiffs' suit.

The facts with which these proceedings are concerned have been the subject of affidavits extending to 28 pages, accompanied by exhibits with 978 pages. These have been fully analysed with great care in the judgment of Oguk J. It is accordingly sufficient in this Court to summarise in narrative form the salient features of the case. Naturally here, as at first instance, it must be remembered that anything said as to those facts simply relate to such evidence as has been made available in affidavits and must in no way be taken as prejudging such findings as may become necessary at trial.

In support of their case the appellants relied on the contention that the charge was valid and the statutory right to sell had arisen. The charge was not void under the Banking Act or the Central Bank of Kenya Act and all the issues were *res judicata*.

These complaints were carefully examined (save for those under the Banking Act which were taken for the first time) in detail by Oguk J and rejected by him as being unlikely to provide grounds for refusing an injunction. With these views expressed in the ruling we respectfully concur, and would only add that some of the complaints at present appear ill founded. Instances are the views taken of orders allegedly made although not prayed for and of extraneous matters allegedly mentioned by the learned judge in the ruling. In our view even assuming (without deciding) that was so they did not occasion any miscarriage or failure of justice. Nor did they vitiate any discretion exercised by the learned judge. On one matter, however, we are satisfied and that is the question of the jurisdiction of the Court to remove a receiver. The jurisdiction of the superior court is unlimited. We are of the view that the learned judge was right in his order to remove the third appellant. It was urged that because no reasons were given this order cannot be upheld. The third appellant was entitled to be told the reasons for not accepting the affidavit of the appellant filed on this issue. It is true that Courts should give reasons but, in our judgments, failure to do so is not necessary fatal. It should not be assumed that because no reasons were set out there were none. Nor does the ruling become any the less transparent because the reasons were not stated. This was a

decision taken by an experienced judge. He had the relevant affidavits before him. It would be quite wrong to infer that he did not consider them. In our judgment there is no merit in the submission. Obviously the learned judge must have disbelieved what was deponed to which he was properly entitled to do.

The line of approach to the exercise of the court's discretion whether or not an interlocutory injunction should be granted is that stated by Lord Denning MR in *Hubbard v Vosper* [1972] 1 All ER 1023 at 1029:

"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint on the defendant but leave him free to go ahead ..... The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."

The learned judge having thus not erred in his approach and we ourselves having examined separately and in turn those factors which led Oguk, J to grant an interlocutory injunction and which have been so powerfully challenged and canvassed in this Court by advocates, it is now right to step back and look at the matter as a whole.

In essence, the plaintiffs' case is that the charge in favour of the first appellant was void.

This is based on questions of fact as well as law. The case grounded on the basis that the charge was obtained by extortion, duress, undue influence or pressure clearly raise questions of fact and if, as is alleged, the invalidity of the charge is also based on it being *ultra vires* the objects of the company or as contravening the provisions of section 36 of the Central Bank of Kenya Act and/or the Transfer of Property Act. Section 36 of the CBK Act sets out the type of securities which the Bank may accept, and these require mature consideration on difficult points of law.

In this case, the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the Court at the hearing of the application of an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the Court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if on that incomplete untested evidence the Court evaluated the chances of the plaintiff's ultimate chances in the action at 50 per cent or less, but permitting its exercise if the Court evaluated his chances at more than 50 percent.

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. Those are matters to be dealt with at the trial. Unless the plaintiff fails to show that he has any real prospects of succeeding, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake, whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial. Save for in the simplest of the cases, it is a counsel of prudence, therefore, to order preservation of the status quo.

We can see no ground for interfering with the learned judge's assessment of the balance of convenience or for interfering with the discretion that he exercised by granting the injunction. In view of the fact that there are serious questions to be tried on which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be

embarrassing to the judge who will have eventually to try the case. The case is much too difficult and complicated for this Court to deal with in interlocutory proceedings. So it ought to go for trial. But meanwhile the best thing to do is to grant an interlocutory injunction, as the learned judge did, so as to maintain the status quo until the trial.

Despite several orders of this Court no trial seems to proceed and this causes us great anxiety and considerable concern. In Civil Appeal No 75 of 1998, (unreported), for example, the Court expressed itself as follows in the judgment of Kwach JA which contained the orders of the Court:-

"As my brothers Tunoi and Bosire JJ A also agree, this appeal is allowed, the ruling and order of O'Kubasu J dated 22nd January, 1998 is set aside and substituted by an order dismissing with costs the plaintiff's application dated 7th December, 1997. We also order that all pending applications in the superior court be and are hereby stayed and that the Honourable the Chief Justice do designate a judge who has not previously dealt with this matter to hear and determine this case expeditiously ....."

This order was made by this Court way back on the 10th July, 1998 and it seems to us that for one reason or the other, the order has been complied with as none of the parties have ever come back the Court to ask it to compel obedience to the order. Instead the parties have with impunity, returned to the Court on other interlocutory applications and appeals of which the current ones are an example. This Court, like all other Courts, must only make orders obedience to which it can compel and once the orders are made the parties must obey thereof, and it is the Court's duty to compel such obedience. So as to compel obedience to the Court's orders made on 10th July, 1998, we now make the following orders:-

1. The appeal and the one consolidated with it (being Civil Appeal No 108 of 1999) each be and is hereby dismissed with costs.

2. All and every pending application in the superior court and in this Court (if any) be and are hereby stayed and shall not be heard except with the special written leave of the Hon the Chief Justice obtained for that purpose.

3. No new suit, application or appeal shall be filed either in the superior court or in this Court except with the special written leave of the Hon the Chief Justice obtained for that purpose.

4. All parties to Civil Suit No 589 of 1999 must appear before the Hon the Chief Justice within fourteen days of the date of this judgment so that the Chief Justice may fix the date or dates for the hearing of the said Civil Case ie No 589 of 1999 and also designate a judge (not excluding Oguk J) to hear the same. If any or all the parties do not appear, the Hon the Chief Justice shall be at liberty to fix the date or dates in the absence of such party or parties and have them served with a hearing notice.

5. The trial of the action before the judge designated by the Hon the Chief Justice shall proceed on a day to day basis until the suit is finalised.

These shall be the orders of the Court on this appeal.

Dated and delivered at Nairobi this 24th day of August, 2000.

R.S.C.OMOLO

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

A.A.LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR