IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, TUNOI & PALL JJ.A)

CIVIL APPLICATION NO.NAI 82 OF 1990

BETWEEN

FRANKART PRINTERS & STATIONERS LTD.....1ST APPLICANT

FRANCIS MBUGUA MWIHIA.....2ND APPLICANT

AND

KENYA FINANCE CORPORATION LTD.....1ST RESPONDENT

NJOKA & KARIUKI (K) LTD.....2ND RESPONDENT

(Applicant for injunction and/or stay in an intended appeal from a Ruling of the High court of Kenya at Nairobi (Mr. Justice Bosire) dated 25th October, 1990

in

H.C.C.C. NO.641 OF 1990)

****

RULING OF THE COURT

By a charge dated 12th September, 1984 registered in the Land Titles Registry at Nairobi as Number I.R. 29214/4 (the charge), the second applicant, Francis Mbugua Mwihia, charged his piece of land known as Land Reference Number 12144/6 together with buildings and improvements thereon in favour of the 1st respondent for better securing to the 1st respondent repayment of an aggregate sum not exceeding Shs.700,000/=, to which extent the 1st respondent at the request of the 2nd applicant agreed to permit the 1st applicant to overdraw its account with the 1st respondent, subject to the terms and conditions of the charge.

It is a common ground that in the same year the 2nd applicant also charged another parcel of land belonging to him known as Nairobi/Block/273 in favour of the 1st respondent to secure repayment of two other loan accounts. By a mutual agreement between the applicants and the 1st respondent all the loan accounts of the 1st applicant were amalgamated into a single account known as Account No. 9044489.

Exercising its powers of sale under the aforesaid charges the 1st respondent instructed the 2nd respondent to sell the said L.R. 12144/6 by public auction on 9.3.1990. This prompted the applicants to sue the respondents seeking orders for injunction against sale of the charged properties, account between the

applicants and the 1st respondent and authorising the applicants to redeem the said charged properties. Along with the plaint, the applicants applied by a chamber summons for an order that the respondents their servants and agents be restrained from disposing of alienating or in any manner dealing with the charged properties until determination of the suit.

By his affidavit in support of the application, the 2nd applicant deponed, inter alia, that the 1st respondent had been overcharging interest on all accounts in contravention of the gazette notices issued by the Central Bank of Kenya, had debited the applicants account with telegram expenses and penalty charges in contravention of the said gazette notices, had wrongly charged interest on accrued arrears of interest and had debited the applicants account with certain legal and finance charges which were either illegal or not agreed by the applicants.

On the other hand Hamilton Onyango Orata a branch manager of the 1st respondent, annexed to his affidavit, sworn on 20th February, 1990, a bundle of documents to show that the applicants had all along requested for indulgence without ever disputing the amount due and outstanding, that the applicants had on the other hand admitted their indebtedness and made several empty promises to liquidate the debt. The applicants, said the deponent, were employing delaying tactics and the suit was an abuse of the process of the court.

The learned Judge by his ruling dated 25th October, 1990 held that regard being had of the applicants conduct prior to filing of the suit, the applicants had not shown that they had a prima facie case against the respondents. He also remarked that the application had not been brought "with utmost good faith." Yet presumably, as it was a land matter, the Judge granted the injunction on the condition that the applicants deposit into an interest earning account all the moneys demanded, to be held in the joint names of both firms of advocates appearing for the parties until the final disposal of the suit and ordered that the deposit should be made within 15 days of the date of his ruling failing which the application for injunction would be deemed to have been dismissed with costs but in the event the order is complied with, costs of the application would be the respondents in any event.

The applicants being dissatisfied with the said ruling filed notice of appeal dated 29th October, 1990 and by a notice of motion dated 1st November, 1990 filed under rule 5(2)(b) of the Court of Appeal Rules, on 5th November, 1990, applied for an order that the respondents, their officers, servants and agents be restrained from selling or in any manner dealing with the charged properties until the determination of the intended appeal. Further or in the alternative, the applicants sought an order for stay of that part of the order of the superior court which required the applicant to deposit all the moneys demanded by the 1st respondent within 15 days as a condition of the granting of the injunction.

It is now more than seven years since the applicants filed the notice of appeal. No appeal has been lodged so far. No acceptable explanation has been offered to account for this failure. There is no evidence that the applicants ever even applied for a certified copy of the proceedings in the superior court which was an essential step if the applicants were seriously interested in preferring the intended appeal.

On 8.11.1990, this court granted interim stay to the applicants pending further orders of the court and adjourned the application at the request of Counsel for the applicants, to 22.11.1990, on which date the application was again adjourned for a date to be fixed at the registry and the stay order was extended as previously ordered. For more than 7 years the applicant having secured the stay order never relisted the motion for hearing. What is required of this court on an application for injunction or stay of execution pending appeal is to consider whether the applicants deserve that the discretion of the court should be exercised in their favour, whether they do have an arguable appeal and whether status quo should be maintained pending the hearing of the appeal. But here as the applicants have failed to file the intended appeal which if they were seriously interested in it, should have been filed more than 7 years ago and there is no acceptable reason for their failure to do so, this application is nothing but an abuse of the process of the court. Granting the application, therefore, would be tantamount to the court being a party to the abuse of its process. The application is absolutely without merit. We dismiss it with costs.

Dated and delivered at Nairobi this 30th day of April 1998.

J.E. GICHERU

.....

JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

G.S. PALL

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR