IN THE COURT OF APPEAL AT NAIROBI

(Coram: Apaloo JA, Gicheru & Kwach Ag JJA)

CIVIL APPLICATION NO NAI 161 OF 1988

Between

GITHUNGURI ....APPELLANT

AND

JIMBA CREDIT CORPORATION LTD ....RESPONDENT

(Application for an interlocutory injunction in an intended appeal from a ruling of the High Court at Nairobi, Mbaluto J)

RULING

November 8, 1988, **Apaloo JA, Gicheru & Kwach Ag JJA** delivered the following Ruling.

The respondent is a limited liability company and a licensed financial institution. We shall hereafter refer to it as the corporation. The applicant appears to be an experienced banker and company director. He seems to have the controlling interest in two companies of which he is a director. These are Tassia Coffee Estate Ltd and Mukawa (Hotels) Holdings Ltd. The applicant as well as these two companies seem to have had business dealings with the corporation. The available evidence shows that as far back as 1982 or possibly earlier, loan or other banking facilities were made available to the applicant and these two companies.

Although the two companies are in law separate legal entities, the corporation seems to have regarded their indebtedness to it as the applicant's. Perhaps being the brain behind these two companies, the applicant himself seems to have looked at things this way. On the September 3, 1988, he wrote the corporation's advocates in his personal capacity and admitted that he and these two companies owe the corporation a total sum of Kshs 71,232,527.75.

In April 1983, the applicant seems to have requested the corporation to grant a loan to Mukawa Hotels. Although the actual sum lent seems much less, the applicant himself averred in his plaint that the sum of Kshs. 40,000,000 was advanced to Mukawa Hotel at his request. To secure repayment of this loan, he charged his leasehold Plot LR No 209/2461 to it. This charge was duly registered. But before this date, he granted an earlier charge to the Industrial Development Bank. The latter agreed that the corporation's later charged should rank in *pari passu* with its own. At the time when the applicant granted the charge to the corporation, the plot was being developed. It is by all accounts, a substantial property.

In April 1983, it was valued at Kshs 80,000,000 but it was said it would be worth Kshs 150,000,000 on completion. It must have been completed at sometime which the evidence did not disclose. The corporation said at the present day, its market value is around Kshs 250,000,000. The applicant said it was much higher. He thinks it should be in the region of Kshs. 800,000,000. Granted that the corporation's

valuation is probably conservative and that the applicant's, a triffle exaggerated, there can be no gainsaying the fact that the charged property is a very substantial asset.

The correspondence exhibited before us shows that the applicant's repayment record was less than satisfactory and this seems to have given some anxiety to the corporation. On September 4, 1984, the corporation addressed a letter to the applicant in which it expressed regret that neither the applicant nor his "various companies" had succeeded in reducing its indebtedness. The corporation then said it had been advised by the Central Bank that his borrowing and that of his companies exceeded the corporation's share capital and reserves and that as a result, the corporation had contravened the Banking Act. The corporation said although they fully appreciated the applicant's difficulties, they pleaded with him to bring his indebtedness down to Kshs 25 Million.

The applicant himself seems to have appreciated the corporation's predicament and seems to have explored avenues to square up the indebtedness. One of the options he considered, was to get a financier to take over his and his companies' total debt so that the charge could be transferred to it. He wrote to the corporation about his efforts in this respect. He did not appear to have succeeded. So in July 1986, the corporation wrote a strongly worded but courteous letter to him. It gave details of his own debt and that of the two companies. It pointed out that its auditor commented adversely on the loans made to him and also re-iterated its contravention of the Banking Act. The corporation said its board had no further discretion but to give notice that if he did not repay the outstanding loans with interest within 21 days from July 31 1986, it would be left with no option but to proceed to enforce its security. To underscore the seriousness of the situation, this letter was signed jointly by the Chairman and a director of the corporation's board.

There is no evidence of the applicant's immediate reaction to this letter but about seven months afterwards, he called on the corporation and apparently reached an agreement with it not only as to the total debt owed by himself but also his "two companies". This was stated by him to be Kshs 65,772,905. He said what rate of interest had been agreed and he reiterated his hope that his "effort to transfer the debt elsewhere shall be successful". But he foresaw that the reality may not match his hopes, so he proposed a schedule how and by what amounts he would repay annually of principal and interest during the years 1987 and 1988. He asked for confirmation of the verbal agreement. On February 23, 1987, that confirmation was given in a letter addressed to him and signed by Mr.. FK Ngatia, the General Manager of the respondent corporation.

What is the legal effect of this correspondence, was a matter of debate. Did it amount to a variation of the charge or was it a valid agreement binding on both sides and precluding the corporation from enforcing its rights under the charge without the breach of its provisions? We have had conflicting submissions on it. For present purposes, we make no pronouncement on which of the rival contentions is right beyond stating that we think, both men of commerce must have thought it was an agreement that would be honourned. There is no reason for thinking otherwise. If faith was kept on this home-made contract, the applicant's liability to resume repayment of principal was suspended till 1989 but he incurs an obligation to continue to pay interest during these two years.

There is nothing in the correspondence exhibited in this application which leads us to think that anything had happened to harm what had hitherto been a cordial business relationship between the applicant and the corporation since the letter of February 23, 1987. However, on August 31, this year, the corporation's advocates addressed a letter to the applicant and demanded immediate payment of Kshs 92,908,639 allegedly due from the applicant himself and his two companies within 14 days. The letter threatened that if payment was not made within the period stated in the letter, the corporation would proceed to exercise "its statutory power of sale pursuant to section 69A of the Transfer of Property Act". To show that it meant business, the corporation's advocates on the same date gave notice to the IDB of its intention to realize the security and enquired how much was owed to it by the applicant. The corporation said it wanted to protect the bank's interest in the projected sale. Its advocates sent a copy of this letter to the applicant. The applicant's reaction on receiving this letter was understandable. He immediately wrote to the corporation's advocates and adverted to his letter of February 11, and the corporation's reply of the 23rd *idem* and suggested that they withhold the threatened action until they saw their clients, that is the corporation.

It is a fair inference that the applicant must have become convinced that the corporation could not be dissuaded from its threatened course of action, that is, to sell the charged premises. So on September 12, 1988, he brought this plaint and sought, in substance, a declaration that the charge granted to the corporation of the suit premises was illegal and the security it provided was also illegal and unenforceable. He prayed for its discharge and an order for its delivery-up. He then sought, clearly as a consequential relief, an injunction restraining the corporation or its servants from exercising its statutory power of sale or in the alternative, an order for accounts. He brought the plaint simultaneously with an application for interim injunction to restrain the corporation from exercising its power of sale pending judgment in the suit. **Mr. Justice Tank** granted the *ex parte* application that very day. The *inter partes* hearing came before **Mr. Justice Mbaluto** on diverse days between September 28, and October 24, 1988.

On October 25, the learned judge delivered a 15 page ruling and held after construing section 10 of the Banking Act that "the charge created over the plaintiff's land was neither illegal nor unenforceable". He said it was "a valid and enforceable contract by which both parties were bound.

The judge concluded that the " plaintiff has not shown to my satisfaction a *prima facie* case with a probability of success and in these circumstances, I do not have to consider the other two conditions set out in the *Giella Case*". The judge therefore held that an injunction did not lie and proceeded to dismiss the application with costs.

The application was repeated before this Court professedly under Rules 5(2) of the Court of Appeal Rules and the motion says:-

> " Notwithstanding the refusal by the High Court in view of an appeal pending …….. this Court be pleased to order an interlocutory injunction restraining the respondent from selling, disposing alienating or otherwise dealing with the property known as LR 209/2461, University Way, Nairobi, together with the buildings and improvements………….. otherwise the applicant will suffer substantial, irreparable, irreversible and irremediable loss………."

On November 1, last, we listened to an exhaustive canvassing of this motion for the whole day. Counsel for the respondent handed us a ten page written submission and presented detailed argument why we, should, like the court below, decline the order sought. As to what our approach to this repeat application should be, counsel submitted at page 2 that:

> "This Court can only interfere with the learned Judge's exercise of his judicial discretion, if it can be clearly shown that the learned Judge misdirected himself in his approach to the issues before him."

We cannot accept that that this is the correct approach. We think this Court's jurisdiction under rule 5(2) to grant either a stay of execution, an injunction or stay of any further proceedings, arises if a notice of appeal has been lodged against the decision or ruling appealed from in accordance with rule 74. And we are then clothed with jurisdiction to grant any of such orders "on such terms as to the Court may think just" . That rule confers an independent original discretion on us and we have to apply our own minds *de novo* on the suitability or otherwise of the relief sought. It is not an appeal from the learned Judge's discretion to ours.

There is a great deal of learning on the principles on which we should base our unfettered discretion and we were referred to a number of decided cases. No two cases are exactly alike and we do not intend to obsfucate the real questions posed for decision in this matter by analysis of the reported cases cited to us on wholly different set of facts. The guiding principles which emerge and are discernible from case law on this subject, are first, the appeal should not be frivolous or as is otherwise put, the applicant must show that he has an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be nugatory.

Accordingly, we put to ourselves these two questions namely, first, on the material made available to us,

is the intended appeal frivolous or has the applicant shown, *prima facie*, that he has substantial points to present to the Court on this appeal, and second if he has, would his appeal be nugatory if we denied him the interim relief sought?

On the first question, that is, whether the applicant has shown, *prima facie*, that he has serious questions for submission to this court at the hearing of the appeal, the applicant makes four points. He says, first, on a true and proper construction of the relevant section of the Banking Act, the loan granted to himself contravened section 10 of the Act and was therefore illegal and so was the charge by himself to the corporation to secure its repayment. Accordingly, the appellant submits that the legal consequence of these contraventions, is that the corporation can neither recover the money lent nor enforce the charge he himself granted to the corporation to secure repayment. He says, he was not in *pari delicto* with the corporation but was, for his part, entirely blameless. With this contention, counsel for the corporation took a serious issue and submitted that if that interpretation of the Act be right, it would entitle the applicant to keep for himself as much as Kshs 90,000,000 of depositor's money for no consideration. So he says, that construction of the Act cannot be right. We think, eyebrows may well be raised on the morality of the applicant's contention on this part of the case. But this is a court of law not of morals and if the applicant's contention is well founded in law, this court's clear duty is to give effect to it. But is it right? We do not feel called upon to pronounce on this at this stage.

Second, the applicant submits that either the charge was varied or that there was an agreement binding on the corporation in which the repayment of the loan and interest were rescheduled and that not having breached that agreement, the power of sale was not exercisable. To buttress this submission, Counsel points to the applicant's letter of February 11, 1987, and the corporation's reply of February 23, which confirms the repayment terms proposed by the applicant. The applicant also submits that though such variation may be registered, this is not a mandatory legal requirement and that the Judge's contrary holding was erroneous.

Third, the applicant says, the legal charge was granted only to secure repayment of the loan made to Mukawa Hotels and that the corporation was not entitled, as a matter of law, to consolidate that Company's loan with the two other loans granted personally to himself and to Tassia Coffee Estate Ltd. Clause 7 (f) of the charge, seems, on a cursory reading to support the applicant's submission.

Fourth, the applicant contends that the statutory notice given him of the corporation's intention to exercise the power of sale was bad in law inasmuch as it contravened section 69A of the Transfer of Property Act. This was, because, only 14 days notice was given him whereas the Act mandated a 3 month notice. Again the corporation's notice of August 31, 1988, seems on the face of it, to bear out the applicant's contention. Having listened to and considered the applicant's legal or seemingly legal contentions, we feel constrained to answer the first question we put to ourselves in the applicant's favour, namely, that the intended appeal, whatever may be its ultimate fate, is not frivolous. On the contrary, we think, the applicant has shown, *prima facie,* that he has serious questions of law for submission to the Court on the hearing of the appeal.

That brings us to the second question, namely, would this appeal become nugatory if we denied the interim injunction sought? The whole purpose of the suit and the interlocutory appeal, is to prevent the threatened sale of the suit premises. It is plain to us that if the charged premises is sold during the pendency of these proceedings, the whole object of the suit and intermediate appeal would have been defeated.

It would then become pointless to continue to pursue the reliefs sought of the Courts. In those circumstances, we think this is eminently a case in which the requirement of justice demands that we exercise our discretion in favour of the applicant and thus grant the interim injunction prayed for in the motion.

Rule 5 2(b) of our Procedure Rules, directs us to grant an injunction on such terms as we think just. In our opinion, this is not a case in which we should grant this equitable relief unconditionally. It must be on terms.

The applicant himself conceded that he remains under an obligation on the varied agreement to pay a further sum by way of interest to the corporation on or before the end of the year in the sum of, as he put it, “over 4 million shillings”. He shrank from mentioning the exact figure. It seems just, that he, for his part, should be held to his bargain. We think he should pay to the corporation, on or before December 31 next, a round sum of Five million shillings. If this sum exceeds interest due for 1988, the excess should be appropriated to reduction of the principal debt due to the corporation from Mukawa Holdings Ltd. To ensure that the applicant does not fall into slumber on obtaining the temporary injunction, he should institute the intended appeal not later than December 15, next and should use his best endeavours to obtain either in conjunction with the corporation’s advocates, or failing their co-operation, by himself, a hearing date of the appeal not later than January 16, 1989. The applicant will give the usual undertaking in damages.

We grant interim injunction on these terms and give each party liberty to apply. The costs of this application, will be costs in the cause.

Dated anad delivered at Nairobi this 8th day of November , 1988.

F.K APALOO

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JUDGE OF APPEAL

J.E GICHERU

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AG. JUDGE OF APPEAL

R.O KWACH AG JJA

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR