REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Hancox, JJA and Nyarangi Ag J A)

CIVIL APPLICATION NO NAI 37 OF 1983

BETWEEN

GURBAKSH SINGH & SONS LIMITED …….…… APPLICANT AND BANK OF CREDIT & COMMERCE

v

INTERNATIONAL (OVERSEAS LIMITED AMIN M JINDANI ……. RESPONDENTS

P S BRADLEY GRAHAM JAMES GREER SILCOCK

(Application for leave to appeal in an intended appeal from judgment of the High Court of Kenya at Nairobi, (Trainor, J) dated 24th June, 1983 In CIVIL CASE NO 2435 OF 1982)

JUDGMENT OF THE COURT

The applicant, together with four others, three of whom were its directors, and one of whom is their brother, began an action in the High Court (Civil Suit No 2435 of 1982) against the first respondent bank, claiming that the interest charged by the bank on its overdraft, exceeded the rate laid down by the Central Bank of Kenya in exercise of its powers under Section 39 of the Central Bank of Kenya Act, Cap 491. Consequently, it claimed that the whole transaction, including the loan, the debenture and the mortgages executed on the individual plaintiffs' property at LR 209/138/91 Nairobi, as security, were thereby tainted with illegality ab initio , and were consequently null and void and irrealisable.

The applicant also claimed a perpetual injunction to restrain the bank and its servants or agents, inter alia , from appointing or attempting to appoint a receiver and manager or enforcing the debenture in any way. Simultaneously, it sought a temporary injunction against the bank in similar terms, from doing the acts which would otherwise have been authorized by the debenture or from enforcing either of the securities. On the 20th August, 1982, Chesoni, J, as he then was, dismissed the application for the temporary injunction with costs. He made a similar order in High Court Suit No 2473 of 1982, with which this application is not directly concerned.

The applicant and its co-plaintiffs appealed against both the Chesoni, J's orders, filing their notices of appeal on the 24th August, 1982. We shall refer to this as the main appeal. On the 6th September, 1982, notwithstanding that Rule 5 of this Court's rules had not then been amended, the applicant and its co-plaintiffs', who had by then become intending appellants in the main appeal, applied ex parte to this court (Madan, Miller and Port JJA) for injunctions in similar terms to that which had been refused by Chesoni, J. The court ordered that the applications be consolidated, served and heard on 23rd September, 1982, and that, in the meantime, the bank and the receiver and/or manager appointed by it should desist from dealing or interfering with the property and assets of the applicant, and of the property and assets of the other intending appellants. An interim injunction was granted in those terms until further order.

The consolidated applications were duly heard by a differently constituted court (Law, Potter and Kneller, JJA), who made an order, which Law, JA, later stated was a consent order, in the following terms:-

"The ex-parte interim injunction granted by this court until further order" on 8 September, 1982, hereby is discharged and set aside, upon the defendant bank's undertaking not to exercise its rights against the real property belonging to the applicants or any of them by sale or otherwise, until determination of the intended appeal." On the 22nd March, 1983, the applicant and its co-appellants in the main appeal applied to the High Court by notices of motion to commit the second, third and fourth respondents to this application, to prison under Section 5(1) of the Judicature Act, (Cap 8) and that a fine be imposed on the bank:

"…. For their several contempts of the honourable court during the pendency of the suit, HCCC No 2435 of 1982"

The alleged acts of contempt appear in the affidavit verifying the statement accompanying the application for committal, and are said to be constituted by the bank through its general manager (the second respondent) appointing the third and fourth respondents as receivers and managers, under the debenture on the 27th August, 1982, and by those respondents carrying out their powers under the debenture, by way of a "studied campaign" through "threats and intimidation" to "inhibit and dissuade" the applicant, in effect, from pursuing its remedy in the action. It will be observed that, the actual appointment of the last two respondents as receivers and managers was made before the order of this court of the 8th and 23rd September, 1982, though, it may be that the various steps they took occurred afterwards.

It is the subject of recent authority in a matrimonial case, P v W (FD) Law Gazette 14th March, 1984, p 734, that where the contempt alleged is a breach of the court's order, the summons for committal must not be vague, but must give precise particulars of the breach with the date, time and place thereof. We apprehend that, this must be good law in relation to any such application for committal for contempt. The order alleged to be disobeyed should be stated definitively and precise details of the breaches given. If they are too numerous to detail, some of them should be given as examples and the others referred to. www.kenyalawreports.or.ke At all events when, on 24th June, 1983, Trainor J, give his decision dismissing the application to the High Court, which is the subject of a further intended appeal to this court, he had no doubt that the order said to be disobeyed, was that of the Court of Appeal which we have set out, and which was reflected in a formal order of this court drawn up and sealed on the 8th October, 1982. Doubtless, we shall, in due course, have for our consideration, the question whether an alleged contempt of this court can be dealt with by the High Court pursuant to Section 5(1) of the Judicature Act, and whether this question is affected by the right of appeal given under Section 5(2) when a positive order is made.

The application now before this court, is a motion for leave to appeal against Trainor, J's decision of the 24th June, 1983, the judge having refused such leave by his further decision dated 12th August, 1983. As Mr Fraser, who represents the third and fourth respondents, says, this is a separate and fresh application, not an appeal from the decision of Trainor, J, refusing leave – see Spry, JA, in Sango Bay Ltd v Dresdner Bank, [1971] EA 17, at p 21.

There is, however, an objection to this application, on the grounds that, no right of appeal exists from the High Court to this court against the refusal of an order for contempt, which should more properly be

phrased as “the refusal of an order of committal (or of a fine, as the case may be) for contempt”. This is expressed in a notice of Preliminary Objection, but Mr D N Khanna, who appears for the applicant, by a further notice of www.kenyalawreports.or.ke

objection, says that the only way in which the first objection can be properly brought, is as a notice of motion to strike out, under Rule 80 and in accordance with Rule 42 of the Rules of this court. This is evident, Mr Khanna says, from the terms of Rule 101(b) which preclude any objection to the competence of an appeal which might have been raised under Rule 80. This is even clearer, because the definition of an appeal at the beginning of the rules, includes an intended appeal, this matter having become “an intended appeal” by the filing of the Notice of Appeal against Trainor, J’s decision on the 7th July, 1983. Thus, even in an intended appeal, the proper way to get rid of an application must be by an application to strike out under Rule 80. Moreover, he says, any other course would lead to a multiplicity of applications and would at least double the cost.

Mr Gautama, who appears for the first and second respondents, on the other hand, submits that, Rule 80 has no application to this case; that the Openda v AHN case, Civil Appeal No.42 of 1981 (to which Mr Khanna made reference) was not in point because, in that case, there was no objection to the competency of the appeal, but only to specific grounds in the Memorandum of Appeal; that there was no requirement that his clients should give notice of this preliminary objection, and that they had only done so as a matter of courtesy which did not, apparently, receive the degree of appreciation which Mr Gautama had expected. The narrow question for our decision on the present application is, therefore, whether the objection to it is competent or must be brought by a notice of motion to strike out.

Attractive, as Mr Khanna’s argument appeared at first sight, we cannot acceded to it. We say unhesitatingly that, in our view, an objection to this nature cannot be appropriately taken by way of a notice of motion to strike out the original application. The matter may be tested in this way: If the application were properly one to strike out, and succeeded, then the main application would not be dismissed, but would be struck out, and could therefore be reinstated – see Law, JA, in Belinda Murai and Others v Amos Wainina, Civil Application NAI 9 of 1978 at page 2, following Ngoni – Matengo Co-operative Marketing Union Ltd v Alimohamed Osman, [1959] EA 577, at p 580, where Bhogal v Jadva Karsan, [1953] 20 EACA, 17, which had said that, an application to extend the time for doing that which had been previously omitted, (a certified copy of the formal order) was incompetent because the appeal had previously been dismissed on that ground, was expressly disapproved. The possibility of reinstatement or restoration of the application would, however, be wholly misconceived, because the substance of it is not an objection to the content of the appeal record or that some other necessary step in the appeal has been omitted, but is an objection to jurisdiction. The respondents to the application say that there is no jurisdiction in this court to entertain the appeal from Trainor, J, because no appeal lies. For this reason, it would be equally inappropriate to hold that, the word “appeal” in Rule 101(b) applies to this intended appeal. In our view, the context requires otherwise, and the definition does not therefore include the intended appeal by the application of Rule 2.

In our judgment, therefore, the objection to Mr Khanna’s main application is properly taken by way of raising an objection in court, as has been done. The notice of preliminary objection, though courteous, was surplusage, though we do not wish to discourage the practice of giving notices of preliminary objections, which we think is a salutary one.

We accordingly reject the notice of objection filed by the applicant on 30th March, 1984, and hold that the objection by the respondent has been taken in proper manner. We make no order as regards the notice of preliminary objection filed on the 29th March, 1984, since it is not a formal document, but one filed in accordance with the practice which has grown up between advocates of giving notice to one another, that an objection will be taken when the matter in question is heard. We order that the costs of the proceedings before us in relation to the purported objection to the competency of the preliminbary objection, be paid by the applicant to the respondents in any event.

Dated and delivered by Hancox, JA, at Nairobi, this 6th day of April, 1984.

A A KNELLER

JUDGE OF APPEAL

A R W HANCOX

JUDGE OF APPEAL

J O NYARANGI

AG JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR