



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI**

**Civil Application 172 of 2009 (UR 116/2009)**

**HARVEER INVESTMENTS COMPANY LTD..... APPLICANT**

**AND**

**EQUITORIAL COMMERCIAL LTD..... 1<sup>ST</sup> RESPONDENT**

**PAHLAD SINGH BHANGRA..... 2<sup>ND</sup> RESPONDENT**

**COME-CONS AFRICA LTD ..... 3<sup>RD</sup> RESPONDENT**

**ADMANTX CO. LTD ..... 4<sup>TH</sup> RESPONDENT**

**(An application for injunction pending the hearing and determination of the intended appeal against the Ruling and order of the High Court of Kenya at Nairobi Milimani Commercial Courts (Lessit J.) dated 29<sup>th</sup> May, 2009**

**in**

**H.C.C.C.NO.128 OF 2009)**

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**RULING OF THE COURT**

By a notice of motion under rule 5(2)(b) of the Court of Appeal Rules, Harveer Investments Company Ltd, seeks a restraining injunction against Equatorial Commercial Bank Ltd to restrain it by itself, agents or servants from exercising any power of sale over a parcel of land known as Nairobi/Block 91/344, or from alienating the property pending the hearing and determination of an intended appeal against the ruling and order of the superior court (Lesiit J.) dated 29<sup>th</sup> May 2009 in Milimani High Court Civil Case No. 128 of 2009.

The background facts are straight forward. On 16<sup>th</sup> September, 2003 the applicant by a director's resolution of that date resolved to borrow Kshs.20m. from Equatorial Commercial Bank, Nairobi. A certified copy of the resolution was signed by **H.K. Bhangra**. A facility letter was later prepared by the bank setting out the terms of lending which terms are shown to have been accepted by H.K. Bhangra on behalf of the applicant. The facility letter which is dated 18<sup>th</sup> September 2003 shows that the lending

would be limited to Kshs.20 million payable within two years. An agreement was executed embodying the terms of the lending, and this too was signed by H. K. Bhangra on behalf of the applicant. On 19<sup>th</sup> September 2003, she executed a charge over the said property before Paul. M. Mwangi, advocate, which advocate signed a certificate confirming that H.K. Bhangra, appeared before him on that day and freely executed the instrument of charge and that she confirmed that she understood the contents. **Tahir Khawaja**, and **Fauzia Shah** signed the document on behalf of the bank. All the other legal formalities were fulfilled but no money was disbursed to the applicant. A note was however made in the applicant's bank account with the bank debiting a total Kshs. 20 million against it on 1<sup>st</sup> October 2003, comprising three debits of Kshs.5,305,302.30; Kshs11,635,552.70, and Kshs. 3,059,145. Against each of the first two debits were noted the words "**Amt Fraud obtained P.S Bhangra**,". Against the third debit were the words, "**AMT Fraud Obtained Come-Cons.**" There was an alleged further lending of Kshs.7 million but no charge documents were executed for it. It is, however, clear from the bank statement of the applicant with the bank that on 6<sup>th</sup> November, 2003, a debit of Kshs.7,099,566.60 was made and is noted as a transfer from P.S. Bhangra account. That entry increased the applicant's indebtedness as reflected on the bank statement from Kshs. 19,275,098 to Kshs.26,374,644.60. This was not, however the amount demanded in a statutory notice dated 2<sup>nd</sup> December, 2008 which provoked the aforesaid suit. Instead the demand was for Kshs.18,115,818.55.

In its plaint commencing the above suit the applicant averred, inter alia, that the execution of the aforesaid charge was obtained through misrepresentation, that there were monies due from Prahlad Singh Bhangra (**the 2<sup>nd</sup> respondent**) and Admant Company Limited (**3<sup>rd</sup> respondent**); and that it was obtained by coercion of one Mr. T. Khawaja who by threats caused the 2<sup>nd</sup> respondent to go into exile, and at the same time intimidated his wife, as principal shareholder of the applicant to execute the charge. The second respondent's wife is **Mrs. H.K. Bhangra**.

Filed with the plaint was an application for an interlocutory injunction to prevent the 1<sup>st</sup> respondent from exercising the power of sale of the aforesaid parcel of land pending the hearing and determination of that application. That application was heard by Lesiit J, and in a considered ruling held that evidence before her showed that the applicant applied for two loan facilities from the bank; that money was advanced to the applicant on the basis of those applications, and on the basis of guarantees executed, and that the applicant had defaulted in repayment. She then concluded that the applicant had not succeeded in demonstrating that it had a **prima case** with the probability of succeeding upon trial. She dismissed the application. One point is clear and Miss Mate for the respondent conceded it, that the applicant did not execute a charge for Kshs.7 million.

The applicant has filed a notice of appeal against that decision and has thus brought itself within the ambit of **rule 5(2)(b)** of this Court's Rules for an order of either stay or injunction. It is now well settled that for an application under that provision to be successful, the applicant is obliged to show not only that the appeal or intended appeal is arguable, but also that the success of that appeal will be rendered nugatory unless the orders sought are granted. Satisfying one condition and not the other will not suffice.

It was common ground that the 1<sup>st</sup> respondent did not lend any money to the applicant on the basis of the charge it relied on to issue a statutory notice. Its argument was that the 2<sup>nd</sup> respondent who was its customer had, in collusion with some bank staff, defrauded the bank. The purported lending was an attempt to recover the money he had allegedly fraudulently obtained from the bank. So in a nutshell it is the 1<sup>st</sup> respondent's case that the charge was executed to cover an existing debt. However, the documents executed for the alleged lending were not explicit on that aspect.

The applicant's case is that the alleged lending was without consideration. The 2<sup>nd</sup> respondent denied he borrowed any money and the alleged debt was created when his account was in credit. He fled the country to escape arrest as the bank had threatened to report him to the police for alleged fraud. His wife, likewise, denied having borrowed any money from the bank. She however, admitted she executed the guarantee documents on behalf of the applicant as its principal shareholder and director. Her contention was however, that she was coerced to do so. She initially believed her husband owed the bank money but

later she learnt that he did not.

It was conceded that the charge and guarantee documents were executed on behalf of the applicant, and that on the face of those documents there would be no basis for the applicant to complain. However, a careful examination of the documents shows, and Miss Mate, for the bank conceded this, that the bank did not disburse any money to the applicant on the basis of those documents. They also show that no guarantee documents were executed for Kshs.7 million. That notwithstanding the bank has been demanding it. The alleged fraud has so far not been shown to have been executed for the benefit of the applicant. Besides, there is no evidence it paid any money to the applicant. Miss Mate informed us from the bar that the 1<sup>st</sup> respondent is not pursuing that claim of Kshs.7 million arguing that it is unsecured. It is arguable whether in view of what we have stated above the 1<sup>st</sup> respondent could properly exercise a power of sale. Besides, coercion to execute the charge having been alleged against the bank it is arguable whether the bank could in the circumstances, be entitled to enforce it. Those are matters to be canvassed either in the intended appeal or before the trial court when the suit will eventually come for a hearing, if at all. For purposes of the application before us it suffices to say that we are satisfied that the applicant's intended appeal is not frivolous.

On the nugatory aspect Mr. Mwangi for the applicant submitted before us that the statutory notice issued by the 1<sup>st</sup> respondent has expired. The intended appeal is unlikely to be heard before the threatened sale. Mr. Mwangi conceded that section 74 of the Registered Land Act, Cap 300 Laws of Kenya, does provide a remedy in damages for a sale of property registered under that Act if the sale is illegal or irregular. The suit property is registered under the Registered Land Act. Mr. Mwangi, however, submitted that there is no basis for the sale of the property herein, and damages will not be an adequate remedy in the circumstances. This is a peculiar case, and some aspects of it will not become clear without a hearing of the matter on the merits. Weighing one thing against another, we consider that unless the injunction prayed for is granted the applicant's intended appeal, if successful, may well be rendered nugatory.

Several authorities were cited to us. They largely deal with the merits or otherwise of the intended appeal. We have not discussed them here. This is not the appeal itself. Our jurisdiction at this stage is confined to considering whether the intended appeal is arguable. We have already held that the applicant's intended appeal is arguable. That suffices for purposes of the motion before us.

Accordingly, we allow the motion dated 12<sup>th</sup> June 2009, and order that an injunction issue restraining the 1<sup>st</sup> respondent from exercising the power of sale over land parcel No. Nairobi/Block 91/344, pending the hearing and final determination of the applicant's intended appeal, or until further order of this Court or the superior court. The costs of the application shall be in the intended appeal.

**Dated and delivered this 25<sup>th</sup> day of September 2009.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**