IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 55 OF 2008 (UR 31/2008)

PEMA HOLDINGS LIMITED …….……..……... APPLICANT

AND

TROPICAL FARM MANAGEMENT (KENYA) LTD ……... 1ST RESPONDENT

STANDARD CHARTERED BANK OF KENYA LTD .....….. 2ND RESPONDENT

(Application for injunction pending the filing, hearing and determination of an intended appeal from a ruling and order of the High Court of Kenya at Nairobi (Warsame, J) dated 28th February, 2008

in

H.C.C.C No. 520 of 2007)

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RULING OF THE COURT

The applicant, Pema Holdings Limited, was and is still the registered owner of L.R. No. 4929 and L.R. No. 4744 which are two coffee farms in Makuyu (hereinafter referred to in this ruling as the subject properties). By a charge dated 30th May 1974, between the applicant and the second respondent, Standard Chartered Bank Kenya Ltd, the second respondent granted to the applicant banking facilities in the sum of Ksh.1,200,000/= for development of the subject properties. The applicant appointed the first respondent, Tropical Farm Management (Kenya) Ltd., which was then operating under a different name but which was and is allegedly a subsidiary of the second respondent, to exclusively manage the subject properties. The first respondent previously operated under the different names at different times such as East African Acceptances (Estate Management Division) Limited, Acceptances Estate Management Limited, Standard Chartered Estate Management Limited (SCEM), SCEM and Farm Management. Further credit facilities limited to a sum of Ksh.7,500,000/= was advanced to the applicant on 3rd April 1996 by the second respondent and later in March 1998, January 1999 and July 1999 more credit facilities were offered to the applicant.

The applicant states that the credit facilities offered after the original facilities of Ksh.1,200,000/= granted in May 1974, were disbursed to the applicant through the first respondent which was in full control of the activities of the subject properties, as the first respondent was allegedly specialized in coffee farming. Those arrangements continued for a period of over 25 years when, owing to poor results from coffee

farming business which the applicant suspected and later confirmed was due to poor management by the first respondent, the applicant took possession of the subject properties. The second respondent also stopped any further credit facilities to the applicant. By 30th November 2002, the amount allegedly outstanding was about Ksh.17,000,000/= which the second respondent demanded from the applicant. The applicant alleged, and it is not disputed, that he made payments to the second respondent reducing the demand to about Ksh.9 million. The second respondent persisted in its demand of that amount. It issued a statutory notice to the applicant threatening to sell the subject properties should the applicant fail to pay that amount. Faced with that situation, the applicant, through its advocates, filed a plaint in the superior court dated 3rd October 2007 and filed into the court on that day. In that plaint, the applicant prayed for judgment against the defendants, jointly and severally, for a permanent injunction restraining its agents, servants and/or employees from selling the two properties; an order that the respondents do render a true account of all monies disbursed by the second respondent to the first respondent on the applicant's account during the period of the first respondent's management of the applicant's properties; a declaration that the applicant is entitled to unconditional discharge from the second respondent of all debentures and charges registered over the applicant company and the applicant's properties; that the first respondent do give a true account and report of all its management activities over the applicant's properties and that the second respondent also do give true account of the interest, penalty and bank charges applied in the applicant's accounts and that a refund to the applicant of the excess be ordered by the court.

The basis of those prayers was as can be deciphered from the plaint, that the first respondent was a subsidiary of the second respondent and that at the relevant period of the first respondent's management of the subject properties, the two respondents shared some directors and as, according to the applicant, the credit facilities offered from time to time by the second respondent to the applicant was disbursed to the first respondent directly and used exclusively by the first respondent in the management of the subject properties, the applicant alleged that the respondents were mortgagees in possession and therefore had to account to it for all payments before the two respondents could take action to sell its properties for any default in refund of the same credit facilities together with interest due from the facilities.

Together with that plaint, the applicant also filed chamber summons dated 3rd October 2007. The relevant prayer in that chamber summons is the third prayer which seeks the following order:

"3. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of injunction restraining the 2nd Defendant, its agents, servants and or employees from selling, putting up for sale by public auction or private treaty and further restraining the 2nd defendant, its agents, servants and or employees from transferring or in any other way disposing off the plaintiff's property, L.R No. 4929/2 and L.R No. 4744 Makuyu."

There were several grounds buttressing that application but the main ones were that the respondents were until 1st May 2005 mortgagees in possession of the applicant's charged subject properties pursuant to an exclusive management agreement with the first respondent and a crop debenture with the second respondent, and that being so, the second respondent had no legal right to sell the charged properties unless and until it accounts for the facilities extended to the applicant but disbursed to the first respondent, and that the statutory notice issued to the applicant by the second respondent was unlawful because in issuing it, the second respondent failed to consider that it had admitted that it applied illegal penalties and interest on the applicant's account and had offered to re-calculate interest and a refund of the excess to the applicant. Thus, the amount in respect of which the statutory notice was issued was not the correct claim. That application was also supported by an affidavit sworn by the applicant's Managing Director, Lawrence Nginyo Kariuki and another affidavit sworn by one Boniface Njoroge, the applicant's farm Manager. The second respondent opposed that application contending that the second respondent, being a holder of a copy debenture, was not a mortgagee in possession and as the first respondent had no charge over the suit properties in its favour, the allegation of their being mortgagees in possession could not arise.

That application went before the superior court (Warsame J.) who, after full hearing dismissed it with costs to the second respondent. In dismissing the application, the learned Judge had this to say *inter alia*:

"The plaintiff contends that the bank was a mortgagee in possession but in my view a holder of a debenture is not a mortgagee in possession. And in any event, the 1st defendant has no charge over the suit properties in its favour. There is ample evidence to show that the plaintiff has always been aware of the financial accommodation granted to it by the 2nd defendant. One needs to look at the annextures to the replying affidavit and the annextures to the affidavit by the plaintiff's managing director. The inference one draws upon perusal of those documents is that the plaintiff has been in active participation in its former state of affairs including loans and overdraft extended to it by the bank."

The applicant felt aggrieved by that ruling. It intends to appeal against it and filed a notice of appeal dated 4th March 2008 on the same date. In the meantime, it has come before us by way of a notice of motion dated 4th April 2008 filed under a certificate of urgency in which it is seeking one main order which is:

"That pending the hearing and determination of the intended appeal, this Honourable Court be pleased to issue an order of injunction restraining the second respondent, its agents, servants and or employees from selling, putting up for sale by public auction or private treaty and further restraining the 2nd defendant, its agents, servants and or employees from transferring or in any other way disposing off the plaintiff's property, L.R No. 4929/2 and L.R No 4744 Makuyu."

Two main grounds advanced in support of the application as can be deciphered from the many grounds set out in the application are that the intended appeal is arguable on the grounds that the second respondent became a mortgagee in possession through its close relationship with the first respondent which was managing the subject properties and through which all the monies advanced to the applicant after the year 1983 were paid and which used the same money but used it without accounting to the applicant. Secondly, the applicant maintained that the second respondent inflated the claims as it did not give credit for the monies that were wrongly credited to the applicant's account through wrong calculations and which it had admitted together with interest that had accrued from the same monies. The second main point raised is that the subject properties being so large and of extremely high value – over Ksh. 200 million, their sale would be devastating to the applicant company and no compensation would suffice. Thus, the results of the intended appeal, were it to succeed, would be rendered nugatory. Mr. Njeru, the learned counsel for the applicant, in emphasizing the same points, submitted further that the applicant is ready, able and willing to furnish a bank guarantee covering the demanded debt amounting to Ksh.9,185,745/25 should the court direct it to do so.

The first respondent, though served with the application and hearing notice, did not appear in court and did not in any way indicate its opposition to or support for the application. The second respondent did not file any affidavit in reply to the applicant's claims, but Mr. Chege, the learned counsel for the second respondent, vehemently opposed the application submitting that the intended appeal would not be arguable as a crop debenture cannot make a mortgagee become a mortgagee in possession. He stated further that the management contract was between the applicant and the first respondent and so in case the applicant had claims on mismanagement of its properties, the same should be directed to the first respondent and should not stop the second respondent from realising its statutory power of sale in respect of the subject properties. Further, he contended, that the applicant in several letters, to which he directed us, readily admitted that he owed the money claimed. On whether the success of the application would be rendered nugatory were the application to be refused, Mr. Chege's position was that as the subject properties were mortgaged, they had gained market status and their value is known or can be ascertained so that in case the intended appeal succeeds, the applicant would be compensated and as such there would be no loss to the applicant.

The notice of motion before us is brought pursuant to **rule 5(2) (b)** of this Court's Rules (**the Rules**). The law as regards the principles that guide the court in deciding such application is now well settled. In order that the applicant in such an application may succeed, he has to first demonstrate to the Court that the intended appeal, or the appeal (if already filed) is arguable. Secondly, he has to show that were the application to be dismissed, the success of the appeal, or intended appeal, as the case may be, would be rendered nugatory. If any authority is needed for those principles, then the case of **Reliance Bank Ltd.**

(in Liquidation) vs. Norlake Investments Ltd. – Civil Application No. Nai. 93 of 2002 (unreported) is readily available. In that case, this Court stated:

"Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,

2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or injunction."

We have perused the record, the grounds for the application, the affidavit in support of the application, and all documents to which we were referred together with the ruling of the learned Judge of the superior court with the above legal principles in mind. We have perused the contents of the debenture made on 7th November, 1985. The applicant, in his plaint, in his application and in the letters he wrote to the second respondent, to which we were referred as evidence of admission, consistently maintained that the relationship between the respondents which included sharing of some directors at one time and credit facility transactions between the respondents led to no other conclusion other than that the second respondent was a mortgagee in possession and that being the case, the applicant felt and submitted to the superior court that the second respondent's power of sale could not arise before the second respondent and the first respondent, which was its subsidiary, accounted to the applicant for the monies that were paid for management of the subject properties which it claimed were badly managed. The learned Judge of the superior court rejected that contention and hence the intended appeal. In our view, having fully considered the matter as stated above, we find that issue not a frivolous point. Whether or not the second respondent's statutory power of sale has arisen would, in our view, depend on the decision as to whether at any one time from 1974 when it advanced the applicant Ksh.1,200,000/= to the time the applicant took over the management of the subject properties, over 25 years later, it ever conducted itself in a manner that would have suggested that it was a mortgagee in possession. Its relationship with the first respondent may need to be ventilated fully to arrive at a fair conclusion on that point. That exercise is not ours in the application before us. Ours is to state whether or not that issue is arguable. We think it is an arguable point. We need not go into other matters such as whether the calculation of the demanded amount was properly done and whether interest accruing from any wrong calculation should have changed the position, save to say that in law it is now established law that disputes as to amounts cannot stop a mortgagee from exercising its statutory power once the same has arisen.

The next matter we need to consider is whether, if we dismiss this application, the success of the intended appeal, were it to succeed, would be rendered nugatory. The subject properties threatened with sale are valued over Ksh.200,000,000/=. That would not be a small loss to the applicant were the sale to proceed. That value may not be realised at a sale by public auction. The applicant has stated in its application that it would be prepared to furnish a bank guarantee covering the entire amount outstanding as at the date the application was filed i.e. 4th April 2008. The second respondent did not file any replying affidavit to respond to that offer, nor did its counsel, at the time he was making his submission, address us on that offer. On our part, we find that offer reasonable in the circumstances of this application.

Subject to the applicant furnishing a bank guarantee from a reputable bank covering the amount of Ksh.9,185,745/25 (nine million one hundred eighty five thousand seven hundred forty five and twenty five cents) within **THIRTY (30) days** of the date hereof, the second respondent, its agents, servants, and or employees are restrained from selling, putting up for sale by public auction or private treaty; and the second respondent, its agents, servants and or employees are restrained from transferring or in any other way disposing of the applicant's properties L.R. No. 4929/2 and L.R. No. 4744 Makuyu till the intended appeal is heard and determined.

Costs of the application shall be in the intended appeal.

Dated and delivered at Nairobi this 9th day of May, 2008.

S.E.O BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

D.K.S AGANYANYA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR