



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Application 312 of 2005

HUTCHINGS BIEMER LTD. APPLICANT

AND

BARCLAYS BANK OF KENYA LTD. 1ST RESPONDENT

ADRIAN SPENCER DEARING 2ND RESPONDENT

J.S. WARD 3RD RESPONDENT

(Application for injunction pending the filing, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Ochieng', J) dated 9th November, 2005

in

H.C.C.C No. 85 of 2005)

RULING OF THE COURT

The applicant in this application, Hutchings Biemer Ltd. (to which we shall refer as “applicant”) sought and obtained Ksh.31,000,000/= from the first respondent, Barclays Bank of Kenya Limited, against a legal charge dated 30th March, 1990. It further sought and obtained Ksh.44,000,000/= against a further charge dated 10th July, 1996 and again sought and obtained a second further loan of Ksh.77,000,000/= against a second further charge dated 26th November, 2001. All the charges were over property Land Reference Number 209/5884 and were created by the applicant in favour of the first respondent. There was also a debenture dated 26th November, 2001 granted to the first respondent over all assets and business of the applicant. The record shows that the applicant failed to honour the terms of the same loans and vide a letter dated 11th January, 2005, the first respondent through its advocates demanded from the applicant Ksh.136,117,950/85 plus USD \$98,683.47 being the amount that was allegedly due and unpaid as at 6th January, 2005. The same letter was also a statutory notice under **section 69(1)** of the Indian **Transfer of Property Act 1882** as amended. The record does not show any response to that demand and on 11th February, 2005, the first respondent appointed the second and third respondents as receivers pursuant to the debenture created by the applicant. As at that time, the amount due was Ksh.124,665,214/55. On 14th February, 2005, the applicant filed Civil Suit No. 85 of 2005 in which it

sought permanent injunction, declaration and other reliefs. Together with that plaint, the applicant also filed in the superior court notice of motion on the same day 14th February, 2005 under certificate of urgency in which it sought several restraining orders of the court against the respondents. The superior court granted to the applicant interim orders and the application came up for inter-partes hearing on 3rd March, 2005. On that day, both parties were before the superior court (Anzangalala, J) when it was by consent of all parties ordered as follows:

“(a) THAT, the plaintiff undertakes to pay the sum of Ksh.30 million within 60 days of the date hereof. The said payment shall be secured by Mr. Satish Gautama S.C giving an irrevocable undertaking on or before the 7th day of March, 2005 to pay the said amount upon completion of the sale of property on behalf of the Plaintiff and in default the defendant to realize its security.

b. THAT, the Plaintiff shall pay a sum of Ksh.30 million within 150 days of the date hereof. The plaintiff shall procure its counsel to provide an irrevocable undertaking to pay the said amount upon completion of the sale of its properties within 30 days of the date hereof. The plaintiff shall have liberty to apply for extension of time only if there is a delay in registration of the transfer arising from any cause other than failure or default of the vendor or purchaser.

c. THAT, the accounts of the amount outstanding shall be taken or agreed upon by the parties within 30 days from the date hereof and in default of such agreement, the accounts shall be tabled and determined by court pursuant to the provisions of Order XIV Rule 2.

d. THAT, the status quo existing as at the date of this order shall be maintained.

e. THAT, the first defendant shall not act upon the statutory notice over L.R No. 209/5884 so long as the Plaintiff complies with the terms of this consent order.

f. THAT, this matter be mentioned on 11th April, 2005 for further or other orders.”

Pursuant to the consent order, the first Ksh.30,000,000/= was paid to the respondent and Satish Gautama, Senior Counsel, made the required undertaking in a letter dated 7th March, 2005 addressed to George Oraro, the learned counsel for the first respondent. That payment was made vide a letter dated 13th May, 2005 from Satish Gautama to Oraro & Company, Advocates in which a cheque for Ksh.30 million was enclosed. Thereafter, things did not seem to work out for the applicant as Satish Gautama wrote to its firm of advocates a letter dated 22nd August, 2005 informing them as follows:

“I am unable to disburse as per my undertaking to the purchaser’s lawyer as I am still awaiting the rates Clearance Certificate from the Nairobi City Council and shall only be able to do so upon the successful registration of the transfer in favour of the purchaser. I am in possession of all other documents save for the said clearance certificate which is due any time now.”

In the meantime, the applicant also obtained some expert advice on the interest charged and armed with that together with the information from Gautama S.C to the effect that the second payment of Ksh.30,000,000/= was not forthcoming, it filed a notice of motion under **Order 44 rules 1, 2 & 3, Order 49 rule 5 and Order 39 rules 1, 2, 3 & 4** of the Civil Procedure Rules and **sections 3A and 80** of the Civil Procedure Act. The orders sought in that application were:

“2. That this Honourable Court do vary and review the orders of 3rd March 2005 substituting the 2nd installment to an amount of Ksh.12,023,778.85 from Ksh.30,000,000/= agreed and do stay the payment of any other sum to the first defendant until the Accounts are settled by the Court.

3. That this Honourable Court do extend the time limited by the consent order of the 3rd day of March, 2005 to enable completion of the sale of the plaintiff’s properties and the release of funds, and/or an adjudication on prayer 2 herein and such extension be for a further period of at least 150

days.

4. That the defendants whether by themselves, servants or agents, or Advocates or Auctioneers or any of them or otherwise be restrained by a temporary order for injunction from doing the following acts or any of them, that is to say from interfering with the plaintiff's right of possession, advertising for sale, disposing or, selling by public auction or otherwise howsoever at any other time or by completing by conveyance or transfer of any sale concluded by auction or private treaty leasing, letting otherwise howsoever interfering with the ownership of title to and/or interest in ALL that piece of land known as L.R. No. 209/5884 Nairobi pending the hearing and determination of this suit."

That application came up for hearing before the superior court (Ochieng', J) and after full hearing, it was dismissed in a ruling delivered on 9th November, 2005. In dismissing the application, the superior court stated concerning the application for extension of time as follows:

"The question that arises is whether or not the delay in obtaining a clearance certificate is a good enough reason to warrant the extension of time for payment of the further sum of Ksh.30 million.

It is to be noted that it was an express term of the consent order that the plaintiff would only seek extension of time "if there is a delay in registration of the transfer arising from any cause other than the failure or default of the vendor or the purchaser". In the supporting affidavit, the plaintiff did not explain the reasons for the delay in obtaining clearance certificate. In effect, the plaintiff did not satisfy the court that the delay in registration of the transfer was attributable to a cause other than the failure or default of the vendor or purchaser. For that reason, I do hold that the plaintiff failed to demonstrate that it had brought itself within the scope of the terms of paragraph (b) of the consent letter. Therefore this court has no basis upon which to grant the extension of time as sought by the plaintiff."

The learned Judge of the superior court considered other matters in respect of the first prayer which was for review and concluded that the applicant had not tendered any explanation for its failure to exercise due diligence prior to executing the consent order. He therefore held that the reliance by the applicant on the new calculations of interest could not be proper foundation for review of the court order. He also dismissed the injunction application and gave reasons for the same. It is against the entire decision that the applicant herein intends to lodge an appeal and it has filed a notice of appeal dated 10th November, 2005. It is now coming to this Court seeking injunctive orders pending the hearing and determination of the intended appeal and it also seeks that it be at liberty to apply for any such further orders and/or directions as it will deem fit. The applicant's main grounds for the application are that the applicant's appeal has high chances of success and/or is not frivolous and that unless the orders sought are granted, the first respondent will proceed and exercise its power of sale and/or appoint receivers and so the applicant will suffer irreparably and the results of the intended appeal, if favourable to the applicant, will be rendered nugatory and lastly, that the interests of justice demand that the injunction orders sought are granted.

The above are the salient aspects of this application as can be deciphered from the record before us. The application is brought under **rule 5(2) (b)** of this Court's Rules. The law relating to the principles such an application would be considered is now well settled. The applicant must satisfy the court on two matters. These are first, that the appeal or intended appeal is an arguable one, that is to say that it is not a frivolous appeal and secondly that if an order of stay or injunction, as the case may be is not granted, the appeal, or intended appeal, were it to eventually succeed, would have been rendered nugatory by the refusal to grant the stay or injunction. (See the case of **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited** – Civil Application No. Nai. 93 of 2002 (unreported).

The applicant's learned counsel, Mr. King'ara, in his address raised mainly two points. These were that the review should have been granted because when consent order was recorded, the applicant relied solely on the accounts as prepared by the first respondent which accounts were subsequently (after the consent was recorded) found by experts to have been incorrect and were fraudulent as the correct amount due to

the first respondent, according to the experts, should have been Ksh.42,023,778/85 and that is the amount which should have formed the basis of the consent order. Secondly, he maintained that the applicant was entitled to extension of time as the delay in receiving clearance certificate which caused eventual delay was not within the applicant's control. Mr. Oraro, the learned counsel for the respondent, on the other hand argued that the applicant cannot rely on the accounts as that was provided for in the consent order and was a matter that would be before the superior court. The taking of accounts was already envisaged when the consent was entered into. In any event, he added, the applicant was already supplied with the respondent's accounts which they pretended not to have received and that the applicant had earlier acknowledged the amount outstanding. Further, he contended that as the superior court could not grant an injunction, this Court also has no jurisdiction to grant one.

We have considered carefully the rival arguments and the principle we have stated hereinabove. In our view, injunctive orders are meant to preserve property and maintain the status quo. This is the light in which we read the holdings in the case of **Madhupaper International Limited vs. Kerr (1985) KLR 840** where this Court referred to concurrent jurisdiction of the superior court as well as of this Court in as far as granting injunction application is concerned. We therefore hold that we have jurisdiction to grant an injunction in respect of a deserving matter before us if only to preserve the status quo during the period the matter is in this Court pending the hearing and final disposal. That of course does not detract from the need to ensure that the principles of granting the same are strictly adhered to.

In the matter before us, without holding a mini-appeal, and having not heard the benefits of full argument which can only be availed during the full hearing of the appeal, it is our view nonetheless that the dispute as to the accounts were matters fully taken care of by the consent order and as the law stands, are not matters that can form a valid ground that would stop a mortgagee from exercising his power of sale so long as there is a debt due to the mortgagee. We say no more on that. However, as to refusal by the superior court to grant extension of time, we have perused the record including part of the judgment reproduced hereinabove and the letters, including the letter from Gautama S.C, and we do feel, without pre-empting the matter, that the intended appeal is arguable on that aspect.

That leaves the question of whether having accepted as we have done, that the intended appeal is arguable, if the intended appeal were to succeed, would the results be rendered nugatory if this application is not granted? In our view, if the application is not granted the first respondent is likely to put up the property charged for sale. If after that sale the intended appeal succeeds, then the applicant will have lost the property charged but not only that, it will have also lost, as it states, the business and all that goes with it. On the other hand, the applicant admits that money is owing to the respondent and it is a large amount of money. The respondent's business interests must also be considered. Under these circumstances, and doing the best we can, we will grant the injunction but upon conditions.

The injunction is granted upon condition that the applicant pays to the first respondent **Ksh.30,000,000/= (Thirty Million)** within **thirty (30) days** of the date hereof. Upon compliance with that, the injunction sought is granted till the intended appeal is heard and determined. There shall be a limited stay for **30 days** from the date hereof to enable the applicant to comply with the order. The first respondent will have costs of this application.

Dated and delivered at Nairobi this 24th day of March, 2006.

E.M. GITHINJI

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR