



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

Civil Appli 128 of 2006

RAMJI HARIBHAI DEVANI LIMITED .....APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED .....RESPONDENT

(Application for injunction pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Milimani Commercial Courts (Ochieng, J) dated 6<sup>th</sup> February, 2006

in

H.C. Civil Suit No. 482 of 2005)

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RULING OF THE COURT

The applicant, **Ramji Haribhai Devani Limited**, is in the business of manufacturing wide range of consumer products from its base at Industrial Area in Nairobi. It was originally with Barclays Bank as its bankers, but later it claims, that the respondent, **Kenya Commercial Bank Limited**, lured it into moving its bank account to the respondent upon promise of extending to it favourable banking facilities both as regards loans and overdraft facilities. The applicant, upon that understanding, applied for and was granted overdraft and loan facilities with the respondent and the applicant deposited with the respondent several securities together with legal charges to secure the loan facilities. The facilities were extended from time to time from the year 1988 and the applicant also provided more securities for the same facilities. Later, after the year 1993, the respondent reneged on the same promises made earlier and began to apply banking guidelines that were unfavourable to the applicant and which resulted into loss to the applicant. Some of these loses were detected and adjustments made but despite the applicant's protest, the respondent continued with the same to the extent that the loss incurred through the same system has, according to the applicant, exceeded by far the amount still due on account of loan and overdraft due from the applicant to the respondent, yet the respondent still has, according to the charges and debentures, the right to recall the loans and overdraft and to appoint receivers and/or sell the securities.

The applicant, therefore, filed a plaint in the superior court which was amended on 30<sup>th</sup> September, 2005 seeking judgment against the respondent for perpetual injunction restraining the respondent from recalling, taking possession of, selling and/or auctioning the applicant's properties which are the securities for the current loan; perpetual injunction against the respondent from appointing a receiver to manage the applicant's business in any way; an order that the respondent be estopped from exercising any

of the options against the securities set out in the various debentures and charges entered into between the parties; a mandatory injunction compelling the respondent to forthwith discharge and release the securities; special damages of Ksh.682,859,635/78 less Ksh.207,000,000/= being the total liabilities due to the respondent; general damages and costs of the suit. Together with the plaint, the applicant also filed Chamber Summons dated 30<sup>th</sup> August, 2005 in which it sought three orders all in the nature of a temporary injunction which were, in a summary, that the respondent be restrained from recalling, taking possession, selling, and/or auctioning the applicant's properties which are the securities for the facilities and from appointing receiver to manage the applicant's manufacturing plant situated on L.R. 209/4231 Industrial Area; a temporary injunction restraining the respondent from demanding and/or debiting the applicant's current and loan account number 250760069 and 31900645097 respectively with further interest pending the final determination of this suit, and that the respondent be restrained from demanding and/or receiving from the applicant any loan repayment installments in relation to the matter.

The respondent filed defence to the plaint and also filed amended defence denying the allegations in the amended plaint. It also objected to the Chamber Summons and filed a replying affidavit. The Chamber Summons was heard by the superior court (Ochieng, J) who, in a lengthy and detailed ruling delivered on 6<sup>th</sup> February, 2006, stated towards the end as follows:

**“In this case, the plaintiff appears to have no more than a hypothetical fear, as regards the realisation of the security or the appointment of the receivers. I therefore find that there is no reason for the court to delve into the realm of hypothesis, to ascertain whether or not the appointment of the receiver or the realisation of the security could lead to irreparable injury. Coupled with that, I hold the view that the balance of convenience rests in favour of the defendant for now. This is because the plaintiff says that it has always made all such payments as the defendant has asserted to be due. If such payments continue to be made, the defendant will have absolutely no reason to either appoint a receiver, or to have the charged property sold by public auction or otherwise. I see no good reason for disturbing that set-up in the interim period, whilst the plaintiff strives to prove its claim against the defendant.”**

The applicant felt aggrieved by the decision, part of which we have reproduced above, and intends to appeal against it. It has filed notice of appeal and is awaiting to lodge the record and memorandum of appeal. In the meantime, it has filed this notice of motion before us dated 9<sup>th</sup> May, 2006 and filed on the same date. In the notice of motion the applicant is seeking three injunctive orders which are an injunction to restrain the respondent from demanding or receiving from the applicant any loan repayment instalments in relation to the matter herein pending the hearing and determination of the intended appeal; an injunction to restrain the respondent from applying any interest, penalties, charges, commissions or any other fees on the applicant's loan account pending the hearing and determination of the intended appeal and lastly, an injunction to restrain the respondent from recalling, taking possession, selling, auctioning, or in any other manner realizing the applicant's properties which are the securities for the facilities provided and/or appointing receivers to manage the applicant's manufacturing plant situated on L.R Number 209/4231 Industrial Area, Nairobi, pending the hearing and determination of the intended appeal. The application is based on several grounds annexed to it and on the supporting affidavit sworn by the applicant's Director, Nilesh Devani. The sum total of the grounds is that the intended appeal is arguable. As the respondent (in the view of the applicant) has, as a result of the system used by the respondent to charge interests on the loan and overdraft, overcharged the applicant such that the entire loan and overdraft are now fully repaid, the respondent, in continuing to hold the securities is causing the applicant irreparable loss and thus if this application is not granted and the applicant's appeal succeeds, the same success of the appeal will be rendered nugatory.

The respondent has opposed the notice of motion through a replying affidavit sworn by John Kamiri, the Relationship Manager of the respondent in which it states again in a nutshell that the intended appeal is not arguable as the appellant has admitted that he still owes the bank an amount to the tune of Ksh.207,000,000/= and as such, the respondent has not breached the contract.

We have considered the notice of motion, the affidavit in support and the replying affidavit. We have also considered the able submissions by the learned counsel, the draft memorandum of appeal and the law

applicable. The law applicable in such cases such as the one before us brought under **rule 5(2) (b)** of the Court of Appeal Rules is now well settled. The applicant is enjoined in such an application to demonstrate within the standards of probability that the intended appeal is arguable or to put it in a different way, that the intended appeal is not frivolous. Secondly, the applicant must also demonstrate to the satisfaction of the Court, that the success of the intended appeal (were it to succeed), would be rendered nugatory if the application is not granted. - See the case of **Mohamed Said Ahmed vs. Grand Batian Hotels Ltd.** – CA No. Nai. 263 of 2004.

In this case, we do accept that matters such as whether the interest applicable was compounded according to the contract applicable i.e. whether it was to be compounded monthly or daily; whether **section 44** of the Banking Act was breached or not and the effect of such a breach together with the correct application of **section 52(1)** of the Banking Act and whether some money was irregularly taken out of the appellant's account and the effect of the same on the loan and overdraft facilities are matters that cannot be said to be frivolous. They are arguable and we have no difficulty on that aspect of the application.

However, as to the second requirement which is whether the success of the intended appeal (if it succeeds), will be rendered nugatory, we are not persuaded that the applicant has demonstrated the same to our satisfaction. If the appeal succeeds, then all that will happen is that the respondent will be stopped from receiving or demanding any further instalments from the appellant on the loan and overdraft facilities and the respondent will be stopped from selling, auctioning or in any way selling the securities deposited with the respondent. Further, the respondent will not be allowed to apply any interest, penalties, charges, commissions or any other fees on the applicant's loan account pending the hearing of the main suit. These would not include mandatory injunction directing the respondent to release the many securities the applicant deposited with the respondent to avert the main concern of the applicant, as Mr. Nyaencha, the learned counsel for the applicant, pleaded in his submission before us. The securities would still remain with the respondent as there is no mandatory injunction application before us. In any case, we do agree with the learned Judge of the superior court in his assertion in the ruling part of which we have reproduced hereinabove that the applicant in the application that was before the superior court and in this application is labouring under a fear that the respondent could appoint receivers and seek to realize securities if he did not obtain injunctive orders to stop the same. In our view, such fear is not founded as the respondent has not taken any step to realize the securities or even to appoint a receiver and so long as the applicant continues to pay the instalments agreed, the respondent will not take such steps in the near future. In short, there is no imminent danger of the applicant's securities being realized or of a receiver being appointed. In any event, even if the applicant continues paying the balance of the loan and pays it fully and later the court finds that the respondent owes the applicant some money as a result of the wrong calculations and wrong application of interest e.t.c as demanded, the respondent will pay back the same as it will, in our view, be able to do so. In the circumstances, should the appeal succeed, the same success would not, in our view, be rendered nugatory.

The upshot of all the above is that we decline to allow this application. It is dismissed with costs to the respondent. Order accordingly.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of June, 2006.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**