REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: TUNOI, O'KUBASU & GITHINJI, JJ.A.)

CIVIL APPLI NAI 109 OF 2005 (59-2005 UR)

BETWEEN

KENYA UNITED STEEL COMPANY LIMITED.....APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED.....1ST RESPONDENT

ADRIAN SPENCER DEARING.....2ND RESPONDENT

(Appeal from the ruling and orders of the High Court of Kenya at Nairobi at

Milimani Commercial Courts (Azangalala, J.) dated 14th day of April, 2005

in

H.C.C.C. NO. 580 OF 2003)
****

RULING OF THE COURT

By notice of motion expressed to be brought under r*ules 5(2)(b)* and *49(1)* of the Court of Appeal Rules (the Rules) the applicant, Kenya United Steel Company Limited, (the plaintiff in the suit in the superior court) prays for the following orders:-

"1. THAT this application be certified as urgent.

2. THAT this honourable court do dispense with service of the application and the same be heard ex-parte in the first instance for grant of prayer 3 and 4 pending the hearing and determination of the application interparties.

3. THAT the first respondents by themselves their servants and/or agents be restrained from appointing receivers/managers, and/or taking over or offering for sale assets, goods stock in trade, business and/or interfering in whatsoever manner with the plaintiffs quiet possession of its business and assets situated on sub-division number 884/VI Mainland Mombasa and L.R. No. 209/4228 Nairobi pending the hearing and determination of the applicants intended appeal.

4. THAT the second respondent by himself his servants and/or agents be restrained from acting as receivers/Managers, advertising his appointment and/or taking over or offering for sale assets, goods

stock in trade, business and/or interfering in whatsoever manner with the plaintiffs quiet possession of its business and assets situated on subdivision number 884/VI Mainland Mombasa and L.R. No. 209/4228 Nairobi pending the hearing and determination of the applicants intended appeal.

5. THAT the costs of this application be provided for."

This application is made on the following grounds:-

> ***"1. The learned Judge F. Azangalala on 14th April 2005 dismissed the applicant's application seeking the respondent herein to be restrained from acting as and/or appointing Receiver/Manager over the applicants assets and business pending hearing and final determination of the suit therein.***
>
> ***2. The applicant are aggrieved by the said ruling and orders and have filed a notice of appeal and requested for typed proceedings with a view to lodge an appeal against the entire ruling.***
>
> ***3. The applicants have an arguable appeal with high chances of success.***
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> ***4. The proposed grounds of appeal include the following:-***
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> > ***(i) The learned trial judge misdirected himself in finding that the first defendant had a valid debenture and therefore a right to appoint receivers.***
> >
> > ***(ii) The learned trial judge erred in law and on the facts in holding that the debenture of 9th March 1998 was valid and gave the 1st defendant/respondents a right to appoint a receiver.***
> >
> > ***(iii) The learned trial judge erred in law and on the facts in disregarding the misappropriation of the plaintiff/applicant's monies by the 1st defendant/respondent's employee and its effect on the matters herein."***

There is then a ***9 paragraph*** affidavit sworn by one, Shailesh Rajani, a director of the applicant company which sets out the background to this application.

The applicant herein, as the plaintiff in the superior court, filed a suit against the respondents seeking certain reliefs, the main one being a declaration that the appointment of a receiver and manager was premature and invalid, an injunction restraining the 1st respondent from exercising its rights under the loan agreement, a declaration that certain debentures were bad in law, and general damages. But before the hearing of the suit the applicant filed an application under Order XXX1X rules 1, 2, 3 and 9 of the Civil Procedure Rules seeking two main orders:-

"1. That the 2nd defendant by himself, his agents and/or servants be restrained from acting as receiver/manager, advertising his appointment, taking over or offering for sale assets, goods stock in trade, business and/or interfering in whatsoever manner with the plaintiff's quiet possession of its business and assets situated on sub-division number 884\VI mainland Mombasa and L.R. No. 209\4228 Nairobi pending the hearing and final determination of the suit herein.

2. That the 1st defendant be restrained from appointing any other or any receiver/manager over any of the plaintiff's assets (both moveable and immovable), business and\or goods situate on subdivision Number 884\VI mainland Mombasa and L.R. No. 209/4228 Nairobi pending the hearing and final determination of the suit herein."

That application was heard before Azangalala, J who, in a ruling delivered on ***14th April 2005***, dismissed the application with costs. The applicant has filed an appeal against that ruling but before that appeal is heard and determined we are being asked to grant a stay as stated at the commencement of this ruling.

Mr. Mungai, the learned counsel for the applicant, submitted that the right to appoint a receiver must flow from a valid debenture and as the debentures are being challenged then the appointment of a receiver was wrong. He went on to submit that if the receivers were appointed the company (applicant) would collapse as the receivership would kill the company.

In opposing this application, Mr. Waweru, the learned counsel for the respondents, submitted that no issue was raised as regards the validity of the debentures, and that in appointing receivers the 1st respondent was exercising the powers granted in the debentures. Mr. Waweru pointed out that since the year 2003 the applicant's business has not been operational. It was pointed out that there was no dispute that money was advanced to the applicant and that the applicant has been, for the last six years, looking for a financier to bail it out of its financial predicament but without success.

In his ruling Azangalala, J. stated, inter alia:-

"The plaintiff in its plaint and even in the present application does not challenge the debenture dated 9th March, 1998. Yet this debenture incorporated all the debentures. In my view even if the debentures challenged were defective, this per se would not invalidate the financial facilities extended to the plaintiff by the 1st defendant in the light of the debenture of 9th March, 1998. It seems to me that the plaintiff has raised objection to some of the debentures as an afterthought. The debentures challenged were all created over 15 years ago except the debenture dated 26th October, 1995. It is obvious to me that the plaintiff owes a large sum of money to the 1st defendant. It is obvious also that its capacity to repay the said sums is weakening by the day. In the premises the orders sought may not assist the plaintiff."

This being an application for stay under rule 5(2)(b) of the Rules this Court has to proceed with caution lest we prejudice the hearing of the main appeal. We must therefore confine ourselves to determining whether the conditions for granting of an order of stay have been satisfied. It is trite law that for an application under rule 5(2)(b) of the Rules to succeed, the applicant must satisfy the Court of two matters namely:-

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

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 eventually succeed would have been rendered nugatory by the refusal to grant stay or the injunction. (See RELIANCE BANK LIMITED (IN LIQUIDATION) VS. NORLAKE INVESTMENTS LIMITED – Civil Application No. NAI.93 of 2002 (unreported).

Our observation on this application is that the applicant herein was advanced money by the 1st respondent. We also observe that its capacity to repay the money was weakening and that the applicant's business has not been operational since 2003.

We have already set out the principles applicable in an application of this nature. These principles are firmly enunciated in two well known cases of **S.M. GITHUNGURI V. JIMBA CREDIT CORPORATION LTD [1988] K.L.R. 838 and J.K. INDUSTRIES LTD V. KENYA COMMERCIAL BANK LTD. [1982-88] 1 KAR.1088.**

Perhaps we need only refer to this Court's decision in **HASTINGS IRRIGATION LTD V. THE STANDARD CHARTERED BANK (K) LTD & OTHER [1987] KLR 280** in which it was held that it was not appropriate, within the above principles for the Court to interfere in the passage of the receivership unless it could be shown that the conduct of the receivers and managers was seriously oppressive, or not in accordance with the recognized principles of law and of commercial practice, or that there were clear and compelling reasons to do so.

Applying the principles stated in those cases to the facts before us, we do not think it can be said that even assuming that the appellants intended appeal is arguable the same would be rendered nugatory if stay was refused.

In view of the foregoing, we are satisfied that this is not a proper case in which to grant an order of stay. Accordingly, the application for stay of the order of Azangalala, J. delivered on 14th April, 2005 is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 3rd day of June, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR