IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, BOSIRE & OWUOR JJ.A)

CIVIL APPLICATION NO.NAI.327 OF 2002

BETWEEN

SAVINGS AND LOAN KENYA LTD ..... APPLICANT

AND

JAYANTI & JAGDEEP DEVELOPERS LTD ..... IST RESPONDENT

JAYANTI A. PATEL ..... 2ND RESPONDENT

JAGDEEP L. KOTEDIA ..... 3RD RESPONDENT

(Application for stay of execution in an intended appeal

from the judgment/order of the High Court of Kenya

at Nairobi (the Honourable Mr. Justice Kasanga

Mulwa) delivered on 26th September 2002

in

H.C.C.C. NO.2159 OF 2000)

****

RULING OF THE COURT

Savings and Loan Kenya Limited, (the applicant) took out a Notice of Motion under rule 5(2)(b) of the Court of Appeal Rules (the Rules) seeking an order that there be a stay of execution of the decree of the superior court given on 26th September, 2002 in its Civil Case No.2159 of 2000, pending the hearing and determination of an intended appeal against the said decree. The applicant was the defendant in the aforesaid suit which was filed by Jayanti & Jagdeep Developers Limited (first respondent), Jayanti A. Patel (second respondent), and Jagdeep L. Kotedia (third respondent), claiming various reliefs against the applicant. Before we set out those reliefs, a short resume of the background facts is imperative.

The applicant at the request of the first respondent, agreed to lend to the latter Kshs.50 million to enable it to complete the construction of several maisonette units. Parcel of land LR No.1870/111/461 was charged to secure the repayment of the loan. The disbursement of the money was to be made in

instalments. Kshs.25 million was disbursed on 10th June, 1997 Kshs.7,615, 607, on 6th November, 1997, and Kshs. 5 million on 31st January, 1998, bringing the total disbursed to Kshs37,615,607. According to the respondents that money was not paid promptly and that the balance was never disbursed at all. It was their case in the court below that the delay in payment and the failure by the applicant to pay the balance made it impossible for them to complete and sell the maisonettes within the projected period of about one year. Consequently, the first respondent, as borrower, could not repay the loan as per the terms of the borrowing. It was further their case that repayment of the loan, apart from the element of interest, was to be from the proceeds of sale of those maisonettes.

The respondents, among other things, also alleged that the guarantees which were given by the second and third respondents as additional security for the repayment of the loan are null and void for reasons that they were given in favour of a body that was unknown to them. Their specific complaint in that regard was that although the applicant was the lender the guarantees were at the applicant's request given to Kenya Commercial Bank Limited, which was shown therein as the lender even though it was not a party to the loan agreement. On that ground and the reason that the second and third respondents allege that they were improperly made to sign copies of blank guarantees the respondents' case in that regard is that the said guarantees and the charge are null and void.

On or about 13th April, 2000, the applicant advertised the aforesaid property for sale in purported exercise of its statutory power of sale, for the reason that the first respondent was in default in the repayment of both the principal sum and interest. The sale having aborted the applicant readvertised the sale of the property on 5th January, 2001. That provoked the filing of the aforesaid suit.

The applicant as defendant in the suit filed a written statement of defence in which it averred, inter alia, that the loan to the first respondent was on terms set out in the letter of offer; that the amount of each instalment to be disbursed was conditional on certain certificates by the first respondent's Valuers and Architects regarding the progress of the construction work on the subject maisonettes being given, and not automatically at the discretion of the first respondent; that repayment of the loan and interest thereon was agreed to be within a period of 12 months, and that the security documents were all proper as the respondents knew all along that the applicant was a wholly owned subsidiary of the Kenya Commercial Bank Limited. The applicant then proceeded to counterclaim the outstanding loan and interest which as at January 19th, 2001 stood at well over Kshs.63,617,785.90.

The respondents' plaint seeks the following reliefs -

(a)A declaration that the charge document is null and void for want of consideration.

(b)An order that the applicant do forthwith discharge the said charge.

(c)An order for the cancellation of the aforesaid guarantees.

(d)An order cancelling the registration of the aforesaid charge from the relevant register in the Registry of Companies.

(e)An injunction to restrain the applicant from selling, assigning, transferring, alienating or otherwise dealing with parcel of land known as L.R. No.1870/111/461.

(g)An order for an account as to how the amount the applicant claims from them is arrived at.

(h)An order that the applicant pay general and aggrevated damages.

(i)An order for the payment of Kshs.144,000,000 being loss arising from reduction in property values.

(j)An order for the payment of Kshs.19,500,000/= being loss of interest.

(k)An order for the payment of Kshs.16 million being loss arising from penalties imposed by contractors.

(l)An order for a setoff of any money found owing to the applicant against any damages in favour of the respondents.

(m)In the event that judgment is entered in favour of the applicant, and money is found owing to it after the setoff the same be liquidated by monthly instalments of Kshs.300,000/= till payment in full.

There were other prayers for various declaratory orders but we do not consider it necessary to set them out herein. On 26th September, 2002, a judgment prepared by Mulwa, J. was delivered by Kuloba J. on his behalf. In that judgment the learned Judge granted orders in terms of prayers (a), (b), (c), (d), (e), and (h) and assessed damages at Kshs.78,900,000. After allowing a setoff in the sum of Kshs.43,435,264, the balance of Kshs.35,464,736/= was found to be due and owing to the respondents, plus costs and interest. It is against that judgment that a notice of appeal was filed on Ist October, 2002. We were informed from the bar that Kshs.35 million odd has been deposited with the superior court to obviate execution. We were similarly informed that the respondents got back their security documents.

It was common ground that the damages awarded to the respondents were based on an alleged breach of a contract. Mr. Kalove, for the respondents, submitted that the amount awarded was made up of Kshs.16 million special damages and Kshs.61 million general damages. But Mr. Lenaola, for the applicant, was of the view and submitted as much that there was no proper foundation laid for claiming the general damages or any other money.

Two principles guide the court in applications of this nature. First, an applicant must show that his appeal or intended appeal is arguable or put another way, that it is not frivolous. Second, that the success in that appeal will be rendered nugatory unless he is granted a stay or injunction as the case might be.

It was common ground that the first respondent did not complete the maisonettes for which it sought and obtained a loan from the applicant. It was also common ground that the loan from the applicant would not without more cover the cost of the entire project. The first respondent needed to raise more money from other sources. It was not in dispute that the loan was to be disbursed in tranches depending on the stage of construction and whether or not the instalment previously disbursed had been exhausted.

In his judgment Mulwa J. held that the applicant delayed in disbursing the sums it paid over to the first respondent and that it improperly withheld the final instalment of Kshs.12,383,993, as a result of which the first respondent delayed in the completion of the maisonettes. The applicant, in his view, was thus in breach of the loan agreement. The learned Judge came to that conclusion notwithstanding an earlier finding that the first respondent was in arrears of interest on the already disbursed amount and the arrears had been outstanding for over two months before the applicant's alleged breach. Part of the applicant's defence was that it withheld the last instalment of the loan because the first respondent was in arrears of the interest due to it. The learned Judge however rationalized the issue of interest arguing that the applicant did not raise the issue before suit to justify its failure to release the last instalment of the loan to the first respondent. The learned Judge also blamed the applicant for allegedly releasing lesser sums at a time than had been requested by the first respondent. It is not clear from the learned Judge's judgment whether whatever sums the first respondent requested tallied with certificates which might have been issued by the valuers and architects of the building project. Be that as it may, the learned Judge concluded that the alleged failure by the applicant to release the last instalment of the loan to the first respondent fully discharged the respondents from the charge and the guarantees respectively. The learned Judge did not however think the charge and the guarantees were invalid as alleged by the respondents.

On the basis of the alleged breach of contract by the applicant the learned Judge proceeded to assess general damages. In Dharamshi v. Karsan[1974]EA 41 the Court of Appeal for East Africa held that general damages may not be properly awarded for breach of a contract in addition to loss of profit. And in Habib Zurich Finance (K) Ltd v. Lee G. Muthoga & Another, (Civil Appeal No.144 of 1991)(unreported) this Court, applying the aforesaid case, held that as damages arising from a breach of contract are usually quantifiable general damages cannot be awarded in that regard. In view of those authorities an issue arises as to whether there was a proper basis for the award of general damages by the learned Judge in the present case. Besides the first respondent was in default in the payment of interest before the alleged

breach of contract by the applicant. In view of that another issue arises as to whether or not the applicant was obliged to release the last instalment of the loan. In view of the two issues, above, we are of the view that the applicant's intended appeal is arguable.

On the second limb of the application it was contended on behalf of the applicant that if the aforesaid decree is executed the respondents are unlikely to refund the amount of the decree and thus render the applicant's appeal, if successful, nugatory. The first respondent was unable to complete construction of the maisonettes for which it sought financial accommodation. It needed just under Kshs.12 million to complete the construction. If the first respondent was unable to raise that money, it is highly unlikely that it will raise the Kshs.35 million odd, being the subject matter of the applicant's intended appeal. Besides, the trial Judge ordered a return by the applicant of the security documents. Consequently, the applicant has nothing to look to for the recovery of its money should its appeal eventually succeed. We have not been shown any evidence that the respondents have the means of refunding the decretal sum, if a stay is not granted and the applicant's appeal were to succeed.

In the result we are of the view that this is a fit case for the grant of an order of stay. Accordingly we order that the execution of the decree dated 26th September, 2002 in Nairobi High Court Civil Case No.2159 of 2000, be stayed pending the determination of the applicant's intended appeal against it. The costs of this motion shall be in the intended appeal. Those are our orders.

Dated and delivered at Nairobi this 17th day of January, 2003.

R.O. KWACH

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR