



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, Lakha & Githinji JJ A)

CIVIL APPLICATION NO NAI 154 OF 2003

NATIONAL BANK OF KENYA LTD & 2 OTHERS.....APPLICANTS

VERSUS

SAM-CON LTD.....RESPONDENT

(Application for stay of execution and injunction pending the hearing
and determination of an appeal from the Ruling and order of the High

Court at Nairobi Milimani Commercial Courts (Mwera, J)

dated 14th May, 2003 in HCCC No 174 of 2003)

RULING

We have before us an application by way of a Notice of Motion dated 12 June, 2003 and filed on behalf of the applicants under rule 5(2)(b) of the

Court of Appeal Rules. It seeks an order for restraining the respondent from removing the 2nd and 3rd applicants from the respondent's premises or in any other way interfering with the receivership pending the hearing and determination of this application and the intended appeal. Secondly, it also seeks a stay of the execution of the orders made by the superior court (Mwera J) on 14 May, 2003 pending the hearing and determination of the intended appeal and for the costs of the application.

The respondent at all material times was indebted to the first applicant under facilities secured by a debenture from the respondent. Upon default and in the exercise of its powers, the first applicant appointed the 2nd and the 3rd applicants as the receivers. This provoked the respondent to apply to the superior court for an injunction and for the ejection and removal of the 2nd and 3rd applicants from the respondent's premises. The application made by the respondent in the superior court was in effect an application for an injunction and is acknowledged as such by the parties and the learned judge.

After hearing the said application, the learned judge, in a reserved ruling, found that the respondent did not have a *prima facie* case with a probability of success. He expressed himself thus:-

“The plaintiff cannot in such circumstance be said to have made out a *prima facie* case with probabilities of success. What success can a debtor have by suing a creditor whose debt is admitted? None at all.”

Notwithstanding that clear finding, the learned judge proceeded to make an order which in effect amounted to an order for injunction. The applicants, being dissatisfied, have filed a Notice of Appeal within time and the present application seeking an injunction and stay as aforesaid.

It is contended on behalf of the applicants that having found that the respondent did not have a *prima facie* case with a probability of success, the learned judge was not entitled, in law or otherwise, to grant the order which he did.

With respect, we think this is an arguable point in the intended appeal.

The conditions for the granting of an interlocutory injunction are now, we think, well settled. In *Giella v Cassman Brown & Co Ltd* [1973] EA 358 at pg 360, it was stated as follows:-

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (*EA Industries v Trufoods*, [1972] EA 420.)”

Furthermore, the learned judge considered other circumstances on an equitable basis and the balance of convenience. He held:-

“The court however acknowledges that the plaintiff has come to it praying for the discretionary and prerogative relief of injunction – an equitable remedy. The court will consider and grant or refuse such a remedy after carefully considering all the circumstances obtaining including the conduct of the parties and especially the applicant. The interests and rights of the respondent shall not be overlooked or ignored in any way. This beckons the balance of convenience to come into play.....”.

With respect, these are arguable points. First, he attempted to have other circumstances apart from the conditions set out above to be considered. Such a course was roundly rejected by the Court of Appeal in *Abel Salim & Others v Okong’o & Others* [1976] KLR 42 at p 48 where it was, *inter alia*, held:-

“In granting or refusing to grant an interlocutory injunction, a court exercises its discretion. I am of the view that the conditions for the grant of an interlocutory injunction are now well settled in East Africa, and I can see no reason to depart from them. These are stated in *Giella v Cassman Brown and Co Ltd* [1973] EA 358 at 360.”

Secondly the court will decide an application on the balance of convenience only if it is in doubt. The finding by the learned judge that the respondent had no *prima facie* case was clear and express. With respect to the learned judge, it is arguable that he misdirected himself in these two respects in reaching the conclusion.

The above sufficiently disposes of the present application before us. We are satisfied upon a careful consideration of the facts that the intended appeal will be rendered nugatory if a stay is not granted. The application succeeds and we hereby grant it as prayed with costs to abide the indeed appeal.

Dated and delivered at Nairobi this 4th day of July, 2003

R.S.C. OMOLO

.....

JUDGE OF APPEAL

A.A. LAKHA

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR