



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT MOMBASA  
CORAM: GICHERU, TUNOI & LAKHA, JJ.A.  
CIVIL APPLICATION NO. NAI 11 OF 2001 (UR 7/2001)

BETWEEN

GARRODA CORAL BEACH LIMITED ..... APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED

COMMISSIONER OF LANDS ..... RESPONDENTS

(An application for a restraining injunction pending the lodging, hearing and determination of appeal from the ruling of the High Court of Kenya at Mombasa (Khaminwa, Comm. of Assize) dated 10th May, 2000  
in  
H.C.C.C. NO. 88 OF 2000 [MSA])

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**RULING OF THE COURT**

By this motion on notice expressed to be brought under rule 5 (2) (b) of the Rules of this Court the applicant is seeking to stay the orders of the superior court made on 10th May, 2000 pending the hearing and determination of the intended appeal therefrom.

By a charge dated 7th October, 1997, the applicant charged its two properties known as CR 10320/18 and CR 13434/13 a tourist facility situated within the Watamu Coral Beach of the North Coast of Kenya, together with the buildings and improvements erected and being thereon (hereinafter referred to as "the suit property") to the first respondent to secure a loan of Shs. 80 million, U.S. \$ 3 million and various other sums of money.

It is not in dispute that soon after the loan was advanced the business of the applicant experienced difficult times and the applicant fell into serious arrears in payment of the principal sum and interest and was unable to service the loan. Consequently, the first respondent called up the entire debt from the applicant and threatened to exercise its statutory power of sale and auction the suit property.

On 18th February, 2000, the applicant, to forestall the threat, filed suit and prayed for a declaration that the instrument of charge over the suit property was illegal, ineffective and inoperative on the grounds inter alia that no Presidential consent to charge was ever obtained; that the charging clause as contained in the charge is vague and uncertain; and that as no redemption date has been stated in the charge there is no covenant on the part of the applicant to repay the loan. Simultaneously, the applicant sought an injunction

to restrain the respondents from selling, alienating, transferring or otherwise disposing of the suit property pending the hearing and determination of the suit.

However, the learned Commissioner of Assize, Mrs Khaminwa, declined to grant the injunction. She observed that the applicant did not dispute its indebtedness to the first respondent and the existence of the charge. Further, she held, that the applicant was not entitled to restrain the first respondent from exercising its statutory power of sale on grounds of technicalities. In her view, these could not invalidate a charge. It is from this decision that this application was mooted and prosecuted.

Before us Mr Bryant for the applicant, rehashed his previous submission before the superior court. But there was a new development. The suit property was disposed of by way of a public auction on 26th January, 2001, and the new purchaser has now taken possession of it. Before that, the exact date not being known, the suit property had been severely gutted by a fire and an insurance claim was or is being lodged. This, of course, is not the subject of this application.

On the issue of whether the applicant has an arguable appeal, we have keenly listened to the rival submissions of parties, and having done so, we think the intended appeal is indeed weighty and arguable. It cannot in any way be said to be frivolous.

Will the intended appeal be rendered nugatory if we do not grant to the applicant the stay it seeks? We bear in mind that the applicant is no longer in physical control or possession of the suit property. Also, that this Court loathes making orders in vain. On this point, we are satisfied that the applicant has failed to show us in what manner the success of its appeal will be rendered nugatory if we do not grant to it a stay of execution. Moreover, there was no allegation made before us that the respondents were entities of straw and would not be able to pay to the applicant any damages or losses it may be found to incur or to have suffered due to a faulty charge or a wrong exercise of the first respondent's statutory power of sale. We need not reiterate that there would not have been any difficulty in physically repossessing the suit property from the new purchaser should the appeal succeed.

The applicant having not satisfied us that unless we grant to it an order of stay, its appeal, if successful, will be rendered nugatory, it must follow that this application must fail and the same is hereby dismissed with costs.

Dated and delivered at Nairobi this 23rd day of February, 2001.

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**A. A. LAKHA**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR