



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, BOSIRE & OWUOR JJA)

CIVIL APPLICATION NO. NAI. 18 OF 2000(11/2001 UR)

BETWEEN

JOSEPH KINORU KAHONGEAPPLICANT

AND

BARCLAYS BANK OF KENYA LTD IST RESPONDENT

BATIAN DAIRY PRODUCTS LTD 2ND RESPONDENT

**(An application for an injunction in an intended appeal
from the ruling and order of the High Court at
Nairobi (Milimani) (Commissioner of Assize Philip
Ransley) delivered on 18th January, 2001**

in

H.C.C.C. No. 3 of 2001

RULING OF THE COURT

Joseph Kinoru Kahonge, the applicant, as the plaintiff in Nairobi High Court Civil Case No.3 of 2001, unsuccessfully applied for a temporary injunction in that suit under Order 39 rules 1 and 2 of the Civil Procedure Rules, against Barclays Bank of Kenya Ltd, the Ist respondent, to restrain it by itself, its servants or agents from selling or offering for sale Land Parcel No. LR.No.36/11/1031 pending final determination of the suit. He was aggrieved and promptly filed a Notice of Appeal declaring his intention of appealing against the refusal. He has herein taken out a motion under rule 5(2)(b) of the Court of Appeal Rules, as he is perfectly entitled to do, seeking the same relief, pending the hearing and determination of an intended appeal against the refusal by the superior court to grant him the injunction as aforesaid.

In an application under rule 5(2)(b) aforesaid, for an applicant to succeed he is principally obliged to show, firstly, that his appeal or intended appeal is arguable and not frivolous. Secondly, that unless he is granted an injunction the appeal or intended appeal if successful will be rendered nugatory (see Githunguri v. Jimba Credit Corporation Ltd. (Civil Application NO.NAI.161 of 1988) (unreported). In such an application the court exercises discretionary jurisdiction which discretion has to be based on evidence and sound legal principles. The duty squarely falls on the applicant to place such evidence

before the court hearing his application.

The background facts are short. The applicant with three or so other people describing themselves as directors of a company known as Batian Dairy Products Limited, the 2nd respondent, executed personal guarantees to secure repayment by the 2nd respondent of Kshs.46 million which the 1st respondent, agreed to and eventually lent the company. In addition, the applicant, as did the other directors, gave to the 1st respondent his aforesaid property as supplemental security to secure Kshs.9 million of the money lent. The 2nd respondent was to use the loan for the importation and installation of machinery for milk processing. The machinery was imported but there was a hitch in clearing them at the port of Mombasa. In the meantime the 2nd respondent defaulted in repaying the loan. Following the default the 1st respondent made a formal demand for payment. On the material before us it is clear that at some stage some directors of the second respondent entered into negotiations with the 1st respondent as to the repayment of the loan. The applicant denies having taken part in those negotiations even though the documentary evidence on record suggest he did. Be that as it may it appears to us that repayment of the balance of the loan was shared among the principal guarantors. Except for the applicant, all the other guarantors have repaid their respective shares, and on the basis of the terms of their agreement with the 1st respondent they appear to have been released from liability. According to that agreement the applicant's share was Kshs.10 million which has since risen to over Kshs.14 million due to accrued interest. It is this sum that the 1st respondent seeks to recover from the applicant by selling his aforesaid property. The said property was advertised to be sold on 7th February, 2001, at 11 a.m. The applicant's suit was provoked by that advertisement.

In his plaint the applicant admits not only that he executed a personal guarantee as aforesaid but also that he gave his aforesaid property to the 1st respondent as security. He is silent on whether or not he did so as a director in the 2nd respondent. But for some reason he raised the issue in the injunction application which he filed contemporaneously with the plaint. In his affidavit in support of the application he deposes, inter alia, that he executed the personal guarantee and gave his property to the 1st respondent as security on the understanding that he would become a shareholder and director in the 2nd respondent, but because he would be co-directors in the company conducted its affairs in a secretive manner he realized too late that there was a conspiracy between the said directors and the 1st respondent to defraud him of his property.

Mr Ransley, a Commissioner of Assize, heard the applicant's application in the superior court. He did not think the applicant made out a prima facie case with the probability of success. He dismissed the plaintiff's contention that he was neither a shareholder nor a director in the second respondent. In doing so he relied on a letter dated 6th June, 1998, signed by the applicant and another in which they describe themselves as directors in the 2nd respondent. The said letter authorized the release to the 1st respondent, of machinery imported by the 2nd respondent with funds lent to it by the 1st respondent. The learned Commissioner of Assize concluded that the applicant could not have signed that letter, as he did, if he was not a director in the second respondent. Mr. P. Lumumba who appeared for the applicant with Mr Njiru Boniface, submitted before us that the material which was before the trial court did not justify such a conclusion. In his view there exists a doubt as to whether or not the applicant has ever been a director in the 2nd respondent.

The letter of 6th June, 1998, was signed more than one and half years after the applicant gave his property to the 1st respondent as security, and over a year after the 1st respondent lent money to the 2nd respondent. The applicant does not deny signing the letter and, prima facie, therefore he must have signed the letter as a director in the 2nd respondent. We see no arguable point on that matter.

The second issue raised before us by Mr Lumumba, is the fact that the 1st respondent entered into an arrangement which purports to release from liability all directors in the 2nd respondent, except the applicant. The liability of the directors to the 1st respondent was both joint and several. Although there is some evidence that the applicant was party to the arrangement which released his co-directors as joint guarantors, there is no document executed by the applicant to show that he was. As we stated earlier the other directors have already acted on that arrangement and have apparently been released from their obligations under their respective guarantees. That fact and also the fact that only the applicant's property

is slated for auction raises an arguable point on the bona fides of the planned sale of the applicant's property. Contrary to what Mr Namachanja for the 1st respondent submitted, the documents appearing at pages 147 to 151 of the record of the application do not clearly show the applicant was involved in discussions which culminated in the sharing among and payment by some directors in the 2nd respondent of the outstanding loan. It is possible and probable that the applicant did. However his duty in an application of this nature is limited to showing the existence of an arguable appeal. That being our view of the matter it follows that the applicant has shown that his intended appeal is arguable.

Regarding the second limb of the application, namely, whether unless we grant the injunction prayed for the applicant's intended appeal if successful, will be rendered nugatory, we say this. The property due to be auctioned is land. In this country issues involving rights in land are sensitive. So if the applicant were to lose his aforesaid property and he eventually succeeds in his intended appeal his success in the appeal will be futile as damage might not fully compensate him for the loss.

In the result and for the foregoing reasons we are minded to allow the applicant's application, but not without terms. The applicant gave the 1st respondent his property as supplemental security of money lent to the 2nd respondent. He concedes the 2nd respondent has not fully repaid the loan. He authorized the release of 2nd respondent's machinery to the 1st respondent. Prime facie, therefore he is not completely innocent in the matter. In view of that we grant him an injunction as prayed, but conditional on him depositing the claimed Kshs.14,848,082/= in an interest bearing bank account with the 1st respondent in the joint names of his counsel and that of the 1st respondent, within 30 days of this ruling, failing which his application will stand dismissed with costs.

Otherwise the costs of this application shall be in the intended appeal.

Dated and delivered at Nairobi this 16th day of February, 2001.

R.O. KWACH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR