



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: LAKHA, OWUOR & KEIWUA, JJ.A)
CIVIL APPLICATION NO. NAI. 89 OF 2001 (55/2001 UR)**

BETWEEN

WALLACE WAMBUGU

**GEORGE K. WAMBUGU 1ST APPLICANTS
(Legal Representatives of the Estate of Douglas Kanuri Wambugu (Deceased))**

SUSAN GACHAMBI WAMBUGU 2ND APPLICANT

BULL CAFE LIMITED 3RD APPLICANT

VERSUS

KENYA COMMERCIAL BANK LIMITED 1ST RESPONDENT

REUBEN SARUNI OLE NAKUO 2ND RESPONDENT

**(Application for an injunction and/or stay of the order
in an intended appeal from the Ruling of the High
Court of Kenya at Nairobi (Mr. Justice Hewett) dated
13th December, 2000**

in

H.C.C.C No. 595 of 2000)

RULING OF THE COURT

The applicants invite us to exercise our discretionary jurisdiction under **Rule 5(2) (b)**, of the Court of Appeal Rules (the Rules) to grant an injunction restraining the 1st respondent from selling the suit premises known as **L.R Nos. 209/8606, 209/6071 and 209/7400**, pending the hearing and determination of the applicants' appeal. In the alternative the applicants be granted stay of any further proceedings (and all the consequential orders thereof) in **H.C.C.C NO. 595 of 2000**, pending the hearing and determination of their appeal.

The application herein does not present much difficulty. As it is now well settled, the principle on which to exercise our jurisdiction under **rule 5(2) (b)** of the Rules are, that stay or injunction would be granted if the intended appeal is not a frivolous one, or as it is sometimes put, if the intended appeal is an arguable one. Additionally stay will be granted to ensure that the intended appeal if successful, would not

be rendered nugatory.

Facts relevant to this application have been clearly, but briefly stated in the ruling of the late learned Judge, Hewett, J. Briefly stated, the applicants made an injunction application in the case to restrain the 1st respondent from selling the three suit premises alluded to herein above. That application was granted by the learned Judge but with certain conditions namely: that the injunction sought was granted to prevent the sale of the three properties belonging to the applicants for a limited period, but that such injunction shall not extend to fresh statutory notices, fresh notification of sale and fresh advertisements. According to the Judge's calculation of the period he allowed, the injunction order would extend till the 21st May, 2001.

It is not in dispute that soon after the delivery of the ruling on 13th December, 2001, the 1st respondent served the 1st and second applicants, the legal representative of the estate of one Douglas Kanini Wambugu 1st plaintiff/applicant (the deceased) with a fresh statutory notice dated 12th January, 2001 indicating that the suit premises would be sold at the expiry of three months from the date of service of the notice. The notice also indicated that a colossal sum of **47,129,971.40** was being demanded from the deceased's Estate on account of his guarantee in favour of the 1st respondent and on account of Davco Enterprises Ltd. who is the principal debtor in the suit but not a party to the suit. The shareholding in Davco Enterprises Ltd. was as follows: 27,500 shares were held by the 1st applicant (the deceased) and his wife the 2nd applicant. Out of 65,000 shares in the company another 27,500 shares are held by the wife of the 2nd respondent. The deceased was the chairman of the company and the 2nd respondent was the Managing Director. The Company dealt mainly in coffee locally and abroad. In 1996 the 1st respondent agreed and entered into a contract with the company whereby certain sums of money were availed to the company both in local and foreign currency as overdrafts. By the Facility letter (agreement) dated 11th September, 1996. It was agreed that the sum of US **\$430,000** would be used by the company "**against confirmed export orders received**". The 1st respondent in turn took the following securities: fifteen properties belonging to the 2nd respondent in Kajiado District and Mavoko Township. Likewise the three suit premises, two of them L.R No. 209/8606 in Industrial Area and L.R No. 209/6011 in Bahati Estate belonging to the deceased, 1st applicant and L.R No. 209/7400 in Uhuru Estate Nairobi belonging to the 3rd applicant, another family company. The 1st respondent was also secured by personal guarantees amounting to Ksh.26M. from each of the directors of the company, who were 1st and 2nd applicant, 2nd respondent and a debenture on the 3rd applicant.

The monies were advanced, but soon after that, trouble started between the deceased and the 2nd respondent whereby, allegations of fraud and mismanagement by the 2nd respondent have been pleaded in the plaint and deponed to in the affidavit sworn in this application as well as gross negligence being alleged against the 1st respondent in the manner it handled the accounts. When payments were not made, the 1st respondent decided to exercise its statutory powers of sale and threatened to sell the suit premises. Proceedings in the superior court from which the ruling herein emanates were commenced only against the 1st respondent. Mr. Machira has urged before us that there are substantial points of law and fact that he will canvass at the hearing of the intended appeal. In particular the fact that the learned Judge misdirected himself in respect of the terms of the agreement (Facility letter) that was entered into by the parties. The same provided inter alia that "approval has been given subject to pre-export financial facility being utilized against confirmed orders received". He submitted that once the learned Judge had found that the 1st respondent had not strictly enforced that arrangement, he should have held that the applicant had established a prima facie case and were therefore entitled to the injunction they sought without any limitation.

Mr. Machira's quarrel with the ruling of the learned Judge is limited, as we understand him, to the limitation or conditions the Judge imposed. It cannot therefore be said that he misdirected himself or that he did not correctly apply the principles set out in **Giella vs Cassman Brown** [1973] EA at page 358. The view we have taken in this matter is that the learned Judge was entirely within his jurisdiction to exercise his discretion in the manner he did and indeed grant the order on the terms that he did. We have not been persuaded that that discretion was exercised wrongly. This was a matter that was entirely within the Judge's discretion and this Court would not normally interfere in the exercise of that discretion unless the same has been exercised on wrong principles. It has not been demonstrated to us that this is the case. We

are not satisfied that the intended appeal is arguable. It therefore becomes unnecessary for us to consider whether it would be rendered nugatory if we do not grant the orders sought.

Mr. Machira informed us that although the period for the fresh notice given by the 1st respondent expired on or about the 12th of April 2001, no steps have been taken in respect of the other limbs of the order, in that there has been no notification and advertisements of the sale by an auctioneer.

In our view the applicants have ample time to have their appeal filed and heard. For these reasons, this application fails and the same is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 29th day of June, 2001.

A.A. LAKHA

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

M. Ole KEIWUA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR