



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: LAKHA, BOSIRE & KEIWUA J.J.A)
CIVIL APPLICATION NO.NAI.321 OF 2001
BETWEEN**

**SOUTHERN CREDIT BANKING CORPORATION LTD APPLICANT
AND
GRANDWAYS VENTURES LTD IST RESPONDENT
WELLANCE BANK LTD (In liquidation) 2ND RESPONDENT**

(An appeal from the ruling and orders of the High Court
of Kenya at Kisumu, (Commissioner of Assize Mr.
P.K.K. Birech) dated 14th of September, 2001

in

H.C.C.C. NO. 272 OF 2001)

RULING OF THE COURT

This is an application under rule 5(2)(b) of the Court of Appeal Rules (the Rules) for a stay of execution of an order of injunction pending the filing, hearing and determination of an intended appeal. Southern Credit Banking Corporation Ltd, the applicant is a bank carrying on business as such, in Nairobi. The respondents; Reliance Bank Limited (in liquidation) and Grandways Ventures Limited, are named the respondents. The application was provoked when, on 14th September, 2001, on the application of Grandways Ventures Limited (the 1st respondent) in **Kisumu High Court Civil Case No.272 of 2001**, a Commissioner of Assize, P.K.K Birech granted injunctive reliefs against both respondents restraining them from dealing with property known as Reliance Centre, which stands on parcel Nos. L.R Nos 1870/IX/114, 1870/IX/115 and 1870/IX/968. The property in question was then registered in the name of Grandways Ventures Limited as lessee for a 99 year term.

The 1st respondent charged the property in favour of First American Bank of Kenya Limited, on or about 31st December, 1996, to secure repayment of overdraft credit and other banking facilities; and in March 1997, the 1st respondent granted a lease to Reliance Bank Limited for a term of 99 years less one day over the same property. The terms of the said lease were reduced into an instrument which was duly engrossed by the parties and was endorsed by First American Bank of Kenya Limited in the following manner:

"First American Bank of Kenya Limited as chargee HEREBY CONSENTS to the within-written lease without prejudice to its rights and to the duties of the within-named Landlord under the said charge registered in its favour. signed

For FIRST AMERICAN BANK OF KENYA LIMITED" The lease to Reliance Bank Limited (2nd respondent) was to enable it to carry on its business of banking, which it did until about 12th September,

2000 when it was placed in liquidation by the Central Bank of Kenya and a liquidator was appointed for that purpose. And in exercise of his powers, the liquidator applied for consent from the 1st respondent to assign the 2nd respondent's lease, but which consent the 1st respondent refused to grant. Despite the refusal the liquidator allegedly gave possession of the property, subjectmatter of the lease, to the applicant on terms which, allegedly, were not disclosed to the 1st respondent. That prompted the 1st respondent to commence civil proceedings against both respondents, seeking, inter alia, a declaration that the 2nd respondent has neither the right nor the capacity to assign or lease the aforesaid property without its consent, a permanent injunction to restrain the 2nd respondent by itself or its servants or agents or otherwise from disposing of the property to the applicant or any other persons, and a permanent injunction restraining the applicant by itself, servants or agents or representatives or assignees from taking possession of or carrying on any business there and that both respondents deliver vacant possession of the property to the 1st respondent.

The suit was filed on 17th July 2001, and two days later, the 1st respondent filed a chamber summons for injunctive reliefs more or less on the same terms as the prayers in its plaint. It is the grant of orders in that application which provoked the motion before us. In allowing the application the superior court, on the main, came to the conclusion that the consent of the 1st respondent was essential before any assignment of the property, and that in absence of such consent, a prima facie case with the probability of succeeding upon trial had been established as entitled the 1st applicant to orders of interlocutory injunction.

Before us, Mr. Mungai for the applicant, urged the view that even assuming that consent to assign was contractually necessary, the provisions of section 40A of the Banking Act, overrides the contractual rights of the parties and therefore rendered any such consent otiose. On that ground, which he said was the applicant's main point, learned counsel submitted that the applicant has an arguable appeal as entitles it to a stay under rule 5(2)(b) aforesaid. That may well be so. But there is a second principle under the rule which an applicant has to satisfy the Court on before he can be entitled to an order. Will the intended appeal be rendered nugatory if a stay is not granted and the applicant were eventually to succeed in its intended appeal?

The suit property is office accommodation which the applicant is allegedly using for its banking business. It is the applicant's case that it operates one of its three branches there; that the branch is its business hub and that its closure will adversely and fundamentally affect its banking operations generally. Dr Kiplagat for the 2nd respondent agreed and added that the balance of convenience favours a stay.

Mr Wasuna for the 1st respondent did not however agree that the applicant's intended appeal will be rendered nugatory should a stay be refused. The reasons he gave for saying so, however, concerned the merits of the intended appeal.

This is an interlocutory appeal and we eschew any attempt to deal with the merits or otherwise of the applicant's intended appeal as counsel on both sides would want us to do. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. If damages will adequately compensate the applicant; or if the act sought to be stayed can reasonably be reversed, then it cannot be said that an appeal or intended appeal will be rendered nugatory unless a stay or injunction is granted.

In the matter before us the dispute is over an alleged assignment of a lease. If a stay is not granted the applicant will most likely be put out of possession of the suit property. It may well lose business but that will only be for a time and the loss of a pecuniary nature, and damages will in those circumstances be an adequate remedy. Besides, if the applicant eventually wins its intended appeal possession will be restored to it and any pecuniary loss it would have suffered in the meantime, would be assessable in monetary terms.

In view of the conclusion we have come to above, we are of the view that the applicant's intended appeal is unlikely to be rendered nugatory if a stay is refused, and the applicant eventually succeeds in its intended appeal. In the result, the applicant has not satisfied the second test for granting an application

under rule 5(2) (b) of the Rules.

Before we conclude this matter there was a preliminary point which Mr. Wasuna, for the 2nd respondent raised, and which we said we would deal with in this ruling. The issue relates to the validity of the applicant's Notice of Appeal dated 14th September, 2001. The copy of the Notice in the record of the application is not signed. Counsel for both respondents also said that the copies which were served on them too, are not signed. Mr. Mungai for the applicant stated from the bar that the copy he lodged in the superior court on 14th September, 2001, was duly signed, but we have no evidence of that fact. Faced with such a situation we considered it proper to hear the applicant's motion de bene issue. Having come to the conclusion that the applicant has not satisfied us that he is entitled to a stay, it will be academic to deal with this point. We say no more on the issue.

In the result this application fails and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 9th day of November, 2001.

A.A. LAKHA

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

M. KEIWUA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR