



REPUBLIC OF KENYA

IN THE COURT OF APPEAL  
AT NAIROBI

(CORAM: KWACH, BOSIRE & O'KUBASU J.J.A)

Repayment was on demand but the respondent was initially allowed to liquidate the loan facility by 35 monthly instalments of Kshs.335,000 each and a final instalment of Kshs.8,275,000. Late payments would attract additional interest of 6% per annum over and above the reigning rate. The respondent accepted the foregoing among other terms, satisfied them and was thereafter granted both facilities. More specifically the respondent executed the debenture on 3rd July, 1997, which was thereafter on 14th July, 1997, registered pursuant to the provisions of section 99 of the Companies Act, Cap 486, Laws of Kenya. Clause (1) of the debenture in pertinent part provides that:

"The company HEREBY UNDERTAKES that it will on demand in writing made to it by the Bank pay to the bank all moneys which now are or at any time hereafter may be due and owing by the company to the Bank or for which the company may be or become liable to the Bank on any account or accounts or in any manner whatsoever..."

The applicant's rights under the debenture included the right to appoint a receiver or receivers and managers over the assets and business of the respondent in the event the respondent defaulted in paying any one instalment or any sums upon demand.

On 10th February, 1998, again at the request of the respondent, the applicant agreed to increase the aggregate credit facility to the respondent from the then existing limit of kshs.75 million to Kshs.85 million for a temporary period up to 31st July, 1998, to be secured by the existing as well as additional securities whose details are not material for the purposes of this ruling. The terms with regard to interest and repayment remained unchanged.

The respondent made payment of some instalments. The applicant contends that the respondent did not pay more than eight out of 21 instalments it was supposed to have paid by 18th October, 1999, when it made its first demand. The total debt, according to the applicant, stood at Kshs.88,402,412.32 which it demanded with interest at the rate of 37% per annum with monthly rests, from 1st October, 1999 until payment in full, but "not later than 1st November, 1999". The letter of demand concluded as follows:

"We further notify you that in default of payment thereof as aforesaid, we will initiate such steps against you as are deemed necessary holding you liable for all costs and consequences. By copy of this letter, we are informing the Guarantors of this demand and their liability to us under the respective Guarantees and indemnities executed by them."

The respondent defaulted and on 2nd November, 1999, the applicant addressed a second letter of demand requiring the former to pay forthwith all sums due to it which had then increased to Kshs.90,505,556.02, failing which the applicant would appoint a receiver or receivers over all the respondent's undertakings, assets, revenues and rights in exercise of the powers conferred on it by the aforementioned debenture.

The respondent again defaulted, and on the same day, namely, 2nd November, 1999, the applicant appointed Vijay Chhotalal Malde and Subhashchandra Girdharlal Devani to be joint receivers and managers of the respondent's assets and business. The receivers and managers immediately notified in writing, all the directors of the respondent of their appointment and what they expected from them. It would appear to us that the receivers took possession of the respondent's assets and business on the same day because on the next day, if not the second day, the respondent brought action against the applicant challenging the appointment of the receivers; an order of injunction restraining them from interfering with the respondent's assets and business; and a mandatory injunction to compel the receivers to vacate the respondent's business premises. There were also other prayers but the one which is material for purposes of this ruling is one for a declaration that the interest charged by the applicant for both credit facilities is unconscionable, high and arbitrary.

Filed with the plaintiff was an application for the aforementioned injunctive reliefs, which

application was expressed to be brought under Section 3A of the Civil Procedure Act, and O.XXXIX rules 2 (a) 3 and 9 of the Civil Procedure Rules. That application was heard by Mulwa J., who held, inter alia, that the length of the notice the applicant gave to the respondent to pay all sums due to it was too short and unreasonable and, it therefore, rendered the appointment of the receivers and managers premature. He then proceeded to grant the injunctive reliefs which were prayed for in the application. The receivers and managers were thus forced out.

The applicant was aggrieved and promptly filed a notice of appeal declaring its intention of challenging the decision before this Court and soon thereafter filed this motion. It is trite law that to succeed an applicant in an application under rule 5(2)(b) of the rules of this Court, is as a general rule, obliged to show, firstly, that his appeal or intended appeal is arguable, and secondly, that unless he is granted the orders sought, the appeal or intended appeal will be rendered nugatory. (See Githunguri v. Jimba Credit Corporation Limited, (Civil Appeal/Application NAI. 161 of 1988). It is also trite law that the jurisdiction of the Court under that rule is discretionary, and the discretion being judicial, is exercisable on the basis of facts and sound legal principles. It is also a settled practice that in an interlocutory application, as the present one, the Court is not hearing the appeal. So care must be exercised to avoid infringing on the jurisdiction of the bench that will eventually hear the intended appeal.

As was rightly pointed out by Mr Fraser, for the applicant, the relationship between the parties herein is based on contract. The respondent wanted credit facilities from the applicant. The applicant spelled out, in its letter to the respondent dated 6th February, 1997, the terms under which it would grant the credit facility, which terms the respondent accepted in writing. In its suit before the superior court however, it laments that the terms with regard to the contractual interest are unconscionable and that the court should so declare. The respondent's case is not that it was misled into entering the contractual relationship. Nor is it its case that the applicant by taking steps to enforce its rights under the contract is acting in breach of it, but that it is acting oppressively and would like this court to intervene.

Mr Wagara for the respondent, conceded before us that the respondent is in arrears of several instalments. He also conceded that the applicant gave the requisite statutory notice before it appointed the two receivers and managers. His complaint as also that of his client is, however, that the interest the applicant is charging is oppressive, was being increased at short intervals, and that although such increases may be within the terms of the contract between the parties the frequency of the increases make the applicant's action oppressive and inequitable. Mr Wagara also talked about the applicant having accepted lower instalment amounts than had been agreed upon which instalments he said had been regularly paid by the respondent. Whether or not equity should be invoked to vary or modify what, prima facie, are clear terms of a written contract, is an arguable point. It is also arguable whether a court has jurisdiction to interfere with the terms and conditions of a contract in absence of fraud, misrepresentation or mistake, to release a party to it from its obligations under it or to vary the terms thereof. Clearly the applicant's intended appeal raises substantial and arguable points.

As to whether unless a stay is granted the applicant's intended appeal will be rendered nugatory, there is evidence before us to show that the respondent has been having cash flow problems. It has not been servicing its debt to the applicant regularly and its indebtedness to the applicant has as a result been increasing instead of decreasing. There is no material before us to show that the respondent's performance in that regard is likely to improve under the current management. We appreciate that the appointment of receivers may not necessarily improve the respondent's financial position. It is, however, one of the contractual remedies available to the applicant for the respondent's default in loan repayment and the applicant should not be hindered from exercising it without good cause. It is owed a substantial amount of money and it is only proper that it takes such steps within its rights under its contract with the respondent to mitigate its loss in the event its intended appeal eventually succeeds. We note that the applicant being a bank there is, prima facie, no danger of it failing to compensate the respondent if at the end of the day it fails to succeed in its intended appeal.

**In the result, we allow the application and order that the order of the superior court dated 25th January, 2000 granting the respondent a mandatory injunction be stayed pending the outcome of the applicant's intended appeal against it. We were told that the receivers and managers had been removed pursuant to the aforesaid order. In view of the fact that they appear to have been regularly appointed we order that they be reinstated forthwith. The costs of this application to abide the outcome of the applicant's intended appeal.**

**Dated and delivered at Nairobi this 10th day of March, 2000.**

**R.O. KWACH**

**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

**JUDGE OF APPEAL**

**E. O'KUBASU**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**