



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 219 OF 2007 (134/2007 UR)

SONALUX LIMITED 1ST APPLICANT

AFRICAN RETAIL TRADERS (K) LTD (In receivership) 2^{NA} APPLICANT

AND

BARCLAYS BANK OF KENYA LIMITED..... 1ST RESPONDENT

ADRIAN SPENCER DEARING 2ND RESPONDENT

JOHN STANLEY WARD 3RD RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal against the Ruling/Order of the High Court of Kenya at Nairobi Milimani Commercial Court and Tax Division (Kasango, J) dated 29th January, 2007 In H.C.C.C. No. 697 of 2005)

RULING OF THE COURT

The applicants herein, filed an application by way of Notice of Motion brought under Rule 5(2)(b) of the Court of Appeal Rules seeking the following orders:-

- (i) THAT the service of this application be dispensed with in the first instance.**
- (ii) THAT this application be set down for inter-parte hearing at a date to be directed by this Honourable Court for stay of execution.**
- (iii) THAT this Honourable Court be pleased to grant an interim stay of execution of the ruling and or Order of the Superior Court made on 29th January 2007 in Civil Case Number H.C.C.C. 697 of 2005 – SONALUX LIMITED, AFRICAN RETAIL TRADERS (K) LTD (In receivership) =VS= BARCLAYS BANK OF KENYA LIMITED, ADRIAN SPENCER DEARING, JOHN STANLEY WARD pending hearing and determination of the intended appeal.**
- (iv) THAT the Applicants'/Plaintiffs' be at liberty to apply for further Orders and directions as this Honourable Court may deem fit and just to grant.**
- (v) THAT the costs of this application be provided for."**

The application was made on the following grounds:-

“(a) THAT the Superior Court’s ruling dated 29th January 2007 dismissed (sic) Applicants’ Chamber Summons application dated 19th December 2005 with costs to the Respondents/Defendants

(b) THAT on 5th February 2007 the Applicants’/Plaintiffs’ filed in the Superior Court a Notice of Motion application under Certificate of Urgency under Order L Rule 1 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act Cap 21 seeking leave from the Superior Court to grant stay and or injunction of the Ruling dated 29th January 2007 pending Appeal and Determination of the intended Appeal, but on 3rd August 2007 the Honourable Mr. Justice Warsame dismissed the said Notice of Motion application with costs to the Respondents’/Defendants’. (sic)

(c) THAT on the same date i.e. 3rd August 2007 the Applicants’/Plaintiffs’ Advocates sought leave in the Superior Court and was granted temporary stay of execution for Thirty (30) days pending filing of this present application in this Honourable Court.

(d) THAT the Applicants’/Plaintiffs’ (sic) had filed Notice of Appeal against the Superior Court’s ruling dated 29th January 2007. The temporary stay of execution granted to the Applicants’/Plaintiffs’ (sic) in the Superior Court lapses on 2nd September, 2007 and unless this Honourable Court grants stay of execution, the Applicants’/Plaintiffs’ property L.R. Number 209/601 will be sold and their intended appeal will be rendered nugatory, thus subjecting the Applicants’/Plaintiffs’ (sic) to suffer irreparable loss and damage.

(e) THAT the Applicants’/Plaintiffs’ (sic) have an arguable appeal with a high probability of success.”

There was then a supporting affidavit by Mr. Billing, the learned counsel for the applicants, and in that affidavit Mr. Billing sets out in some details the history of this matter.

From the respondents side there was a replying affidavit sworn by one Alforse Kisilu who described himself as an employee of the 1st respondent working in the Business Support Department. In the third paragraph of that replying affidavit Mr. Kisilu depones:-

“I am advised by the respondents’ advocate, Mr. David Majanja, whose advise I accept, that the application before this court is incompetent in so far as the order sought is one to stay the ruling and order of Honourable Justice Kasango made on 29th January, 2007 as the said order only dismissed the applicants application for injunctive relief hence there is nothing in the said order to be stayed by this court.”

The significance of the foregoing will become clear in a moment.

When the application for stay of execution came up for hearing before us on 30th January, 2008 Mr. M. Billing appeared for the applicants while Prof. Githu Muigai appeared for the respondents. Relying on the replying affidavit of Mr. Kisilu and particularly the third paragraph which we have already reproduced herein, Prof. Muigai raised a preliminary objection in relation to the competence of the notice of motion filed by the applicants. Prof. Muigai chose to leave the substance of the motion to be dealt with on the basis of affidavits filed. Mr. Billing was agreeable to that proposition.

In his submissions on the preliminary objection, Prof. Muigai stated that the substantive issue related to the dismissal of the chamber summons by Kasango, J. In his brief submission, Prof. Muigai contended that under **rule 5(2)(b)** of this Court’s Rules, the Court may issue an injunction but if a party asks for a stay there must be something to be stayed. In this case, so submitted Prof. Muigai, there was nothing to

be stayed since the order of Kasango, J. was a dismissal of the chamber summons.

In equally brief submissions, Mr. M. Billing started by declaring this preliminary objection unmeritorious. Mr. Billing referred us to prayers 4 and 6 of the notice of motion and contended that this Court can grant an injunction on its own discretion. He therefore asked us to dismiss the preliminary objection.

A brief summary of the background to this application may be necessary. By a plaint filed in the superior court on 19th December, 2005 the applicants herein (as plaintiffs) brought action challenging the 1st respondent's act of appointment of 2nd and 3rd respondents as receiver managers by the power donated by a debenture. The 1st applicant had given its property L.R. No. 209/601 as security for the 2nd applicant's indebtedness to the 1st respondent. In that regard a charge was executed. The applicants also sought to restrain the respondents from selling the aforesaid property in exercise of the statutory power of sale.

Simultaneously with the said plaint, the applicants also filed a chamber summons application expressed as having been brought "*Under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and section 52 of the Transfer of Property Act, section 353 and 354 (i) of the Companies Act Cap 486.*" The prayers sought in that chamber summons application were as follows:-

"1. That the Defendants be restrained by themselves, their agents or servants from acting and or purporting to act as Receiver/Managers of the Plaintiff and interfering in any manner with the Plaintiff's quite (sic) possession and enjoyment of all the plaintiffs' land, properties, machinery, equipment, and assets pending the hearing and full determination of this suit.

2. That the defendants be restrained by themselves, their agents or servants from advertising, selling, disposing off, offering for sale or alienating in any manner whatsoever any of the Plaintiff's land, properties, machinery, equipment, assets or stock or any part thereof, pending hearing and final determination of this suit.

3. That the second and third defendants and or their agents or servants be ejected and removed from the Plaintiff's premises and the Plaintiff's possession of all the properties be restrained pending the hearing and determination of this suit.

4. That the second and third defendants be ordered to deliver the statements of account, forthwith, since the date of appointment to date.

5. That defendants be restrained from advertising, selling, disposing off, offering for sale by private treaty or public auction or alternating (sic) in any manner whatsoever any plaintiffs' Land, Properties, Machinery, Equipment, Assets or Stocks or any part thereof pending hearing and determination of this suit under Section 52 of Indian Transfer of Property ACT."

That was the application that was placed before Kasango, J. for determination. The learned Judge considered the rival submissions presented by counsel appearing for the parties and in the end dismissed the application. In dismissing that chamber summons application the learned Judge in her ruling dated and delivered on 29th January, 2007 expressed herself thus:-

I have in totality examined the Plaintiffs' application and the affidavit evidence and I find that the plaintiffs have failed to satisfy the first test in the case of *GIELLA V CASSMAN BROWN* [1973] EA 358. The Plaintiffs have failed to show a prima facie case with probability of success. The second test on irreparable loss the plaintiffs will suffer, this one too plaintiffs have failed to satisfy. The issues raised by the plaintiffs clearly is quantifiable and if quantifiable it cannot be said to be of irreparable loss. I find that I am not in doubt in respect of those two tests and accordingly I do not have to consider the third test of that case, that is where the balance of convenience lies.

I do need to consider the ground raised by the plaintiffs in respect of section 52 TPA. I am of the considered view that once the power of sale has arisen a party cannot hide behind the provisions of that section and seek to stop sale of a charged property. It cannot have been the intention of the Legislature to have sections of any statute that contradicts each other. The TPA recognizes that once a demand is made as provided by section 69 A of TPA a chargee may proceed with the sale of a charged property. If that be so, then section 52 cannot stop that right by providing an injunction against that sale. I reject the Plaintiffs' reliance on Section 52 in that regard.

The end result is that the plaintiff's application by chamber summons dated 19th December, 2005 is dismissed with costs to the defendants."

It is that order dismissing the chamber summons that the applicants seek to appeal from.

We have taken the trouble to set out the background so that it may be clear as to what is sought to be stayed. From what we have already stated there can be no doubt that the applicants herein seek stay of the order of Kasango, J. That order as we have endeavoured to demonstrate was a dismissal of the chamber summons application.

The preliminary objection relates to the competence of this application for stay of execution. The applicants' chamber summons was dismissed with costs. What then is to be stayed? In our view, there is nothing to be stayed.

In **Western college of Arts and Applied Sciences vs. Oronga (1976) KLR 63** at p. 66 Law V P said:-

"But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs ... In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay, to enforce or to restrain by injunction."

On his part, Mustafa, J.A. said in part at page 67 paragraph B:

"The temporary injunction asked for by the applicant is extraneous to a stay of execution as it does not relate to what the High Court ordered to be done or not to be done and this Court has no jurisdiction to entertain it".

And in a recent judgment delivered on 20th December, 2007 in **The Hon. Peter Anyang' Nyongo' & 2 others vs. The Minister for Finance & Another** – Civil Application No. NAI. 273 of 2007 (unreported) this Court referred to **Ndungu Kinyanjui vs. Kibichoi Kugeria services & Another** – Civil Application No. NAI 79 of 2007 (unreported) where we said in part:-

"This Court has repeatedly stated in previous decisions, among them, David Thiongo T/A Welcome General Stores vs. Market Fancy Emporium, Civil Application No. Nai. 47 of 2007 that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum there would be nothing arising out of that decision for this Court to enforce or to restrain by injunction".

It would appear that the preliminary objection raised by Prof. Muigai is a matter which has engaged this Court in the recent past. As regards the matter before us all we can say is that the ruling of the superior court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that ruling.

For the foregoing reasons we do not agree with Mr. Billing that the preliminary objection lacks merit. On the contrary, the preliminary objection is clearly meritorious. We accordingly uphold the preliminary

objection and order that the notice of motion dated 24th August, 2007 be and is hereby struck out with costs to the respondents.

Dated and delivered at Nairobi this 8th day of February, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.