**Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of ruling:** 8 January 2004

**Case Number:** 349/03

**Before:** Tunoi, O’Kubasu and Githinji JJA

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*Appeal – Stay pending appeal – Injunction – Respondent seeking to exercise statutory power of sale –*

*Property to be sold charged to Respondent by guarantor – Whether Appellant had locus to challenge*

*exercise of statutory power of sale – Rule 5(2)(*b*) – Court of Appeal Rules.*

**Editor’s Summary**

The Applicant obtained a loan for KShs 7,5 million in 1998. It was partly secured by a charge against a third party’s property. Four years later, the debt balance stood at KShs 47,1 million due to non-servicing of the credit facilities. The Applicant applied to restrain the threatened exercise of statutory power of sale by the Respondent. The Respondent raised a preliminary objection that the Appellant, not being the charger, lacked *locus standi* to challenge the exercise of the statutory power of sale. The court upheld the objection and the Applicant appealed and filed the application under consideration, seeking stay pending appeal and an injunction to restrain the sale of the charged property.

**Held** – The prayer for stay of execution of the superior court order was misconceived since the superior court had not made any positive order capable of execution.

With respect to grant of an injunction pending appeal, such power is discretionary and to be exercised judicially (*Madhupaper International Ltd v Kerr* [1985] KLR 840 followed). Courts should exercise the discretion to avoid the situation where an appeal, if successful, would be rendered nugatory (*Butt v Rent*

*Restriction Tribunal* [1982] KLR 417 followed). The applicant must also have an arguable appeal (*JK*

*Industries Ltd v Kenya Commercial Bank* [1982-88] 1 KAR 1088 followed).

The Appellant had not annexed a memorandum of appeal disclosing any reasonable grounds for the appeal, and had failed to show that he had an arguable appeal by relying on any authorities. There was no evidence that the appeal would be rendered nugatory, the Appellant not having any proprietary right to the property sought to be sold.

**Application dismissed with costs. Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Butt v Rent Restriction Tribunal* [1982] KLR 417

*Giella v Cassman Brown Co Ltd* [1973] EA

*JK Industries Ltd v Kenya Commercial Bank* [1982-88] 1 KAR 1088

*Madhupaper International Ltd v Kerr* [1985] KLR 840 – **F**

*Mamba Village v National Bank of Kenya* [2002] 1 EA 197

*Shitukha Mwamodo and others* [1986] KLR 445