**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.*

**RULING**

**Tunoi, O’Kubasu and Githinji JJA:** This is an application by M/S Venture Capital Credit Ltd (“the

Applicant”) under rule 5(2)(*b*) of the Court of Appeal rules for orders:

“1. ...

2. That the execution of the ruling and order dated 24 October 2003 given by Mohammed Ibrahim J be stayed pending the hearing and determination of the Applicant’s appeal.

3. That an injunction restraining the Respondent, its servants, agents and or representatives from selling, disposing of or wasting. Land parcel LR Number 11531/3 Kangundo Road Nairobi until the

Applicant’s appeal is heard and determined”.

In 1998, the Respondent (“the bank”), granted a loan and overdraft facilities to the Applicant for a total sum of KShs 7,5 million which was secured, *inter alia*, by a legal charge dated 24 February 1998 over land registration number 11531/3 registered in the name of Komarock View Estate Ltd. The Applicant as a principal debtor failed to pay the loan and overdraft facilities under the terms and conditions of the loan repayment and subsequent proposals by Applicant for the repayment of the loan and overdraft facilities were not honoured. By a letter dated 8 January 2003 the Respondent instructed its lawyers to proceed with the realisation of the security (“the suit property”) to recover the debt balance which stood at KShs

47 155 966,30 as at 31 December 2002 and the suit property was ultimately advertised for sale on 12

September 2003.

On 8 September 2003, the Applicant filed a suit against the Respondent seeking as the only relief an order of injunction to restrain the bank from disposing of the suit property until the suit is heard and determined. An application for an interlocutory injunction to restrain the bank from selling the suit property on the scheduled date was filed contemporaneously with the plaint. The suit and the application were based on the grounds that:

“(i) The Defendant has not served Plaintiff or the guarantor with a statutory notice.

( ii) The Defendant has imposed illegal charges and penalties making it impossible for Plaintiff to repay the loan.

(iii) Defendant has failed to supply Plaintiff with any periodic statements of account”.

When the interlocutory application for an order of injunction came for hearing the bank’s counsel raised a preliminary objection to the application on the ground that the Plaintiff had no *locus standi* to challenge the sale of the suit property belonging to Komarock View Estate Limited.

On 24 October 2003, Mohammed Ibrahim J, upheld the preliminary objection and dismissed the application holding that Plaintiff had no proprietary rights over the suit property and that no statutory notice was due to him. The Learned Judge cited with approval a passage from the ruling of Ringera J in

*Mamba Village v National Bank of Kenya* [2002] 1 EA 197 in which Ringera J said in part: “In my judgment the only person who can legitimately complain that a power of sale is being exercised unlawfully, irregularly or oppressively is the Chargor”.

The Applicant being aggrieved by the ruling filed a notice of appeal on 30 October 2003. We are informed by the Applicant’s counsel from the bar that the Applicant indeed filed civil appeal number 329 of 2003 on 24 December 2003.

The first prayer for an order of stay of execution of the ruling and the order of Ibrahim J dated 24

October 2003 is misconceived as the Learned Judge never made any positive order in favour of the

Respondent which is capable of execution. Rather, the Learned Judge merely dismissed the application for interlocutory injunction with the result that neither party was given any interlocutory relief.

As regards the second prayer, the court’s jurisdiction to grant an injunction pending an appeal is discretionary and such discretion is exercised judicially and not in whimsical or arbitrary fashion. (See

*Madhupaper International Ltd v Kerr* [1985] KLR 840 at page 847 paragraph 35.) In that case,

(*Madhupaper*), the Court said at 846 paragraph 30:

“There are cases, however, where it would be wrong to grant an injunction pending appeal. These would include where the appeal is frivolous or to grant it would inflict greater hardship than it would avoid. And there will be others which we have not experienced yet”.

As a general rule, a court ought to exercise its best discretion in a way so as to prevent the appeal, if successful, from being nugatory (see *Butt v Rent Restriction Tribunal* [1982] KLR 417). And in order to be entitled to an order for maintenance of the *status quo* pending appeal, the Applicant must show that a reasonable argument can be put forward in support of the appeal – *JK Industries Ltd v Kenya*

*Commercial Bank* [1982-88] 1 KAR 1088. Moreover, the case of *Shitukha Mwamodo and others* [1986]

KLR 445 shows that the principles stated in *Giella v Cassman Brown Co Ltd* [1973] EA at 360 guide both the High Court and the Court of Appeal in deciding whether or not to grant a temporary injunction.

Has the Applicant shown that it has an arguable appeal on the narrow question of *locus standi*?

Firstly, the Applicant has not exhibited a copy of the draft memorandum of appeal or the memorandum of appeal already filed. So apart from saying that the Learned Judge erred in his holding, the Applicant has not disclosed any reasonable grounds of appeal. Further, the Applicant has not attempted to show by authorities or otherwise that the holding of Ringera J that it is only the chargor who can legitimately complain that a power of sale is being exercised unlawfully, irregularly or oppressively which was adopted with approval by Ibrahim J, is not sound in law. Secondly, the Applicant has failed to show that the grounds on which the suit and the application for interlocutory injunction in the superior court were based, considered against the express terms of the charge, are valid grounds or sufficient grounds for interfering with the bank’s statutory right to realise the security having regard to the fact that the Applicant does not deny that it has defaulted in the repayment of the loan.

Lastly the Applicant has not shown that if the order of injunction is not granted, the appeal, if successful, will be rendered nugatory. The suit property does not belong to the Applicant. The owner of the suit property M/S Komarock View Estate Limited is not a party to the suit and has not challenged the intended exercise of statutory power of sale by the bank. So, even if the suit property is sold, the Applicant will not lose any proprietary right to the property. In the circumstances, if the appeal succeeds damages would be the only relief appropriate to the Applicant. It has not been said that the Respondent’s bank has no means to pay compensation that may be ordered.

For those reasons, the application has no merit. It is dismissed with costs to the Respondent.

For the Applicant:

*Information not available*

For the Respondent:

*Information not available*