REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appli 217 of 2008 (UR 137/2008)

NAGENDRA SAXENA …….. APPLICANT

AND

1. MIWANI SUGAR MILLS LIMITED

2. MIWANI SUGAR CO. (1989) LTD (IN RECEIVERSHIP)

3. JOHN G. KIMANI t/a JOGI AUCTIONEERS

4. CROSSLEY HOLDINGS LIMITED…….. RESPONDENTS

(Application for stay of execution and proceedings pending an appeal from the Ruling of the High Court of Kenya at Kisumu (Mwera J.) dated 13th June 2008

in

H.C.C.C. NO.225 OF 1993

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RULING OF THE COURT

Before us is a motion expressed to be brought under **rule 5(2)(b**) of the Court of Appeal Rules, and the Appellate Jurisdiction Act, Cap 7, but it should actually have read, Cap 9 of the Laws of Kenya. The specific prayers relate to the orders of the superior court made on 13th June 2008, in it High Court Civil Case No. 1993. The applicant, **Nagendra Saxena**, who was the plaintiff in that case, seeks orders that the aforesaid order be stayed pending the filing and determination of an intended appeal against that order and that the respondents in this application be restrained from acting upon the said orders.

The respondents in this application are given as **Miwani Sugar Mills Limited** (*1st Respondent*), **Miwani Sugar Co. (1989) Ltd** (in Receivership), the 2nd respondent, **John G. Kimani** trading as **Jogi Auctioneers** (*3rd respondent*) and **Crossley Holdings Limited** (*4th respondent).*

When the application was argued before us on 3rd December, 2008 Mr. Nowrojee appeared for

the applicant, Mr. David Otieno for the 1st and 2nd respondents and Mr. Ngome appeared for 3rd and 4th respondents. From their submissions it is clear to us that all the counsel are aware of the principles which guide the Court in applications of this nature. The first one of those principles is that to succeed the applicant must show that his appeal or intended appeal is arguable. In that regard one arguable point, if shown, is sufficient to satisfy that requirement. The second principle is that the applicant must, in addition, demonstrate that unless he is granted a stay or injunction, as the case may be, and he were eventually to succeed in his appeal or intended appeal, that success would be rendered nugatory. It is obligatory for the applicant to establish both principles before he can be granted the order or orders prayed for in an application of this nature.

The facts giving rise to the application before us are straight forward and may be summarized thus. On 28th June 1993 the applicant filed in the superior court a plaint in which he made a liquidated demand of US$400,000 being fees for professional consultancy services. It was common ground that summons to enter appearance and the plaint were not served upon the named defendant, Miwani Sugar Mills Ltd, the first respondent in the application before us. On 28th May 2007, over ten years after the plaint was filed, the applicant moved the superior court by a chamber summons for an order extending the time for the re-issuance of summons to enter appearance and cited, among other grounds, the reason that the plaintiff's counsel had passed on, and hence the delay in taking the necessary steps in prosecuting the suit. The Chamber Summons was expressed to be brought under **O.49 rule 5** of the Civil Procedure Rules. That rule empowers the court to enlarge the time for the doing of any act or taking any proceedings under the rules, notwithstanding that an application for the enlargement of the time is made after the expiry of the time stipulated for doing any act or taking any step in the proceedings. The application was placed before a Deputy Registrar of the superior court who granted orders in terms of the application. The Deputy Registrar's jurisdiction to handle such an application is one of the issues which has been raised and which will be canvassed at the hearing of the intended appeal.

Following the extension of time for the re-issuance of the summons to enter appearance, a fresh summons was issued and was allegedly served on 7th April 2007. There is a dispute as to who was served, but that is not an issue we will trouble ourselves with the matter before us not being the intended appeal. We gather from the material before us that service was effected by registered post and courier service. Neither a memorandum of appearance nor a defence was filed within the time stipulated in the Rules. Consequently an ex parte judgment in default was entered. Execution proceedings followed, and certain immovable property to wit L.R. Nos. I.R 21038 and I.R 21039, were allegedly attached and sold by public auction to the 4th respondent herein by the 3rd respondent, who is an auctioneer. It is that alleged sale which prompted the 1st respondent to move the superior court by a Chamber Summons, dated 10th December, 2007, for an order setting aside the ex parte judgment. There were other applications which were filed in that court before that one, but we do not consider it necessary to set the particulars thereof herein.

Among the grounds given for the application included the following. The applicant was different from Miwani Sugar Mills Ltd, which was named as defendant; the applicant had no prior notice of the suit, the Deputy Registrar lacked jurisdiction to extend the time for the re-issuance of the summons to enter appearance, and that the applicant had no knowledge of the applicant's claim. Several other applications followed, among them, one by the applicant, dated 24th December, 2007, in which he sought, among other orders, an order confirming the sale of the two parcels of land and an application by Miwani Sugar Company (1989) Limited, (In Receivership) for, among other orders, an order setting aside the said sale. This latter application with others dated 22nd and 23rd April 2008, respectively, were placed before Mwera J. on 7th May 2008. The learned Judge after perusing all those applications, thought that certain pertinent issues raised by all those application needed to be addressed, and he

framed those issues as follows:

"(1) Was the plaint filed on 28th June 1993 assessed as to fees and the sum paid"

(2) Was the renewal/re-issue of summons to enter appearance by the Deputy Registrar within the law"

(3) Are the Miwanis one and the same entity and which one is under receivership (section 228 of the Companies Act)"

(4) Is one and the same title of land in issue"

(5) Which sale is in question – by execution of decree or by the receivers""

After hearing submissions from counsel for the parties, the learned Judge concluded that Miwani Sugar Company Limited took over the assets of Miwani Sugar Mills consequent upon some financial transaction with the Government, the latter company having been a parastal. In his view neither company was under liquidation for **section 228** to apply. The learned Judge also held that the two parcels of land, above, are separate, and their sale was pursuant to execution of decree by the applicant respondent in this application. Finally, the learned Judge found as fact, first that no court fees was assessed and paid when the applicant filed his plaint and secondly that the Deputy Registrar had no jurisdiction to extend the time for the re-issuance of the summons to enter appearance. Consequently, he held that, he had the jurisdiction to, **suo motu** or **sua sponte**, declare as a nullity the re-issuance of the summons to enter appearance on 30th May 2007, and the proceedings that followed. He added that it would be a waste of money and time to require parties to file formal applications for declaratory orders to that effect. It is that order which the applicant intends to appeal against.

The applicant filed a notice of appeal in the superior court on 26th June 2008. That notice was timeous and by dint of the provisions of rule **5(2)(b**), aforesaid, this Court has the jurisdiction to entertain the application before us.

In his submissions before us, Mr. Nowrojee, submitted that setting aside an existing judgment and consequential orders is not a light matter and in his view the all important question is whether the learned Judge had jurisdiction to do so **suo motu**, more so because there were several applications pending on the issue. We agree that the issue raised is important more so because the vacating of the judgment had the effect of depriving certain parties of rights which had accrued, but without, prima facie, giving them a hearing. As we stated earlier, if an applicant, succeeds, in showing the existence of at least one issue, as the applicant has done herein he would have thus satisfied the first condition. We do not therefore need to consider the other issues which Mr. Nowrojee urged before us in an attempt to demonstrate that the applicant's intended appeal is arguable.

On the nugatory aspect, we have no doubt in our minds that the success of the intended appeal will be rendered nugatory unless we grant a stay of the order of the superior court dated 13th June 2008. The subject matter of the litigation between the parties is land. Issues involving land in this country are emotive. Besides, there are issues which require to be investigated. It has been alleged that the 2nd respondent is not the registered proprietor of the subject property and has never been. The property was not covered by the debenture under which the 2nd respondent was allegedly placed under receivership. Yet the 1st and 2nd respondents have evinced an intention of selling the property. In paragraph 8 of the replying affidavit by Martin Owiti Odero, it is deponed:

"That sometime in mid-March 2008, we decided to carry out a search on the land title 7545/3 since there had been a government back proposal to offload the land together with the factory that stands on it publicly known as Miwani Sugar Factory to a private investor."

There is a need to maintain the status quo, to allow the issues raised in the intended appeal to be determined. The issues are many and weighty. Unless the status quo is preserved and the applicant eventually succeeds in his intended appeal there is the risk of the subject property being disposed of to third parties. It might not be possible thereafter to reverse the sale.

In the foregoing circumstances we allow the application dated 31st July 2008, and order that the status quo obtaining as at the date of the ruling dated 13th June, 2008, be maintained, pending the filing and determination of an intended appeal against that decision by the applicant herein. The costs of the application shall be in the intended appeal. Because of the circumstances of this matter, we order that the appeal be lodged within 45 days of the date hereof, if it has not by now been filed, failing which the aforesaid order shall lapse, and the application herein shall be deemed to have been dismissed with costs.

Dated and delivered at Kisumu this 16th day of January, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR