



REPUBLIC OF KENYA

HIGH COURT OF AT NAIROBI (MILIMANI LAW COURTS)

Civil Case 795 of 1997

**SAMVIR TRUSTEE LIMITED .....PLAINTIFF**

**VERSUS**

**GUARDIAN BANK LIMITED.....DEFENDANT**

**RULING**

The defendant/applicant is aggrieved in the decision and judgement made by **Justice Ibrahim** on 2<sup>nd</sup> December, 2005 and has since filed a notice of appeal. The present application is a Notice of Motion under **Order 41 Rule 4** of the Civil Procedure Rules. The application seeks that execution of the decree herein be stayed pending the hearing and final determination of the appeal against the judgement and decree of **Justice Ibrahim** given on 2<sup>nd</sup> December, 2005.

The application is grounded on 4 grounds namely;

- (1) That the plaintiff was acting as agent for Mr. Ajay Indravadan Shah who was the true owner of the moneys the subject of this case.**
- (2) If payment is made to the plaintiff then the plaintiff will play over the moneys to Mr. Ajay Shah thereby putting the moneys beyond the reach of the defendant in the event that the appeal is successful.**
- (3) The defendant is a substantial bank which is well able to satisfy the judgement and the defendant is prepared to provide such security as the court may require.**
- (4) The defendant has good prospects of success.**

The application is supported by the affidavit of **Mr. Gofinath H. Bhatt**, who is the Executive Director of the defendant bank. He also filed a further affidavit to respond to some of the allegations contained in the replying affidavit. He states that he is aware that judgement was entered in favour of the plaintiff on 2<sup>nd</sup> December, 2005 for Kshs.25 million together with interest thereon at 18% per annum from 5<sup>th</sup> March, 1996 and costs. The defendant then filed a notice of appeal dated 7<sup>th</sup> December 2005 before the Court of Appeal. It subsequently applied for a copy of the proceedings and judgement, which he claims was not received by the defendant.

The deponent contends that the defendant is a financial institution, with substantial assets as shown in annual Report and accounts as at 31<sup>st</sup> December, 2004, a copy of which is attached to the supporting

affidavit. It is further deponed that the monies claimed by the plaintiff was paid to one **Satish Naker**, who left Kenya suddenly in 1997 to avoid his creditors and arrest by the police. The whereabouts of **Mr. Naker** or his assets are not known and that the defendant has no prospect of recovering the monies from **Mr. Naker**. It is therefore the position of the defendant that if the money is paid again to the plaintiff, would have paid the money twice.

It is also the position of the defendant that according to the evidence tendered before court, the money did not belong to the plaintiff but one **Ajay Shah**. And if the money is paid over to the plaintiff, there is all the possibility that it will pay over the moneys to its principal **Mr. Ajay Shah**. In paragraph 11, the deponent states;

**“I am not aware of any assets belonging to the plaintiff and in view of the nature of the business carried on by the plaintiff I am concerned that the plaintiff may not have sufficient assets to cover the refund of the decretal amount in the event of the appeal being successful”.**

The plaintiff filed two affidavits in response to the application. The contents of which is as follows: That the principal sum of Kshs.25 million plus interest of 18% per annum from 5<sup>th</sup> March 1996 is currently standing over 70 million, which was not indicated as a liability or debt in the defendant’s statements of accounts. And that the defendant is not a well established bank. The plaintiff also states that it is willing to give an undertaking that the money will not be paid over to Mr. Ajay Shah. And it is further willing to give a bank guarantee for Kshs.80 million from **Chase Bank (K) Limited**.

The most important contention by the plaintiff is that it has been out of pocket for Kshs.25 million from 5<sup>th</sup> March 1996 plus interest at 18% per annum, which puts it in substantial financial hardship. In reply the defendant states that it does not wish to accept a guarantee from Chase Bank Ltd in view of the failure of the said bank to honour on its due date a guarantee dated 5<sup>th</sup> October 2004, which transaction subsequently became the subject of court dispute.

**Mr. Fraser** Advocate for the defendant/applicant submitted that unless an order of stay is granted there is a risk of substantial loss to the defendant who has genuine issues to be tried by the Court of Appeal. And since the defendant is a bank with substantial assets, a stay with no condition can be granted. He also submitted that since the financial situation of the plaintiff is not known, it would be dangerous to entrust it with the money, which is about Kshs.75 million.

**Mr. Billing** Advocate opposed the application and submitted that the defendant Bank failed to disclose the judgement as a liability to their audited accounts attached to the application. And since the judgement figure is not indicated as a liability in the annual accounts of the Bank, then there is a risk that the defendant may not take into consideration the interest of the plaintiff, which has matured.

**Mr. Billing** proposed that the whole decretal sum plus interest so far accrued to date be deposited in a joint account in the names of the plaintiff and defendant’s Advocates with either **Chase Bank (K) Ltd** or with a reputable Bank.

I have considered the application, the four affidavits filed by the parties herein. I have taken into consideration the able submissions made by **Mr. Fraser** and **Billing** Advocates. My considered view in this matter is that there is a substantial claim against the defendant which is awaiting determination before the Court of Appeal. The purpose of the intended appeal is to determine whether or not the decision of 2<sup>nd</sup> December, 2005 by **Ibrahim J** can withstand the test of the law. The issues canvassed and discussed in that judgement is fairly novel and it is in the interest of all the parties to ensure the determination of the Court of Appeal is not rendered nugatory by radically changing the status of the parties.

I agree that every party aggrieved with a decision of this court has a natural and undoubted right to seek the intervention of the Court of appeal. And as far as this matter is concerned, I do not think this court should put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. In my understanding a stay would be granted unless there is overwhelming hindrance to the exercise of the discretionary powers of the court.

I appreciate and understand that the court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement, hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant.

It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.

No doubt the defendant is a bank, allegedly with substantial assets. However, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation. The plaintiff has proposed to give a Bank guarantee of Kshs.80 million from **Chase Bank (K) Limited**. The defendant says that a guarantee from **Chase Bank (K) Ltd** is not reliable for it is not a substantial Bank.

The contest between the parties is the amount of money involved and whether the security offered by each party can be a basis for granting or refusing a stay of execution of the decree. At this stage we must as a court ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interest of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other party. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrives within the corridors of the court. In my view justice and fairness requires this court to give an order of stay but with certain condition.

As stated the defendant claim to be a substantial Bank with a considerable amount of money and assets. And that it would be in a excellent position to pay any sums decreed by the Court of appeal. Without being paranoid or disrespectful I do not think the defendant has all the hallmarks of what amounts to a substantial Bank, by the standard of a reasonable bystander. This court is aware what has no assumed public knowledge or notoriety in the financial system of this country.

There is no dispute that this country has a bloated banking and financial institutions. The basis is that the banks and financial institution are incorporated as a bait or a fishing net to capture savings from the members of the public and public corporations. Blinded by the urge to steal or defraud, the blue eyed boys in the system and top brass in the financial and political sector incorporate and get licences to operate Banks like applying for a licence to run a kiosk in Gikomba market. In essence Banks and financial institutions have been growing or increasing in numbers in this country for the last 16 years without adequate and proper financial base or liquidity. The birth of the new banks with no financial base or liquidity and with no strict supervision or regulation from the Central Bank of Kenya gave birth to crest fallen depositors and creditors in our midst. It means the growth in the number of banking institution is not meant to carry out a sustained banking facility but to trap funds from an unsuspecting depositors and negligent public corporation heads. The game is to attract a temporary business for purposes of achieving the goal set of stealing money from the members of the public and public institutions managed by suspicious characters with no head and mind. What has happened in the financial sector in this country for the last 16 years needs to be taken into account when attempting to define what is a substantial Bank.

Without being disrespectful, I do not think **Chase Bank (K) Ltd** and **Guardian Bank Ltd** can fall within the meaning of a substantial Bank by standard of a reasonable bystander. With profound respect and defence to the two institutions, I am not in any way saying that they have financial deficit or deficiency in their operation and management. But what I am saying that due to the history of the financial sector in

this country, I am skeptical to qualify them as substantial Banks. I therefore think the decretal sum plus the interest should be deposited in another bank with no possibility to going under within the next 3 or 4 years, when the appeal would have been determined.

The upshot is that I grant an order of stay on condition that the defendant deposits a sum of Kshs.60 million in an interest earning account in the joint names of both Advocates within the next 30 days from the date hereof. The money shall be deposited with either **Kenya Commercial Bank (K. C. B.)** or **National Bank of Kenya** or **Barclays Bank** or **Standard Chartered Bank Limited** on the preference of the parties and whichever that provides the best interest. The defendant shall pay the costs of this application to the plaintiff.

Dated and delivered at Nairobi this 12<sup>th</sup> day of July, 2007.

**M. A. WARSAME**

**JUDGE**