REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO. 706 OF 2019

CHASE BANK (K) LIMITED.....APPLICANT

VERSUS

CONNIX INDUSTRIES LIMITED.....RESPONDENT

RULING

The applicant filed an application dated 6th November, 2019 seeking for leave to file its appeal out of time against the judgement delivered by Honourable P.N. Gisora on 24th September, 2019 in Milimani CMCC No. 2714 of 2016 and an Order for stay of execution. A ruling was delivered on 30th June, 2020, by Justice J. Kamau allowing the applicant's application and made the following orders;

> **1. The Applicant is hereby directed to file and serve its Memorandum of Appeal within fourteen (14) days from the date of this Ruling.**
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> **2. The Applicant is hereby directed to file and serve its Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.**
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> **3. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the Applicant comply with the timelines within which to file its Record of Appeal as aforesaid.**
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> **4. There shall be a stay of execution of the decree in Milimani CMCC No. 7806 of 2014 Connix Industries Limited vs Chase Bank (K) Limited & Another that was delivered on 24th September 2019 on condition that the Applicant shall deposit into an interest earning account in the joint names of its counsel and counsel for the Respondent the sum of Kshs. 9,666,433 within forty five (45) days from the date of this Ruling.**
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> **5. For the avoidance of doubt, in the event, the Applicant shall default on Paragraph 4 hereinabove, the conditional stay of execution shall automatically lapse.**
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> **6. Either party is at liberty to apply.**
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> **7. Costs of the application will be in the cause.**

The applicant has now filed the present application dated 30th July, 2020 seeking the following orders:

> **i) THAT the application be certified urgent and service thereof be dispensed with in the first instance.(Prayer overtaken by events)**
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> **ii) THAT pending inter-parties hearing of the subject application, this Honourable Court be pleased to vacate, set aside, review and/or vary the Order issued by the Honourable Lady Justice Jacqueline N. Kamau on 30th June, 2020 to wit;**
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> **"THAT there shall be a stay of execution of the decree in Milimani CMCC No. 7806 of 2014 Connix Industries Limited vs Chase Bank (K) Limited & Another that was delivered on 24th September 2019 on condition that the Applicant shall deposit into an interest earning account in the joint names of its counsel and counsel for the Respondent the sum of Kshs. 9,666,433 within forty five (45) days from the date of this Ruling".**
>
> **iii) THAT pending the inter-partes hearing of the subject application, this Honourable Court be pleased to vacate, set aside, review and/or vary the Order issued by the Honourable Lady Justice N. Kamau on 30th June, 2020 to wit;**

"THAT if the applicant fails to deposit the said amounts within the aforementioned period of Forty-Five days, the order for Stay of Execution of the impugned judgement and decree will stand vacated."

iv) THAT the execution of the Ruling/Order be stayed pending the hearing and determination of this Application inter-partes.

v) THAT this Honourable Court be pleased to make such orders as it deems mete and just.

vi) THAT the costs of and incidental to this Application be provided for.

The application is supported by the affidavit of David Irungu sworn on 30th July 2020 while the respondent filed a replying affidavit sworn by Purity Makori on 28th August 2020 opposing the application. When the application came up for hearing on 25th November, 2020, the parties agreed to have the same determined by way of written submissions. The applicant and the respondent both filed their submissions dated 7th December, 2020 and 30th November, 2020 respectively.

Applicant's Case

The firm of Robson Harris & Co. Advocates for the applicant submitted that the application raises two issues namely:

i) Whether the Applicant has the capacity to deposit the sum of Kshs. 9,666,433.00 in a Joint-Interest Earning Account in the names of the Advocates for the parties herein; and

ii) Whether the Applicant has provided sufficient grounds that warrant a review of the Ruling delivered by Honourable J Kamau on 30th June, 2020.

On the first issue, it is submitted that on 7th April, 2016 and pursuant to the provisions of Section 43(1) of the Kenya Deposit Insurance Act, No. 10 of 2012, the Kenya Deposit Insurance Corporation (KIDC) was appointed as the official receiver of Chase Bank Limited and further, vide Gazette Notice No. 2321 of 7th April, 2016 a Moratorioum was declared by KIDC stipulating inter alia as follows;

a) THAT no deposits on any types of accounts operated by Chase Bank Limited(In Receivership) shall be paid nor shall any claims by any other class of creditors be met;

b) THAT the maximum rate of interest which shall accrue on deposits and other debts payable by Chase Bank Limited (in receivership) during the period of the moratorium shall be limited to the minimum rate determined by the Central Bank of Kenya, provided that there shall be no obligation on Chase Bank to pay interest at a higher rate to any depositor than would otherwise have been the case; and

c) THAT the running of time for the purposes of the law of limitation in respect of a claim by any depositor or creditor of Chase Bank Limited is suspended for the duration that the moratorium shall remain in effect.

For the foregoing reasons, counsel submits that since the applicant is under receivership and in view of the Moratorium that was placed by KIDC, the applicant is constrained to comply with the court's Ruling of 30th June, 2020 as it is no longer an existing entity in law.

Further, it is submitted that the proceedings in the lower court were irregular as the Respondent did not seek leave and/or sanction of the court to continue with the proceedings therein pursuant to the provisions of Section 56 of the Kenya Deposit Insurance Corporation Act, No. 10 of 2012 which provides as follows;

(1) No cause of action which subsisted against the Stay of directors, management or the institution prior to liquidation shall be maintained against the liquidator.

(2) No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.

(3) No attachment, garnishment, execution or other method of enforcement of a judgment or order against the institution or its assets may take place or continue.

The applicant's counsel also referred to the case of **Kwanza Estates vs. Dubai Bank of Kenya Ltd & Another [2016] eKLR**, **Charity Wangui Ngumo vs Chase Bank Limited (In Receivership) & Antique Actions Agencies[2018]eKLR** and **Donald Smith Earle vs Central Bank of Kenya & Another; Imperial Bank Limited (Interested Party) [2019] eKLR.**

In the case of **Kwanza Estates**(Supra)**,** the court stated as follows:-

"This provision, as I understand it bar any fresh suit from being commenced without a court sanction and for that forbid continuance with any subsisting litigation without the same sanctions.

The rational for such a legal requirement is founded on the need that a neutral arbiter oversees the affairs of the company to ensure that some improper, ignoble, in-genuine or unjustified activities are not undertaken by or against the company to the

disadvantage of its shareholders' creditors, other stakeholders and the company itself."

Similarly in the case of **Donald Smith Earle vs Central Bank of Kenya & another: Imperial bank Limited (Interested Party) [2019] eKLR**, the Court stated as follows:-

> **"The legislature, in enacting the Act, in its wisdom found that of necessity before action is instituted, or in the case of Section 56 (1) proceeded with, against an institution under receivership the Court ought to be given an opportunity to consider and give leave either for the institution of the action or the continuing of one already instituted. The Petitioner in my view, is instituting the action against the Interested Party, (the institution) missed an important and vital step which cannot be condoned. Section 56 (2) of the Act forbids it."**

On the second issue, the applicant's counsel contends that it has sufficient reasons to apply for review and that the same has been done without unreasonable delay. The applicant confirms that although it was aware of the Moratorium that has been in existence since 2016, it is only until the Court directed that the applicant deposit the decretal amount in a joint-Interest Earning Acount in the names of the advocates that the proceedings herein were affected by the Moratorium. The applicant submits that this qualifies as an important evidence that could not be produced at the time the order was made. The applicant further submits that its application for review is warranted on the grounds of sufficient reasons and has relied on the case of **Republic vs Public Procurement Administrative Review Board & 2 others [2018]eKLR**.

Lastly, the applicant through its counsel has refuted the claim by the Respondent that SBM Bank Kenya Limited has taken over Chase Bank Kenya Limited. The applicant referred to a Press Release by Chase Bank (K) Limited (In Receivership) and SBM Bank (K) Limited, 97% of the accounts have been fully paid since 7th April 2016 and that 75% of the value of deposits that remained under moratorium at Chase Bank (K) Limited (In Receivership) were transferred to SBM Bank (K) Limited but the same was not furnished to the court.

Respondent's Case:

The Respondent's submissions dated 30th November, 2020 was filed by the firm of Mogeni & Co. Advocates who maintain that the Applicant has failed to demonstrate how a non-existent entity continues to give instructions to counsel and litigate matters before court. The Respondent further submits that the primary suit was filed in 2016 where the applicant called a witness to testify and later through Miscelleneous Application dated 6th November, 2019 moved the court seeking Orders to file an Appeal out of time, stay of execution of the judgement of 24th September, 2019 during the pendency of the Moratorium. The respondent contends that the application is an afterthought and is meant to deny the respondent the fruits of the judgment on the ground that if indeed the Moratorium affected the proceedings of this case, then the same would have been discovered during the trial of the case. The Respondent has relied on the case of ***Pancras* T. Swai v Kenya Breweries Limited [2014] eKLR, Abdullahi Mohamud v Mohammud Kahinye [2015] eKLR** that cited the case of **Mwihoko Housing Company Limited v Equity Building Society[2007] 2 KLR 171.**

The Respondent's Counsel submits that the applicant is purporting to hide under a Moratorium that was issued in 2016 but has failed to disclose the subsequent takeover of Chase Bank (K) Limited (In Receivership) by SBM Bank (K) Limited. The Respondent avers that in a Press Release dated 20th August, 2018, a copy of which is annexed on the Respondents Replying Affidavit and marked as 'PM1', the Central Bank of Kenya announced that SBM Bank (K) Limited had taken over from Chase Bank (Kenya) Limited (In Receivership).

Lastly, the Respondent submits that the applicant is guilty of laches and is abusing the court process and consequently, the application should be dismissed with costs. It's the respondent's contention that this application has been filed in the wrong forum and the applicant ought to seek the orders in the substantive appeal as stay of execution can only be granted pending appeal. Further, the Respondent avers that the Miscellaneous Application was dispensed with on 30th June 2020 and the applicant was granted 14 days leave to file an appeal which is yet to be filed as he was already out of time.

Analysis:

The main issues for determination in the present application is whether the applicant has furnished the court with sufficient reasons to warrant the grant of an Order for Review of the Orders granted by Justice N. Kamau.

Section 80 of the **Civil Procedure Act, Cap 21** provides as follows:-

> **80. Any person who considers himself aggrieved-**
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> **(a)by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
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> **(b)by a decree or order from which no appeal is allowed by this Act,**

May apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

While **Order 45 Rule 1** provides as follows:

> **(1) Any person considering himself aggrieved—**
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> > **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

In the case of **Mwangi M'abuanga v Festus Muriungi [1994] eKLR**, Kuloba J. (As he then was) succinctly stated;

"...Section 80 of the Civil Procedure Act, and Order 44 of the Civil Procedure Rules permit applications for review, but exact very strict conditions so as to prevent litigants lying on their cars when they ought to be diligent',: and applicants must portray themselves as not having been negligent in the matter."

The ruling by Justice J Kamau was delivered on 30th June, 2020 and the application herein was made on 30th July, 2020. I find that that the application was made without undue delay.

The applicant has asked this court to review the Order made on 30th June, 2020 directing that it deposits the sum of Kshs. 9,666,433/- in a Joint-Interest Earning account in the names of the advocates for the parties herein within 45 days from the date of the ruling. The applicant has submitted that there is now important evidence that could not be produced at the time the Order was made.

From the affidavits on record and the submissions, it is not in dispute that the applicant was placed under a Moratorium on 20th April 2016 by Kenya Deposit Insurance Corporation way before the present suit was filed. The suit proceeded before the trial court and judgment was entered against the applicant on 24th September, 2019; subsequently a stay of execution was also granted. It is also worth noting that the applicant had a counsel on record and a perusal of the lower court judgment reveals that the applicant called witnesses. The applicant never raised the issue of the Moratorium during these proceedings despite having knowledge of the same. An attempt to raise the same now is a kin to shutting the stable door after the horse has bolted.

For the foregoing reasons, i find that the applicant's submission that being placed under a Moratorium is the important evidence that was discovered and that could not be produced at the time the order was made is not sufficient proof. Order 45 Rule 3(2) provides that no such application for review shall be granted on the ground of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree was passed or made without strict proof of such allegation.

Similarly, the Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR, pronounced itself on application for review on ground of discovery of new and important matter and cited with authority the case of Francis Origo & Another v. Jacob Kumali Mungala** ***(C.A. Civil Appeal No.149 of 2001 (unreported),*** *where the Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witnesses they intended to call were all along known to them.*

The applicant also raised the general ground for review that is on 'sufficient reason'. It is the applicant's submission that the court finds that the application for review is warranted on grounds of sufficient reasons which is analogous to the ground that there is discovery of important evidence.

In the case of ***Nasibwa Wakenya Moses vs. University of Nairobi & Another [2019] eKLR,*** the court observed that:

"An application for review may be allowed on any other "sufficient reason." The phrase 'sufficient reason' within the meaning of the above rule means analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in Sadar Mohamed vs Charan Singh and Another where the court held that: -

"Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."

Further, the Court of Appeal in the case of **Assets Recovery Agency v Charity Wangui Gethi & 3 others [2020] eKLR** stated that;-

"The ground "other sufficient reason" has been held to be consonant with the first two grounds: See Kuria v Shah [1990] KLR 316."

The applicants have not demonstrated that any other sufficient ground exists to warrant the orders for review being sort. The applicant has neither proved discovery of new and important evidence nor identified any mistake in the record or any sufficient reason for review analogous to the two.

The applicant has raised issues of irregularity of the lower court judgment, the legal status of a company under receivership and the powers of the official receiver. The applicant can't seem to be inviting the court to sit on an appeal in the guise of a review application. The issues raised by the applicant can be best addressed in an appeal.

The suit before the Chief Magistrate's Court was instituted in 2016. The Deposit Protection Fund took over the operations of the appellant

on 7th April, 2016. The judgment of the Trial Court indicate that the amended plaint was dated 15th July, 2016. Section 56(2) of the Deposit Insurance Corporation Act No. 10 of 2012 calls for sanction of the court before an injunction or any other action or civil proceedings may be brought in respect of an institution which is in liquidation. The applicant duly participated in the proceedings before the trial court. My view is that it was at the trial stage when the applicant could have raised the issue of its being non-existent. Further, it is the applicant who sought orders of stay of execution pending appeal. Between 2016 to 2019 when the current miscellaneous file was opened the applicant knew it was under receivership. The contention that the applicant is nonexistent and cannot comply with the conditional orders is tantamount to telling the court that even if the appeal is dismissed, still the applicant will not comply with the verdict of the court. There is the position that depositors were paid and SBM Bank (K) Limited took over the applicant. I believe the takeover was not for free. The respondent is one of the creditors who is holding a valid judgment. The provisions of Section 56 of Act No 10 of 2012 cannot be used to stop a decree holder from pursuing its entitlement. When the applicant sought orders staying execution, it knew very well that the court could put some conditions while allowing the request by the applicant. There is no discovery of any new or important matter by the applicant. Section 55 of Act No. 10 of 2012 empowers The Deposit Insurance Corporation to pay off creditors. The Corporation can also sell or dispose assets of an institution that is placed under its control.

For the foregoing reasons, I am satisfied that the application for review was bereft of merit and should be dismissed for the simple reason that it fails to meet the threshold prescribed by the law.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2021

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S. CHITEMBWE

JUDGE