REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 277 OF 2000

CFC BANK LTD. …...……...……...…….... PLAINTIFF

VERSUS

DILESH BID ……...…….…… 1ST DEFENDANT

KAMLESH S. SHAH ……...…...……...…… 2ND DEFENDANT

R U L I N G

1. The Defendant's Application by way of Notice of Motion dated 17 October 2012 is brought under the provisions of **Order 42 rule 6** of the *Civil Procedure Rules* as well as under **section 3A** of the *Civil Procedure Act*. The Application seeks the substantive prayer that the execution of the Judgement of the Honourable M. K. Ibrahim J. (as he then was) dated 22 August 2012 and delivered on 5 October 2012 be stayed pending the filing, hearing and determination of the Defendants' intended Appeal against the said Judgement. The grounds upon which the Application is brought is that the Defendants are dissatisfied with the said Judgement which they note has been delivered 6 years after the conclusion of the hearing before the learned Judge. The Defendants detailed that they intend to Appeal against the said Judgement and have applied to this court for copies of the Proceedings and a certified copy thereof. The Defendants have also filed the requisite Notice of Appeal and maintain that they have an arguable Appeal with an overwhelming chance of success. They maintain that if this Application is not heard urgently, the Plaintiff will proceed with execution and the Defendants' Appeal shall be rendered nugatory.
2. The Application is supported by the Affidavit sworn by the first Defendant **Dilesh Somchand Bid** dated 17 October 2012. In his said Affidavit, the deponent noted that the hearing of the case had been concluded on 9 December 2005 but it took until 5 October 2012 for the Judgement to be delivered. The deponent attached copies of the relevant Notice of Appeal as well as the application by letter from his advocates on record to the Registrar of this Court, to be supplied with copies of the proceedings and a certified copy of the Judgement. He also attached a copy of the Draft Memorandum of Appeal. As regards the Defendants' dissatisfaction with the said Judgement, the deponent noted that it had been delivered approximately 6 years after the conclusion of the trial thereby making it difficult, if not impossible, for the learned Judge to appreciate the evidence or demeanour of the Plaintiff's witness PW1. He maintained that it was quite obvious from the Judgement that the learned Judge had incorrectly read and interpreted the evidence. Further, the Judge had not determined the exact amount for which he had given judgement for and in the circumstances, it was not possible for the Defendants to understand what amount had been awarded against them. He also noted that this Application has been filed without unreasonable delay and that the Defendants would file and prosecute the Appeal expeditiously. By paragraph 11 of the Supporting Affidavit, Mr. Bid indicated that the Defendants were able and willing to offer

such security for the stay to be granted as may be ordered by this Court.

3. The Plaintiff herein filed Grounds of Opposition on 7 November 2012. These detailed as follows:

"1. The Applicants have not satisfied requirements of stay of execution under order 42, rule 6 (2) of the Civil Procedure Rules, 2010. There is no evidence of substantial loss to the Applicants, either in paying the decretal sum awarded which would cause difficulty to the Applicants or because they would lose their money, if payment was made, since the Respondent would be unable to repay the decretal sum plus costs

2. The Respondent is a reputable financial institution and it can easily refund the decretal sum if the Applicants are successful in the appeal.

3. The Applicants having failed to demonstrate substantial loss, the application must fail notwithstanding other conditions for the grant of stay order for instance providing security and filing application without undue delay may have been fulfilled.

4. Contrary to the assertion of the Applicants, the Honourable Justice Ibrahim had jurisdiction to write the judgment notwithstanding the verdict of the Judges and Magistrates Vetting Board pursuant to the Ruling delivered by Justice Majanja in HCCC No. 230 of 2000 Peter Denis Mbwali & Another vs. Kenya Literature Bureau.

5. There is no compelling evidence before this court to justify denying the successful litigant of the fruits of its Judgement.

6. The Applicants claim that the trial Judge did not determine the exact amount payable is frivolous. The Judgment is clear, precise and amount payable is determinable; and if there is any disagreement on the decree, it can be resolved by a Judge pursuant to Order 21, rule 8 (4) of the Civil Procedure Rules.

7. The Applicants are under misapprehension that this court should exercise its jurisdiction under order 42 rule 6 of the Civil Procedure Rules 2010 on the basis of chances of success of appeal which ground can only be relied upon by Court of Appeal when exercising its jurisdiction under rule 5 (2) (b) of the Court of Appeal Rules. The jurisdiction of this court under order 42 rule 2 of the Civil Procedure Rules is distinct with jurisdiction of the Court of Appeal under rule 5 (2) (b) of the Court of Appeal Rules.

8. The Application before this court is an abuse of court process and intended to delay justice. The same should be dismissed with costs to the Respondent".

This court should detail, right at the start, that it considers that the learned Judge Ibrahim did have jurisdiction to write the Judgement herein as per Ground 4 above and discounts the Defendants' objection to the Judgement in this regard.

4. Although the Defendants' Application is properly brought under **Order 42 rule 6** of the *Civil Procedure Rules*, Mr. Sehmi, learned counsel for the Defendants, concentrated his submissions around the fact that the Judgement herein was delivered some 6 years after the conclusion of the hearing. He felt that the same was unjust and pointed to the grounds in support of the said Application. He maintained that there had been no explanation why there had been such a delay. He stated that it was the duty of the court not to allow a Judgement of this nature to stand. He submitted that the late delivery of the Judgement was against public policy and the same had been delivered with disdain. Mr. Sehmi then referred the court to 3 authorities commencing with **Parbat and Co Ltd versus Kassim Lakha HCCC No. 2513 of 1997 (unreported)** and quoting **Ringera J** as follows:

"All in all, when I consider the substance of the intended appeal and its merits, the convenience of the parties from the perspective of costs and the prospects of the intended

appeal being filed timeously, I am persuaded that the defendant has shown sufficient cause why the proceedings in this court should be stayed and it is in the overall interests of justice to do so."

5. Counsel then moved on to the Court of Appeal authority being **Civil Appeal No. 88 of 2000 Manchester Outfitters Suiting Division Ltd & Anor. versus Standard Chartered Financial Services Ltd & 2 Ors**. In that case the judgement had been delivered 4 years from the conclusion of the hearing and the Appellate Judges held that a delay of that length was inordinate especially where there was no explanation as to justify and to render the late delivery of the judgement excusable. Counsel quoted from the Judgement of **Lakha JA** as follows:

   "In the present case there is no explanation or account for such an inordinate delay to justify it or render it excusable. In addition, upon a careful consideration of the judgement it appears that there were numerous errors, clear contradictions and incompatible findings because of delay resulting in there being no fair determination and a real likelihood of a failure or miscarriage of justice. I am satisfied that on this first ground of appeal alone the appeal may be allowed and the judgement set aside."

   Counsel also quoted from the judgement of **Tunoi JA** (as he then was) as below:

   "It has been argued by Mr. Nowrojee, for the appellants, that the delay was inordinate and prejudicial to the interests of the appellants. Moreover, he argued, the delay only goes to show that there was no fair determination of the suit and this amounted to a denial of justice to the appellants…… These observations equally apply to the four years delay of the learned judge in delivering his judgement which is the subject matter of the appeal before us. In the circumstances I would agree with Mr. Nowrojee that such a judgement so delayed lacks credibility of a judgement. For this reason alone the appeal must be allowed."

6. On my part, these authorities relate to the success or otherwise of the Defendants' appeal to the Court of Appeal. In my opinion, they do not apply in connection with an application for stay of execution pending appeal, save only to demonstrate the likelihood of the Court of Appeal to set aside a judgement for inordinate delay. The only case cited to me by learned counsel for the Defendants of any assistance in connection with a stay application was that of **Butt versus The Rent Restriction Tribunal Civil Application No.NAI 6 of 1979**. This time counsel for the Defendants quoted from the Ruling of **Madan JA** (as he then was) as follows:

   "If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted or not to be refused because the judge considers that another which in his opinion will be a better remedy will become available to the applicant at the conclusion of the proceedings.

   It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory."

   Learned counsel for the Defendants then spent a considerable amount of time attacking the Judgement detailing that, largely because of its late delivery, it was so blatantly wrong and because of the failings of the Judge himself, it should be struck out. Again, I was of the opinion that such matters were best left to the Appeal Court for consideration at the appeal hearing and had little or nothing to do with an application for stay of execution.

7. As if sensing the irrelevance of a large part of counsel for the Defendants' submissions as regards an application for stay of execution in this court, Mr. Kiruki submitted that the conditions for a stay are very clear. These are detailed in **Order 42 rule 6** and 3 conditions must be met: –

a. The Applicant must show that it will suffer substantial loss;
b. The Application must be filed without delay and
c. There must be security provided.

In counsel's view, there was no evidence that the Applicant would suffer substantial loss. He referred the court to the authority of **Kenya Shell Ltd versus Benjamin K. Kibiru & Anor Civil Application No. NAI 97 of 1986** as per **Platt JA** as follows:

"An intended appeal does not automatically operate as a stay. The application for the stay made before the High Court failed because the first of the conditions set out in order XLI rule 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts. It was however suggested that at least the decretal sum could be placed in an interest-bearing account."

Later in his judgement the learned Judge of Appeal observed:

"It is usually a good rule to see if the order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."

8. Mr. Kiruki went on to say that the above was the correct position of the law. The Plaintiff is a reputable financial institution and if the decretal sum is paid, the Plaintiff will be able to repay the Applicants if their appeal is successful. In counsel's opinion, the Plaintiff should be entitled to the fruits of its judgement. He maintained that Mr. Sehmi had dealt at length on whether the Appeal is arguable reflective of the position under **Rule 5 (2) (b)** of the *Court of Appeal Rules*. It was for the Appellate Court not the High Court to consider the merits of an Appeal.
9. In counsel's further opinion the exact amount of the decretal sum could be determined from the Judgement. In a brief rejoinder, Mr. Sehmi submitted that the Judge had lost the demeanour of the witnesses such factor being occasioned by the unexplained delay in the delivery of the Judgement. As regards **Order 21 rule 8**, if the Judgement did not determine the exact amount payable, how could the Plaintiff arrive at an amount which may be plucked out of the air? In his view, the decretal amount was unexplainable and the Judgement was so blatantly wrong. Could the Plaintiff take advantage of an unexplained judgement? He also asked the question whether the overall justice of the case allowed the Judgement to be executed. In his view, it had been demonstrated that there would be substantial loss to the Defendants. He stated that the Defendants had gone out of their way to undertake to put up security.
10. **Order 42 rule 6 (2)** reads:

"6. (2) No order for stay of execution shall be made under subrule (1) unless –

a. **The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

b. **Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant".**

The Judgement herein was delivered on 5 October 2012 by my learned brother Musinga J. (as he then was). This Application before court, was filed on the 18 October 2012 and I do not consider such as "unreasonable delay". I am of the opinion that the principal question to be answered in this Application is whether this court is satisfied that the Defendants may incur substantial loss if a stay

of execution is not granted. The Replying Affidavit in support of the Application does not go into great detail as to what substantial loss the Defendants will incur if a stay is not granted. However I agree with the Defendants when they say that the exact amount of the Judgement has not been determined by the learned Judge. However, I believe that the judgement amount can be easily ascertained. The Judge did not give judgement in the amount of Shs. 870,000/= being the shortfall that he found to have occurred when the suit vehicle was sold. He reduced the Defendants' indebtedness by Shs. 200,000/- in which case the judgement amount would be Shs.670,000/=. However the Judge had noted that the shortfall would continue to attract interest at 2.75 % per annum. In this connection, I believe that the learned Judge was mistaken in that at paragraph 9 of the Plaint, the Plaintiff's claim was for the sum of Shs. 1,204,399.40 plus interest thereon at 2.75% per month. If that is so, then the Defendants are certainly likely to suffer substantial loss particularly over the 6 years delay in the delivery of the Judgement. To this end therefore, I am satisfied that this amounts to an exceptional case and that the Defendants will suffer substantial loss unless stay of execution is ordered by this court.

11. At paragraph 11 of the Affidavit in support of the Application, the deponent detailed that the Defendants were able and willing to offer such security as may be ordered by this Honourable Court. The question is what amount of security should be ordered for the stay to be granted? In the **Kenya Shell** case as above, it would seem that the norm is to order that the decretal sum be placed in an interest-bearing account as security for an Order for stay of execution. I have already found that the judgement amount is Shs.670,000/= as above. Accordingly, I grant prayer No. 2 of the Application with costs to the Defendants. However such stay being granted will be on the condition that, the Defendants will pay into an interest-bearing account in the joint names of the advocates for the Plaintiff as well as the advocates for the Defendant within 14 days from the date hereof, the sum of Shs. 670,000/-. Order accordingly.

DATED and delivered at Nairobi this 12th day of February 2013.

J. B.HAVELOCK

JUDGE