



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 626 of 2006

KENYA COMMERCIAL BANK LIMITED PLAINTIFF

VERSUS

CHARTERHOUSE BANK LIMITED DEFENDANT

R U L I N G

By originating summons dated 16th November 2006 the Plaintiff, **KENYA COMMERCIAL BANK LIMITED**, sought the following main orders against the Defendant, **CHARTERHOUSE BANK LIMITED**:

“1.

2. **THAT the Respondent do honour its undertaking to return the Applicant the title and security documents sent to the Respondent by the Applicant upon the terms of undertaking given by the Respondent to the Applicant in a letter dated 2nd June 2006.**

3. **THAT the undertaking by the Respondent to the Applicant in (2) above be honoured within Four (4) days from the date of this Honourable Court’s order failing which an order for enforcement of the undertaking do issue forthwith against the Respondent.**

4.”

It is within public knowledge that the Defendant was placed under statutory management by the Central Bank of Kenya in June 2006 under Section 34(1)(d) and (2)(a) of the Banking Act, Cap. 488. On 30th November 2006, learned counsel for the Plaintiff, **MR. NAMACHANJA**, informed the court that the originating summons had been served upon the Statutory Manager of the Defendant. If indeed this was so, it was the correct thing to do since under paragraph (a) of sub-section (2) of section 34 of the aforesaid Act, the Statutory Manager assumed the management, control and conduct of the affairs and business of, and exercises all the powers of the Defendant, including the use of its corporate seal, to the exclusion of its board of directors. Such management, control and conduct of the affairs and business, and exercise of all the powers, of the Defendant, must, in my judgement, include defending any legal proceedings instituted against the Defendant. On the said date there was another learned counsel, **MR. ODERA**, who said that he appeared for the Defendant. He further stated that his clients, who he said were the directors of the Defendant, had obtained a copy of the originating summons from the Statutory Manager’s representative, and that they intended to file papers in response to the application. As the originating summons had been filed under certificate of urgency, the court directed that any papers in response to the

summons be filed within seven (7) days. Indeed a replying affidavit sworn by one **SANJAY SHAH**, who described himself as the managing director of the Defendant, was filed on 7th December 2006 on behalf of the Defendant. It appears that no papers have been filed by or on behalf of the Statutory Manager.

On 11th December 2006 an application by chamber summons of the same date was filed on behalf of the Defendant under Order 1, rule 14(1)(c) of the Civil Procedure Rules, seeking leave for the Defendant to issue third party notices against the **CENTRAL BANK OF KENYA** and one **ROSE DETHO**, the Statutory Manager of the Defendant. The following grounds for the application appear on the face thereof:

“(i) On the 23rd June 2006 the Central Bank of Kenya placed the Respondent under statutory management thereby taking away its management from the hands of its directors and vesting the management in the hands of Rose Detho (the statutory manager).

(ii) According to the provisions of the Banking Act and in terms of the instrument appointing her, the statutory manager was supposed to and indeed expected to continue with the running of the business of the Respondent. *She will assume the management, control and conduct of the affairs and business of the institution.*

(iii) Since her appointment Rose Detho has never honoured the terms of her appointment, has never respected or obeyed the provisions of the Banking Act and generally has refused to carry out the business of the Respondent including honouring the undertaking now subject of the proceedings herein.

(iv) On the 15th September 2006, the High Court of Kenya, Eldoret in Misc application No. 638 of 2006 pursuant to an Application by some of the Respondent’s depositors did grant orders directing the proposed third parties to allow the Applicant and any other person banking services with the Respondent.

(v) The proposed third parties have disobeyed, ignored and indeed snared at the said High Court Orders with the cumulative effect that the Respondent has not been able to meet the demands such of that of the Applicant herein.

(vi) On the 9th October 2006, the High Court of Kenya at Malindi in Misc Application No. 97 of 2006 pursuant to an Application by another of the Respondent’s depositors obtained Orders *inter-alia* saying the decision placing the Respondent under statutory management and effectively returning the management of the Respondent to its Directors.

(vii) The proposed third parties again have ignored, snared at and indeed acted in utter contempt of the said High Court Orders with the result that the Respondent cannot meet the demands and/or claim of the nature now filed in court b y the Applicant.

(viii) The respondent prays that this Honourable Court do grant it leave to issue third party notice against the Central Bank of Kenya and Rose Detho.

(ix) For the Respondent to honour the Applicants claim the proposed third parties must allow its possession of its business and control of its affairs.”

Rule 14 (1) aforesaid provides as follows:

“14. (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)-

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he may, by leave of the court, issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers *ex parte* supported by affidavit.”

It appears that the Central Bank of Kenya is sought to be introduced in these proceedings because it placed the Defendant under statutory management and appointed the Statutory Manager. The Statutory Manager is sought to be introduced in the proceedings because she is the one who has assumed the management, control and conduct of the affairs and business, and now exercises all the powers, of the Defendant to the exclusion of its board of directors.

I have already held that the management, control and conduct of the affairs and business, and exercise of all the powers, of the Defendant, to the exclusion of its board of directors, must include defending any court proceedings that may be brought against the Defendant, including the present proceedings. In other words, the Statutory Manager is the proper person to defend the present proceedings, and not the directors of the Defendant. The Statutory Manager is thus already a party in the proceedings and cannot be said to be a person not already a party in the suit. By the same token, it cannot be said that the Defendant is entitled, as against the proposed third parties, to contribution or indemnity, or to any relief or remedy relating to or connected with the original subject-matter of the suit that is substantially the same as the relief or remedy claimed by the Plaintiff. Nor can it be said that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the Plaintiff and the Defendant that should properly be determined, not only as between the Plaintiff and Defendant, but as between the Plaintiff, the Defendant and the proposed third parties, or between any or either of them.

The reasons for all this are clear enough. The Plaintiff is merely seeking to enforce an undertaking said to have been given by the Defendant in respect to some title and security documents. As already observed, it is the duty of the Statutory Manager to defend the suit, should she be so minded. Equally, it will be her duty to abide by any order or decree that may be issued in favour of the Plaintiff.

The issues raised by the directors of the Defendant in the present application in essence amount to a challenge of the action of the Central Bank of Kenya in placing the Defendant under statutory management and the conduct of the Statutory Manager. Those issues are not germane at all to the Plaintiff's suit and cannot be properly litigated in the present proceedings. Indeed, those issues may be the subject-matter of a previous suit before this Division and other suits pending before other registries of this Court. Allowing them to be litigated here will not only delay and probably prejudice the Plaintiff's claim, but may also occasion mischief.

In the circumstances I must refuse the leave sought. The application is therefore dismissed with no orders as to costs. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF JANUARY, 2007.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 19TH DAY OF JANUARY, 2007.