REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 812 OF 2004

PRIME BANK LIMITED …… APPELLANT

VERSUS

JOSEPHAT OGOVA ESIGE ……..……. RESPONDENT

RULING

There are two applications before the court. The first application is by the Appellant. It is dated 7th October, 2004. In that application, the Appellant seeks to stay the proceedings in the lower court pending the outcome of this appeal. The second application is by the Respondent. It is dated 25th October, 2004. In it, the Respondent seeks, in the main, to have the appeal summarily rejected on several grounds set out in the body of that application. The two applications appear to counter each other and it is on that basis that I directed that both would be heard at the same time.

Having carefully perused the two applications, it is plain and obvious that the Respondent's application has drastic and serious ramifications since were it to succeed it would bring the whole appeal to an end. That application went into the merit of the appeal and going by the course of the submissions of Counsel amounted to arguing the appeal itself. However, I warned myself seriously, the strength of those submissions notwithstanding, that the court was not well placed at that stage to decide the appeal as it did not have all the material envisaged under Order XLI Rule 8 B (4) of the Civil Procedure Rules.

For example, I did not have the benefit of the arguments and submissions advanced before the lower court and how the Learned Magistrate treated the same and, in any event, how he delivered himself in coming to the decision that he did. Those are very important things to be considered by an appeal court when it is called upon to interfere with a decision of an inferior tribunal. That aside, an appeal court must, like any other court, guard itself carefully against locking out any litigant by summary procedure unless the case or appeal is plain and obvious. As will be seen in the comments which follow shortly, strong arguments were advanced which would entice this court to follow the summary process but again I believe that litigants who come before the court must be given an opportunity, which is guaranteed under the Constitution, to present their case for adjudication on merit. On this view alone, I would reject the Respondent's application as it sought orders which were too drastic in the circumstances and which would have had the effect of shutting the Appellant from putting forward its case – however weak it may seem.

Now, that leaves us with the Appellant's application. Although Order XLI Rule 4 of the Civil Procedure Rules deals with "stay" and it begins by mentioning both "stay of a decree" and "stay of proceedings", the rest of that rule focuses primarily on execution, and outlines in extensive detail the principles governing the grant of stay of execution. There is mighty little said of "stay of proceedings". It is unclear what the

Rules committee had in mind when dealing with this dichotomy, and it is clear that it is applications for stay of execution which have engaged the courts over the years. My recommendation to the Committee is that the matter needs to be reviewed if not for anything more, then for the sake of clarity.

However, the omission of the Rules Committee is not fatal. The fact that the Committee did not give a guide on how to deal with applications for stay of proceedings did not prevent those applications from being presented to the courts. How should this court deal with such an application?

The provisions of Rule 5 (2) (b) of the Court of Appeal Rules which deals with matters similar to the ones raised in the Appellant's application does not also provide for any particular way in which the power may be exercised but only says that they should act "on such terms as the court may think just". Now, the Court of Appeal has developed some principles to guide the exercise of that power so that the same is not left to caprice and those guidelines are simple and direct as follows:

"(a) The Appellant must show that his appeal is an arguable one. In other words, he must show that the appeal is not a frivolous one.

(b) The Appellant must also show, in addition, that if the order for stay of proceedings is not granted, his appeal, if it were to succeed, would be rendered nugatory."

{See ***The Standard Ltd & Others vs Wilson Kalya & Another t/a Kalya & Company Advocates*** Civil Application No Nairobi 369 of 2001 (196/2001 UR)}. Now, although the principles to be exercised by the Court of Appeal were designed to be applied to the Rules of that Court, they are sound principles which this court can borrow in similar circumstances, especially this one where there are no guidelines given in the Rules which are applicable. I will, therefore, apply those principles in deciding the Appellant's application under reference.

The questions to be decided then are, does the Appellant's appeal raise serious prospects of success? And is it true that the Appellants appeal will be rendered nugatory if its application is refused? I have deliberately used the word "and" since the Court of Appeal requires that one must fulfill both conditions before he can be entitled to the order (See ***The Standard*** case supra).

I will begin by answering the first question. To do so, one must understand what the appeal is all about. So, I must set out the history of the appeal.

The Respondent sued the Appellant and another person in the lower court seeking damages for personal injuries suffered and arising from a motor vehicle accident. The case was fixed for hearing. At the hearing, the Respondent called one Dr Moses Kinuthia who was the first prosecution witness (PW 1). While PW 1 was giving his testimony, the Appellant's Advocate objected to a portion of it. In fact, PW 1 is a medical Doctor who had examined the Respondent and prepared a Medical Report. He was called to testify in respect of his findings which he made in his Report.

Among other things, the medical Report contained two portions, one headed "History of Injuries (as given by Josephat Ogova)" and the other "Presenting (sic) Complains". What was contained under those headings are things which had been told to PW 1 by the Respondent. So Mr Sarvia for the Appellant objected to that evidence as being hearsay and inadmissible and sought that it be excluded from the record of proceedings. The lower court overruled him on two occasions.

The Appellant was aggrieved by the decision of the lower court on the objections of its Counsel and appeal to this court, hence the appeal. The appeal is simple and straight forward as set out in the following grounds of appeal:

1. The Learned Magistrate erred in failing to rule in his Ruling delivered on 1 st September 2004 that the oral evidence of Plaintiff Witness Number 1, Dr Moses Kinuthia (hereinafter called "PW 1"), relating to the history of the Plaintiff's alleged injuries and the alleged treatment received by the Plaintiff was hearsay and inadmissible under the provisions of Section 63 of the Evidence Act Chapter

80 of the Laws of Kenya.

2. The Learned Mag istrate erred in failing to uphold the Appellant's objection to the adduction by PW 1 of oral evidence relating to the history of the Plaintiff's alleged injuries and the alleged treatment received by the Plaintiff.

3. The Learned Magistrate erred in admittin g into evidence PW 1's oral evidence relating to the history of the Plaintiff's alleged injuries and the alleged treatment received by the Plaintiff.

4. The Learned Magistrate erred in his Ruling delivered on 3 rd September, 2004 in failing to rule that that p art of PW 1's Medical Report produced as Plaintiff Exhibit 1 (hereinafter called "PE 1") as appears between the headings "History of injuries" and "Presenting Complaints" contravened Section 35 of the Evidence Act Cap 80 and was inadmissible in evidence.

5. The Learned Magistrate erred in failing to uphold the Appellant's objection to the adduction into evidence by PW 1 of that part of PE 1 as appears between the headings "History of injuries" and "Presenting Complaints".

6. The Learned Magistrate erred in admitt ing into evidence the part of PE 1 as appears between the headings "History of injuries" and "Presenting Complaints".

In brief, what the Appellant is complaining about in its appeal is that the lower court was wrong in admitting certain portions of the Medical Report which was hearsay and therefore inadmissible. Was the Doctor's evidence hearsay?

I must remind and warn myself that at this stage, the court is not concerned with the merits of the appeal and it cannot make a decision on it now.

However, in deciding the application before it, the court must look at the appeal (or proposed appeal) and see whether the appeal is a strong one or a frivolous one. If the appeal is a strong one, the court has then to consider whether it will be rendered nugatory if the application were refused. But if the appeal is frivolous, there will be no need to stay the proceedings in the first place.

Counsel for the contending parties made extensive and useful submissions on whether the evidence complained of was hearsay and inadmissible and I am most grateful to them for their insight. Mr Sarvia argued that the evidence of PW 1 complained of was hearsay as PW 1 was repeating what had been told to him by the Respondent. That evidence was not direct and was, therefore, inadmissible.

The importance of the hearsay rule cannot be downplayed nor treated casually especially when one considers that the rule postulates a wide grey area for which there is no common judicial pronouncement nor is there an accepted agreement among judicial scholars as to its scope and function.

However, for the present purposes, I will only concern myself with the practical implications of the rule when courts are weighing admissibility or otherwise of evidence in judicial proceedings. This is because the importance of the rule can raise too many academic questions when considered in abstract.

The hearsay rule may be formulated generally in the following words:

"A statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted"

(See ***Cross on Evidence*** (6th Edition) p. 38 – cited in ***Phipson on Evidence*** 14th Edition at p. 558). That is the import of the provisions of Section 63 of the Evidence Act (Cap 80). The law imposes on the courts a duty to reply on direct evidence only in adjudicating disputes. However, if that condition were to be applied strictly, it would lead to absurdities which in the result will not engender the administration of justice but would in fact stultify it.

The courts have, therefore, developed certain rules to decide when evidence should be rejected as inadmissible for being hearsay. One of the key tests is to consider the purpose for which the evidence is tendered.

Is the evidence tendered to establish the truth or falsity of a fact or only for some other purpose? If the evidence is tendered to establish the truth or falsity of a certain fact and it is not direct, then it is hearsay and inadmissible. However, evidence may be "hearsay" that is to say, not direct but admissible if it is tendered for some other purpose quiet apart from establishing the truth or falsity of any fact. The position was summarized in the following words in ***Subramanian vs Public Prosecutor*** ***(1956) I WLR 965 (P C)*** at p. 969.

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

(Cited at p. 563 of ***Phipson on Evidence*** supra).

So the question to ponder is whether the statements narrated by PW 1 in the medical report and to which the Appellant's Advocate objected to were hearsay and inadmissible. My view is that they were not. It is a common practice by Doctors in preparing medical report to set out the history of their patients and their complaints as narrated by the patients. Now, the narration of the patients, though captured in the medical report will not become hearsay since it is not offered to prove what the patient said but to lay a basis for the medical report. If one were to take Mr Sarvia's view on its face, it would amount to taking the rule of hearsay too far and expert witnesses such as PW 1 would find it impossible to lay a basis for their opinions. In another respect, one can also choose to say that the narration of what was told to PW 1 by the Respondent was not hearsay. It was direct because the witness said what he was told. He heard it and reproduced what he heard. So whether the witness heard what the Respondent told him and which he reproduced cannot then be said to be hearsay.

Having said this, I have serious doubts whether the Appellant's appeal is a strong one. In my view, it is not and I think it is unlikely to succeed.

Further, the Appellant did not demonstrate to the satisfaction of the court that its appeal would be rendered nugatory if its application were not allowed. To render an appeal nugatory in a sense means that the appeal would be useless – of no value. How will the Appellant's appeal become useless if it succeeded? It cannot be. If the trial in the lower court were to proceed and it turned out that the Appellant succeeded in its appeal the trial in the lower court could be undone as appropriate.

I could stop there but there are certain arguments proffered by Mr Harun on behalf of the Respondent which bolster the decision I have come to and which I must at least consider here to make the point clearer. Section 175 of the Evidence Act provides that the improper admission or rejection of evidence shall not of itself be ground for a new trial or for reversal of any decision in a case if it appears to the court before which the objection is taken that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision.

What this means is that the admission or non-admission of evidence is not a foregone issue. Where a court admits evidence, correctly or not is not the primary matter but it is how the court will deal with that evidence. Will the court take into account the evidence in deciding the case or will it ignore it?

If the court will take into account the contested evidence, what weight will it attach to that evidence in deciding the case? That being the case, it is my view that the Appellant's application is premature as we do not know at this stage how the lower court will deal with the evidence which is challenged.

The Appellant's appeal is likely to prejudge the wisdom of the Learned Magistrate in dealing with the

contested evidence. That is not useful in our judicial practice.

In fairness to Counsel and for conclusiveness of record, I must state that I have looked at all the other issues raised by them before me, which I do not doubt are important, but I do not think that any of them would affect the decision I have come to. I would also say that the comments I have made about the appeal have been made in good faith and to offer assistance to the Appellant and its Counsel to consider the best way forward which would obviously lead to the quick resolution of this case and avoid escalation of costs in the interests of all parties concerned. I must, however, observe that should the Appellant opt to pursue the appeal, I find that it shall not be appropriate that the same be heard by me in view of the rather extensive comments that I have offered at this time.

In the result, I dismiss the two applications by the parties and order that each of them shall bear their own costs.

Dated and delivered at Nairobi this 9th day of February, 2005.

ALNASHIR VISRAM

JUDGE