REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 209 OF 2017

CHASE BANK (K) LTD...........................APPLICANT

VERSUS

PETER KARUGA KARIUKI...............RESPONDENT

RULING

1. The applicant through an application dated 19th October, 2017 brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 rule 6(1) of the Civil Procedure Rules, 2010 and all enabling provisions of the law seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That pending the hearing and determination of the Appeal this Honourable court be pleased to stay execution of the interlocutory Judgment entered on 2nd June, 2016 in its entirety together with all consequential orders arising therefrom;

(iv) That this Honourable court be pleased to issue any other order it deems mete and just in the circumstances;

(v) That the costs of and incidental to this application be provided for.

2. The application is supported by the affidavit of Kevin Kimani, the Legal Officer of Chase Bank Kenya Limited (applicant), sworn on 19th October, 2017. The respondent filed a replying affidavit on 12th January, 2018. Thereafter, the applicant's Counsel filed his submissions on 20th March, 2018 while the respondent's Counsel filed his on 8th May, 2018.

3. Mr. Obinju, Learned Counsel for the applicant submitted that the interlocutory judgment against which they sought stay of execution was entered on 2nd June, 2016. He stated that the principles for stay of execution are coached under the provisions of Order 42 rule 6 of the Civil Procedure Rules and the applicant must establish that it will suffer substantial loss.

4. He also submitted that the application for stay of execution has to be made without undue delay and that sufficient security has been given by the applicant.

5. On substantial loss, the case of **Antoine Ndiaye vs African Virtual University** [2015] eKLR was cited where the court held that substantial loss does not represent any mathematical formula but a qualitative concept.

6. Mr. Obinju further submitted that the respondent has to show that he will be in a position to refund the decretal sum and the applicant has to offer security.

7. He referred to the case of **Socfinac Company Limited vs Nelphat Kimotho Muturi** [2013] eKLR, where the court held that the legal burden remains with the applicant but the evidential burden shifts to the respondent. He submitted that the issue of the respondent being able to pay the decretal sum is determined on a case by case basis and that the respondent had failed to show that he will refund the decretal sum to the applicant, if the appeal is successful.

8. Counsel for the applicant submitted that the applicant is under receivership and any amounts payable to the respondent would amount to substantial loss to depositors' funds that are under a moratorium. He stated that SBM was to take over the assets of the applicant. He relied on the provisions of Section 56(3) of the Kenya Deposit Insurance Act which state that no attachment, garnishment, execution or other

method of the enforcement of a Judgment or order against an institution or its assets may take place or continue.

9. It was submitted that the application herein was made without undue delay as the ruling was delivered on 3rd October, 2017 and the application was filed on 12th October, 2017, which was 9 days after the said ruling.

10. On the issue of depositing security in satisfaction of the decree, the applicant's Counsel argued that the applicant is not in a position to make payments as it is under receivership, but it was willing to abide by any conditions given by the court. He cited the case of **Kwanza Estate Limited vs Dubai Bank of Kenya Limited (in liquidation) and Another** [2016] where the court held that no attachment, execution or other method of enforcement could take place or continue upon the company being placed under liquidation.

11. Mr. Obinju concluded his arguments by stating that enforcement of any decree is subject to the provisions of Section 56(3) of the Kenya Deposit Insurance Act. He prayed for the application to be allowed.

12. Mr. Manguro, Learned Counsel for the respondent submitted that under the provisions of Order 42 rule 6 of the Civil Procedure Rules, the applicant has not demonstrated the substantial loss it will suffer, whereas a party who alleges must prove.

13. He counteracted the submissions that the applicant is under receivership as no evidence was tendered to that effect. It was argued that the applicant was under duty to demonstrate that SBM had not taken over the liabilities of the applicant.

14. In Mr. Manguro's view, there were no prospects of the appeal succeeding as the applicant failed to attend court on numerous occasions. He cited the case of **Wayua James and Philip Munyoki Kaluki vs Daniel Kipkorone Tarus** [2014] eKLR, where the court held that the applicants were indolent and declined to grant orders.

15. He took the position that if the application herein is allowed, it would deny the respondent the fruits of litigation. He urged the court to issue a conditional stay if it grants the orders sought. He relied on the case of **Sailesh Patel T/a Energy Company of Africa vs Works PVT Limited and 2 Others** [2014] eKLR where the court granted a conditional stay.

16. Mr. Manguro informed the court that the applicant had previously applied for stay of execution before the lower court, but the application was not allowed.

ANALYSIS AND DETERMINATION

17. The issues for determination are:-

(i) If the application herein is *res judicata*; and

(ii) If the applicant should be granted stay of execution pending appeal.

18. The facts deposed to in the affidavits of the applicant and the respondent have been well articulated by their Advocates in both their oral and written submissions.

RES JUDICATA

19. On the respondent's contention that the application herein is *res judicata*, this court must refer to the prayers for stay of execution in the application that was filed in the lower court. The said application is dated 6th July, 2017 and it was filed in Mombasa CMCC No. 1782 of 2015. The applicant sought the following orders, among others:-

> ***"(i)That pending the hearing of the application interpartes, this Honourable court be pleased to issue an order for stay of execution of the judgment entered herein on 2nd July, 2016 in its entirety; and***
>
> ***(iii) That this Honurable court be pleased to set aside the judgment entered on 2nd June, 2016 in its entirety and the defendant/applicant be granted leave to file and serve its statement of defence out of the prescribed time."***

20. As at the time the orders for stay of execution were being sought in the lower courts interlocutory judgment had been entered against the applicant. The applicant therefore sought stay of execution of the said judgment in the hope that it would be allowed to file and serve its statement of defence out of the prescribed time.

21. The application before this court is for stay of execution of the interlocutory judgment entered on 2nd June, 2016 in its entirety together with all consequential orders arising therefrom, pending the hearing and determination of the appeal filed to the High Court.

22. The Court of Appeal stated as follows with regard to the doctrine of *res judicata*, in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR:-**

> ***"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of***

litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

23. A perusal of the two applications leaves no doubt in this court's mind that the reasons for which stay of execution was prayed for in the lower court is different from the reasons for which it is sought in the High Court. I therefore hold that the application dated 19th October, 2017 is not *res judicata*.

STAY OF EXECUTION

24. The other pertinent issue that was submitted on is that the applicant is cushioned from depositing security in satisfaction of the decree under the provisions of Order 42 rule 6 of the Civil Procedure Rules, for the reason that the provisions of Section 56(3) of the Kenya Deposit Insurance Act, apply in the instant case.

25. The preamble to the said Act provides that it is:-

> ***"An Act of Parliament to provide for the establishment of a deposit insurance system for the <u>receivership</u> and <u>liquidation</u> of deposit taking institutions, to provide for the Kenya Deposit Insurance Corporation and for connected purposes."*** *(emphasis added).*

26. Section 56 of the said Act provides as follows:-

> ***"(1) No cause of action which subsisted against the directors, management or the institution <u>prior to liquidation shall be maintained against the liquidator.</u>*** *(emphasis added).*
>
> ***(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."***

27. Whereas the provisions of section 56(3) of the Kenya Deposit Insurance Act which was cited by the applicant's Counsel relate to a company or institution under liquidation, the affidavit that was filed by the applicant's deponent in paragraph 8 states thus:-

> ***"That it is not in dispute that <u>the applicant herein is presently under receivership and therefore the provisions Section 56 as a fore-stated are applicable to it</u>."*** *(emphasis added).*

28. The above deposition reveals that the applicant has outrightly relied on the wrong provisions of the law as the basis of its argument for it to be granted stay of execution, on the argument that it is under receivership.

29. Section 44 of the Kenya Deposit Insurance Act provides as follows:-

> ***"(1) The Central Bank shall notify the Corporation in writing where an institution has ceased, or, is likely to cease, to be viable.***
>
> ***(2) Upon receipt of a notification under subsection (1), the Corporation may-***
>
> > ***(a) Require the institution-***
> >
> > > ***(i) To take any action within such time as the Corporation may consider necessary or expedient;***
> > >
> > > ***(ii) To stop receiving, or paying of deposits or from carrying on any of its businesses or part thereof; or***
> > >
> > > ***(iii) To restructure the whole or part of its businesses, as may be specified by the Corporation;***
> >
> > ***(b) <u>Assume control as a receiver of the whole of the assets, liabilities, businesses and affairs of the institution; and</u>***
> >
> > > ***(i) <u>Carry on the whole of its businesses and manage the assets, liabilities and affairs</u>; or***
> > >
> > > ***(ii) <u>Assume control of such part of its assets, liabilities, businesses and affairs including disposal of assets, and carry such part of its business and affairs</u>; or***
> > >
> > > ***(iii) <u>Appoint any person to carry on the whole of the businesses and manage the assets, liabilities and affairs of the institution on its behalf</u>."*** *(emphasis added).*

30. Section 45(5) thereof provide as follows:-

"Where the Corporation or the appointed person has assumed control of an institution, the Corporation or the appointed person shall-

(a) Be deemed to be acting as the agent of the institution in carrying on the businesses and managing the assets, liabilities and affairs of the institution or in carrying out any transaction relating to the institution or its assets, businesses and affairs, including disposal of assets; and (emphasis added).

(b) Not, by reason of having assumed control of the institution or any action taken by it, be held to have assumed or incurred any obligation or liability of the institution for its own account."

31. The above provisions clearly indicate that either the Kenya Deposit Insurance Corporation or the person appointed as Receiver Manager is empowered by the law to run the affairs and business of a company or institution that has been placed under receivership and to take over any liabilities that may accrue during receivership or any that may have accrued before receivership. The applicant is therefore is not wholly insulated from meeting its liabilities.

32. Further Section 50(2) of the Kenya Deposit Insurance Act provides as follows:-

"For the purpose of discharging its responsibilities as receiver, the Corporation shall have power to declare a moratorium on the payment by the institution to its depositors and other creditors and the declaration of the moratorium shall- (emphasis added).

(a) Be applied equally and without discrimination to all classes of creditors:

Provided that the Corporation may offset the deposits or other liabilities owed by the institution to any depositor or other creditor against any loans or other debts owed by that depositor or creditor to the institution."

33. In the present application, the applicant failed to attach to its affidavit a notice to prove that a moratorium was in existence to cushion it against making good monies owing to third parties.

34. In **Ashok L. Doshi & Another vs Central Bank of Kenya and Another** [2016] eKLR, the court found that the provisions of Section 56 of the Kenya Deposit Insurance Act were not applicable to a company that had been put under receivership.

35. I note that the application for stay of execution was filed timeously. The applicant however failed to offer security and to show how it will suffer substantial loss if the orders sought are not granted. It put too much weight on the provisions of Section 56(3) of the Kenya Deposit Insurance Act and by so doing lost sight of and failed to comply fully with the provisions of Order 42 rule 6 of the Civil Procedure Rules.

36. It is therefore my finding that the application is incompetent. It is hereby dismissed. The costs of the application are awarded to the respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 18th day of January, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the applicant

Mr. Anagwe holding brief for Mr. Kedeki for the respondent

Mr. Oliver Musundi - Court Assistant