REPUBLIC OF KENYA

HIGH COURT AT NAIROBI [COMMERCIAL LAW COURTS]

CIVIL CASE NO.1243 OF 2001

TRUST BANK LTD. ………....…………………………………… PLAINTIFF

VERSUS

PARAMOUNT UNIVERSAL BANK …........……………… 1ST DEFENDANT

AJAY SHAH ………………………………...………… 2ND DEFENDANT

PRAFUL SHAH ……………………………………………. 3RD DEFENDANT

R U L I N G

1. On 1st February 2012, I dismissed the Plaintiff's Preliminary Objection as regards the 1st Defendant's Notice of Motion dated 15 December 2011. In my Ruling, I detailed the Orders sought by the First Defendant in its current Application before me and the grounds under which it is brought. I see little point in repeating what I detailed in that regard in my said Ruling, here. Further and briefly, the principle reasons for dismissing the Plaintiff's Preliminary Objection were that the principles to be applied in stay of execution applications as before the Court of Appeal on the one hand and this Court, on the other, are entirely different.

2. The powers of this Court for granting a stay of execution have been often quoted as per **Order 42 Rule 6 (2)** *Civil Procedure Rules 2010* which replaced the old **Order XLI Rule 4**. For clarification purposes those powers were spelt out in the Court of Appeal's judgment in **Carter & Sons Limited v Deposit Protection Fund Board & 2 Others** – *Civil Appeal No. 291 of 1997*.

"…… had been made under the provisions of Order 41 rule 4. Sub-rule 2 of the same rule reads:

(2) No order for stay of execution shall be made under sub-rule 1 unless –

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that 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".

Indeed, the Court of Appeal went further in that case by stating:

'As was held by the Court of Appeal in Vishram Ravji Halai & Another vs. Thornton & Turpin (1963) Limited, *Civil Application 15 of 1990* (unreported). The superior court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause. Secondly, the Court

must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the Applicant must furnish security. The application must, of course, be made without unreasonable delay".

3. The Application dated 15 December 2001 is supported the Affidavit of the 1st Defendant's counsel herein Paul Ogunde. His Affidavit went into details of the filing of a Notice of Motion in the Court of Appeal dated 7 December 2011. Indeed, Mr. Ogunde annexed a copy of the same. The Notice of Motion sought a stay of execution of the Decree of this Court in this cause pending the hearing and determination of an appeal against my Order made herein on 1st December 2011. I will refer back to that application shortly, below. What I found illuminating as regards Mr. Ogunde's said Affidavit is paragraph 4 which reads as follows:

"I verily believe that it is just to allow the Court of Appeal to determine whether the decree herein should be stayed pending hearing and determination of the intended appeal against the order made herein on 1st December 2011, by halting execution until that determination is made".

Again, I would wish to refer to the paragraph as below.

4. As can be seen from this Court's record, there were a flurry of applications to and fro as a result of my granting interim orders of stay of the Decree herein pending the inter partes hearing of the Notice of Motion dated 15 December 2012. All such Motions have now been disposed of before this Court save the said Notice of Motion of 15 December 2011 now being considered.

5. In his submissions before Court, Mr. Ogunde apologized for not specifically detailing **Order 42 Rule 6 (2)** in the heading of the Application but he was relying upon all other provisions of the law which he submitted would encompass **Order 42 rule 6 (2)**. He continued that there were 2 matters in which I need be satisfied in granting the Application. The first was that unless the stay order was granted the Applicant would suffer substantial loss. Secondly, that the Applicant must provide security. As regards the first point Mr. Ogunde pointed out that the Plaintiff was in liquidation and if it was paid by way of execution of the Decree, it could not refund such payments if the Appeal was successful. Secondly, the amount in the Decree is over Shs. 100 million against a principal sum of Shs. 3 million. To pay that sort of sum, said Mr. Ogunde, to an institution that cannot refund, is substantial loss. As regards security, Mr. Ogunde pointed out that the deposit of Shs. 15 million ordered by the Court of Appeal in its Ruling of 22 October 2010 had been made which was 5 times the principal amount.

6. Mr. Ogunde further submitted that there was nothing to stop me making the orders sought by the Application. He advanced 3 reasons therefore:

(a) New matters arose after the ruling of the Court of Appeal dated 22 October 2010 was delivered.

(b) The First Defendant had contended that those new matters either relaxed or created a situation that made it justifiable for the deposit (of Shs. 15 million) to be made outside time and;

(c) I had found against the First Defendant in my Ruling of 1st December 2011 and there is an appeal in place against that finding. The Court of Appeal has yet to determine that point.

There would be nothing to stop this Court from keeping the parties on an equal footing until the Court of Appeal determines the matter. Further Mr.Ogunde submitted that if the stay was not granted and the money paid to the Plaintiff, there would be nothing left to argue in the Court of Appeal.

7. Mr. Ogunde also addressed the Court on the issue of jurisdiction. He felt that I had dealt with the point amply in my Ruling on the Preliminary Objection dated 1 February 2012. In the Court of Appeal, there is a stay application pending as well as an intended Appeal. It would be best for all, Mr. Ogunde submitted, if the parties were on equal footing until heard by the Court of Appeal. There would be no prejudice to the Plaintiff as the Shs. 15 million deposit was in place. In any event, the Applicant was a

commercial bank with substantial assets to satisfy the Decree should the proceedings before the Court of Appeal prove unsuccessful.

8. Mr. Wananda held brief at the hearing of the Application for Mr. Oyatsi who had had to travel up-country. However, Mr. Oyatsi had put together written submissions in relation to the Application which were handed into Court. In his brief submissions, Mr. Wananda stated that the Plaintiff opposed the Application detailing that it was not properly premised under **O.42 Rule 6 (2)**. The other issue was the effect of the Order of the Court of Appeal dated 22 October 2010. The Plaintiff's position was that Order had finally decided the issue as to stay of execution which order the 1st Defendant had failed to comply with. In Mr. Wananda's opinion, as backed by Mr. Oyatsi in his written submissions, the 1st Defendant's only option would have been to go back to the Court of Appeal to seek an extension of time to comply with the Court's Order. This Court, Mr. Wandanda opined, cannot re-open the same issue – *stare decisis*. He referred me to the Ruling handed down by O'Kubasu, JA on 31 January 2012 where the learned Judge had said the same thing.

9. I was then referred to the decision in **Pop-in (Kenya) Ltd. & 3 Others vs. Habib Bank AG Zurich** [1990] KLR 109 in relation to the principle of *res judicata* –

"The plea of res judicata applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time".

Mr. Wananda repeated Mr. Oyatsi's written submissions by detailing that by allowing the First Defendant's Application, there would be the absurd position of the Court of Appeal allowing the Plaintiff to execute and this Court stopping the execution. I was urged not to allow such situation to prevail. As Mr. Oyatsi put it in his written submissions:

"the said ruling determined the said application in the Court of Appeal and there is nothing remaining or pending in that application which enables the High Court to exercise its jurisdiction under Order 42 of the Civil Procedure Rules".

Finally, Mr. Oyatsi concluded his written submissions by referring and quoting O'Kubasu JA's Ruling delivered on 31 January 2012 as follows:

"Having heard the rival submissions by both Mr. Ogunde and Mr. Oyatsi, I am of the view that the starting point should be the ruling of this Court delivered on 22nd October, 2010. If the applicant had any difficulties in complying with conditions set out in that ruling, it should have come back to this Court soon after 22nd October 2010. Instead of doing so, it went to start the process afresh. We are now in 2012 and the dispute is still undetermined. It would not be in the interest of justice to prolong the matter anymore. Consequently, I find no urgency in the matter and I decline to certify this matter as urgent".

10. There is no doubt in my mind that O'Kubasu JA is absolutely right when he details in his Ruling above that the First Defendant's course of action herein, once it knew that it could not abide by the conditions of the Court of Appeal's Ruling of 22 October 2010, was to have gone back to that Court. Even paragraph 4 of Mr. Ogunde's Supporting Affidavit (supra) seems to recognize that fact. Certainly, Mr. Oyatsi and Mr. Wananda have emphasized this point in their submissions before Court. Reverting to the **Vishram Ravji Halai & Another vs. Thomton & Turpin** case (supra) the first thing that an applicant must establish in a stay application is *"sufficient cause"*. As per my Ruling of 1st December 2011. I do not think that the Applicant herein has shown sufficient cause. I am also not convinced that the Applicant has satisfied this Court that substantial loss will result unless the order is made. The Plaintiff is in liquidation. There are still Applications in the Court of Appeal outstanding that may result in a turn around as regards the decretal sum. It would be an imprudent liquidator indeed who being aware of such situation, allowed such decretal sum to be so absorbed as to sink without trace in the

coffers of the liquidation.

11. I have also considered the principle of *res judicata* as raised herein by Mr. Oyatsi's written submissions with reference to the Pop-in (Kenya) case (supra). There is no doubt that the Court of Appeal long deliberated on the question of stay arriving as it did in its Ruling of 22 October 2010. By this Court allowing a stay after the Court of Appeal's dictum is already in place would be a clear breach of the *res judicata* principle. As the Plaintiff puts over the point:

"it is a gross abuse of the Court process to create a situation where we have an Order from the Court of Appeal to execute the Decree and, at the same time, an Order from the High Court (a lower Court) staying execution of the same Decree".

Further as O'Kubasu JA has stated in his Ruling of 31st January 2012:

"We are now in 2012 and the dispute is still undetermined. It would not be in the interest of justice to prolong the matter anymore".

12. The ultimate result of the above is that I dismiss the 1st Defendant's Notice of Motion dated 15 December 2012 seeking stay of execution herein, with costs to the Plaintiff.

DATED and DELIVERED at NAIROBI this 1st day of March 2012.

J. B. HAVELOCK
JUDGE