REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 875 OF 2001

TRUST BANK LIMITED …….....…….. PLAINTIFF

VERSUS

AJAY SHAH ……..…….…… 1ST DEFENDANT

NITIN CHANDARIA …… ……. 2ND DEFENDANT

VINOD PATEL ……..…….. 3RD DEFENDANT/DECREE HOLDER

JIGNESH DESAI …… 4TH DEFENDANT

R U L I N G

This is a ruling on two applications dated 3RD April, 2012 and 24th April, 2012, respectively. The first application (hereinafter "the **garnishee application**") is by the 3rd Defendant/Decree Holder and seeks for the garnishee order Nisi made herein on 4th April, 2012 to be made absolute whilst the second application is by the Plaintiff seeking a stay of execution of the order of 19th March 2010 pending appeal (hereinafter "the stay application"). I propose to consider the stay application first.

The stay application has been brought under Orders 42 Rule 6 and 51 Rule 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks to stay execution of the order made on 19th March, 2010. In support of the application, Adam Boru the Liquidation Agent of the Plaintiff swore an Affidavit.

The Plaintiff contended that judgment dismissing the suit was delivered on 22nd November, 2007 without costs being awarded, that on the 3rd Defendant's application, the judgment was reviewed and an order was made on 19th March, 2010 awarding the 3rd Defendant the costs of the suit, the Plaintiff had filed a Notice of Appeal against that decision, that there was further proceedings including the taxation of the bill of costs of the 3rd Defendant which was taxed at Kshs.17,002,770/- which has been objected to. That the court has not yet provided the Plaintiff with the typed ruling of the taxing master to enable the Plaintiff file the reference, that the 3rd Defendant run away from the country soon after the case was filed, that if the intended appeal succeeds, the Plaintiff will have to recover any monies awarded to the 3rd Defendant, that if the 3rd Defendant executes the order for costs, the Plaintiff will suffer substantial loss and that the winding up of the Plaintiff is an ongoing process which had not been concluded.

Mr. Oyatsi, learned Counsel for the Plaintiff submitted that the 3rd Defendant has not sworn any Affidavit

to challenge the averments made on oath by the Liquidation Agent, that the Replying Affidavit by James Singh Gitau an Advocate was improper as the said Advocate was not on record for the 3rd Defendant, that the said Replying Affidavit does not state the whereabouts of the 3rd Defendant nor disclose when the authority was given. That if the appeal succeeds, the Plaintiff will not be able to recover the said funds if the same were released to the 3rd Defendant.

For the 3rd Defendant, a Replying Affidavit by James Gitau Singh was filed. The 3rd Defendant contended that the application was bad in law, it was an afterthought brought to frustrate the 3rd Defendant's application dated 4th April, 2012, that the Plaintiff had participated in the taxation and had proposed costs of Kshs.9,720,480/96 to the 3rd Defendant, that the 3rd Defendant had not fled the country but had refrained from testifying in court on advise of Mr. James Singh Gitau, that in various suits filed by the Plaintiff and dismissed with costs, the successful parties had encountered difficulties in recovering costs from the Plaintiff and that on 13th March, 2011 the parties had agreed to deposit the costs into a joint account on the grounds that the Plaintiff was under liquidation.

Mr. Singh Gitau submitted that there was a delay in applying for stay to the extent of 5½ years as against the decree of 22nd November, 2007 and 2 years as against the order of 19th March, 2010, respectively, that the Plaintiff had not demonstrated how it was likely to suffer substantial loss, that there was no evidence that the 3rd Defendant had escaped from the jurisdiction. Counsel referred to the cases of **Daniel Chebutuk Rotich –vs- Morgan Kimaret Chebutuk, royal Media –vs- Telkom Kenya, Ngure –vs- Majugu** on the proposition that substantial loss must be demonstrated in an application for stay and that delay must be explained.

Counsel further submitted that a judgment dismissing a suit cannot be stayed, that the Plaintiff had not offered security for the due performance of the decree. Counsel urged that the application be dismissed with costs.

Having considered the Affidavits on record, written submissions and oral hi-lights of counsel, and the authorities relied on, my view of the matter is as follows:-

This is an application for stay of execution pending appeal. The jurisdiction to entertain such an application is discretionary. However, the discretion is fettered by the conditions set out in Rule 6(2) of Order 42 of the Civil procedure Rules. That subrule provides:-

"(2) No order for stay 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." (Emphasis supplied)

It is clear from the foregoing that the subrule is courched in mandatory terms by the use of the words "**shall not**." Accordingly, for a stay to be granted an applicant must satisfy three requirements, namely, that the application has been made timeously, that the applicant will suffer substantial loss if the stay is not granted and must give security for the due performance of the decree or order sought to be stayed.

Will the Plaintiff herein suffer substantial loss? The Plaintiff contended that the 3rd Defendant fled the country after the suit was filed and that the Plaintiff was not aware of any assets belonging to the 3rd Defendant in this country. That if the sum of Kshs.17,002,770/- awarded as costs is released to the 3rd Defendant and the appeal succeeds, the Plaintiff will not be able to recover. The Plaintiff objected to the Replying Affidavit of James Gitau Singh on the ground that the same was by an Advocate who was not

on record in this case. Mr. Singh Gitau contended that his Replying Affidavit was sufficient and proper.

I do not think that the Replying Affidavit of Singh Gitau rebutted the evidence or the allegations of the Plaintiff regarding the whereabouts of the 3rd Defendant. If the 3rd Defendant was within the country, why didn't he swear the Affidavit himself. Mr. Singh did not explain where the 3rd Defendant was and why he had not sworn the Replying Affidavit.

Further, that Affidavit did not address the issue of the 3rd Defendant not having any assets in this country. I am therefore compelled to believe that if the monies are released to the 3rd Defendant and the appeal succeeds, the same will be out of reach of the Plaintiff whereby it will suffer substantial loss.

Was the application made timeously? As submitted on behalf of the 3rd Defendant, the decree sought to be stayed was made on 22nd November, 2007 and the Order on 19th March, 2011 and 25 months, respectively.

Courts in this country have dealt with the issue of delay in applying for an order of stay. In HCCC No. 15 of 2000 **Royal Media Services –vs- Telkom Kenya Ltd and 13 others,** Ransley J held that **8 months** was unreasonable delay. In **Ngure –vs- Magugu (2004) e KLR**, Waweru J held that **4 months** was unreasonable delay, in **Cyrus Nderi China –vs- Jennifer Wanjuki Kanyayi HCCCA No. 21 of 2004 (UR)** Lenaola J found that **six (6) months** to be unreasonable delay, in **George W. Omondi –vs- Guilders International Bank Ltd HCCC No. 1217 of 2002 (UR)**, I found **4 months and 18 days** to be inordinate delay and in **Jogoo Kimakia Bus Service Ltd –vs- Electrocom International Ltd 1985 KLR 260**, the Court of Appeal held that six **(6) weeks**, which is one a half month was a matter of concern in an application for stay.

The foregoing being the case, what of the matter at hand where the delay is 24 and 64 months, respectively. To my mind, the delay is not only inordinate but is also unacceptable in resolution of civil disputes. No acceptable reasons were advanced to explain the delay. The allegation of the filing of numerous applications after the decree and order were made and the unavailability of the typed proceedings are in my view not sound grounds to explain the delay. There was nothing that prevented the Plaintiff from at least filing its application for stay. Accordingly, the application was made after unreasonable delay contrary to Rule 6(2) (a) of Order 42.

As regards security, for the performance of the decree, no security has been offered by the Plaintiff. In **Stephen M'ikunyua M'Imathiu 7 Anor –vs- Rev. Elijah Mwirigi (2006) e KLR**, Hon Lenaola J delivered himself thus:-

"For discretion to be exercised in favour of the Appellant, the court is enjoined to do so upon a security being given by the Appellant or the court would otherwise create other terms as it deems fit for granting the stay of execution. In the instant application, it is from the bar that Mr. Kariuki for the Appellant has offered security which is unclear. Why was hat matter not deponed to in an Affidavit by the Appellant. ……..."

I agree an Application under Order 42 Rule 6(2) of the rules must offer to give security at the time of making the application as a sign of bona fides. In this case none has been given.

The conditions set out in Order 42 Rule 6 (2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff's Notice of Motion dated 24th April, 2012 is without merit.

If I am wrong, which I do not think I am, the decree in this case was for the dismissal of the suit. That is a negative order which is incapable of being stayed. There is ample authority to that end. All in all the Plaintiff application dated 24th April, 2012 is for dismissal and it is hereby dismissed with costs.

The Garnishee application seeks to attach any monies invested by the Plaintiff by way of Treasury Bills or Government Securities and held by the Central Bank of Kenya, the Garnishee. The grounds upon which the application was made is that there was no stay of execution against the judgment the 3rd Defendant had obtained against the Plaintiff, that the decree of Kshs.17,002,770/- remain unsatisfied, that the Plaintiff was about to declare a final dividend and that the Garnishee was holding funds for the Plaintiff.

Mr. Singh Gitau submitted for the 3rd Defendant that order 23 Rule 1 of the Civil Procedure Rules allows attachment of debts belonging to a judgment debtor, that although Central Bank of Kenya had been served to appear in court and show cause it had failed to do so, that it was not in dispute that the Plaintiff's debt with the Central Bank was in credit, that the Plaintiff has not asked the taxing officer to give reasons for the award of costs, that the taxing officer's reasons were contained in the ruling of 28th October, 2011 and the reference against the taxation should have been lodged by the 11th November, 2011, that Section 241 of the Companies Act was not applicable as costs of the suit by the Company are payable forthwith. Counsel relied on the cases of **Trust Bank Ltd –vs- Ajay Shah HCCC No. 72 of 2001 (UR) and Trust Bank Ltd –vs- Ajah Shah & Others HCCC No. 73 of 2001 (UR)**. That there was a consent recorded in court on 13th March, 2012 that a sum of Ksh.15 million be deposited in a joint account, in the names of the Advocates for the Plaintiff and 3rd Defendant as security for costs. He urged that the application be allowed.

Adam Boru the Liquidation Agent of the Plaintiff swore a Replying Affidavit in opposition to the Garnishee application. The Plaintiff contended that the application was an abuse of the court process, that since it was an attachment in execution of the decree it was in breach of Section 241 of the Companies Act, that the Plaintiff had filed a Notice Objecting to the taxed costs, that reference against the taxation can only be lodged upon receipt of the typed copy of the ruling of the taxing master, that the correct sum payable as costs have not yet been ascertained that there was no evidence that the Plaintiff was about to declare final dividend, that the Plaintiff intended to appeal against the decree, that the Affidavit in support was sworn by Mr. Gitau who was not the Advocate on record.

Mr. Oyatsi learned counsel for the Plaintiff submitted that Mr. Gitau could not swear the Affidavit as he was not the Advocate on record, No Notice of Change of Advocate had been filed under Order 9 Rule 5, that he had no capacity to bring the application or swear the Affidavit on behalf of the 3rd Defendant that Section 225 of the Companies Act bars any execution against a company under liquidation, same with Section 35(1) of the Banking Act, that the case relied on by the 3rd Defendant was decided in 1895 in England long before our Companies Act was enacted, counsel urged that the application be dismissed with costs.

In a rejoinder, Mr. Singh Gitau submitted that he had had the personal conduct of the matter throughout these proceedings and documents were being served upon him, that the application and submissions were drawn by Mukita Musangi Advocates who are properly on record, that having had personal conduct of the matter he was swearing the Affidavit legally under Order 19 Rule 3(1) of the Rules, that the averments in the Supporting Affidavit had not been controverted, that the cases relied on by the 3rd Defendant had not been distinguished that the provisions of the Companies Act do not apply to the liquidation by Central Bank of Kenya. He relied on the case of **Euro Bank Vs G K Meenye t/a Meenye & Co. (HCCC No. 455 of 2000 (UR).** Counsel urged that the application be allowed.

Having considered the Affidavits and submissions of the respective counsel for and against the application my take of this matter is as follows:-

The existence of a decree that is yet to be satisfied is not in dispute. It is also not disputed that the Garnishee, Central Bank of Kenya, is indebted to the Judgment Debtor and has not appeared to show cause as directed by the court. It is also not in dispute that this suit amongst many others were commenced with leave of court. In my view the issues to be determined is whether in the circumstances of this case where the Affidavit has been sworn by Mr. James Singh Gitau and not the 3rd Defendant himself, is the application competent and secondly whether the costs pleaded in these proceedings can be

recovered through execution whilst the Plaintiff is under liquidation.

Before I address the above two issues, the Plaintiff did contend that the costs have not been ascertained and therefore no execution can be levied in respect thereof. Mr. Oyatsi's view was that since the Plaintiff had challenged the taxation by the taxing master it was premature for the 3rd Defendant to purport to execute for the costs which the court had not yet ascertained.

My view is that once a taxing master has assessed costs or taxed a bill of costs properly drawn for that purpose, costs are deemed to have been ascertained. To my mind, the process of reference to a taxation under Rule 11 of the Advocates Remuneration Order to a judge is but an appellate process. The process of ascertainment of costs ends with the taxing master. Accordingly, unless there is a stay of the ruling or order of the taxing master, a decree on costs as ascertained by a taxing master is in my view capable of and susceptible to execution.

Accordingly, I do not agree with the Plaintiff that the costs have not been ascertained. The mere pendency of a reference is not either a stay or a primary process of ascertainment of costs but rather secondary.

On the issue of the Supporting Affidavit sworn by James Singh Gitau, I have already considered the arguments of the parties on that issue. Contrary to the contention by the Plaintiff, both the application and the Supporting Affidavits are drawn by the firm of Mukite Musangi Advocates. Therefore, the documents have been properly drawn and the issue of the filing of a Notice of Change of Advocates under Order 9 Rules 5 and 7 of the Civil Procedure Rules does not arise. What Mukite Musangi Advocates have done is to have the Affidavit in Support and Further Affidavit sworn by Mr. James Singh Gitau.

Is it wrong for Mr. Singh Gitau to have sworn the Affidavits? Mr. Singh Gitau has sworn that he has had the personal conduct of the matter on behalf of the 3rd Defendant, that he has been the one appearing in this matter on the instructions of Counsel on record. He has sworn that the contents he has deponed to are true and within his knowledge. Under Order 19 Rule 3, the requirement imposed on a deponent of an Affidavit is that he shall only confine his depositions to facts based on his knowledge. It has not been contended that Mr. Singh Gitau has no knowledge of the matters he has deposed to in the two affidavits. His averments have not been controverted. Even if they were denied, that Affidavit is not in breach of the Advocates Practice Rules that bar Advocates from swearing Affidavits on behalf of their client. In the instance case, Mr. Singh has deposed that the matters he has deposed to are within his ***"Knowledge, information and belief"***. I have perused the entire Affidavits and I entertain no doubt that the matters deposed to are in the knowledge of Mr. Singh. This is because, they relate to the prosecution of this suit which h has sworn he has been undertaking personally.

Further, as I understand the law, in any litigation evidence will be received from any witness a litigant puts forward provided the evidence is relevant, and direct evidence i.e. it is within the personal knowledge of the witness. The same way a litigant can choose not to testify at a trial but call evidence through other witnesses, I am of the view and so hold that a litigant can do so in an application by authorizing someone else who has firsthand knowledge of the matters in issue to swear the Affidavit on his behalf.

My decision in this issue is informed by the decision of the Court of Appeal in the case of **Julianne Ulrike Stamni –vs- Jiwi Beach Hotel Ltd (1995) e KLR** wherein it was held that: -

"…. there is no reference in this rule to the Plaintiff himself giving evidence first or at all. <u>But a Plaintiff is bound to produce evidence in support of the issues which he is bound to prove and which evidence can be given by any competent witness not necessarily himself.</u> A Plaintiff does not have to be personally present when he is represented by a duly instructed Counsel as was the case here" (Emphasis mine)

Accordingly, I am not persuaded that the application is defective on the basis of the Affidavit in support being sworn by someone else other than the 3rd Defendant himself or his Advocates on record.

The Plaintiff has contended that Section 225 of the Companies Act bars any execution being levied against it since the company is under liquidation. My take of it is that that Section is supposed to protect the assets of the Company for the benefit of the creditors of the Company. It prohibits any attachment, distress or execution of the assets of the company.

The 3rd Defendant relied on **HCCC No. 72 of 2001 and 73 of 2001 Trust Bank Ltd –vs- Ajay Shah**. In that case, Khaminwa J relying on the decisions in **Re London Drapery Stores (1898) 2 Ch D 1686 and Re Pacific Coast Syndicate Ltd 2 Ch D 26** held that the costs incurred by the liquidator are not subject to proof and are therefore subject to a court order. The Plaintiff was of the view that the decisions in those cases are not binding and they were premised on English decisions that were decided long before the enactment of our Companies Act which is premised on the English Companies Act of 1948.

I have considered the rival submissions, it would seem that although the liquidation of the Plaintiff was commenced through the Banking Act Chapter 488 of the Laws of Kenya, under Section 35(1) of that Act, once the Central Bank of Kenya appoints the Deposit Protection Fund to liquidate a bank, the provisions of Part VI of the Companies Act apply. These include the restrictions as to execution and attachment of the company under liquidation under Section 225 of the Companies Act.

As I have already stated, Section 225 of the Companies Act is meant to protect and conserve the assets of the company for the benefit of the creditors of the company. Section 241 of the Companies Act allow the liquidator to commence or defend any action in the name of or on behalf of the company. In so doing, the liquidator is bound to incur costs for he may appoint Advocates or other experts to help him achieve his goal. The question that arises is, if he incurs any debt or expense while exercising that power or obligation, will such a debt by way of costs have to wait and rank with the rest of the debts of the company? Will he for example instruct an Advocate who will have to wait until after liquidation the que with the rest of the creditors in terms of Section 311 of the Companies Act? Is he not entitled to incur costs whilst winding up the company?

My view is, since it is the court that authorizes the liquidator to commence or defend any action or proceeding after a winding-up order has been made or the liquidator has been appointed, the same court has the power to order whether costs be paid to the liquidator if he is successful or be paid by him if he is unsuccessful. The English position is that the liquidator is usually condemned to bear the costs personally where he is in the wrong or he takes recourse to the assets of the company if he brought the suit in the name of the company and he is found not to have made a mistake.

In **Halsbury's Laws of England, (1974)** the text reads as follows:

"Where a liquidator sues or defends actions or other proceedings in the name of the company, he is not a party to the action, and cannot be ordered to pay the costs personally but when he is the applicant in proceedings brought by him as liquidator, an order for costs will be made against the liquidator personally, even if he is also the official receiver. If the proceedings in which the order is made are not in the winding up the order may be made without prejudice to any application he may make to have the costs allowed out of the company's assets."

In the case of **Re Wilson Lovatt & Sons Ltd (1977) I ALL ER 274** Olive J delivered himself at page 285 thus:-

"I cannot at the moment see why it should be contended that a liquidator who takes it on himself to institute proceedings, to bring parties before the court, to subject them to costs, and as against whom it is quite clearly established that no order for security can be made, should then be entitled to plead that he is not responsible beyond the extent of the assets in his hands. I can see no reason at all why a liquidator should be entitled to an immunity which is not conferred on other litigants. A trustee or a personal representative who institutes proceedings no doubt has a right to indemnity out of the estate which he represents but, if he litigates, he litigates at his own risk and so, in my judgment, it should be with the liquidator, and the authorities which point that way seem to me, if I may say so respectfully to

be completely reasonable." (Emphasis supplied)

From the foregoing, my view is that the decisions of Khaminwa J referred to by the 3rd Defendant are persuasive. The costs incurred in a litigation by the company through the liquidator are not strictly so called debts of the company that should be ranked with other debts under Section 311 of the Companies Act for which the company was placed under liquidation. They are a special category of debt. Indeed under Section 35A (1) of the Banking Act, they are supposed to be paid out as charges and expenses of the winding up. The Section provides:-

"35A (1) Any expense incurred by reason of the exercise of the powers conferred by this part in respect of an institution shall be met by the institution.

Provided that the Board may, where it is appointed as a liquidator under this act, in the event that the assets being insufficient to satisfy liabilities, authorize payment out of the assets, of the Fund costs, charges and expenses incurred in the winding up in such order or priority as it may consider appropriate."

Since the Liquidator (Deposit Protection Fund) has not paid these charges that were legally incurred after obtaining the leave of court to commence these proceedings, I am of the view as so hold that the execution sought to be levied is proper.

Accordingly, I allow the 3rd Defendant's application dated 3rd April, 2012 and since the Central Bank of Kenya did not appear as directed by the Court on 4th April, 2012, I do order that the Order of Garnishee Nisi issued herein on 4th April, 2012 is hereby made absolute.

I award the 3rd Defendant the costs of the application in any event.

DATED and delivered at Nairobi this 17th day of July, 2012.

……..
A. MABEYA
JUDGE