



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: GITHINJI, MUSINGA & KIAGE, J.J.A.)**

**CIVIL APPEAL NO. 312 OF 2006**

**BETWEEN**

**CENTRAL BANK OF KENYA.....1ST APPELLANT**

**ROSE DETHO.....2ND APPELLANT**

**AND**

**AHMED NASSIR.....1ST RESPONDENT**

**CHARTERHOUSE BANK LIMITED.....2ND RESPONDENT**

**MINISTER FOR FINANCE.....3RD RESPONDENT**

**KENYA BANKERS ASSOCIATION.....4TH RESPONDENT**

**KENYA REVENUE AUTHORITY.....5TH RESPONDENT**

*(Being an appeal from the Ruling and Order of the High Court of Kenya*

*at Malindi(Ouko, J.) dated the 9th day of October, 2006*

*in*

Misc. Civil Application No. 97 of 2006)

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**CONSOLIDATED WITH CIVIL APPEAL NO 313 OF 2006**

**CENTRAL BANK OF KENYA.....1ST APPELLANT**

**ROSE DETHO.....2ND APPELLANT**

**AND**

**HIDAYA MOHAMED LOO.....1ST RESPONDENT**

**CHARTERHOUSE BANK LIMITED.....2ND RESPONDENT**

**MINISTER FOR FINANCE.....3RD RESPONDENT**

**KENYA BANKERS ASSOCIATION.....4TH RESPONDENT**

Misc. Civil Application No. 98 of 2006)

## JUDGMENT OF THE COURT

[1] Although the two appeals were filed at the Mombasa Registry of the Court, they were heard in Nairobi, one immediately after the other, together with three other related appeals as previously ordered by the Court. The two appeals challenge the decision of the High Court granting leave to apply for judicial review orders and also the order that the grant of leave do operate as a stay of the specific matters complained of. The appellants in the two appeals and the grounds of appeal are the same. Three of the respondents are the same and the respective counsel for the parties are the same. The impugned decisions were made by the same Judge. Lastly, the 1st the respondent in each appeal was a customer of Charterhouse Bank Ltd. It is for those reasons that we have found it expedient to render a consolidated judgment in the two appeals pursuant to **Rule 103** of the **Court of Appeal Rules**.

[2] On 30th June 2006, three Gazette notices were published all dated 23rd June, 2006 all relating to Charterhouse Bank Limited (Charterhouse), the 2nd respondent in the two appeals. By Gazette Notice No. 4936 the Acting Governor of the **Central Bank of Kenya (CBK)** in exercise of powers conferred by **section 34(2)(a)** of the **Banking Act** and acting with the approval of the Minister for Finance appointed **Rose Detho (2nd appellant herein)** to be Statutory Manager of Charterhouse for a period not exceeding twelve (12) months with effect from 23rd June 2006. By Gazette Notice No. 4937, the Acting Governor, in exercise of powers conferred by section 34(2) of the Banking Act and with the approval of Minister for Finance revoked the powers of the Board of Directors and Management of Charterhouse and vested the powers of management and control to the Statutory Manager. By Gazette Notice No. 4935, in exercise of the powers conferred by **section 34(6)** of the **Banking Act**, the Statutory Manager declared a moratorium on the liabilities of Charterhouse which, amongst other things, prohibited payment to depositors of the accounts operated by Charterhouse or any claims by any other class of creditors.

[3.1] On 6th October 2006, **Ahmed Nassir**, the 1st respondent in **Civil Appeal No. 312 of 2006**, filed an application by way of chamber summons under section 8 and 9 of the **Law Reform Act** and **Order 53, Rules 1, 2 and 3 of Civil Procedure Rules** seeking leave to apply for an order of certiorari to quash Gazette Notice Nos. 4935, 4936 and 4937, an order of prohibition and four orders of mandamus. The 2nd respondent also applied for an order, *inter alia*, that the leave granted do operate as;

and

**“2(g) (i) ...a stay of any approval, decision, action and reports in respect of the interested party under statutory management, the appointment of statutory manager, the closing of the interested party and blocking and disallowing of the *ex parte* applicant to access banking and financial services or its deposits by 1st, 2nd and 3rd respondents”**

**“2(g) (v) ...that the grant of leave aforesaid do operate as a stay of the decision placing the 1st interested party under statutory management and further a stay of any act and/or decision done/made by the respondents jointly and/or severally pursuant to the placement of the 1st interested party under statutory management until the determination of judicial review application.”**

The two appellants, and the 3rd, 4th and 5th respondents herein were named as the respondents in the application while Charterhouse was named as an interested party.

[3.2] The application was accompanied by a statement and by an affidavit sworn by the 1st respondent which disclosed that the 1st respondent operated an account with Charterhouse. The statement specified eleven grounds on which relief was sought.

[3.3] The application was heard on the same day after which the court in an *ex tempore* decision stated:

**“The application and submissions are duly considered. The *ex parte* applicant has shown triable issues in this application. For this reason, leave is hereby granted to him to apply for judicial review within 21 days from the date hereof. It is further ordered that leave granted herein shall operate as a stay of the matters enumerated by prayer 2(g)(i) and (v) of the chamber summons dated 6th October, 2006 pending the hearing and determination of the motion to be filed. All interested parties to be served.”**

[3.4] In Civil Appeal No. 312 of 2006, the appellants contend that the learned judge erred; in failing to appreciate that judicial review jurisdiction is concerned only with legality of a decision making process and not with the merits of the decision; in applying the wrong test; in failing to appreciate that the appellants do not owe any public duty to the 1st respondent to lift the moratorium or to reinstate the powers of attorney of the board of directors; in failing to appreciate that S.34 of the Banking Act vests powers on the 1st appellant to place a bank on statutory management and in failing to appreciate that the 1st respondent was seeking orders on behalf of the 2nd respondent. The appellants further contend that the judge erred; in exceeding his jurisdiction in issuing stay beyond the matters in the proceedings; in granting stay which restrained *ex parte* the 2nd appellant from executing her statutory mandate; and in granting stay which was so wide, imprecise and ambiguous.

[4.1] On 11th October 2006, **Hidaya Mohammed Loo**, the 1st respondent in **Civil Appeal No. 313 of 2006**, filed a similar application for leave to apply for judicial review orders and for leave to operate as stay of the specific matters complained of. The application was accompanied by a statement and a verifying affidavit. The two appellants and the 3rd and 4th respondents in the appeal were the respondents in the application and Charterhouse the interested party. The verifying affidavit indicates that the 1st respondent had a savings account with Charterhouse and received her husbands' pension through the Charterhouse account.

[4.2] The 1st respondent sought leave to apply for two orders of certiorari to quash the decisions made in the three gazette notices aforesaid,

any adverse letter, report or document; ten orders of prohibition; including prohibitions against enforcing the decision in the three gazette notices, and preventing the 1st respondent and other depositors from getting into Charterhouse; and eight orders of mandamus compelling the appellants to take certain actions including lifting the moratorium and to reinstate the mandate of the board of directors of Charterhouse. The 1st respondent also sought an order that leave granted do operate as stay:

**“2(u) (iii) for the disallowing of and the blocking of the applicant from being provided with banking services at Charterhouse Bank pending the determination of the application.”**

[4.3] The application was heard on the same day and upon hearing the 1st respondent’s counsel, the court made an *ex tempore* decision in the following terms:

**“upon reading the application and considering the same as well as the submissions and annexures, I am satisfied that the applicant has made out at this stage an arguable case. It is therefore ordered that leave is granted to the applicant to bring a motion for judicial review as prayed within 21 days from today’s date. It is further ordered that leave so granted do operate as a stay of the respondent’s actions as contained in prayer 2(u)(ii). All the interested parties to be served.”**

The decision of the Court is assailed in Civil Appeal No. 313 of 2006 on the same grounds as in Civil Appeal No. 312 of 2006.

[5] In both appeals, **Chacha Odera** for the appellants filed similar submissions on which they relied, without making oral submissions. In Civil Appeal No. 312 of 2006, the 1st respondent’s counsel did not attend the hearing and failed to file written submissions. In both appeals, Charterhouse, the 2nd respondent, filed written submissions opposing the appeal but its counsel, **Ms. Migiro**, did not make oral submissions. In Civil Appeal No. 312 of 2006, the respective counsel for 3rd and 5th respondents supported the appeal but did not file written submissions in both appeals. **Mr. Fraser** for 4th respondent in both appeals filed written submissions supporting the appeal. In Civil Appeal No. 313 of 2006, counsel for the 1st respondent did not attend the hearing but filed written submissions opposing the appeal.

[6] The 1st appellant (CBK) is a body corporate with power to sue and be sued in its own name (S.3(1) of Central Bank Act). One of its objects is to foster the liquidity, solvency and proper functioning of a stable market-based financial system (S.4(2) of Central Bank Act). Section 34(1) of the Banking Act stipulates the circumstances in which CBK can intervene in the management of a bank and such intervention is, by section 34(3), limited to a maximum of 12 months unless the High Court extends the period.

It is clear from the provisions of section 34(1) that the power of CBK to intervene in the management of a bank is discretionary. The function of a statutory manager appointed by CBK in exercise of the powers under S. 34(2) are stipulated in section 34(4) and include the declaration of a moratorium of payment by the bank, of its depositors and other creditors.

[7] The essence of the submission by the appellant’s counsel is that the court did not exercise its discretion judicially in granting leave and stay; that there was no *prima facie* evidence of an arguable case having regard to the scope of judicial review; that the issue of access to accounts raised by the 1st respondent in both appeals is a matter of private law; that the court did not explain how the discretion was exercised and that, leave was given as a matter of course. The counsel for the 1st respondent in Civil Appeal No. 313 of 2006 submitted, in essence that, the appellants had a legal duty to offer banking business to the 1st respondent which they breached. Counsel for Charterhouse cited the relevant provisions of the Banking Act and Central Bank Act and summarised the submissions thus:

**“In the premises aforesaid, to hold that an inquiry as to the statutory duty of the appellants owed to 1st respondent and by extension to the 2nd respondent cannot be an idle inquiry to be viewed as misconceived, worse still at the leave stage of judicial review application”**

[8] The two appeals should be decided on the basis of the procedural law of judicial review as it existed before the promulgation of 2010 Constitution. By Order LIII, rule 1(1) of Civil Procedure Rules (now order 53 rule 1(1) of the Civil Procedure Rules, 2010), leave of the court should be obtained before an application for an order of mandamus, prohibition or certiorari can be made.

In Aga Khan Educational Service Kenya v Republic and Others [2004] 1 EA 1 this Court held that in order to enable a judge to grant leave, there must be *prima facie* evidence of an arguable case. Furthermore, the court dealing with an application for leave has to consider the material available without going into the matter in depth to enable it to exercise its direction judicially to grant or not to grant leave.

[9] We respectfully agree with the submissions of the appellants’ counsel that, in deciding whether or not *prima facie* evidence or an arguable case has been established, the court has to consider the nature of the remedy that an applicant intends to seek. As the case of Kenya National Examination Council v Republic – Civil Appeal No. 266 of 1996 (1997 eKLR) shows; an order of mandamus commands the performance of a public duty imposed by statute. However, where a statute imposes a duty, but leaves the discretion as to the mode of performing the duty to a person or public body, mandamus cannot command the duty to be carried out in a specific way. An order of prohibition looks at the future and forbids action which would be *ultra vires*. Lastly, an order of certiorari quashes a decision that is *ultra vires* already made.

[10] In R v Kenya Bureau of Standards ex parte Bivac International SA – High Court Miscellaneous Civil Application No. 1541 of 2005, Nyamu, J (as he then was) in dealing with an application for leave to apply for judicial review orders stated:

**“...the court is aware that as judicial review remedies are at the end of the day discretionary ... that discretion is a judicial discretion and for that reason a court has to explain how the discretion, if any, was exercised so that all parties are aware of the factors which led to the exercise of the court’s discretion.**

**The other reason for outlining the factors is that in the event of an appeal the appellate court should be able to ascertain how**

**and why court's discretion was exercised in the way or manner it was exercised.”**

[11] As already stated, CBK has statutory power and in its discretion to intervene in the management of a bank and take over its management and control by appointing a statutory manager, if the circumstances stipulated in section 34(1) of the Banking Act arise.

The 1st respondent in each appeal held a deposit account in Charterhouse. Each of them filed a statement showing the grounds on which relief was sought, which grounds are similar. They stated that in essence the placing of Charterhouse under the statutory manager was unlawful because it had not breached the relevant law; that the right procedure was not followed and that the decision was unreasonable. That being their main case, they were required to show a *prima facie* arguable case of unlawful exercise of power by CBK before leave could be granted.

[12] The 1st respondent in each appeal demonstrated at the leave stage that each held a deposit account in Charterhouse which had been placed under statutory management. The learned judge at the leave stage was not required to consider the case of each respondent exhaustively by engaging in deep analysis of the material placed before the court and the legal regime. The leave sought was only intended to allow the two respondents to file a substantive application to challenge the decision of CBK. The merits of that claim would be determined in the envisaged substantive application.

The applications were in any case *ex parte* and the judge was exercising jurisdiction akin to summary jurisdiction. In each case, the learned judge indicated that he had considered each application and the submissions and that he was satisfied that triable issues or arguable case had been made in each case. That is the basis on which the learned judge exercised his discretion to grant leave.

The substantive submissions raised by the appellants' counsel in this appeal would have been appropriate had they been in respect of grant of the substantive application for judicial review on the merits. That stage was never reached because the applications were never heard or determined in favour of the 1st respondent in each appeal.

[13] Although the learned judge should have given reasons for the exercise of discretion to grant leave, the fact that the reasons were not given is not *ipso facto* indicative that the discretion was not exercised judicially. For those reasons, the appeal against the grant of leave has no merit.

[14] As regards the order that leave do operate as a stay, the stay granted in Civil Appeal No. 312 of 2006 stayed the decision by CBK placing Charterhouse under statutory management, the decision to appoint a statutory manager and the declaration of moratorium. The stay granted in Civil Appeal No. 313 of 2006, in essence, stayed the decision of declaration of a moratorium. By the time the orders were granted by the High Court, Charterhouse had been under statutory management for over three months. The process of placing Charterhouse under a statutory manager had been completed, a decision made and implemented three months before the applications for leave and stay were made.

The decision of CBK to place Charterhouse under statutory management which had been already implemented could only be reversed by judicial review court after hearing the substantive application. The order of stay in terms stated in effect reversed or inherently revoked the decision of CBK without hearing and restored the management and control of Charterhouse to its Board of Directors. That was not only an inappropriate decision, but was also disproportionate to the grievance of both 1st respondents in the two appeals as depositors in the circumstances of the case.

[15] Lastly, it is apparent that the Kenya Bankers Association and Kenya Revenue Authority were not involved in the decision to place Charterhouse under statutory management. They were not proper parties in the applications. The Court did not consider this aspect of the application.

For those reasons, we are satisfied that the two depositors did not establish a case for grant of stay in the terms sought.

[16] Regarding the costs of appeals, it is apparent that the applications in the High Court were made for and on behalf of Charterhouse. They were thinly veiled efforts to rescue Charterhouse from statutory management. The appellants and the Minister of Finance and Kenya Revenue Authority have incurred costs in this appeal. It is only just that the 1st respondent in both appeals and Charterhouse should pay those costs.

In the premises;

- (i) Civil Appeals Nos. 312 of 2006 and 313 of 2006 are partially allowed.
- (ii) The respective decisions dated 9th October, 2006 and 11th October, 2006 to the effect that leave operate as stay are set aside.
- (iii) The respective leave granted by the learned judge is upheld but the same shall not operate as stay of matters complained of.
- (iv) The 1st and 2nd respondents in each appeal shall jointly and severally pay the costs of each appeal to the appellants and to the 3rd and 4th respondents in each appeal and also to the 5th respondent in 312 of 2006.

**Dated and Delivered at Nairobi this 20th day of December, 2018.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

DEPUTY REGISTRAR