IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, J. MOHAMMED & KANTAI, JJ.A.)

CIVIL APPLICATION NO. 279 OF 2016

BETWEEN

BARCLAYS BANK OF KENYA LIMITED ………. APPLICANT

VERSUS

HABIHALIM COMPANY LIMITED ………….....RESPONDENT

(Being an application for stay of execution of the orders of the High Court pending the lodging, hearing and determination of an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Sergon, J.) given on 25th November, 2016

in

HCCC No. 13 of 2014)

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RULING OF THE COURT

The respondent, **Habihalim Company Limited** purchased a bankers cheque in the sum of **US$29,127.20** from the applicant's **(Barclays Bank of Kenya Limited)** Nkrumah branch on 24th September, 2013. When that cheque was presented for payment it was dishonoured by the applicant on the grounds that there were insufficient funds in the respondent's account. This action did not go down well with the respondent which filed a suit at the High Court against the applicant claiming various reliefs. The applicant filed an appropriate defence against that suit but the respondent successfully had that defence struck out. The suit in the High Court between the parties herein is pending in that court for formal proof. The respondent did not stop there. Through a notice of motion filed in that court on 24th March, 2016 it was prayed in the main that the applicant be ordered to deposit in court a sum of Shs.6,000,000/= being anticipated costs and damages or in the alternative US$29,127.20 being the value of the dishonored cheque for purposes of preserving the subject matter of the suit pending the hearing and determination of the said formal proof. The main reason given for that application was that the applicant's holding company Barclays Africa Group Limited had intimated in the print and electronic media that it intended to close its operations in Kenya and relocate to South Africa. That application was heard by Sergon, J. who in a ruling delivered on 25th November, 2016 allowed it directing the applicant to deposit the said sum of Shs.6,000,000/= in court within 30 days from the date of that ruling. The applicant is dissatisfied with that order and has filed an appeal. Pending the hearing of the appeal, the applicant has moved to this Court by Notice of Motion brought under **rules 5 (2) (b), 41 and 42** of the **rules** of this Court where it is prayed in the main:

"2. THAT pending the hearing and determination of the Applicant's Appeal the Honourable Court be pleased to grant an order staying any further proceedings in Nairobi High Court Civil Case No. 13 of 2014 Habihalim Company Limited vs. Barclays Bank of Kenya Limited.

3. THAT pending the hearing of the Applicant's intended Appeal the Honourable Court be pleased to grant an order staying execution of the Ruling of Honourable J.K. Sergon in HCCC No. 13 of 2014 dated 25th November, 2016, pending the hearing and determination of this application."

In the grounds in support of the Motion, it is said in essence that there was no evidence tendered before the High Court that the applicant was about to leave Kenya or to dispose of its property; that it had been established before the High Court that it was the applicant's holding company Barclays Africa Group Limited which was transferring its regional office to South Africa and not the applicant; that the ruling takes away the applicant's right to be heard and serves to predetermine the matter in dispute by exacting punishment on the applicant before the hearing; that the applicant has an arguable appeal and that the applicant would suffer substantial loss if stay was not granted.

Ms. Nerea Okanga, the applicant's legal counsel in the **Legal and Secretarial Services Department** of the applicant swore an affidavit in support where the grounds we have set out are elucidated. There is also a further affidavit of the same deponent which states in addition that because an application for contempt of court for not obeying the said orders had been filed the applicant had deposited the said sum of Shs.6,000,000/= in the High Court on 6th of February, 2017.

In a replying affidavit sworn on behalf of the respondent, **Adan Dahir Ibrahim**, a director of the respondent opposes the application.

We heard the motion on 16th February, 2017 when **Mr. Geofrey Muchiri**, learned counsel appeared for the applicant while **Mr. M.D. Tebino,** learned counsel appeared for the respondent. Mr. Muchiri submitted that because Barclays Africa Group Limited was not a party to the proceedings in the High Court it was arguable whether orders could be made against it by the court. Counsel submitted that the ruling could have the effect of having the many customers of the applicant run on the bank by withdrawing their deposits. According to counsel the sum deposited in the High Court was deposited without prejudice to the application and avoid contempt of court being cited against the applicant's managing director.

Mr. Tebino on the other hand did not agree. Counsel argued that the application for the applicant's officers to be cited for contempt had been filed because of failure by the applicant to comply with the orders of the High Court but that after the payment made on 6th February, 2017 that application was overtaken by events and would not be pursued. Learned counsel therefore thought that there was nothing capable of being stayed by this Court. On the submission by Mr. Muchiri that there could be a run on the bank, Mr. Tebino submitted that that was a substantive issue in the appeal which could not be determined in an application such as this one.

The jurisprudence on applications for stay pending appeal is well settled in this country and there is a plethora of case law which holds that for an applicant to succeed in an application for stay of execution pending appeal such as this one the applicant has to satisfy the Court that the appeal, if filed, or the intended appeal, is arguable which is the same as saying that it is not frivolous. Such an applicant, if he satisfies the Court on that limb must, in addition show that if the order sought is not granted, the appeal, or the intended appeal, as the case may be, would be rendered nugatory absent stay – see, for a discussion of these principles which we consider in such applications the case of **Reliance Bank Limited v Norlake Investments Limited [2002] 1 EA 227** where the following passage appears**:**

"For an application under rule 5(2) (b) to succeed, the Applicant had to satisfy the Court that the appeal was arguable, that is, that it was not frivolous, and that if the order were not granted, the appeal, were it eventually to succeed, would be rendered nugatory. In determining the second limb of the test, the court in Oraro and Rachier Advocates v Co-operative Bank of Kenya Limited

(supra) had not been enunciating a third principle but merely stating that, in making its decision, it was bound to consider the conflicting claims of both sides. Where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factors that could render the success of an appeal nugatory thus had to be considered within the circumstances of each particular case (Oraro and Rachier Advocates v Co-operative Bank of Kenya (supra) explained and followed). Rule 5(2) (b) conferred on the court original jurisdiction based on the exercise of discretion by the judges of the court. In the exercise of that discretion, certain principles had been developed to guide the court, the scope of which took account of evolving circumstances as they arose in various cases. In this instance, the circumstances showed that it would be too onerous to require the liquidator of the Applicant to deposit the money in court. A refusal to grant a stay would cause the Applicant such hardship as would be out of proportion to any suffering the respondent might undergo while awaiting the hearing and determination Applicant's appeal."

We have perused draft memorandum of appeal where various grounds are taken. It is for instance taken as a ground of appeal that the learned judge erred in finding that the applicant's holding company (Barclays Africa Group Limited) was leaving Kenya and that was sufficient reason to order the applicant to deposit the said sum in court pending hearing and determination of the pending formal proof. The applicant has also taken as a ground of appeal that because it was not leaving Kenya and in the absence of evidence that it was disposing of its property it was wrong for the learned judge to make the impugned orders. We find these to be arguable points and the position is that to satisfy the first limb of the principles which we apply in applications such as this one an applicant need not demonstrate a multiplicity of arguable points as one ground will suffice – see **Judicial Commission of Inquiry into the Goldenberg Affairs & 3 Others v Kilach [2003] KLR 249.**

What about the nugatory aspect of the said principles which it is also the duty of an applicant to satisfy? Learned counsel for the applicant submits that there are many cases filed against the applicant in various courts and claimants in those cases may very well file applications like the one filed in the High Court for the applicant to be ordered to deposit money as security pending hearing of suits. Learned counsel argues further that a publication of the impugned ruling could lead to a run on the applicant by its many customers all over Kenya. No evidence was however placed before us on other suits that may be pending against the applicant and we are unable at this stage to make a determination on such feared action or whether there can be a run on the bank. These are, as correctly submitted by Mr. Tebino, issues on which we cannot at a hearing of an application for stay make determinations which it is the court hearing the appeal that would have the benefit of a record of appeal and substantive argument to consider and decide. We should not at this stage make findings of fact that may embarrass that bench.

It is demonstrated by both parties here that after the High Court made the order for money to be deposited in court the applicant did on 6th February, 2017 deposit the whole sum in court as ordered. That sum is safe in the custody of the court and would be available to be returned to the applicant should the respondent fail in the formal proof now pending in the High Court. There has been full compliance with the order of the High Court and the position here is different from the position that obtained in **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR** where it was held by the majority that although the dismissed employee who had been reinstated to office to avoid consequences of disobeying a court order this Court retained jurisdiction under **rule 5(2) (b)** to give a stay pending appeal. We find that there is nothing to stay here because the order of the High Court has been complied with in full and learned counsel for the respondent has confirmed that in view of that compliance an application to cite the applicant's officers for contempt filed in the High Court has been overtaken by events and would not be prosecuted.

Although the applicant has shown that its intended appeal is arguable it has failed to satisfy the second limb of the principle as it is not demonstrated how the intended appeal would be rendered nugatory in the absence of an order for stay pending appeal. That being so the application fails and is accordingly dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 31st day of March, 2017.

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR