IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, G.B.M. KARIUKI & MWILU, JJ.A)

CIVIL APPLICATION NO. NAI 51 OF 2016 (UR 38/2016)

BETWEEN

HABIB BANK A.G. ZURICH.....APPELLANT / APPLICANT

AND

RAJNIKANT KHETSHI SHAH.....RESPONDENT

***(Appellant's Notice of Motion under Sections 3, #A and 3B of the Appellate Jurisdiction Act, Rule 5(2)(b) of the Court of Appeal Rules 2010 seeking stay of execution of the Judgment and Decree of the High Court of Kenya at Nairobi (the Honourable Mr. Justice Francis Gikonyo) dated 10th February 2016 and delivered on the 26th February, 2016)* in**

HCCC NO. 246 OF 2011

****

RULING OF THE COURT

1. This is a Notice of Motion application dated 8th March 2016 brought under the provisions of **sections 3A and 3 B** of the Appellate Jurisdiction Act and **rules 5(2) (b) and 42** of the rules of this Court. The application has been brought by the intended appellant, **Habib Bank AG Zurich** (hereinafter referred to as "the applicant") against **Rajnikant Khetshi Shah** (hereinafter referred to as "the respondent"). The application seeks, in the main, an order of stay of execution of the Judgment and Decree of the High Court of Kenya at Nairobi dated 10th February 2016 (and delivered on 26th February 2016) pending the *inter partes* hearing of the application and pending the hearing and determination of the intended appeal.

2. The application is premised on nine grounds as set out on the face of the application. The application is also supported by the affidavit of **Andrew Mungai**, the Head of Legal Section in the applicant's bank. The said **Andrew Mungai** has further sworn a supplementary affidavit in response to the replying affidavit by the respondent. The application is opposed by way of a replying affidavit sworn by the respondent.

3. The respondent, vide a Plaint dated 15th June 2011 and filed on 20th June 2011, moved to the High Court seeking, *inter alia*, a declaration that the respondent does not owe the applicant any money and that the continued holding of a legal charge over LR 7785/201 (original Number 7785/10/197) (hereinafter referred to as the suit property) by the applicant was unlawful and inequitable. The respondent also sought the discharge of the Charge over the suit property by the applicant.

4. In summary, the applicant through its offer letter dated 10th March, 1982 agreed to grant a facility in the nature of local bills discounting in favour of Pop In Limited (hereinafter referred to as "the borrower") in the sum of Kenya Shillings Five Million. To secure the facility, the respondent, being a director of the borrower charged the suit property by way of legal charge for Shs.5,000,000/= . The instrument of charge was registered on 8th October 1982. The charge was still subsisting for over 30 years leading to the respondent's institution of a suit to have charge over the suit property discharged in the manner alluded to hereinabove.

5. In entering judgment in favour of the respondent, the Superior Court observed that the conduct of the applicant was contrived to defeat the law and in particular the equity of redemption. The Superior Court observed that the respondent had proved that the applicant was guilty of laches and was thus estopped from exercising its rights over the suit property. A declaration was made by the superior court to the effect that the continued holding of a legal charge over the suit property by the applicant was unlawful and inequitable; and the court directed the applicant to immediately execute the instrument of discharge of charge of the suit property in favour of the respondent failure to which the Deputy Registrar shall execute the instrument in favour the respondent.

6. Immediately after the delivery of the judgment by the superior court, the applicant through its advocate orally applied for stay of execution orders and was granted stay orders for fourteen days. The applicant aggrieved by the superior court's decision then filed a Notice of Appeal and also filed an application for stay of execution pending hearing and determination of the intended Appeal by this Court vide a notice of motion lodged in registry on 9th March 2016. It is this application that is the subject of this Court's determination

7. At the hearing, **Mr. Regeru** learned counsel appeared for the applicant. In his submissions, he pointed out the two tests to be considered for grant of orders under **Rule 5(2)(b)** of this court's rules. The applicant needs to demonstrate an arguable appeal and that the appeal will be rendered nugatory unless the orders of stay are granted.

8. On whether the appeal is arguable, learned counsel referred us to the draft memorandum of appeal which listed over twenty grounds of appeal. The grounds includes the issue of laches in that the respondent's claim at the High Court was said to be time barred, the respondent having not done anything for twenty eight years under contract or as chargor, yet the charge remains in force until satisfied. Counsel faulted the trial judge's subjection of the legal charge to equitable provisions yet equity follows the law and **sections 47** of the **Registration of Titles Act** (now repealed) and **section 85(1)** of the **Land Act** afford the applicant protection. Counsel contended that the judge disregarded the argument that the debt was admitted and still undischarged. He further argued that even if there was a dispute on the accounts, that on its own was not a ground to discharge the suit property.

9. On the appeal being rendered nugatory, **Mr. Regeru** submitted that the borrower is no longer in business and has no known assets in Kenya and its two directors are no longer in Kenya. Learned counsel further submitted that unless stay orders are granted the suit property could be sold and the appeal would be rendered nugatory. He pointed out that the respondent's replying affidavit did not dispute the applicant's position in this respect. Learned counsel also submitted that the onus was on the respondent to show that he could pay the loan amount and the respondent had not done so.

10. As regards the pending application before the High Court, Mr. Regeru submitted that it was completely different from the instant application in that the application before the High Court related to enlargement of time and was not an application for stay of execution. In the premises, there was no application similar to the one before this Court in any other forum. Counsel urged us to allow the

application

11. In response, **Mr. B.M. Isindu** on behalf of the responded opposed the application in terms of the replying affidavit. Counsel informed us, *albeit* from the bar, that the respondent resides in Westlands, Nairobi, while the co-director lives in Lavington, Nairobi. Counsel indicated that it is the respondent's family that resides in Australia and the respondent only visits them occasionally. Mr. Isindu submitted that the application before the High Court is indeed an application for stay of execution by its tenure and import. Counsel argued that the application before us was an abuse of the court process in the sense that when the judgment was delivered on 26th February 2016 the applicant was granted stay of execution for fourteen days and then proceeded to file this application before this Court which was refused by a single judge. The applicant then rushed back to the High Court to file an application out of which temporary relief was granted until 29th May 2016. The matter is still proceeding. The respondent has thus taken the view that the applicant is forum-shopping and the Court should frown at this.

12. Mr. Isindu argued that the appeal is neither arguable nor will it become nugatory as per the reasoning of the trial judge. The charge having been executed in 1982 and no demand for the money having been made by the applicant, the respondent argued that the applicant was unlikely to act in a manner different from that which it had adopted for the past 33 years. Counsel therefore urged us to dismiss the application with costs.

13. In reply, Mr. Regeru for the applicant submitted that there was no abuse of the court process, reiterating the distinction between the applications before the High Court and this Court and pointing out that the orders granted by the High Court were issued to maintain the status quo. Counsel urged us to grant interim stay in terms of prayer 1 of the application pending this ruling.

14. Both counsel filed their authorities to support their position. Without necessarily listing them out, we have considered the cases cited and will make reference to them where necessary in the course of this ruling.

15. As rightly noted and argued by both counsel, it is now well settled on how this court exercises its jurisdiction under **rule 5(2)(b)** of this Court's rules.

As we always do in the circumstances, we follow the two laid down principles. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal that merits to be heard (see ***Githunguri v Jimba Corporation Limited (1988) KLR 838)***; and secondly, this Court should ensure that the appeal, if successful, would not be rendered nugatory, see ***Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd***, ***Civil Application Number Nai. 93/02 (UR).***

Lastly, both limbs must be demonstrated to exist before one can obtain relief under rule **5(2) (b)**, see ***Republic v. Kenya Anti-Corruption Commission & 2 others [2009*]** **KLR 31**).

16. We have applied the principles to the present circumstances. In considering whether the appeal is arguable, we have considered the applicant's arguments and the draft memorandum of appeal. We have also perused the trial court's decision which gives rise to the intended appeal. One issue remains uncontroverted – there is a subsisting charge created over the suit property in favour of the applicant by the respondent to secure a facility that was granted to the borrower.

17. From the draft memorandum of appeal, the applicant raises several issues including the applicability of the provisions of **sections 4(1)(a) and 4(3)** of the **Limitation of Actions Act**; the rights and remedies of parties under a charge including the provisions of **section 47** of the **Registration of Titles Act (Cap 281; Laws of Kenya**) (Repealed), **Sections 85(1) and 102** of the **Land Act (2012**); the statutory rights, remedies and protection vested by statute and the law in favour of a chargee whose debt remains unsatisfied including the provisions of **section 23(3)** of the **Limitation of Actions Act (Cap 22 Laws of Kenya),** to name just but a few. In total, the applicant proposes twenty grounds of appeal. In our view, the applicant has ably demonstrated that it not only has arguable points for purposes of appeal but also that

some of the points of appeal raise serious issues of law. As we are, at this early stage, not expected to inquire into the merits of the arguments and whether they will succeed or not, we are satisfied that the applicant has met the requisite threshold on the arguability of the appeal as the existence of only one arguable point is sufficient.

18. Turning to the second limb as to whether the appeal, if successful, would be rendered nugatory if stay orders are not granted, counsel for the applicant submitted that the suit property risks being disposed off in the event we do not grant interim orders. There is little doubt that the suit property is the substratum of the proceedings. The conduct of the parties leading to the proceedings before the trial court notwithstanding and whether acquiescence or larches can be inferred on either of or all the parties, there is a real possibility that the respondent may as well be indebted to the applicant to some extent and the only recourse the applicant has is to the suit property currently held as security. In the event that the applicant succeeds in its appeal and the said amount or any other amount is found due and owing to it, the respondent has not demonstrated that it would be able to pay such a decretal sum. In relation to a money decree, this Court in the case of ***Kenya Hotel Properties Limited v Willesden Properties Limited Civil Application Nai. No. 322 of 2006 (UR 178/06)*** stated thus:-

> ***"The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a*** *"man of straw"* ***but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.***
>
> ***However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree."***

19. It was incumbent upon the respondent to offer some form of comfort and security to assuage the applicant's fears on the appeal being rendered nugatory. In addition, save for counsel's submission from the bar, which are of no evidential value, it is evident from the replying affidavit that the borrower ceased operating more than thirty years ago and has no known assets capable of attachment in satisfaction of any decree should the applicant succeed. The directors may well be resident in Kenya as was submitted by Mr. Isindu, but again that is worth nothing as there was no deponement by them to that very crucial fact but again none of them was committal on the payment of the debt as sought by the applicant. In the absence of such evidence by the respondent, we have no hesitation in finding that the applicant succeeds on the second limb of the twin principles.

20. Before we conclude, counsel for the respondent made an argument on the likely abuse of court process by the applicant in filing multiple applications of the same nature, what counsel described as forum shopping. We took exceptional interest on this issue as courts should not condone or allow its processes to be abused. The respondent in paragraphs 10 to 12 of his replying affidavit made an averment to the effect that in addition to the oral application for stay by the High Court for fourteen days upon delivery of judgment, the applicant unsuccessfully applied for stay before a single judge of this court and thereafter applied for stay through an application dated 11th March 2016 seeking the same orders before the High Court while this application was subsisting. The respondent further alleges that the appellant filed a further similar application dated 17th March 2016 before the High Court which application has never been served. The respondent also raised certain issues with the Deputy Registrar's conduct

21. The appellant on its part argued pursuant to the supplementary affidavit filed before this court on 30th May 2015 that the application before the High Court dated 11th March 2016 was for purposes of enlargement of time for the stay orders granted on 26th February 2016. We have perused the annexure to the respondent's replying affidavit and must agree with the appellant's advocate as to the nature of the application before the High Court in relation to the present application before us. Our determination of the application obviously renders the application before the High Court spent. We are unable to address our minds to the application said to have been filed on 17th March, 2016 as nothing sufficient was said about the same by either side herein.

22. A single judge of this Court is not permitted under **rule 53(2)(b)** of this court's rules to hear and determine an application for stay of execution. A single judge may only certify the application urgent. It is therefore incorrect for Mr. Isindu to assert that the applicant's application for stay under **rule 5(2)(b)** was declined by a single judge of this Court. With this clarification, we are unable to see how the applicant abused the court process. Every litigant is entitled to access the courts providing there is compliance with the applicable rules.

23. As we exercise our discretion while considering this application, we seek to balance the interests of the respective parties. The approach we have always taken in determining whether or not to grant a stay of execution is to ensure that the applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruits of judgment in their favour and their rights are safeguarded. In our view, the balance in the circumstances of this case tilts in favour of the applicant, for the reasons stated above.

24. The upshot of this decision is that we allow the applicant's notice of motion dated 8th March 2016 in terms of prayers 2 and 3, prayer 1 having been spent. The costs of this application shall be in the appeal.

Dated and delivered at Nairobi this 15th day of July, 2016.

E. M. GITHINJI

.....

JUDGE OF APPEAL

G. B. M. KARIUKI

.....

JUDGE OF APPEAL

P. M. MWILU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR