



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & SICHALE, JJ.A)

CIVIL APPEAL NO. 87 OF 2014

CHARTERHOUSE BANK LIMITED

(UNDER STATUTORY MANAGEMENT).....APPELLANT

AND

FRANK N. KAMAU.....RESPONDENT/APPLICANT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Koome, J)

delivered on 28th January, 2011 in

CIVIL SUIT NO. 263 OF 2008)

RULING OF THE COURT

The appellant **CHARTERHOUSE BANK LIMITED**, which is under Statutory Management filed an appeal from the judgment of Koome J (as she then was) delivered on 28th January 2011. Briefly the appellant had filed suit vide a plaint dated 29th April, 2008. In the plaint, the appellant averred that on divers dated from 31st July, 2005 it granted **FRANK N. KAMAU** the respondent in the appeal an overdraft facility which then stood at Kshs. 18,000,000.00. Its prayer was for:

- a. Kshs. 18,075,270.00 together with interest at the rate of 14.75% from December, 2007 until payment in full.
- b. Costs of this suit.
- c. Any other relief that this honorable court may deem fit and just to grant.

The respondent filed a defence dated 11th December, 2008 and denied owing the appellant the sum of Kshs 18,000,000.00. The suit proceeded to trial in the High Court and the appellant's claim was dismissed on 28th January, 2011 thus precipitating this appeal.

It is during the pendency of the aforesaid appeal, that the respondent filed a Notice of Motion application dated 31st December, 2014 that is the subject of this ruling. The application was premised on the

provisions of **Rule 42(1), 82(1)(d) and 107(3)** of this **Court's Rules** as well as **Section 401** of the **Companies Act** (Cap 486 of the Laws of Kenya) and all other enabling provisions of law.

In the Notice of Motion the respondent (hereinafter referred to as applicant) sought the following orders:

1. ***THAT the hearing of this Appeal be stayed pending the hearing and determination of this application.***
2. ***THAT the Appellant be and is hereby ordered to deposit a sum of Kshs.751,069/= or such sum as this court may deem fit as security for the Respondent's costs within a period of thirty (30) days from the date of this order or such period as this court may deem fit.***
3. ***THAT in default of compliance with the order to furnish security for the Respondent's costs of the Appeal, the Appellant's Appeal be dismissed.***
4. ***THAT the cost of this application be in the cause.***

The application was supported by the affidavit of the applicant, sworn on 31st December, 2014. The applicant deponed that the appellant filed suit against him on 19th May 2008 seeking a sum of Kshs.18,075,270.50 plus interest and costs; that the appellant's case was dismissed on 28th January 2011 hence the appeal; that before the filing of the suit in the High Court the appellant had been placed under Statutory Management by the Central Bank of Kenya on 23rd June 2006, that since then it has not been trading, that it is uncertain if it will resume trading at all and finally that he was apprehensive that if the appeal would be unsuccessful, he would not recover costs from the respondent.

In a replying affidavit dated 15th April 2015 **JIMMY MUIWA** the appointed Statutory Manager of the respondent deponed that the respondent had deposited the sum of Kshs.6,000/= as required and that to request further payment is an unnecessary impediment on the respondent's right of access to justice as enshrined in **Article 48** of the **Constitution**, and **Section 3A and 3A** of the **Appellate Jurisdiction Act** which sets the overriding objective as to facilitate the just expeditious proportionate and affordable resolution of disputes.

The application came before us for hearing on 16th April 2015. Miss Kosgei who was holding brief for Mr. Mituga for the applicant reiterated the contents of the applicant's affidavit, principally that the respondent having been placed under Statutory Management, it may not be able to pay costs, hence the need for an order of payment of security for costs.

Mr. Mbaluto on behalf of the respondent opposed the motion. He contended that the applicant had failed to distinguish an entity placed under Statutory Management *vis-à-vis* an entity under liquidation. It was his submission that ever since the institution of the High Court case, the circumstances of the respondent had not changed and that indeed the costs awarded by the High Court were paid through the Central Bank of Kenya. He pointed out that the respondent had paid a sum of Kshs.6000/= as security for costs as per **Rule 107(1)** of this **Court's Rules**. In conclusion, he invited us to find that to hold would be against the provisions of **Article 48** of the **Constitution** as well as **Section 3 & 3A** of the **Appellate Jurisdiction Act** which provisions place a premium on access to justice.

He relied on the following authorities:-

1. ***Keary Developments v Tarmal Construction & Another [1995]3 AII 534***
2. ***Ignazio Messina and C.P.S.A v Stallion Insurance Company Ltd [2005] eKLR***
3. ***Sir Lindsay Parkinson & Co. Ltd. v Triplan Ltd. [1973] 2 AII***
4. ***Mama Ngina Kenyatta & Another v Mahira Housing Company [2005] eKLR***

5. *Kenya Education Trust Limited v Katherine S. M. Whitton [2011] eKLR.*

On our part, we have considered the rival submissions, the authorities cited herein, the Notice of Motion application and the supporting affidavit as well as the replying affidavit of the respondent. It is true as submitted by the respondent's counsel that at the time the respondent filed suit against the applicant, on 19th May, 2008 the respondent was already under Statutory Management. Mr. Mbaluto submitted that the costs awarded to the applicant upon the determination of the High Court suit in favour of the applicant, were paid by the Central Bank of Kenya, the authority which had placed the respondent under Statutory Management. The applicant did not refute that he was indeed paid costs by the Central Bank of Kenya. If this be the case, then we find that nothing has materially changed to warrant us making an order for further security for costs. In the case of **LALJI GANJI NATHOO v NATHOO VASSANJEE [1960] EA 315**, the Court of Appeal for Eastern Africa, the predecessor of this Court when faced with a similar application for security for costs delivered itself thus:

“Under rule 60, the burden lies on the applicant for an order for further security, as it normally lies on any applicant to a court for any relief, to show cause why that relief should be granted, and that he cannot merely by averring that the security already deposited for costs of the appeal is inadequate, or that costs in the action below, ordered in his favour, have not been paid, impose any obligation upon the court or judge or registrar to grant his application.”

So what has changed? The respondent paid the costs awarded to the applicant as well as the security for costs provided in the rules. We were not told for instance, that, the respondent is in a far worse situation than before. And why would Central Bank not pay as it did before? We find that the applicant did not discharge the burden placed on him to justify an order for further security for costs.

We also note that the respondent had deposited the sum of Kshs.6,000/= as stipulated under **Rule 104** of the **Court's Rules**. We are further in agreement that to order otherwise would be against the provisions of **Article 48** of the **Constitution** which provides:

“The state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

An order of payment of further security for costs would be tantamount to shutting out the respondents from pursuing their undoubted right of appeal, in the event that they were unable to make payment for security of costs. This would stifle the appeal contrary to the spirit of the overriding objective of achieving the just resolution of appeals as enunciated under **Section 3(A) of the Appellate Jurisdiction Act**, It would also be contrary to **Article 48** of the **Constitution** that provides that payments required in accessing justice should be reasonable and should not impede access to justice.

For the foregoing reasons, we find that the Notice of Motion dated 24th March 2011 lacks merit and it is dismissed with costs.

Dated and delivered at Nairobi this 12th day of June, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR