IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), G.B.M. KARIUKI & MURGOR, JJ.A.))

CIVIL APPEAL NO.204 OF 2013 (UR 148/2013)

BETWEEN

DEVELOPMENT BANK OF KENYA LTD..... APPLICANT

AND

PALM HEALTHCARE INTERNATIONAL

LIMITED (IN RECEIVERSHIP) ..... RESPONDENT

(BEING AN APPLICATION FOR STAY PENDING APPEAL FROM THE RULING OF THE HIGH COURT OF KENYA AT NAIROBI, (HAVELOCK, J) DELIVERED ON 31ST JULY, 2013

IN

H.C.C.C. 264 OF 2010)

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RULING OF THE COURT

1. The applicant, Development Bank of Kenya Limited, presented to this Court on 13th August 2013 an application by way of a notice of motion dated 12th August 2013 seeking, inter alia:

"an order of stay of execution of the ruling by (Havelock J) delivered on 31st July 2013 and any consequential decree or order pending the hearing and determination of the appeal filed by the applicant."

The notice of motion was supported by an affidavit sworn on 12th August 2013 by Celestine Otieno, the Company Secretary of the applicant (Bank).

2. Palm Healthcare International Limited (in receivership), the respondent, did not file a replying affidavit to the application.
3. The application came up for hearing before us on 6th November 2013. Learned counsel Miss Faith Simiyu appeared for the applicant while learned counsel Mr. Paul Ongunde appeared for the respondent.
4. The background to the application is that on 28.4.2010, the respondent sued the applicant in Civil Suit No.264 of 2010 in the Commercial and Tax Division of the High Court at Milimani Law

Courts Nairobi seeking a mandatory injunction directing the applicant to immediately pay the sum of Shs.83,729,405.60 to the respondent together with interest at court rates from 20th April 2009 until payment in full and costs of the suit and for any further relief that the Court might deem fit to grant.

5. By a debenture dated 31st January 2006, the respondent charged to the applicant its assets to secure the loan of US$1.8 million. The terms of the debenture in respect of the properties charged by the respondent to the applicant included:

"all the right title and interest of the respondent to and in book and other debts, revenues, and claims both present and future (including bank deposits and credit balances) and the proceeds of sale of all stocks-in-trade and all things in action due or owing or which may become due or owing to or purchased or otherwise acquired by the company and the benefit of all rights and guarantees of any nature whatsoever now or at any time enjoyed or held by the respondent"

6. On 6th April 2009, **Benard Rop** was appointed as a Receiver/ Manager of the respondent pursuant to the terms of the debenture dated 31.01.2006 given by the latter in favour of the Eastern and South African Trade and Development Bank (the P.T.A Bank). The receiver/manager sought information regarding the latter's accounts with the applicant. The respondent provided the same. Upon analyzing the information provided, the receiver/manager confirmed that as at the time of his appointment as receiver/manager and notification of that fact to the respondent, the latter had Shs.83,729,403.60 to its credit in a fixed deposit account number 3 200722 026 in the applicant (Bank).
7. Further, the application shows that the receiver/manager expressed concern that the credit balances in favour of the respondent were apparently set-off on or about 20th April 2009 to repay the respondent's indebtedness to the applicant after the date of appointment of the receiver/manager. The latter requested reversal of the debit entries in the respondent's account.
8. The applicant refused to reverse the entries in the respondent's account on the ground that the fixed deposits were also pledged as security to the applicant and therefore the latter refused to return the money to the respondent notwithstanding that the respondent maintained that the debiting of its account to off-set the debt ostensibly after the appointment of receiver/manager was in contravention of the law.
9. The application further shows that the respondent maintained that the applicant knew that it would only be paid after the (Eastern and South African Trade and Development Bank(PTA Bank)) was paid first and surplus remained. It is as a result of this that the respondent consequently took the matter to the High Court and filed in the Commercial and Admiralty Division suit No.624 of 2010 and a notice of motion dated 27.4.2010 seeking mandatory injunction directing the applicant to return the money.
10. In his ruling in the said application, Havelock J, held that the respondent was entitled to the protection it sought and consequently allowed the respondent's notice of motion dated 27.4.2010 to the extent of its prayer number 3 which sought:

"a mandatory injunction be issued ordering the defendant to immediately pay the sum of Shs.83,729,403.60 to the plaintiff (the respondent) together with interest at court rates from 20th April 2009 until payment in full."

11. Aggrieved by that decision, the applicant filed in this Court Civil Appeal No.204 of 2013 challenging the said decision.
12. The application by notice of motion dated 12th August 2013 by the applicant, Development Bank of Kenya Limited, came up for hearing before us on 6th November 2013.
13. Miss Simiyu submitted that the applicant had on 5th August 2013 lodged a notice of appeal dated 1st August 2013 manifesting its intention to appeal against the whole of the decision of the High Court contained in the ruling delivered on 31st July 2013 by Havelock J. She contended that the intended appeal was arguable and that there were important issues of law reflected in the draft

memorandum of appeal annexed to the application and marked as *"CO5"*. In particular, Miss Simiyu contended that the order for mandatory injunction was misplaced. It was Miss Simiyu's further submission that if stay was not granted, the appeal would be rendered nugatory. No case law was cited by the applicant's counsel.

14. On behalf of the respondent, Palm Healthcare International Limited (in receivership),Mr. Ogunde pointed out that the respondent had not filed a replying affidavit to the application but indicated that he would submit only on issues of law as he was entitled to do. He pointed out, correctly in our view, that the applicant was enjoined to satisfy the court that the appeal is arguable and that it would be rendered nugatory if stay was not granted in the event that the applicant was successful in the appeal. On the nugatory aspect, Mr. Ogunde submitted that there was nothing to show that the appeal would be rendered nugatory if stay was not granted and the money paid on execution. He opined that the status and progress of the receivership was not stated, yet it was said to be germane. In his view, the claim was not properly presented. It was his contention that all that the applicant had stated was that the sum of money involved was inordinately high yet the judgment debtor was a Bank and he wondered if it was saying that it would shut down or be financially crippled if stay was declined and refund made. But this was to miss the point. Though the applicant is a bank, the nugatory issue relates to the appeal. Mr. Ogunde urged the Court not to exercise its discretion in favour of the applicant and instead reject the application as clearly, in his view, the appeal would not be rendered nugatory.

15. Under Rule 5(2)(b) of The Court of Appeal Rules 2010, this Court has discretionary power to order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just where an appeal has been instituted or an applicant has given notice of appeal pursuant to rule 75 of the rules of this Court manifesting his intention to appeal.

16. The application is premised on rule 5(2)(b) of the rules of this Court. The jurisprudence that has emerged and continues to develop in relation to this rule shows that where a party has appealed or in compliance with rule 75 of the rules of this Court has given notice of appeal manifesting its intention to appeal, this Court is vested with jurisdiction to entertain and determine applications for stay of execution, injunction, or stay of further proceedings and to make such orders as the Court may think fit. The Court is enjoined, in handling litigation before it, to ensure, just determination. In step with this, rule 1(2) of the Rules of this Court emphasizes the inherent power of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

17. In the instant application, the applicant lodged the notice of appeal pursuant to rule 75 (supra) on 5th August 2013 and hence this Court has jurisdiction to hear and determine the application for stay. This is not an issue but if any emphasis is required, this Court expounded on the interpretation relating to its jurisdiction under rule 5(2)(b)(supra) when it stated in **Safaricom Limited versus Ocean View Beach Hotel Limited & 2 others** (civil application No.327 of 2009) that:

"It is clear from all the provisions of rule 5 that the basic aim is to provide an interim relief where the Superior Court (High Court) has determined a matter and the party against whom the determination is made has either appealed or intends to appeal ..."

18. Further, in **Reuben and 9 others versus Nderito & Another** (1989) KLR 459 this Court observed that:

"at the stage of determining an application under rule 5(2)(b) there may or may not be actual appeal. Where there is no actual appeal already lodged, there nevertheless must be an intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under rule 5(2)(b) because... the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or an intended appeal manifested by lodgment of a notice of appeal, the Court of Appeal would have no business to meddle in the decision of the High Court."

19. What does the applicant need to satisfy the Court so as to secure the order for stay? The principles in this regard are a well beaten track. Firstly, the applicant is enjoined to show that it has an

arguable appeal and secondly that if stay is not granted the appeal will be rendered nugatory in the event that the applicant succeeds in it. It is not enough to satisfy the Court with regard to one of these two criteria. Both criteria must be met; see **Reliance Bank Ltd. v. Norlake Investments Ltd (2002) 1 E A 227; Githunguri v. Jumba Corp. Ltd & others (No.2) 1988 KLR 828; Wardga Holdings Ltd & others versus Emmanuel Waweru Mathai & H.F.C.K. (Civil Appeal No.72 of 2011 (unreported)).**It may be added that in addition to these two criteria, the application must not be frivolous.

20. An applicant must discharge the burden of satisfying the Court that the application meets the two criteria.
21. The order made by the High Court in allowing the respondent's Notice of Motion dated 27.4.2010 was pursuant to prayer No.3 of the motion which prayed for:

"mandatory injunction ordering the applicant, Development Bank of Kenya Ltd to immediately pay the sum of Kshs.83,729,403.60 to the respondent, Palm Healthcare International Limited (in receivership) together with interest at Court rates from 20th April 2009 until payment in full."

This is the order that the applicant seeks to have stayed to enable it eschew its compliance pending the hearing and determination of the appeal. Has the applicant shown that it has an arguable appeal and in addition that the appeal, if successful, will be rendered nugatory if stay is not granted?

22. As to whether the intended appeal is arguable, one has to look at the facts that emerge from the application to see if there are issues of law and/or fact on which the appeal is predicated. In the instant application, the issue that emerges seems to be whether there was set-off as opposed to a lien when the applicant appropriated the fixed deposit of 83,729,404.60 to liquidate the respondent's debt to the applicant. Its common ground that the respondent had a fixed deposit in the applicant bank in which it had a credit of Shs. 83,729,403.60in account No.3 200722 026.As stated in the application, when the respondent went into receivership, the receiver/manager, Bernard Rop, brought to the attention of the applicant the fact of his appointment. The debenture dated 31.01.2006 pursuant to which the receiver/manager was appointed was in favour of the Eastern and Southern African Trade and Development Bank (the PTA Bank). It (debenture) bound the respondent which was indebted to the PTA bank to the tune of US$1,800,000 in respect of all the right, title, and interest to and in book and other debts revenues and claims both present and future including bank deposits and credit balances etc. A consent signed by the applicant and PTA Bank on 2.10.2008 appears to have given PTA Bank priority over other creditors including the applicant. Notwithstanding that the respondent as receiver/manager was not notified, the applicant proceeded to set-off from the respondent's fixed deposits monies owed by the respondent to the applicant on the basis that such fixed deposits were also pledged as security. The respondent protested. The applicant refused to reverse the entries debiting the account in the set-off. This is what sparked off the suit in the High Court by the respondent against the applicant which resulted in the mandatory order requiring the applicant to return the money taken by the applicant in the set-off. The PTA Bank seems to be entitled to a first charge over the deposit. It seems as if the applicant did self-help but whether this was legally permissible or not is a matter for the Court that shall hear and determine the appeal. Clearly there are legal issues thrown up that are debatable. In our view, the appeal is arguable even if there be only one arguable point.
23. In the event that the applicant succeeds in the appeal, would the appeal become nugatory if stay was not granted, thus forcing the applicant to comply with the mandatory order given by the High Court to refund the money? The money in question, though said to be due to the applicant as a debt under the debenture instruments was money taken from the respondent's fixed deposit account over which the PTA Bank seems to have a first charge. On our part, we observe that there is no evidence that the appeal shall be rendered nugatory if stay is not granted provided that the money does not dissipate. We are concerned, however, that there is absence of evidence on the status of the receivership. For this reason, and in view of the above, we decline to allow the application or to grant the order sought and dismiss the application but the circumstances of this case and the status of the respondent call for an urgent hearing of the appeal and accordingly we direct that the appeal be set down for hearing this term. Costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 24th day of January, 2014.

P. KIHARA KARIUKI

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PRESIDENT, COURT OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR