IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, G.B.M. KARIUKI, & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. NAI 156 OF 2013 (UR 105/2013)

consolidated with

CIVIL APPLICATION NO.186 OF 2013 (UR 132/2013)

BETWEEN

AJAY I. SHAH.....APPLICANT

AND

DEPOSIT PROTECTION FUND BOARD AS

LIQUIDATOR OF TRUST BANK LIMITED.....1ST RESPONDENT

PRAFUL SHAH ..... 2ND RESPONDENT

(Being an application for stay of execution pending hearing and determination of an intended appeal against the Ruling and/or Order/decree of the High Court of Kenya at Milimani, Commercial & Admiralty Division, Nairobi, (OGOLA, J) delivered on 30th May, 2013

in

MISC CIVIL APPLICATION NO.294 OF 2010)

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RULING OF THE COURT

1. The Applicant, **AJAY I. SHAH**, was the 1st respondent in the High Court Civil application No.294 of 2010 at Commercial and Admiralty Division, Milimani Law Courts, Nairobi while **PRAFUL SHAH** was the 2nd respondent and Deposit Protection Fund Board as Liquidator of Trust Bank Limited was the applicant.

2. On 30th May 2013, the High Court (the Hon. E.K.O. Ogola J.) delivered a Ruling allowing a notice of motion filed by the Deposit Protection Fund Board as Liquidator of Trust Bank Limited (in liquidation) with the effect that the four orders as prayed in the motion were granted. These were:

(a) A declaration that the respondents Ajay Shah and Praful Shah who acted as Executive Directors of Trust Bank Limited (in liquidation) were knowingly parties to the carrying on of business of Trust Bank Ltd (in liquidation) with intent to defraud creditors of the Company and for a fraudulent purpose.

(b) A declaration that the Respondents Ajay Shah and Praful Shah who acted as Executive Directors of Trust Bank Limited (in liquidation) were guilty of misfeasance and breach of trust in relation to the said company.

(c) A declaration that the Respondents Ajay Shah and Praful Shah who acted as Executive Directors and employees of Trust Bank Limited (in liquidation) in breach of their fiduciary duties to Trust Bank Limited allowed and/or caused Trust Capital Services Limited, in which they had a personal interest, to overdraw its accounts without proper security and thereby caused the Bank to loose over Kshs.241,442,376.80 cts as at 16th September 1998.

(d) An order that the Respondents Ajay Shah and Praful Shal jointly and severally are liable to make good and pay the Applicant, Deposit Protection Fund Board as Liquidator of Trust Bank Limited (in Liquidation) the sum of Kshs.1.549,591,424.41 cts being the amount due in the account of Trust Capital Services Limited as at 28th February 2010 together with interest thereon at prevailing Bank rates from 1st March 2010 to the date of payment in full.

3. Following the said ruling by the High Court (E. K. O. Ogola J) the applicant made an application to this court by way of a Notice of Motion dated and lodged in court on 9th July 2013 which was supported by his own affidavit. A supplementary affidavit sworn on 2nd October 2013 by the applicant was subsequently filed on 3rd October 2013 in further support of the motion.

4. The application was predicated on Rule 5(2)(b) of the Rules of this Court. It sought in prayers 4, 5 and 6 the following orders:-

(4) "that this honourable court be pleased to order stay of execution of the Superior Court's ruling and/or decree in Misc Civil Application Number 294 of 2010, between Trust Bank Limited in liquidation and AJAY SHAH (the applicant herein) and PRAFUL SHAH, the applicant in CA Civil Application No.186 of 2013 pending hearing and determination of the applicant's intended civil appeal;

(5) that the applicant be at liberty to apply for further orders and or relief as this honourable court may deem fit and just to grant.

(6) that costs of this application be in the cause."

5. The grounds stated for making the application included a statement that there was a decree against the applicant to the tune of Ksh.2.6 billion and that costs were in the process of being taxed in the aforesaid Civil Application No.294 of 2010, and further that the applicant had a good appeal against the ruling of the Superior Court below and that unless stay was ordered, the appeal would be rendered nugatory.

6. Soon after the presentation of the applicant's notice of motion, **Praful Shah**, the second respondent in the aforesaid civil application number 294 of 2010 presented to this court on 26th July 2013 an **application No.186 of 2013** also by way of Notice of Motion premised under Rule 5(2)(b) of the rules of this court supported by his own affidavit of even date and a supplementary affidavit sworn by him on 2nd October 2013. The grounds and reasons for making the application were similar to those stated by Ajay Shah in his application number 156 of 2013.

7. In Civil Application No. Nai 156 of 2013, **Deposit Protection Fund Board** as Liquidator of Trust Bank (in liquidation) was named as the 1st respondent and **Praful Shah** as the 2nd respondent while in civil application No. Nai 186 of 2013, Deposit Protection Fund Board as liquidator of Trust Bank (in

Liquidation) was named as the 1st respondent while Ajay Shah was named as the 2nd respondent.

8. The two applications came up for hearing before us on 8th October 2013. The Learned Counsel **Mr. R. O. Kwach** assisted by **Mr. M. Billing** appeared for Mr. Ajay I. Shah, the applicant in application No.156 of 2013 who is also named as the 2nd respondent in application number 186 of 2013.

9. The Learned counsel **Mr. D. Oyatsi** appeared for Deposit Protection Fund Board, the 1st respondent in both applications Nos. 156/2013 and 186 of 2013 while the learned counsel **Mr. D. Gitonga Kimani** appeared for Praful Shah, the 2nd respondent in Civil Application No. 156/2013 who is also the applicant in Civil Application No.186/2013.

10. **By consent** of all the counsel for the parties the notice of motion No.156 of 2013 was consolidated with notice of motion No.186 of 2013 with the result that this ruling which ensues from both applications is a composite ruling and shall bind the parties in both applications.

11. The background giving rise to the two applications is reflected in the applications themselves and in the material annexed to them. It shows that Ajay Shah and Praful Shah were Directors of both Trust Bank Ltd and Trust Capital Services Ltd. Trust Bank Ltd went into liquidation on 16th August 2001. Hitherto, there have been no less than four liquidation agents. Investigations by the liquidation Agents are said to have revealed that Ajay Shah and Praful Shah owed money to Trust Bank Ltd and that this fact led to the institution by the Liquidator of Trust Bank in the High Court Commercial & Admiralty Division at Milimani, Nairobi, in March 2010 of Miscellaneous Civil Application No. 294 of 2010 in an attempt by the liquidator to recover Shs.241,442,376.80 found to be owing by Ajay Shah and Praful Shah (hereinafter referred to as the 1st and 2nd applicants respectively) as at 16th September 1998 together with interest thereon. The liquidator also alleged that Ajay Shah and Praful Shah diverted from Trust Bank Ltd to Trust Capital Services Ltd money belonging to Trust Bank Ltd and that as at 28th February 2010 the amount stood at Ksh.1,549,591,424.41 in respect of which (together with interest thereon) the liquidator sought an order that both Ajay Shah and Praful Shah be declared jointly and severally liable. The Liquidator also alleged fraud on the part of Ajay Shah and Praful Shah and further that the funds belonging to Trust Bank Limited were fraudulently channelled to Trust Capital Services Ltd. He specially, singled out Shs.241,442,376.80 as having been withdrawn from Trust Bank Ltd and transmitted to Trust Capital Services Ltd in absence of an application by the latter for a loan, or overdraft facility.

12. It is shown that in his investigations, the liquidator established (1) that Trust Capital Services Limited was incorporated on 10th November 1993 and (2) that the subscribers to the memorandum of Association were Ajay Shah and Praful Shah and (3) that Trust Capital Services Limited operated three accounts in Trust Bank Limited being account numbers 00059811 – 0001; 0058653-001 and 25862-01 and Ajay Shah and Praful Shah were the allowed signatories of account No.25862-01. The Liquidator, Deposit Protection Fund Board, was appointed by the Central Bank of Kenya under Section 36 of the Banking Act, Cap 488 which under subsection (2) gives it perpetual succession and a common seal and is capable in its corporate name or in the name of the institution under liquidation of suing and being sued without the sanction of the court or a committee of inspection. In his investigations, the liquidator alleged that the money claimed was withdrawn from the Trust Bank Ltd and channelled to Trust Capital Services Ltd without the sanction of the Trust Bank Ltd to an account that was officially non- existent in the latter's books and further that no security was held on account of the money to guarantee repayment.

13. In a space of seven days, from 9th to 16th September 1998 a massive withdrawal of funds from Trust Bank Ltd was made to the tune of 207,385,083 and two days later, Trust Bank Ltd was placed under statutory management by Central Bank. It was the liquidator's position that Ajay Shah and Praful Shah stood in a fiduciary relationship to the customers of Trust Bank Ltd whose funds they held as custodians and were enjoined to safeguard customers' funds and to discharge their duties with diligence and transparency and to eschew fraudulence.

14. Messrs Ajay Shah and Praful Shah aver in their applications that the money that Trust Bank lost was not received by them but rather went to a separate and distinct legal entity, to wit, Trust Capital Services

Limited which was separate and independent from them. Praful Shah specifically averred that not a cent went into his pocket as an individual. In his affidavit in support of the application No.156 of 2013, Ajah Shah averred in paragraph 8A(iii) *"that the total paid is Shs.96,500,000/= plus Shs.146,687,402.40 making a total of Shs.243,187,402.40"*. In effect, Ajay Shah averred that the money claimed by the liquidator has been paid in full and in paragraph 10 of his supporting affidavit that if, therefore, he is not granted stay he will *"suffer irreparable loss and damage in particular but not limited to loss of liberty, execution of decree for purposes of embarrassing and harassing him, and bankruptcy."*

15. In paragraph 9 of his supplementary affidavit sworn on 1.10.2013, Ajay Shah averred that the cheques totaling Shs.*241,442,376.80 "were not dishonoured but not cleared because of closure of Bank. Further the cash payment of Shs.95.6 million paid on 30th April 1999 has not been reversed."* The liquidator in paragraph 19 of his replying affidavit counters this by stating that what Ajay Shah refers to as *"repayments were in fact reverse entries made by Trust Bank Limited in relation to bankers cheques which had been unlawfully issued by Trust Bank Ltd from the account of Trust Capital Services Ltd prior to 18th September 1998 in the same manner and arising the same period as the said sum of Shs.246,400,000/="* The liquidation Agent, **Micah L. Nabori,** explained in his replying affidavit that the only *"reason why these cheques were returned and reverse entries made as stated was because the Bank (Trust Bank Ltd) had been placed under Statutory Management and by reason thereof, cheques issued by the Bank could not be honoured after 18th September 1998, the date of receivership."*

16. After hearing the notice of motion dated 23rd March 2010 made by the Deposit Protection Fund Board (in liquidation) as the applicant in miscellaneous application No. 294 of 2010 and after hearing both Ajay Shah and Praful Shah as the 1st and 2nd respondents, the learned trial Judge, Hon. E. K. O. Ogola, allowed the notice of motion on 30th May 2013 and in doing so stated in part:

> ***"24. Trust Bank Limited was placed under statutory management by the Central Bank on 18th September 1998. In 1999 there was an attempt to revive the operations of the Bank under a Scheme of Arrangement dated 26th May 1999. The two respondents were party to the said scheme of arrangement. They provided information that was used in the drawing of the scheme of arrangement and also signed the said scheme of arrangement and acknowledged the accuracy of the information contained therein, their liability to the Bank and their commitment to pay their liability. The two respondents also acknowledged that Trust Capital Services Limited owed Ksh.246,000,000/= to the Bank as at 26th May 1999. The said sum of Kshs.246.4 million was withdrawn from the Bank on account No.00059811-0001. This account was not officially opened in the Bank books and while account No.25682-001 had no account opening document to support it, there were no company resolution from Trust Capital Services Limited to open the account nor was there a mandate to open the account and the Bank does not have authorized signatories to the account.***
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> ***26. A reference to annexture DM 3 by the Plaintiff's liquidator shows that as at 9th September 1998, the said account was overdrawn in the sum of Kshs.34,057,293.30/= and on 16th September 1998 the same account was overdrawn in the sum of Kshs.241,442,376.80/=. It is evident from the above facts that in a space of 7 days between 9th and 16th September 1998 there was a massive withdrawal of funds from Trust Bank Limited (in liquidation) using the said account to the tune of Ksh.207,385,083.50/=. Two days later after the said withdrawal, Trust Bank Limited (now in liquidation) was placed under Statutory Management. There was obviously a run on the Bank and the Respondents were the Executive Directors then who knew or ought to have known of this fact.***
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> ***27. The two Respondents obviously owe an explanation to the depositors of Trust Bank Limited (now in liquidation). It is difficult not to reach the conclusion that the account was used by the Respondents who knew that the Bank was about to collapse as a way of siphoning money out of the Bank.***

28. The Respondents have not convincingly denied the factual allegations in this application. Actually, they admit most of them. At page 92 of the exhibit "R-1" by the second respondent the following facts come out clear:-

(a) That trust Capital Services Limited owed a sum of Kshs.246.4 million to Trust Bank Limited (in liquidation) as at 26th May 1999.

(b) There was no security held by Trust Bank Ltd (in liquidation) in respect of the said indebtedness.

(c) Trust Capital Services Ltd was a related party of the existing directors of the Bank who signed appendix 11(d) contained at page 92.

(d) The three Directors included the Respondent herein and one Nitin Chandaria.

(e) At the said page, the said Directors admitted the debt and agreed to use their best endeavors to assist the Bank in the full recovery of the debt.

29. There is no evidence to date that a single coin has been repaid by the Respondents. This brings into question their loyalty and trust to the depositors of the Bank.

323 (1) (a) "if in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

While Section 324(1) states as follows:-

"324 (1) If in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer or the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just."

31. The Director's responsibility or liability under Section 323 arises where the business of the company has been carried out with intent to defraud creditors. On the other hand the Director's liability under Section 324 arises where the assets of the company have been misplaced by the Directors or where the Director is guilty of breach trust or misfeasance in relation to the company.

33. The Respondents responses to the application are substantially based on technical grounds, mainly attacking the affidavits in support of the application, but not in any way responding to the issues of trust and liability to depositors and their undertaking to repay the said loan. In my view the issues raised in the application are very serious also raise public concern. The issues raised concern a period where banks just used to go under and depositors losing their lifelong savings without a soul on earth caring. The Respondents had a responsibility to the depositors. Upon their failure to act responsibly, they became liable. They were directors of the company which was carrying on banking business and by that reason became custodians or trustees of the

depositor's funds. Those funds were withdrawn through a non-existent account or without a proper channel sanctioned by the bank. That not being enough, the Respondents misrepresented to the creditors and to the Court in the Scheme of Arrangement that the said withdrawals of funds was made pursuant to a valid loan transaction between Trust Capital Services Ltd and the bank in order to conceal the true fact that the funds had been withdrawn from the bank without a loan application from the alleged customer and through an account which was not officially opened in the bank's books.

17. Aggrieved by the said decision, Ajay Shah and Praful Shah through their advocates, Guram & Company, lodged a notice of appeal on 31st May 2013 manifesting their intention to challenge on appeal the whole decision of the Superior Court below. A draft memorandum of appeal was attached to the application of Ajay Shah showing the grounds on which both Ajay Shah and Praful Shah intend to attack the decision of the Superior Court below.

18. The Learned counsel Mr. R. O. Kwach for Ajay Shah submitted that the case is contentious and that the appeal involves a colossal sum of Shs.2.6 billion. He opined that if Ajay Shah and Praful Shah, the two applicants, fail in the appeal they will never be able to hold positions as company directors. Referring to item (c) of the Bill of Costs filed by the Deposit Protection Fund Board as Liquidator of Trust Bank Ltd (in liquidation) under the heading "importance of the case" counsel, repeating the Liquidation Agent's words, alluded to the importance of the litigation to the two applicants as captured by the respondent wherein the Liquidation Agent stated that *"the case was crucially important to the respondents because it raised various issues including their liability to pay the said sum of Shs.2,651,794,538/= and allegations of fraud leveled against them."* In addition, he said, the outcome of the case has the potential to disqualify the respondents (Ajay Shah and Praful Shah) acting as directors of any regulated enterprise in Kenya, and in other jurisdictions. In contrast, the Liquidation Agent in the same paragraph number (c) also highlighted the importance of the case to the Liquidator by stating that the case is of crucial importance to the Liquidator as it provides remedies to be applied and followed by the latter in the recovery of assets misappropriated by Directors of Financial institutions under Liquidation, which include Banks and Building Societies.

19. It was Mr. Kwach's submission that the two applicants can also be declared bankrupt if they fail in the appeal. They could also be put in civil jail, he added. It was his contention that it was because of the importance of the case and the issues involved in it that the High Court granted stay to enable the applicants to come to this court. Only if stay is granted, he said, will the applicants have their day in court. Citing the case of **Dr.**

Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission and Hon. Attorney General (Nbi C.A. No. Nai 43 of 2006 (UR 24/2006) Mr. Kwach contended that just as Dr. Christopher Murungaru in the cited case got stay to prevent the Anti-Corruption Commission from forcing him to supply information on investigations on corruption, so also this Court should grant the applicants stay to ensure that their appeal does not become nugatory if they are eventually successful.

20. We observe that in the case of Dr. Christopher Murungaru, the latter was required by notice under Section 26 of the Anti-Corruption Act to furnish the Anti-Corruption Commission with certain information. But Dr. Christopher Murungaru's answer was that Sections 26, 27 & 28 of the Anti-Corruption Act were inconsistent with Section 77 of the retired Constitution which provided for fair trial. The court expressed the view that the question whether Dr. Christopher Murungaru was bound to supply the information ought to await the resolution of the issue whether or not sections 26, 27 and 28 (supra) creating the Commission were constitutional. Dr. Christopher Murungaru faced a charge in a magistrate court of the offence created by Section 26 (2) of the said Act. This court opined that *"if the trial of Dr. Christopher Murungaru were to proceed before the magistrate, the former risked being fined or sent to prison or both. For that reason, his appeal would be rendered nugatory."* An order for stay was therefore warranted. But this court (differently constituted) pointed out that

"in cases which are purely civil, this court hardly grants a stay of proceedings on the basis that even if the proceedings to be stayed went ahead and were determined, that would not render an

appeal nugatory because if the appeal succeeded, the decision of the trial court would be nullified and an appropriate order for costs in respect of the abortive hearing can be made – see for example Silverstein v Cheson (2002) KLR 867. But matters involving penal consequences must, of necessity, be treated differently. It can be of no consolation to tell a man that his appeal will not be rendered nugatory even if he went to prison even for only one week. The appeal would have been rendered nugatory."

21. As is apparent, the case of Dr. Christopher Murungaru on all fours involved penal consequences. He faced a criminal charge. To that extent, it can easily be distinguished from the instant case which is purely civil. Mr. Kwach urged that if the decree were enforced, one of the consequences was an order for civil jail. Although civil jail deprives one of liberty and freedom no less than a jail sentence in a conviction for criminal offence does, the two spring from two totally different legal regimes. In the latter, there is criminality while the former relates to enforcement of decrees for the purpose of securing civil remedies. This distinction is particularly important because while in criminal cases the state on behalf of the public has interest that focuses on violation of penal statutes, and hence public interest is involved, in civil cases, the interest centres on the rights of parties *inter se* as they relate to civil law as opposed to criminal law. This distinction is clear.

22. Mr. Kwach also referred us to the decision of this Court in **Total Kenya Ltd V. Kenya Revenue Authority** (Nbi CA No Nai 135 of 2012 (UR 101/2012) to buttress his argument that there was need to give the applicants interim protection by ensuring preservation of *status quo* through grant of an order for stay. He pointed out that the trial Court had held that the two applicants are fraudsters but in his submission Mr. Kwach did not think there is a case in which a defendant has nothing to say. In his view, if stay is not granted, this will be a death sentence to the applicants. It was his submission that the applicants have paid the full amount but the liquidator has reversed the payments!

23. In the case of **Total Kenya Ltd v Kenya Revenue Authority** (supra) this Court issued an order for preservation of status quo as a measure of interim protection to the applicant who although had paid to Kenya Revenue Authority all the tax demanded amounting to Shs.3,045,026/= and the penalties and interest raised thereon amounting to Shs.23,407,724/= the latter made further demand of a whooping sum of sum of Ksh.133 million and the Court therefore ordered preservation of *status quo* pending the determination of the appeal.

24. Mr. Kwach likened the situation in the instant case with that in the **Total Kenya Ltd v. Kenya Revenue Authority** (supra) and urged us to allow the application and grant stay. He contended that denial of stay will amount to a death sentence and contended that his clients were not guilty of abuse of the Court process. He did not comment, though, on the averment by the respondent that the alleged payments by the applicants were in fact reverse entries made because Trust Bank Ltd had been placed under statutory management and by reason thereof cheques issued by the Bank could not be honoured after 18th September 1998, the date of receivership.

25. Before **Mr. Oyatsi,** learned counsel for the 1st respondent, made his submissions, **Mr. Kimani Gitonga**, learned counsel for the 2nd respondent, associated himself with the submissions made by Mr. Kwach on behalf of the applicant and indicated that he had nothing else to add save that his client was apprehensive about loss of liberty before the appeal is heard which he described as having chances of success. He reiterated that the money demanded was not money had and received but money credited to an account in a limited company which was a separate legal entity. Mr. Gitonga urged the Court to look at the respondents' case and in particular Ajay Shah's affidavit and contended that the payments demanded were reflected in the respondents' evidence. It was counsel's contention that if no payment had been made, then there would have been a charge of theft against the respondents.

26. **Mr. Oyatsi** opposed the applications. He left to the Court the issue as to whether the appeal is arguable and contended that the applications should be determined on the question whether the appeals, if successful, would be rendered nugatory. It was Mr. Oyatsi's submission that the order sought is discretionary and therefore the applicant is enjoined to be candid to the Court. This, contended Mr. Oyatsi, goes to the root of the application. He emphasized that if this requirement is not met, the twin

principles pertaining to the arguability of the appeal and the nugatory effect if it is successful should stay be disinclined, will not matter. He drew our attention to the following statement in the case of **Total Kenya Limited v. Kenya Revenue Authority (supra) -**

> ***"the inherent powers of this Court, like discretionary powers, are exercised as a means of enabling the Court to take any such action and make such orders as to maintain its character as a court of justice; to prevent its process from being misused; to preserve the subject matter of a dispute in an appeal, and to protect a party from suffering injustice."***

27. Mr. Oyatsi submitted that the applicants have not been candid to the Court about their assets. He pointed out that the applicants have averred that they have no assets and that they argue from that stand point that they will be declared bankrupt or be sent to civil jail. Yet in the Scheme of Arrangement dated 26th May 1999 they have endorsed their signatures admitting that they owe the money demanded from them by the respondent. The definition of *"insider loan,"* said counsel, as per the definitions in the said scheme of arrangement means *"any advance or credit or guarantee granted by the Bank to any of its officers or their associates (i.e. related parties").* Mr. Oyatsi submitted that the applicants were officers of the said Banks and he drew our attention to the definition of the word *"associate"* in the Scheme of Arrangement which is shown to mean "in relation to an individual, *"any member of his family"*, *"any company or anybody corporate controlled directly or indirectly, by him whether alone or with his associates,"* and *"any associate of his associate."*

28. It was Mr. Oyatsi's submission that the applicants signed the Scheme of Arrangement and effectively made admissions not only about taking the loans referred to but also that the loans were insider trading. It was Mr. Oyatsi's submission that the applicants failed to pay as undertaken by them in the Scheme of Arrangement and consequently the scheme collapsed as the applicants failed to keep their part of the bargain. These admissions by the applicants have not been mentioned, said counsel who added that the applicants' allegations are that they paid between September 1998 and December 1998.

29. We observe that the Bank was put under liquidation in1998 and that the Scheme of Arrangement was in 1999 and was sanctioned by the Superior Court below.

30. Mr. Oyatsi's point was that the applicants did not make full disclosures and were not candid. Instead, they painted a picture of the matter that was false. Mr. Oyatsi sought to distinguish the case of Dr. Christopher N. Murungaru (supra) where the matter was pending investigations and hence there was a question of fundamental rights as opposed to the instant case which, he said, is entirely different in that there is no dispute as regards liability of the applicants to pay as is evidenced by the payment schedule the applicants have signed.

31. Mr. Oyatsi also urged us to focus not only on the suffering that the applicants say they will face if stay is not granted, but also on the perspective of the liquidator who represents hundreds of creditors who have rights and expectations and who also could be bankrupt on account of the applicants' failure to honour their undertaking to pay. It was Mr. Oyatsi's submission that if the applicants have an arguable appeal, they should furnish security so that if the appeal does not succeed, the respondents do not suffer prejudice. The plight of hundreds of creditors represented by the liquidator, he said, cannot be ignored.

32. We note that the issue of payments was not raised in the superior court below and Mr. Oyatsi submits that payment was not disputed.

33. It was Mr. Oyatsi's further submission that the applicants were underserving of the discretionary remedy of stay of execution on account, not only of their conduct which shows lack of candour, but also, because it shows that they are trying to misuse the Court process. As far as the learned counsel was concerned, the party suffering injustice was the group of creditors represented by the liquidator. It was necessary for the applicants to provide security for the order for stay, submitted counsel, if the Court is inclined to grant stay. Mr. Oyatsi concluded by submitting that the requirements of Rule 5(2)(b) of the Rules of this Court had not been met.

34. Have the applicants made out a case for the grant of the order for stay under Rule 5(2)(b) of the Rules of this Court?

35. The jurisdiction of this Court under Rule 5(2)(b) is original, independent, unfettered and discretionary. As a discretionary power, it is to be exercised so as to serve the interest of justice by making orders that will preserve the subject-matter in an appeal and to protect a party from suffering injustice.

36. In **Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 Others** (C.A. No.256 of 2013, Nbi) this Court stated in relation to an application under Rule 5(2)(b) that the purpose of the inquiry into whether an appeal, if successful, will be rendered nugatory is

> ***"... to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual."***

37. In addition, the Court will guard against abuse of the process of the Court so as to safeguard integrity of the court process and thus protect public interest. An applicant for an order of stay under Rule 5(2)(b) must show candour and must not mislead the Court by deliberately distorting material facts. An applicant who is shown or found to have deliberately distorted material facts disentitles himself or herself of the discretionary order under Rule 5(2)(b). In the **Owners of the Motor Vessel "Lillians"** (Civil Appeal No.50/89) (unreported) this court differently constituted) stated-

> ***"...I entertain no doubt at all that Caltex failed in its duty to make a full and frank disclosure of material facts and the application by the appellants to set aside the writ and the warrant of arrest of the ship ought to have been allowed because quite clearly the original order made by Githinji J for the arrest of the ship was improperly obtained."***

38. The requirements of Rule 5(2)(b) which an applicant must show to the satisfaction of the Court are that the appeal or intended appeal is arguable and that if it is successful, it shall be rendered nugatory if stay is not granted. See **Stanley Munga Githunguri v. Jimba Credit Corp. Ltd** (Civil Application No Nai 161 of 1988). It is now settled that an arguable appeal is one that is not frivolous and that for it to be arguable an applicant need not show a plurality of points of law because even a solitary legal point will be sufficient. In **Nairobi Deluxe Service Ltd v. Eric Onyango Ndege**

(Civil Application No. Nai 64 of 1992) this Court after referring to the conditions required to be met by an applicant under Rule 5(2)(b) stated that –

> ***"we would like to point out that once these conditions are satisfied, this Court will normally grant an order for stay of execution without making any distinction between money and other decrees."***

39. In the instant application, the appeal has not been filed. However notice of appeal was lodged on 31st May 2013 and the grounds of appeal intended to be raised in the appeal are reflected in the draft memorandum of appeal marked as "A158" annexed to the instant application. Without going into the merits of the matters intended to be pursued on appeal, for that is the preserve of the Bench that shall hear and determine the appeal itself, we think that the appeal is tenuous. We observe that while it is contended by the applicants that the money was paid to a company in which they have interest as directors and shareholders, the respondents aver that the money claimed was paid to the applicants in insider trading just when the banks were within an ace of going into liquidation. It is also averred by the respondents that contrary to the allegation that the applicants made payments, the factual position is that there were reversal of entries as earlier stated.

40. As to whether the appeal shall be rendered nugatory in the event it succeeds if stay is not granted, we have carefully perused the affidavits filed by the parties and the annextures attached to them and have duly considered the rival submissions made by counsel for the parties. We think if the appeal is successful

and stay is not granted the success will not be turned into Pyrrhic victory because the Deposit Protection Fund Board as a Bank can refund the decretal sum. It is also our finding that the applicants have not shown full candour and as a consequence therefore do not on account of this deserve the exercise of our discretionary power to grant stay.

41. Accordingly, we disallow both applications Nos.156 of 2013 and 186 of 2013 and dismiss them with costs to the 1st respondent, Deposit Protection Fund Board.

Dated and delivered at Nairobi this 18th day of December 2014.

D. K. MARAGA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR