REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, AGANYANYA & NYAMU, JJ.A.)

CIVIL APPLICATION NO. NAI 293 OF 2010 (UR 204/2010)

In the matter of an intended appeal between

COMMERCIAL BANK OF AFRICA LIMITED.....APPLICANT

AND

KAJULU HOLDINGS LIMITED.....RESPONDENT

(Application for stay of execution from the order of the High Court of Kenya at Nairobi (Apondi, J.) dated 9th December, 2010

in

H.C.C.C.NO.732 OF 2010)

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RULING OF THE COURT

This is an application brought under ***Rule 5(2)(b)*** of this Court's Rules.

The applicant bank seeks two orders, namely:-

1. There be a stay of execution of the Order of the High Court dated 9th December, 2010 pending the hearing and determination of the intended appeal.

2. The *Receivers* ***and*** *Managers* ***appointed by the applicant be put back in possession of the assets and business of the respondent pending the hearing of the intended appeal.***

The applicant is a bank and the respondent is a limited liability company involved in a variety of businesses which include, quarrying, mining, excavation, supply of ballast and limestone and whole sale and retail of motor vehicle tyres. The relationship which gave rise to the subject matter of the application started in 2007. By a letter dated 20th August 2007 the applicant bank, at the respondent's request offered the respondent various credit facilities totaling Kshs.570,000,000. On 17th December, 2007 the facility were increased to 705,680,000. The facilities were secured, inter-alia, by a debenture executed by the respondent in favour of the applicant and clause 2 of the debenture provided that the moneys secured were payable on demand, and that in default the applicant bank could appoint receivers and

managers. Concerned about the escalation of the debt, the respondent commissioned an independent business review report. The independent review report triggered demands for payment by the applicant bank on 25th October, 2010, 10th November, 2010 and 22nd November 2010 respectively, and upon default in making payment it appointed receivers and managers on 22nd November, 2010. However the respondent went to court on 24th November, 2010 to restrain the receivers and managers and the superior court ***(Apondi, J.)*** issued an ex-parte mandatory injunction restraining them and further ordered them to give up possession. On 25th November, 2010, in obedience to the superior court's order, the applicant instructed the Receivers and Managers to hand back the business premises to the directors of the respondent. On 7th December, 2010 the injunction application came up for hearing inter-partes when the learned judge allocated 30 minutes as the available hearing time but when the respondent's advocate, ***Mr Wasuna,*** started prosecuting the application and after submitting for 30 minutes, he gave indications to the court that he needed two more hours to finalise his submissions. This resulted in the court allocating fresh hearing dates on 16th and 23rd February 2011 for continued hearing despite strong representations for urgent hearing by ***Mr Fraser***, learned counsel for the applicant. At this point the respondent's counsel Mr Wasuna requested the court to extend the interim orders made on 24th November, 2010 until the determination of the application. As expected the extension was opposed by the applicant's counsel. The court gave indications that it would give a ruling on 8th December, 2010 but the ruling was eventually given on 9th December, 2010 when the ex-parte orders were extended until the determination of the application. It is quite clear that the ruling was given approximately eight months after the objection to extend the ex-parte injunction and after what appears to us to have been an inconclusive inter-partes hearing of the injunction application. Aggrieved by the verdict the applicant lodged a notice of appeal on 10th December, 2010, thus laying the basis for this application.

The application is principally based on the grounds set out in its body which include inter-alia that the extension of the order was contrary to the Civil Procedure Order 39 (now Order 40 of the new Civil Procedure Rules) under which the application was grounded; that there was in law no basis for the grant of a mandatory injunction order ex-parte or at an interlocutory stage; that the order has compelled the receivers and managers appointed under the debenture to vacate the premises of the respondent thereby giving up all control over the assets which are charged to the applicant under the debenture; that the applicant fears that the assets of the respondent which constitute the security under the debenture may be wasted or disposed of before the appeal is heard thereby rendering the appeal nugatory and finally that as a debenture is a contract between the parties a stay would be in the interest of justice taking into account that there is a debt due which is largely uncontested and therefore the right to appoint receivers had arisen. Mr Fraser highlighted the above grounds both in his oral and in his written submissions. He further relied on a list of authorities filed in court on 8th April 2011 dealing with this Court's past decisions concerning the appointment of receivers under debentures.

On his part, Mr Wasuna for the respondent opposed the application on the grounds that the court was entitled to grant an interim mandatory order under ***section 3A*** of the Civil Procedure Act and not under ***Order 39*** of the Court Procedure Rules now renamed ***Order 40*** and that under this provision orders could be given ex-parte; that the court gave reasons for the extension of the order; that the interim order could be extended beyond 14 days until further orders even without the consent of the respondent; that the application for the orders had been brought under the inherent powers of the court; that the court was exercising a discretion for compelling reasons; that the receivers wanted to sell the assets and needed to be stopped because the assets constituted the lifeline for the company; that the respondent had given an undertaking to the applicant's counsel that it would not sell the assets the subject matter of the debenture; and finally that there was no arguable appeal in the circumstances and since the company is still in existence including its assets the intended appeal could not be rendered nugatory.

In the challenged ruling the learned Judge stated inter-alia:-

"At a personal level, I don't know the receiver managers who have been appointed. However, my knowledge of the corporate scene clearly shows that the majority of receiver managers in this country have never understood their roles. Most of them believe that if a company is put under receivership then the only option is for the company to be sent to its grave. …… To me it would be suidical to place this company under receivership."

For obvious reasons we cannot comment on the learned Judge's observations as set out above. For now we hope the quotation will assist us in designing an appropriate order to suit the circumstances. In the draft memorandum of appeal the applicant bank has set out grounds 2 and 3 as follows:-

"2. The learned Judge failed to appreciate that the floating charge created by the debenture has crystallized on the appointment of the receivers and managers so that the appellant had a fixed charge on all the assets of the respondent and that the effect of the confirmation of the mandatory interlocutory injunction was to paralyse the respondent.

3. The learned Judge erred in failing to hold that it was the contractual right of the appellant as debenture holder to appoint a receiver and manager where there is a debt due and the right to appoint has arisen irrespective of whether this would cause loss to the respondent."

Again we have deliberately set out the above grounds of appeal in order to assist us on the effect of the mandatory order on the charged assets of the company and the management of those assets.

In this matter we propose to interpret and apply ***rule 5(2)(b)*** in the light of ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act.

Taking into account the contents of affidavits in support and in opposition, submissions of counsel, authorities cited and the grounds set out in the draft memorandum including the observations of the learned Judge as reproduced above, our view is that the grounds relied on by the applicant cannot be said to be frivolous and therefore we consider that the requirement of arguability of the appeal has been established.

Turning to the second requirement on whether the intended appeal if successful could be rendered nugatory it is clear to us that the remedy of appointment of receivers and managers was prima facie invoked because of the applicant's apprehension touching on the financial health of the respondent and therefore under the debenture the only recourse open to the applicant is to the assets covered by the debenture. From the description of the assets they are nearly all wasting assets and because of their nature they are all subject to a higher rate of depreciation and should the current state of affairs to ***wit,*** a paralysis in the management persist, it is possible that in the long term the applicant might not have any assets to sell so as to cover the indebtedness or a reasonable amount of it. At the other end of the pendulum, the respondent could if finally successful enforce any orders against the applicant bank for any liability or loss which might stem from the appointment of the receiver managers. The reverse is in our view not possible and the bank might find it difficult to make any recovery. To this extent the intended appeal could be rendered nugatory.

It follows therefore that the balancing of the parties commercial interests in the subject matter must of necessity involve the invocation of the principle of proportionality which was recently defined by this Court in the case of ***Stanley Githunguri v Kenya Pipeline Company Nai Civil Application No. 300 of 2010***. What emerges from the application of the principle is that in a situation where issues surrounding an interlocutory application have not been resolved by the court for a period close to one year it would make sense for this Court to apply its commercial sense in considering the hardships occasioned by the delay or likely to be occasioned by any continuing delay. From the outline of facts as set out above it is clear to us that greater hardship would be caused to the applicant than to the respondent if we declined to grant the orders sought in view of the paralysis in management and the crystallization of the charge following the appointment of the receiver managers. This Court is required to give effect to the overriding objective in the interpretation or in exercising any power under the Appellate Jurisdiction Act or under the rules of the Court including ***Rule 5(2)(b).*** Approaching the matter with a sense of proportionality is one of the principal aims of the objective. Weighing the hardship of the two parties would in our view involve making effort to resolve the paralysis in the interim pending the hearing of the appeal on merit. In this regard, since the challenged order did not nullify the appointment of the receiver managers, it means that the charge over the assets covered by the debenture has crystallized. Having crystallized it is far proportionate in our view to remove the stalemate over the management of the assets by reinstating the receiver managers in the interim period before the hearing of the appeal so that they may in turn take care

of the charged assets. In doing so we will fortunately not be walking on an untrodden path. This Court in a differently constituted bench did pave the way in the case of ***Fina Bank Ltd v Spares and Industries Ltd C.A. Nai 25 of 2000 (unreported)*** where it specifically reinstated the receivers in almost similar circumstances stating:-

"We were told that the receivers and managers had been removed pursuant to the aforesaid order. In view of the fact that they appear to have been regularly appointed we order that they be reinstated for them."

We invoke the same principle here. In the result, we allow the application and order that the order of the superior court dated 9th December, 2010 granting the respondent a mandatory injunction be stayed pending the outcome of the applicant's intended appeal. It is not in dispute that the receivers and managers had been removed pursuant to the aforesaid order. Since there is no challenge touching on their appointment, we order that they be reinstated forthwith. The costs of this application to abide the outcome of the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 13th day of May 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR