



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, WAKI & AGANYANYA, JJ.A)

CIVIL APPLICATION NO. NAI. 113 OF 2009 (UR. 72/2009)

BETWEEN

BULK MEDICALS LIMITED (*in receivership*)APPLICANT

AND

PARAMOUNT UNIVERSAL BANK LTD. 1ST RESPONDENT

HARVEEN GADHOKE 2ND RESPONDENT

DANIEL M. NDONYE 3RD RESPONDENT

(An application for stay of execution of the entire ruling and order of the High Court (Kimaru, J.) dated 18th March, 2009

in

H.C.C.C. NO. 249 OF 2006)

RULING OF THE COURT

The applicant herein **M/S. Bulk Medicals Ltd** (“*the Company*”) seeks the following substantive order under **Rule 5 (2) (b)** of the Rules of this Court:

“2. *THAT this Honourable Court be pleased to grant a stay of execution of the superior court’s ruling and orders delivered on 18th March, 2009 by the Hon. justice L. Kimaru requiring the applicant to deposit a total sum of Kshs.4.0 million in a joint account to be opened by the advocates on record for the parties within a period of 30 days failure to which all proceedings in the present suit would be stayed.*”

The short background to the application is as follows: -

The company was a customer of the 1st respondent, **M/S. Paramount Universal Bank Ltd** (“*the Bank*”) in the year 1995. In August, 1997, the company sought financial accommodation from the bank in form of letters of credit to facilitate importation of some goods. The bank accepted the request and on 18th September, 1997 a debenture was executed by the company to secure a sum of Shs.10 million. A further debenture to secure another sum of Shs.10 million was also executed on 29th January, 1998. Subsequent thereto the company defaulted severally in agreed repayment terms and the debt, according to the bank, escalated to Shs.18.6 million as at April, 2001. The company then agreed to restructuring of the debt which was converted into a loan repayable on new terms, but the company once again fell into arrears. For that reason the bank appointed the 2nd and 3rd respondents herein (“*the receivers*”) on 10th May, 2006 under the debenture terms.

The directors of the company felt aggrieved by that turn of events and so went to the superior court in the name of the company on 15th May, 2006 and filed a suit. They challenged, *inter alia*, the validity of the debentures which they claimed were not in accordance with the law, the rate of interest and other charges on the loan facility which they said was in breach of the Banking Act; and asserted that they had repaid the full loan and therefore the figure demanded by the bank was fictitious. They prayed for a prohibitory as well as mandatory injunction to regain possession and control of the company, declarations that the debentures were unlawful; that the interest rates were unlawful and that the whole loan had been repaid; an order for delivery up of the assets and property of the company; and general compensatory and punitive damages for trespass. With the filing of that suit the directors applied for interlocutory prohibitory and mandatory injunctions which the superior court declined to grant.

The bank filed defence asserting that the debentures, which were registered after execution, and the appointment of receivers thereunder, were lawful. It denied allegations of excessive or wrongful charges of interest as they accorded with the terms of the debentures and asserted that the company was truly indebted to it before appointment of the receivers. The receivers also filed their defence asserting that they had been lawfully appointed. They also asserted that the company was hopelessly insolvent by the time they took charge of it since its liabilities exceeded its assets. Several creditors were owed in excess of Shs.130 million whilst the assets of the company were book debts of about Shs.38 million whose realizable value was about Shs.14 million, and stock worth shs.3 million. The operations of the company had also been shut down in September, 2006 when auctioneers descended on it to levy distress for rent arrears. In March, 2007, the receivers sold the assets of the company to a third party for a sum of Shs.14 million but continued with the receivership since the indebtedness to the bank was not liquidated.

Nothing appears to have happened for the next one year until 17th July, 2008 when the directors of the company returned to court and obtained an order for amendment of their plaint. In the amended plaint they pleaded further legal infractions by the bank in relation to interest rates and the Banking Act; irregular and illegal sale of the company's assets at an under value; intentional running down of the company; and failure to account for the proceeds of the receivership. They sought special damages in excess of Shs.178 million; a discharge of securities; lifting of receivership, among other declarations. Those claims were promptly denied by the bank and the Receivers.

In January, 2009 the Receivers took out a chamber summons under **Order XXV rules 1, 2, 5 (1) and 6** of the Civil Procedure Rules, and **section 401** of the Companies Act seeking security for costs of the suit in the sum of Shs.5,212,915. They calculated those costs on the basis of the Advocates Remuneration Order. The bank also filed a similar application under the same provisions seeking security for costs in the sum of Shs.3,016,742. Both of them sought a further order for stay of proceedings until the security was provided.

The directors of the company resisted the applications asserting, *inter alia*, that the applications were vexatious, frivolous and an abuse of court process; that it was only a company in liquidation, and not one under receivership, which could be ordered to deposit security; that it was the Receivers who had depleted the company's assets through mismanagement and in any event they were still in control of the company and cannot therefore be heard to demand security over funds they control.

The two applications fell for hearing and determination before Kimaru J. After hearing submissions from the learned counsel for all the parties, the learned Judge considered the provisions of **section 401** of the Companies Act which states as follows: -

“Where a limited company is plaintiff in any suit or other legal proceedings, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.”

He also referred to the former **Order XXV** of the Civil Procedure Rules which donated the discretion for issuance of the orders sought and concluded thus:

“.....it is clear that the matter in issue in this application is not whether the plaintiff has a prima facie case against the defendants but rather whether the plaintiff has any other assets which may be attached to satisfy the costs of the defendants in the event that the defendants are successful in the defence of the suit.

In the present suit, when the plaintiff was confronted with the applications filed by the defendants seeking to compel it to furnish security, instead of the plaintiffs managing director placing before the court evidence that the plaintiff has assets that can be utilized to settle the costs of the defendants in the event that the defendants are successful in the defence of the case, the plaintiff confirmed that indeed the assets of the company were sold by the receivers in realization of the debt owed to the 1st defendant. It is therefore clear that the plaintiff does not have any disclosed assets that may be attached to satisfy the costs that may be awarded to the defendants in the event they are successful.”

And with that, the Judge ordered the company to furnish security in the sum of Shs. 1.5 million to the bank and Shs.2.5 million to the Receivers, such sums to be deposited in a joint interest earning account in a reputable bank in the names of the respective counsel for the parties. Further proceedings were stayed pending compliance. That was on 18th March, 2009.

There was no compliance. Instead, the company filed a notice of appeal and came before this Court on 22nd April, 2009 seeking the main order reproduced above. That order will be granted if the company shows that the intended appeal is not frivolous and is arguable even on a solitary ground. It must also in addition show that unless the orders sought are granted, the intended appeal, if successful, shall be rendered nugatory.

We are told by learned counsel for the company Mr. Peter Kingara that the appeal has already been filed as No. 9 of 2010. It will raise issues of law, among them, whether the order should have been granted against a company which was under receivership and could not therefore borrow, recapitalize or do anything to raise funds; whether the receiver managers who had control and custody of the company assets can seek security from the same company; whether the receivers who had depleted the company's assets through mismanagement can seek security; and whether there was proper exercise of discretion. On the nugatory aspect, Mr. Kingara submitted that the company will be ejected from the seat of justice and be forever barred from pursuing a genuine claim against the bank and the receivers if the superior court's orders are not stayed as prayed.

In response to those submissions, learned counsel for the bank, Mr. Fred Ngatia, took the view that the two orders issued by the superior court, had nothing positive about them which the company was required to do, and consequently there was nothing executable which could be stayed. In his submission, the intention of the applicant was therefore to undo or reverse the said orders which an order for stay was not capable of doing as stated by this Court in **Western College of Arts & Applied Sciences v Oranga [1976] KLR 63** and **Kileleshwa Services Station Ltd v. Kenya Shell Ltd. Civil App. NAI. 84/08 9 (ur)** both of which were cited with approval in **Attorney General v Law Society of Kenya & Another Civil Appl. NAI. 144/09 (UR)**. Granting the orders sought would be tantamount to allowing the appeal before hearing it. Mr. Ngatia further submitted that the company was in receivership to the knowledge of the directors but it decided to amend its suit against the bank to claim enormous amounts of money when it was incapable of paying costs. Mr. Allan Gichuhi, learned counsel for the receivers supported those submissions and added that the orders of the superior court had already been defied before this motion was filed and the receivers have already sought an order from the superior court to strike out the entire suit. He submitted that although the company was in receivership, it was still alive and should be prepared to pay costs if it decided to sue, otherwise it would be unjust to expose defendants to expensive litigation without security. He found no basis for asserting that success of the intended appeal should be rendered nugatory.

We have considered all the submissions of counsel and the material placed before us. Whether indeed the company ought to have been ordered to furnish security when it was acknowledge to be in receivership may well be an issue worth agitating before the appellate court and we would not begrudge the applicant

that opportunity. It is not a frivolous issue. But the first order of the superior court required the payment of some money in a specified manner within a specified period. Contrary to the submissions of Mr. Ngatia, it was an order that could have been stayed before it took effect by suspending the time required for its performance. In the *Kileleshwa Service Station case*, “stay” was explained thus:

“A “stay” does not reverse, annul, undo or suspend what already had been done or what is not specifically stayed nor pass on the merits of the orders of the trial court, but merely suspends the time required for performance of the particular mandates stayed, to preserve a status quo pending appeal.”

Emphasis added.

This motion, however, was filed after the expiry of the time limited for compliance with the order and therefore the second order for stay of proceedings had taken effect. The order for stay now sought by the applicant would in effect “reverse, annul, undo or suspend” what has already taken place which is not the jurisdiction of this Court under **rule 5 (2) (b)**. In other words we cannot ordinarily in a motion for stay, restore orders of the superior court which have taken effect as that would be tantamount to deciding the appeal on a motion. For those reasons we would agree with the respondents that the application for stay would be misconceived.

Furthermore we are not persuaded that the intended appeal would be rendered nugatory if the order for furnishing security was not stayed. In accordance with the order, the money would be jointly held by all the parties and would be available to any of them in the event of losing or winning the intended appeal.

On the whole the motion is not only misconceived but also lacking in merit and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 15th day of July, 2011

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR