IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 154 OF 2010

PARAMOUNT UNIVERSAL BANK LIMITED ……..……. APPLICANT

AND

1. **TRUST BANK LIMITED**
2. **AJAY SHAH**
3. **PRAFUL SHAH ……..…….. RESPONDENTS**

(Application for stay of the decree of the High Court of Kenya at Nairobi (Lessit, J.) dated 30th January, 2009

in

H.C.C.C. NO. 1243 of 2001)

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RULING OF THE COURT

Although the pleadings are not part of the record before us, on perusal of the Judgment in the record and other documents enclosed, it is apparent that **Trust Bank Limited** , 1st respondent in this notice of motion dated and filed on 24th June, 2010, sued **Paramount Universal Bank Limited**, the applicant herein and two others namely **Ajay Shah** and **Praful Shah**, the 2nd and 3rd respondents respectively, in the superior court seeking recovery of Kshs3,627,922.50 on grounds that the 2nd and 3rd respondents who were directors of Trust Bank Limited, at the relevant time, fraudulently caused a run on Trust Bank by siphoning money out of it before its closure knowing fully well that Trust Bank was about to be closed by Central Bank. This was done by use of seven cheques which were drawn in favour of the applicant (Paramount Universal Bank Limited). The applicant, 2nd and 3rd respondents denied the allegations, but after full hearing, the learned Judge of the superior court (Lesiit, J.) in a judgment dated and delivered on 30th January, 2009 found in favour of the 1st respondent as against the applicant, 2nd and 3rd respondents and entered judgment against the three as follows:

“(a) Judgment in the sum of Kshs.3,677,922/50.

(b) Compound interest on (a) above at the rate of 25% per annum from September, 1998 until payment in full.

(c) The Defendants will also pay for the costs of the suit with interest."

The applicant together with the 2nd and 3rd respondents felt aggrieved with that judgment and all of them indicated their desire to appeal to this Court against that decision. The record before us shows that the applicant filed a notice of appeal on 10th February, 2009. As the records regarding the other two – that is 2nd and 3rd respondent are not included in the record before us, we cannot as certain, (except relying on what their two learned counsel have told us), that they also filed notices of appeal. What however is certain, is that they jointly filed a notice of motion dated 27th February, 2009 in the superior court seeking an order that the execution of the judgment entered on 30th January, 2009, be stayed pending the hearing and determination of an intended appeal against the said judgment. The notice of motion filed by the applicant was dated and filed on 27th February, 2009, and although we are not certain of when the other two filed theirs, the Ruling on the applications sufficiently indicates that all of them did apply for stay of execution in the superior court. That application was heard by the same learned Judge who in a Ruling dated 5th June, 2009 concluded:

"In the result, I will allow each of the applicants' Notice of Motion and order that each applicant should deposit with this court the sum of Kshs.15 million within 30 days from the date herein with either party having leave to apply".

The applicant still felt aggrieved with that decision but made no application to the superior court. Instead, it has come before us seeking two orders namely that:

"1. There be a stay of execution of the decree of the superior court in Milimani High Court Civil Case No. 1243 of 2001.

2. Costs of and incidental for this application be provided for."

The application is premised upon **Sections 3A** and **3B** of the Appellate Jurisdiction Act and **Rule 5 (2) (b)** of the Court of Appeal Rules. The reasons in support of the application are that the intended appeal is arguable; that the conditional stay of execution of the decree granted by the superior court is in the circumstances of the case unfair for being oppressive, punitive, onerous and will not leave the parties in equal and just footing as required by the principles which underlie the overriding objectives of the Appellate Jurisdiction Act and Civil Procedure Act; that should the intended appeal succeed, such success will be rendered nugatory as the 1st respondent is insolvent and such payment if made to the 1st respondent, would not be recovered; and that the applicant being a commercial bank competing for business with other banks, the money is required for the development and growth of its business.

Before us, Mr. Ogunde, the learned counsel for the applicant submitted that the intended appeal is arguable on grounds, among others that the learned Judge erred in her judgment in applying as a standard of proof of fraud, the balance of probabilities test; that the court erred in failing to adopt a higher standard of proof for fraud as is required by law and had it done so, it would have found that fraud was not proved and lastly that the court erred in making an order for compound interest to be paid on the amount of money found due to the 1st respondent. On the nugatory aspect, Mr. Ogunde's view was that as the 1st respondent was insolvent, whatever money paid to it would not be recovered and that being the case, the success of the intended appeal would be rendered nugatory. He proposed that the applicant be allowed to avail a bank guarantee to secure payment in case the intended appeal does not succeed. Mr. Billing, the learned counsel for the 2nd respondent; while admitting that the 2nd respondent did not file any application before us for stay, nonetheless supported the notice of motion maintaining that the main dispute in the matter is on the order made by the superior court in relation to compound interest. In his view, a deposit of Kshs.3,000,000/= by the applicant, 2nd and 3rd respondents would suffice. Mr. Gitonga Kimani, the learned counsel for the 3rd Respondent supported Mr. Ogunde and Mr. Billing. He also

conceded that his client did not file application for stay before us.

Mr. Oyatsi, the learned counsel for the 1st respondent opposed the application submitting that it was an abuse of court process as in its application for stay of execution before the superior court, the applicant had stated categorically that it was prepared to abide by any condition imposed by the court in granting the order sought then. Further in the affidavit sworn by its legal consultant, Mr. Timothy Kimani, in support of that application, Mr. Kimani stated that the applicant was prepared to abide by any condition imposed by the court in granting the order. Further to Mr. Oyatsi's contention that the application was an abuse of the court process, he stated that the order of stay given by the superior court specified that the money had to be paid within 30 days from 5th June, 2009, but the applicant and the 2nd and 3rd respondents failed to do so and whereas the 2nd and 3rd respondents have not made any application in this Court, the applicant came to this court with this application on 24th June, 2010 long after the 30 days had expired. It waited until the bill of costs was taxed and the 1st respondent was ready to execute and then preferred to approach this Court so as to avoid execution. He thus pleaded with us not to exercise our discretion in the circumstances obtaining. On the applicant's proposal to avail a bank guarantee, Mr. Oyatsi said that suggestion had been made in the superior court, which after considering it, rejected it. Whereas he preferred not to address us on the arguability of the intended appeal, he stated that a proper case for granting the orders sought had not been made out and urged us to dismiss the application.

We have considered the notice of motion, the record before us, the submissions by all the learned counsel, the judgment of the learned Judge, the ruling of the superior court on the application for stay and the law. We do have original jurisdiction to determine this application before us, the ruling of the learned Judge of the superior court notwithstanding. In our view, two issues raised in support of the intended appeal, namely, whether the learned Judge applied the correct standard of proof in civil cases where fraud is pleaded and whether compound interest should have been ordered as was done by the learned Judge, are matters that we think will need full ventilation at the hearing of the intended appeal. We think, Mr. Oyatsi was right when he decided not to address us on the arguability of the intended appeal. It is arguable. That does not however mean that it will succeed. All it means is that it may or may not succeed, but those points will need to be heard in full.

That leaves the second issue, which is whether the success of the appeal, if it succeeds, will be rendered nugatory. Mr. Ogunde says the first respondent is insolvent and so if money is paid to it, it may not be recovered in case the appeal succeeds. We do not, with respect, think that argument is valid. The payment need not be made to the first respondent directly. The superior court ordered it to be paid into the Court and to have it remain there till the intended appeal is heard and determined. In this case, if the appellant succeeds, it would have its money refunded and so no loss would occur. In any case, we agree with Mr. Oyatsi and it is on record that the applicant had accepted on its own, before the superior court, to abide by any condition imposed by that court; and that the delay to file this application, which has not been explained, coupled with the fact that the orders given by the superior court had not been complied with, are matters that must be considered in coming to a fair and just decision on the notice of motion before us. We agree that the applicant is a commercial bank and would need to have its money earning some interest for it.

In the circumstances, we would not disturb the order of stay granted by the superior court save to modify it and order that the amount of 15 million to be paid into an interest earning account in a reputable bank within 30 days of the date hereof. The ensuing order is as follows:

The notice of motion dated 24th June, 2010 is dismissed and the order of the superior court made on 5th June, 2009 is confirmed but varied to the extent that the applicant, second and third respondents each to deposit Kshs. Fifteen million (15,000,000) into an interest earning bank account in the joint names of the advocates for the first respondent and the applicant, within thirty (30) days on the date hereof, failing which the first respondent shall be at liberty to execute. Costs of this application to be paid by the applicant to the first respondent.

Dated and delivered at Nairobi this 22nd day of October, 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR