



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLI. NAI NO. 115 OF 2008 (70/2008)**

**KENYA COMMERCIAL BANK LTD.....APPLICANT**

**AND**

**1. STEPHEN MUKIRI NDEGWA.....1<sup>ST</sup> RESPONDENT**

**2. CONTINENTAL MARKETING LTD.....2<sup>ND</sup> RESPONDENT**

**(Application for stay of execution of the judgment and decree of the High Court of Kenya at Nairobi (Lady Justice Lesiit) dated 2<sup>nd</sup> May, 2008**

**in**

**H.C.C.C. NO. 172 OF 1997)**

**\*\*\*\*\***

**RULING OF THE COURT**

The applicant, **KENYA COMMERCIAL BANK**, by this application expressed to be brought under **rule 5(2)** of the Rules of this Court seeks an order for stay of execution of the judgment of the superior court made in Nairobi H.C.C.C No. 172 of 1997 and delivered on 2<sup>nd</sup> May, 2008 pending the hearing and determination of its appeal being Civil Appeal No. 132 of 2008.

The subject matter of the dispute which gave rise to this application relates to accounts held by the respondents in the applicant bank. The respondents aver that between 1987 to about 1989 they applied for overdraft facilities from the applicant which it agreed to grant on the condition that security was provided. This requirement was duly complied with and the advance was subsequently credited in favour of the respondents. In or about 1993 the respondents received US \$ 144,037.65 from Pakistan with instructions that it be credited into their account. It is their case before the superior court that their instructions were not complied with. Instead, the applicant continued to charge interest higher than the agreed rate; and consequently, the debt escalated until January, 1997 when it purportedly exercised its statutory power of sale by disposing of the security. The respondents contended that the sale by public auction was illegal by reason of the debt owing to the applicant having been fully liquidated. It sought, *inter alia*, full account of all its money received by the applicant on its behalf; a nullification of the sale of the security and the return of its security fully discharged and free from all encumbrances.

The applicant's defence was shortly as follows. All the funds it received from or on behalf of the

respondents were utilized for their credit and on their instructions. The statements thereof were forwarded to the respondents who accepted them without complaint. Further, they admitted their indebtedness and liability to the applicant.

However, the learned trial Judge Lesiit J. in a lengthy judgment found for the respondents and granted them the prayers they sought. Her findings have triggered this application.

Mr Ougo for the applicant contended before us that the appeal so lodged is arguable and is not a frivolous one. In this regard he referred us to the memorandum of appeal which contains a total of nine grounds of appeal. In our respectful view, we think that these grounds are clearly arguable. In reaching this conclusion, we have, also, taken into account the fact that Mr Mogeni for the respondents conceded that there could be some arguable points in the appeal and as this Court has said before a supplicant for an order of stay need not show that he has a litany or chain of arguable points. One arguable point is sufficient.

The applicant expresses fears that if the security is discharged the respondents are likely to dispose of it or dissipate it in a manner which will put it beyond its reach before the appeal is heard and the applicant will not be able to recover it which fact will destroy its substratum and render the appeal nugatory in the event of success. We would think that the fear is reasonable. And moreover, the respondents have not shown the existence of any other assets it may have. Thus, if the security is discharged there could be a minimal chance of recovery of whatever money may be eventually due to the applicant, if any.

In the result, we grant the application as prayed. There shall be a stay of execution of the judgment and the decree of the superior court dated 2<sup>nd</sup> May, 2008 and all other consequential orders thereto and such stay shall be in force until the determination of Civil Appeal No. 132 of 2008 or until further orders of the Court. The costs of the motion shall be in the appeal.

**Dated and delivered at Nairobi this 31<sup>st</sup> day of October, 2008.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**S. E. O. BOSIRE**

.....

**JUDGE OF APPEAL**

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**