



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civ Appli 200 of 2006

CHARTERHOUSE BANK LIMITED APPLICANT

AND

CENTRAL BANK OF KENYA

MINISTER OF FINANCE

**ROSE DETHO
RESPONDENTS**

(Application for an interlocutory injunction under Rule 5 (2). (b) of the Court of Appeal Rules pending the hearing and determination of an intended appeal from the ruling and orders of the High Court of Kenya at Nairobi (Azangalala J) dated 26th July, 2006

in

H.C.C.C. NO. 329 OF 2006)

RULING OF THE COURT

This is an application by **CHARTERHOUSE BANK LIMITED** (Bank) under **Rule 5 (2) (b)** of the Court of Appeal Rules (Rules) for an order of:

“..... Interlocutory injunction restraining the 3rd respondent from assuming the management of the applicant bank or otherwise further managing, controlling or directing the affairs and business of the applicant bank along side or to the exclusion of its Board of directors pending the hearing of the applicants intended appeal against the ruling and/or order of the superior court, Azangalala J”.

The Bank intends to appeal against the ruling/order of the superior court (Azangalala J) dated 26th July, 2006 in *Nairobi Milimani Commercial Courts H.C.C.C. No. 329 of 2006* (suit) dismissing an application for interlocutory injunctions pending the hearing of the suit.

The suit in the superior court was triggered by the appointment of **ROSE DETHO**, the third respondent herein, by the Central Bank of Kenya (CBK) the first respondent herein, as statutory manager of the applicant Bank vide a letter dated 23rd June, 2006 addressed to the Chairman of the applicant Bank in the

following terms.

“RE: PLACING OF CHARTERHOUSE BANK LIMITED UNDER STATUTORY MANAGEMENT

In order to protect the interests of Charterhouse Bank Limited, its depositors and other creditors, the Central Bank of Kenya has today appointed Miss Rose Detho as Statutory Manager for Charterhouse Bank Limited pursuant to Section 34 (1) (d) of the Banking Act, with effect from 23rd June, 2006.

Miss Rose Detho, who is an Assistant Director in the Central Bank, will exercise all the powers conferred on her by the Banking Act and shall enjoy the rights and privileges of a Manager in accordance with Section 34 (2) and 34 (6) of the Banking Act. She will assume the management, control, and conduct of the affairs and business of the institution to the exclusion of the Board of Directors.

The appointment of the Statutory Manager shall be for a period not exceeding twelve months, unless otherwise extended.

JACINTA W. MWATELA

ACTING GOVERNOR

c.c. Managing Director

Charterhouse Bank Limited

P.O. Box 43252 – 00100

NAIROBI.

Upon receipt of the said letter, the applicant Bank moved with expedition. It filed the suit challenging the appointment of the statutory manager together with an application for interlocutory injunction on the same day of the appointment of the statutory manager, that is, on 23rd June, 2006. The main basis of the suit is that the appointment of the statutory manager was without any foundation or statutory blessings as the prerequisite circumstances specified in **Section 34 (1)** of the Banking Act had not occurred in respect of the applicant Bank. The remedies sought in the plaint include a declaration that the purported appointment of the statutory manager of the applicant Bank is illegal, null and void, a permanent injunction as specified in that plaint, general and punitive damages for any losses that the applicant Bank may incur and, lastly, special damages to be particularized.

Two orders were sought in the application for interlocutory injunction, namely, firstly, an order of injunction to restrain CBK from interfering with business operations and management of the applicant Bank including appointing a statutory manager, and, secondly, an order of injunction to restrain the appointed statutory manager from assuming the management of the applicant Bank or exercising any functions or powers of a statutory manager. The applicant sought *ex parte* orders intended to preserve the status quo pending the hearing of the application *inter partes*. However, the superior court declined to grant *ex parte* orders and proceeded to hear and determine the application *inter partes*.

The superior court considered the application for the injunction in the light of the principles enunciated in ***Giella vs. Cassman Brown & Co. Ltd*** [1973] EA 358. The superior court first dealt with the question of whether the applicant Bank had established a prima facie case with a probability of success. In determining that issue the question of the true construction of **section 34 (1)** of the Banking Act (Act) arose in that court. The section provides:

“34. (1) This section applies, and the powers conferred by subsection (2) may be exercised, in the following circumstances –

(a) if the institution fails to meet any financial obligation to pay any depositor;

(b) if a petition is filed, or a resolution proposed, for the winding up of the institution or if any receiver or receiver and manager or similar officer is appointed in respect of the institution or in respect of all or any part of its assets;

(c) if the auditor of an institution makes a report to the Central Bank under the provisions of subsection (4) of section 24;

(d) if the Central Bank discovers (whether on an inspection or otherwise) or becomes aware of any fact or circumstance which, in the opinion of the Central Bank, warrants the exercise of the relevant power in the interests of the institution or its depositors or other creditors.

And **section 34 (2)** referred to above provides as follows:

“34. (2) In any case to which this section applies, the Central Bank may with the approval of the Minister –

(a) appoint any person (in this Act referred to as “a manager”) to assume the management, control and conduct of the affairs and business of an institution to exercise all the powers of the institution to the exclusion of its board of directors including the use of its corporate seal;

The applicant Bank contended in the superior court, among other things, that the powers of CBK under **section 34 (2)** of the Act are only exercisable on the occurrence of all the circumstances set out in **section 34 (1) (a) (b) (c) (d)** of the Act and that since all the circumstances had not happened, the appointment of a statutory manager was unlawful, illegal, null and void.

It was contended on behalf of CBK, on the other hand, that, CBK does not have to wait for all the circumstances to occur and that appointment of the statutory manager was lawful as circumstance specified in **section 34 (1) (d)** had occurred.

The superior court preferred the construction placed on **section 34 (1)** by CBK and ruled:

“In the premises, I hold that on the occurrence of any one circumstance set out under section 34 (1) of the Banking Act the 1st defendant (i.e. CBK) was entitled to exercise the powers given under section 34 (2) of the same Act”.

The superior court believed the affidavit evidence of Gerald Arita Nyaoma – Director, Financial Institution Supervision Department of CBK that the applicant Bank had committed various violations of the Banking Act and came to the conclusion that CBK was prima facie entitled to exercise powers vested under **section 34 (2)** of the Act in appointing a statutory manager and for that reason, the applicant Bank had not established a prima facie case with probability of success.

In addition, the superior court expressed the view that since the appointment of the statutory manager had become effective and had not been revoked, what the applicant was seeking to restrain had already occurred.

Lastly, the superior court concluded that the injury that the applicant Bank may suffer would be adequately compensated in damages which CBK was capable of paying and that the balance of convenience tilted in favour of declining the injunction.

The applicant being aggrieved by the decision of the superior court, has filed a Notice of Appeal dated 26th July, 2006.

The principles upon which this Court exercises its unfettered discretion to grant a stay of execution, stay of proceedings or an order of injunction are settled. The applicant should satisfy the court that the

appeal or the intended appeal is not frivolous, that is to say, that, the appeal or intended appeal is arguable and, secondly, that unless the application is granted the results of the appeal, if successful would be rendered nugatory. The purpose of granting an injunction pending appeal is to preserve the *status quo* and to prevent the appeal, if successful, from being rendered nugatory. (See *Madhupaper International Limited vs. Kerr* [1985] KLR 840; *J. K. Industries vs. Kenya Commercial Bank Ltd & Another* [1987] KLR 506; *Githunguri vs. Jimba Credit Corporation Ltd (No. 2)* [1988] KLR 838).

The application is supported by affidavit of Sanjay Shah – a director of the applicant Bank. He states that the applicant Bank has a good appeal with great chances of success. He has set out the grounds of appeal in paragraph 10 of the affidavit. He further states that the intended appeal shall be rendered nugatory for the reasons that he has stated unless the order of injunction pending appeal is granted.

Mr. Odera Obar Kennedy, learned counsel for the applicant Bank has submitted at length in an attempt to show, among other things, that the learned Judge erred in the construction of **section 34 (1)** of the Act; that the violations of the Banking Act relied on by CBK occurred in 2004 and were mere allegations; that CBK acted in bad faith; that there was no evidence that the statutory manager has assumed office nor evidence that CBK had the means to pay damages to the applicant Bank.

Mr. Ougo, learned counsel CBK and for the statutory manager on the other hand, contended that the basis of the applicant Bank's case in the superior court was that the appointment of the statutory manager was unlawful for two reasons; first, that all the four circumstances specified in **section 34 (1)** of the Banking Act had not occurred and secondly; that the Minister for Finance had not authorized the appointment of a statutory manager.

He further contended that the appeal based on the two issues is not arguable and that the statutory manager has finished her business and made recommendations to the appointing authority.

Ms. Muthoni Kimani for the Minister of Finance, on her part, submitted that the applicant Bank has not made a case to warrant the exercise of discretion in its favour.

It is apparent from the submissions of Mr. Odera, that he presented the case before us as if he is dealing with the merits of the suit itself. The superior court merely dealt with an application for interlocutory injunctions which are both equitable and discretionary remedies. It is manifest that the superior court declined to exercise its discretion in favour of the applicant Bank. The focus of the intended appeal can only be on the manner that the superior court exercised its discretion and not on the decision on the merits. It is well settled that this Court will not interfere with the exercise of discretion of a Judge unless it is satisfied that the decision is clearly wrong, because, it has taken into consideration irrelevant or extraneous matters or it has disregarded relevant matters which it should have taken into account and thereby arrived at a wrong conclusion. (See *Mbogo vs. Shah* [1968] EA 93). Considering the limited jurisdiction of this Court in dealing with appeals arising from the exercise of discretion by a Judge, we do not find it necessary to deal with the issues raised by the counsel for the applicant Bank which challenge the legality or lawfulness of the decision of the CBK to place the applicant Bank under statutory management. Those issues cannot be conclusively decided either in the present application or in intended appeal. Rather they can only be conclusively determined at the trial of the suit pending in the superior court.

The applicant Bank can only show that the intended appeal is arguable, if it demonstrates that Azangalala J did not, *prima facie*, exercise his discretion judicially because either he acted on the wrong principles or that he took into account irrelevant matters or failed to consider relevant matters. The applicant Bank has totally failed to show *prima facie* that Azangalala J did not exercise his discretion judicially. Rather, the counsel for the applicant Bank adopted the wrong approach by attempting to show that the decision of the superior court is wrong on the merits. Thus, in our respectful view, the applicant Bank has failed to show that the intended appeal is arguable.

Moreover, it seems to us that the order of injunction if granted in the terms sought will not only be unlawful, but, would also lead to undesirable consequences. The applicant prays that **ROSE DETHO**, the

statutory manager, be restrained from assuming the management of the applicant Bank. **Section 34 (4)** of the Banking Act, provides:

“A manager shall upon assuming the management, control and conduct of the affairs and business of an institution, discharge his duties with diligence and in accordance with sound banking and financial principles and in particular, with due regard to the interest of the institution, its depositors and other creditors”.

The responsibilities of a statutory manager are specified in **section 34 (5)** of the Act. Rose Detho deposes in paragraph 3 of her affidavit sworn on 2nd August, 2006 thus:

“3. I was appointed as the applicants statutory manager on the 23rd day of June, 2006 and confirm that, in exercise of my statutory mandate I duly assumed the management, control and conduct of the affairs and business of the applicant on the same date”.

The Minister for Finance, Hon. Amos Kimunya has also sworn a replying affidavit in which he deposes, *inter alia*, that the action taken by CBK was approved by him and that the statutory manager is not acting illegally as she has been appointed as manager by CBK with his approval.

It is now over nine (9) months since the statutory manager was appointed for a term of 12 months. Firstly, it would be unlawful to restrain the statutory manager from exercising her statutory duties. Secondly, an order of injunction will leave a vacuum as it will not interfere with her appointment or reactivate the Board of Directors of the applicant Bank. Thirdly, the order of injunction will have the effect of removing the statutory manager from office while the applicant Bank has not sought a mandatory injunction.

On the question of the intended appeal being rendered nugatory, the reality is that applicant Bank was placed under statutory management for a period of twelve (12) months which is the maximum period provided by **section 34 (3)** of the Act. That period expires in the next three months’ time and yet the appeal has not been filed. It is apparent that the applicant Bank will have ceased to be under statutory management, seemingly, even before the appeal is filed. In that event, it is improbable that the applicant Bank would lodge any appeal.

Furthermore, assuming that the appeal is filed and ultimately succeeds the effect would be to grant an order of injunction which the superior court failed to give. That result would not be efficacious because the statutory management of the applicant Bank would have long ceased by operation of law.

Lastly, according to CBK the statutory manager was appointed in order to protect the interest of the applicant Bank, its depositors and other creditors. The law enjoins the statutory manager to discharge her duties with diligence and in accordance with sound banking and financial principles, and, particularly, to have due regard to the interests of the institution, its depositors and other creditors. There is no complaint that the statutory manager has breached any of her statutory duties in relation to the applicant Bank.

For the foregoing reasons, and having regard to the peculiar circumstances of this case, we have reached the conclusion that the application has no merit and it is rejected.

In the result, the application is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 9th day of March, 2007.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR