



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli. Nai 278 of 2003

SOUTHERN CREDIT BANK CORPORATION LIMITED..... APPLICANT

AND

TULIP APARTMENTS LIMITED ..... 1<sup>ST</sup> RESPONDENT

LORIMAR APARTMENTS LIMITED ..... 2<sup>ND</sup> RESPONDENT

MOHAMMED A.K. MADHANI ADVOCATE

Practicing as MOHAMED MADHANI &

COMPANY ADVOCATES ..... 3<sup>RD</sup> RESPONDENT

*(Application for stay of execution pending an appeal from the judgment of the High Court of Kenya at Nairobi (Rimita, J.) dated 3<sup>rd</sup> day of October, 2003*

in

*H.C.C.SUIT NO. 284 OF 2002)*

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**RULING OF THE COURT**

This is an application by way of Notice of Motion brought under **Rule 5(2)(b)** of the Court of Appeal Rules (the Rules) in which the applicant, **Southern Credit Bank Corporation Limited**, seeks mainly an order that the decision of the superior court in *Civil Case No. 284 of 2002* dated 3<sup>rd</sup> October, 2003 be stayed until the applicant's intended appeal is heard and determined. The application is brought on the following grounds:-

***“(a) THAT the applicant/1<sup>st</sup> defendant has filed a Notice of Appeal against the whole decision of the judgment delivered by the superior court dated 3<sup>rd</sup> October, 2003 and unless there is a stay of execution, the applicant's/1<sup>st</sup> defendant's intended appeal will be rendered nugatory and the applicant/1<sup>st</sup> defendant will be obliged to release and discharge the security document to the 1<sup>st</sup> & 2<sup>nd</sup> respondents/1<sup>st</sup> & 2<sup>nd</sup> plaintiff in which case the applicant/1<sup>st</sup> defendant will have no control or possession of the security documents.***

**(b) THAT if the applicant/1<sup>st</sup> defendant releases and discharges the security documents to the 1<sup>st</sup> and 2<sup>nd</sup> respondents/1<sup>st</sup> and 2<sup>nd</sup> plaintiffs the latter would and may transfer the suit property to a third party in which case, the applicant's/1<sup>st</sup> defendant's intended appeal will be rendered nugatory and the applicant/1<sup>st</sup> defendant will suffer irreparable loss and damage.**

**(c) THAT the applicant/1<sup>st</sup> defendant has an arguable appeal with good prospects of success.”**

There is then an affidavit sworn by one, **Dilip A. Shah**, in support of the application. Mr. Shah is described as the Managing Director of the applicant Company.

This application was fixed for hearing by consent of the parties and when it came up for hearing on 7<sup>th</sup> June, 2007, Mr. M. Billing, the learned counsel for the applicant, was present and ready to proceed with the application and so was Mr. D. Majanja, the learned counsel for the 3<sup>rd</sup> respondent. In the circumstances, the Court decided to proceed with the hearing of the application pursuant to **rule 55(2)** of the Rules which provides:-

**“If the applicant appears and the respondent fails to appear, the application shall proceed in the absence of the respondent unless the Court sees fit to adjourn the hearing”.**

In his brief address, Mr. Billing informed us that the intended appeal being *Civil Appeal No. 41 of 2003* had already been filed awaiting fixing of the hearing date. Mr. Billing reminded us that there had been an order of interim stay granted by this Court way back in **2003**. In prosecuting the application he sought to rely on the grounds which we have already set out at the commencement of this ruling and the affidavit of Mr. Dilip Shah.

Mr. Majanja on his part did not oppose this application for stay.

There is, however, a replying affidavit sworn by one, **Navinchandra Nathoo Shah** a director of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. In that replying affidavit, Mr. Shah depones inter alia:-

**“2. THAT I make this affidavit in opposition to the Applicant's application filed in this Honourable Court for a stay of execution, which application I have read, understood and have also had explained to me by my advocates on record.**

**3. THAT the applicant has not demonstrated in what respect it considers it's intended appeal to be meritorious, arguable or its probability of success.**

**4. THAT the applicant has not filed any draft memorandum of appeal of its intended appeal to enable this Honourable Court determine whether or not its intended appeal is meritorious, arguable or has a probability of success.**

**5. THAT without any such draft memorandum of appeal of the intended appeal by the applicant, the applicant's intended appeal cannot be said to be meritorious, arguable or having a probability of success.**

**6. THAT what the applicant seeks to stay by its application to this Honourable Court will not in any way render its intended appeal nugatory.**

**7. THAT the applicant has not demonstrated or sufficiently demonstrated how the mere release of the security documents to the 1<sup>st</sup> & 2<sup>nd</sup> respondents as ordered by the superior court will render the applicant's appeal nugatory.**

**8. THAT in the event that the applicant's intended appeal is successful, the respondent companies have sufficient means and assets at their disposal that would be able to satisfy any such orders as may be made by this Honourable Court.**

9. **THAT the applicant's present application for stay of execution is made with the sole purpose of keeping the 1<sup>st</sup> & 2<sup>nd</sup> respondents from enjoying the fruits of the judgment properly obtained from the superior court.**

10. **THAT I am advised by my advocates on record that the applicant's application for a stay of execution before this Honourable Court lacks any merit; I verily believe the said advice to be true and I would consequently pray that the same be dismissed with costs to the 1<sup>st</sup> & 2<sup>nd</sup> respondents."**

In an application of this nature (**under rule 5(2)(b) of the Rules**) it is upon the applicant to satisfy us not only that the intended appeal is arguable and is not frivolous but also that the intended appeal, if successful, will be rendered nugatory if stay orders are not granted at this stage. This is a settled law and if any authority is required, it is readily available in the case of **KIRAN CHANDUBHAI PATEL VS. TRANSWORLD SAFARIS LIMITED** – Civil Application No. Nai. 197 of 2003 (unreported) where this Court stated:-

**"It is trite law that in an application such as this for an applicant to succeed he is principally obliged to show, firstly, that his intended appeal is arguable and not frivolous. Secondly, that, unless he is granted an injunction, the intended appeal if successful will be rendered nugatory. In deciding the matter before it the Court exercises discretionary jurisdiction which discretion has to be based on evidence and sound legal principles. The duty, obviously squarely falls on the applicant to place such evidence before the Court hearing his application."**

We have perused the ruling of the superior court which is the subject of the intended appeal; the grounds upon which this application is brought; the supporting affidavit of **Dilip Shah** and the replying affidavit by **Navinchandra Nathoo Shah** and we are of the view that taking into consideration all the circumstances of this matter, the application should be granted now that the appeal has been filed and only awaiting the hearing dates.

For the foregoing reasons, we grant a stay of execution of the superior court's ruling dated and delivered on 3<sup>rd</sup> October, 2003. Costs of this application shall abide the outcome of the appeal.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of June, 2007.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**