REPUBLIC OF KENYA

IN TH ECOURT OF APPEAL AT NAIROBI

CIVILAPPLI 234 OF 2007(UR145/07)

AZIM TAIBJEE

MADHAV BHALLA both trading as

TAIBJEE AND BHALLA ADVOCATES ………………......…….. APPLICANTS

AND

KENYA COMMERCIAL BANK LIMITED ……….....……… 1ST RESPONDENT

CHARTERHOUSE BANK LIMITED ..……………………. 2ND RESPONDENT

(Application for stay of proceedings pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya

Nairobi (Warsame, J) dated 4th September 2007

in

H.C.C.C No. 626 of 2006 (O.S)

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RULING OF THE COURT

The applicants in this notice of motion before us dated 18th September 2007, Azim Taibjee and Madhav Bhalla both trading as Taibjee & Bhalla Advocates were prior to 13th June 2006, the advocates for the second respondent, Charterhouse Bank Limited. The first respondent, Kenya Commercial Bank Limited, had granted financial facilities to two of its customers namely Campack Limited and East African Foundry Works Limited on security of charges and debentures over the assets of the same two companies. The companies defaulted in the repayment of the facilities. The companies and the first respondent entered into discussion on how to settle the indebtedness. In the process of their discussion, the companies approached the second respondent (Charterhouse) for financial facilities to partly offset the debt to the first respondent. The securities to be used for those financial facilities were the same securities which had been deposited with the first respondent (Kenya Commercial Bank Limited). It was agreed that the first respondent would release the title and security documents in its possession to the second respondent on agreed terms of undertaking and that the first respondent would be paid a sum of Ksh.56 million in full and final redemption of its account with the companies once the securities were perfected by the second respondent. In the event that the second respondent failed to do so, then the documents would be returned to the first respondent on demand. Vide a letter dated 2nd June 2006, the

second respondent gave its undertaking to the first respondent. On the receipt of that letter and specifically on 13th June 2006, the first respondent, through its advocates M/S Walker Kontos, released the documents to the then advocates for the second respondent namely the applicants in this notice of motion. Subsequently, the Central Bank of Kenya appointed a statutory manager to run the affairs of the second respondent. It is not clear from the records whether that aspect had any direct effect on the matter but the second respondent was unable to finalise its lending to the companies and the first respondent demanded return of the documents in line with the terms of the undertaking as spelt out in the letter dated 2nd June 2006. The demand was first made in the month of August 2006 and the same demand was made to the second respondent and to its then advocates, the applicants. Despite the demands, the documents were not returned. Apparently, the second respondent later joined the first respondent in demanding the release and return of the same documents to the first respondent from the applicants but the applicants resisted the same. The record shows that they wanted an undertaking as to their costs and for any damages, losses or any matters that might occur later should any complaints arise concerning the release of the documents. After much correspondence on the matter, the first respondent moved to the superior court by way of originating summons dated 16th November 2006. That originating summons was filed against the second respondent only. The salient prayers in that originating summons were:

"**2. That the respondent do honour its undertaking to return to the applicant the title and security documents sent to the respondent by the applicant upon the terms of undertaking given by the respondent to the applicant in a letter dated 2nd June 2006.**

3. That the undertaking by the respondent to the applicant in (2) above be honoured within four (4) days from the date of this Honourable Court's order failing which an order for enforcement of the undertaking do issue forthwith against the respondent.

4. That costs be provided for."

As we have stated, that originating summons was filed when the applicants in this notice of motion were the advocates for the second respondent and so the application seeking orders against the said respondent which was their principal naturally sought orders against them as agents. However, again as we have said, on the face of it, that application did not cite the applicants as a party. It appears that discussions went on between the first and the second respondents and as a result, vide a notice of motion dated 31st August 2007, and filed on the same date, the first respondent sought the following orders in respect of the originating motion we have referred to hereinabove.

"**1. That this application be certified as urgent and be heard during the High Court vacation and service be disposed with in the first instance.**

2. That this suit be marked as wholly adjusted or settled in terms of the agreement, or compromise reached and evidenced by the correspondence exchanged between the parties between 24th May 2007 and 18th July 2007.

3. That judgment be entered for the applicant in terms of the said agreement or compromise as follows:

(a) That Respondent's advocates or agents Messrs Taibjee and Bhalla Advocates do within five days of service of this order do release all the applicant's security documents set out in schedule of deeds dated 13th June 2006 to the applicant's advocates Messrs Waker Kontos upon the terms of the undertaking given by the respondents to the applicants in a letter dated 2nd June 2006.

(b) That in the event that the security documents are not released within four days of service of this order, the court do issue an order for enforcement of the undertaking against the firm of Messers Taibjee and Bhalla Advocates upon confirmation in writing by the applicant's advocates that the said firm has refused to comply with the court order.

(c) That each party bears its own costs and in the event the security documents are not released by the firm of Messrs Taibjee and Bhalla Advocates within four days of service of the order, the said firm be personally held liable to pay the costs of the originating summons and the application.

(d) Any further relief that this court deems fit in the interest of justice."

There were four grounds in support of the same application but the main ground was that the firm of Taibjee & Bhalla Advoctes, who were holding the first respondent's security documents pursuant to an undertaking issued by the second respondent, had deliberately refused to release the said documents in breach of the undertaking and instructions issued by the second respondent. We note, and it is important, that that application was on the face of it served upon Ochieng, Onyango, Kibet & Ohaga, Advocates who were at that time acting for the second respondent. It was not set out to be served upon M/S Taibjee and Bhalla Advocates, the applicants, although before us we were told it was served upon them. That application dated 31st August 2007 was placed before the superior court (Warsame, J) on 4th September 2007. We do not have the advantage of reading the proceedings as the same were not included in the record but the order extracted shows that the orders sought were granted. The relevant orders were that in the event the applicants do not release the subject security documents within four days of the service of that order upon them, the court would issue an order for enforcement of the undertaking against the applicants, and the third order granted was as follows:

"**3(c) That each party bears its own costs and in the event the security documents are not released by the firm of Messrs Taibjee and Bhalla Advocates within four days of service of the order, the said firm be personally held liable to pay the costs of the originating summons and the application.**

4. That Taibjee and Bhalla Advocates do release the documents within the next 7 days."

Clearly, that order is confused in as much as it states at 3(c) that the documents should be released within four days of the service of the order and also states at 4 that the documents to be released within the next 7 days. That however is not ours to go into in this ruling and we leave it at that.

The applicants felt aggrieved by that order given vide a ruling delivered on 4th September 2007 and intend to appeal against it to this Court. In the meanwhile, it came to this Court by way of a notice of motion we have referred to hereinabove dated 18th September 2007 and filed on the same day. It is seeking only one substantive order which is:

"**1. That all further proceedings in the High Court Civil Suit No. 626 of 2006 be stayed pending the hearing and determination of the intended appeal against the ruling and orders of the superior court, Warsame J. delivered on 4th September 2007."**

Several grounds were advanced in support of the application the main ground being that the orders should not have been made against the applicants as they were not parties to the originating summons and as they had not been joined as parties to the same suit and had not been served with any order requiring them to attend court; that the applicants, though not parties to the suit, sent an advocate to the court to seek adjournment in case their (applicants') input was necessary; that the same advocate applied for adjournment to enable the applicants be conversant with the matters and to enable them prepare their case but that application for adjournment was refused and the court proceeded to issue mandatory orders against them. The other grounds for the application were on the historical factors that the applicants felt necessitated their resisting the release of the security documents without proper undertaking both for their fees and for the security of the document.

The application was opposed by both respondents and each respondent filed an affidavit and annextures all of which we have perused and considered together with the applicants' affidavit in support.

Before us, Mr. King'ara, the learned counsel for the applicant, submitted that the intended appeal was arguable as the applicants were not parties to the suit in respect of which the orders affecting them

directly were issued and when they asked for adjournment to be able to explain why they held on to the subject documents, the learned Judge refused the application and did not join them in the originating summons. He however informed the court that the documents had, as at the time of hearing the application, been released and so the only matter the applicants were pursuing was that stay be ordered of the proceedings in respect of costs which had not been taxed but had been indicated to the applicants by the respondents. The applicants, while abandoning their application for stay of proceedings as that had been overtaken by events, nonetheless would proceed with stay of taxation and execution of costs as they still intended to appeal against costs. In his argument, it was not proper to order costs against the applicants for the originating summons in which they were not parties and which had been compromised.

Mr. Gichuhi, the learned counsel for the first respondent, on the other hand urged us to dismiss the application arguing that the applicants had no business refusing to release the security documents as there was an undertaking by the law firm of Ochieng, Onyango, Kibet & Ohaga to pay costs of the applicants. He stated that the success of the intended appeal, if it succeeds, will not be rendered nugatory as the costs awarded have not been taxed and even after taxation, the applicants still could file a reference and then an appeal. That would take a long time to finalise. Mr. Werimo Echesa, the learned counsel for the second respondent, also opposed the application arguing that the applicants had been instructed by the second respondent to release the documents the subject of the originating summons but failed to comply with the same instructions and so the intended appeal is not arguable. Further, it was not demonstrated that the results of the intended appeal, if successful, would be rendered nugatory were we to refuse the application.

We have considered the record before us; the facts part of which we have set out in details hereinabove; the submissions by the learned counsel and the law. This notice of motion is brought under **rule 5(2) (b)** of the Court of Appeal Rules. The law as regards the principles to guide the court when considering an application under that rule is now well settled. First, the applicant must satisfy the court that the appeal or the intended appeal (as in this matter before us) is arguable. Secondly, it must be demonstrated that if the application is refused, the results of the intended appeal, were it to succeed, would be rendered nugatory - see the case of **Reliance Bank Limited vs. Norlake Investments Limited** **(2002) I EA**. In the case before us, Mr. King'ara has abandoned the application that seeks orders for the stay of all further proceedings in the superior court in H.C.C. Suit No. 626 of 2006. He wants us to stay only the proceedings as relates to costs that were awarded against the applicants. We have considered the notice of motion with that in mind. We have observed that by the time the originating summons the costs of which the applicants were ordered to pay was filed, it would appear the applicants were no longer acting for the second respondent. We say so because the originating summons was not served upon the appellants. It was served directly upon the second respondent as appears in the same originating summons. If we are wrong on that, then certainly, the application by way of notice of motion dated 31st August 2007 which resulted in the orders being made against the applicants was filed after the applicant had ceased to act for the second respondent for it was not drawn to be served upon the applicants even if it was so served. It was to be served upon Ochieng', Onyango, Kibet & Ohaga who were then the advocates for the second respondent. Under those circumstances, and without deciding on the matter at this stage, we are of the view that the issue as to whether the applicants cited in that application and who were at that time not the advocates for the second respondent should have been ordered to pay costs of the entire originating summons compromised by parties other than the applicants is an arguable point. Secondly, we also note that it was not until 14th September 2007 when the new firm of advocates for the second respondent Messrs Ochieng', Onyango, Kibet & Ohaga gave their undertaking on behalf of the second respondent for the costs occasioned by the applicants. That was ten days after the order complained of had been given. That in effect meant that the issue as to whether the applicants' application for adjournment to enable them prepare their response to that application which sought costs to be issued against them was arguable. The sum total of all the above is that we are of the view that the intended appeal is arguable.

The next point to consider is whether the success of the intended appeal, if it succeeds, will be rendered nugatory were we to refuse this application. The applicants are trading as a firm of advocates. Costs were ordered against them in person. That will, in our mind, certainly affect their practice while at the same time it is not specifically stated in the order as to who is to have the costs as the parties to the

originating summons were each to bear their own costs. We were told, from the bar, and it was not disputed, that such costs have not been taxed. We do not feel we should interfere with the taxation of the same costs. However, once taxed, we feel no execution of the costs should proceed until the intended appeal is heard and determined. We order so.

The execution for costs once taxed, is stayed pending the filing, hearing and determination of the intended appeal. Costs of this application shall be costs in the intended appeal.

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

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…………….……………

JUDGE OF APPEAL

W.S. DEVERELL

……………….…………

JUDGE OF APPEAL

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

DEPUTY REGISTRAR