



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Application No. 136 of 2005

DELPHIS BANK LIMITEDAPPLICANT

AND

CHANNAN SINGH CHATTHE

SATWANT SINGH CHATTHE

SUKHWINDER SINGH CHATTHE

RAGHBIR SINGH CHATTHE T/A CHANNAN AGRICULTURAL CONTRACTORS

CHARANJIT SINGH HAYER

RAJNIKANT KARSANDAS SOMAIARESPONDENTS

(An application for a stay of the proceedings of the High Court

pending the lodging, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Kisumu (Mr. Justice Tanui) dated 4th May 2005

in

H.C.C.C. NO. 164 OF 2003)

RULING OF THE COURT

This is an application by Notice of Motion dated 20th May 2005 under **rule 5(2(b))** of the Court of Appeal Rules (the Rules) seeking an order that, pending the lodging, hearing and determination of the applicant's intended appeal, there be a stay of all further proceedings in Kisumu High Court Civil Case No. 164 of 2003. The applicant is Delphis Bank Ltd being the defendant in the High Court. The intended appeal is against the decision of the High Court at Kisumu (**Tanui J.**) made on 4th May 2005 by which he summarily dismissed the applicant defendant's counterclaim.

The suit in which this application was made was one brought by four individuals named Channan Singh

Chatthe, Satwant Singh Chatthe, Sukwinder Singh Chatthe and Ragbir Singh Chatthe (hereinafter each individually referred to by their first names) trading in partnership as Channan Agricultural Contractors (Kenya) hereinafter collectively referred to as the “*plaintiffs*”).

The said partnership was the registered owner of land parcel number South Wanga/Lukero1892.

The defendant, Delphis Bank Ltd., is a Bank incorporated in Kenya. It is hereinafter referred to as “*Delphis*”.

Paragraph 4 and 5 of the plaint read as follows:-

“4. On or about the 7th July, 1998, the plaintiffs, at the request of the defendant, executed an instrument of charge wherein the plaintiffs charged their interest in the parcel aforesaid (i.e. South Wanga/Lureko/1892) to the defendant in consideration of the defendant agreeing to advance Kibos Sugar Industries an aggregate amount not exceeding Shs.22,000,000/=, full particulars whereof are in the knowledge of the defendant.....

5. The plaintiffs aver that subsequent to the registration of the charge above stated, the defendant, through its officers, directors, managers and other employees, falsely and fraudulently misrepresented to the plaintiffs that the defendant had, at the request of the said Kibos Sugar Industries, made advances or granted to the said Kibos Sugar Industries financial facilities or accommodation of Kshs.40,000,000/= and that the said facility was secured by the charge aforesaid.”

In its defence and counterclaim Delphis denied all the allegations in the plaint and put the plaintiffs to strict proof of them. Delphis further alleged the following in brief summary:-

In 1997 Sukhwinder together with Sarnager Singh Hayer as partners trading as Kibos Sugar Industries (hereinafter “*Kibos*”) applied to the defendant for a loan facility in the sum of Kshs.40,000,000/= . Agreement was reached expressed in a signed letter of offer dated 2nd October, 1997 from *Delphis* to *Kibos*. Clause 11 of that agreement required Sukhwinder and Sarnager Singh Hayer each to execute a guarantee for Kshs. 40,000,000/= duly supported by a First Legal Charges over immovable property.

Before the guarantees and legal charges were created and executed, *Delphis*, at the request and instruction of *Kibos*, disbursed the Kshs.40,000,000/=, not to Kibos, but to Dolphin Management Services Ltd. (hereinafter “*Dolphin*”).

It is pleaded by *Delphis* that *Dolphin* and *Delphis* are distinct and separate legal entities.

Kibos failed to service the loan facility with the result that as at 30th June, 1998 the loan debt stood at Kshs.66,000,000/= which sum it was then agreed between *Delphis* and *Kibos* would be secured by legal charges over specified immovable properties being South Wanga/Lureko/1892), Kisumu Municipality/Block 11/119 and Kisumu Municipality/Block 12/288 (hereinafter “*the Charged Properties*”). The legal charges were then duly executed and registered having been drafted by Mr. Menezes in his capacity as advocate for *Delphis* but who is now appearing before us for the 5th respondent and 1st defendant to the counterclaim Charanjit Singh Hayer.

Kibos however continued to default in servicing the loan facility with the result that as at August 1999 the loan debt stood at Kshs.68,568,705.

Negotiations, begun by a letter dated 13th August 1999 from the *Kibos* partners together with Rajnikant Karsandas Somaia (hereinafter “*R. K. Somaia*”), then ensued between them and *Delphis* resulting in the following arrangement:-

(i) That the partnership of *Kibos* be dissolved as at September 1999.

(ii) That the outstanding sum of Kshs.68,568,705/= be split or apportioned and/or assigned as follows:-

Charanjit Singh Hayer Kshs.19,908,507/= secured by the charge over Kisumu Municipality/Block11/119.

RagbirKshs.19,908,507/= secured by the charge over South Wangal/Lureko/1892.

R. K. SomaiaKshs.28,751,691/= secured by the charge over Kisumu Municipality/Block12/288.

(iii) That the existing securities were to continue operating as securities for the new debt assigned to the Debtors as aforesaid.

The above three persons are hereinafter collectively referred to as ("**the Debtors**").

Some none of the said amounts were paid by **the Debtors** to **Delphis**, **Delphis** counterclaimed against each of **the Debtors** claiming the above respective amounts from each **Debtor** plus interest at 25% per annum with effect from 1st October 1999.

All the allegations of fraud and fraudulent misrepresentation contained in the plaint were expressly denied by **Delphis** in its defence and the plaintiff was put to strict proof of them by **Delphis**.

This was by no means the end of the pleadings contained in the record of appeal. There were a further 40 odd pages of pleadings in the record which do not require to be set out or described in relation to the present application before us.

The application before us is brought by **Delphis** and the affidavit in support is sworn by the Executive Relationship Officer of the applicant Mr. Harun Kuria. The respondents to the application are the plaintiffs together with Charanjit Singh Hayer and R. K. Somaia (hereinafter "**the respondents**").

The first two grounds on which the application was based were:-

1. Unless the application, which seeks a stay of further proceedings in Kisumu HCCC No. 164 of 2003, is heard as a matter of urgency, the plaintiffs are likely to proceed and obtain judgment pursuant to the ex parte hearing conducted on the afternoon of 4th May, 2005. The applicant's (**Delphis**) counterclaim has been dismissed with costs and the judgment is set to be delivered on 31st May 2005.

2. Unless all further proceedings in Kisumu HCCC No.164 of 2003 are stayed by an order of this Honourable Court, **Delphis** will forever be shut out from ventilating its defence and prosecuting its very substantial counterclaim against the respondents. If this happens, before the substantive appeal is heard and determined, the said appeal will be rendered nugatory and occasion loss and prejudice to the applicant.

The third ground was, in short, that the validity or otherwise of **Delphis'** charges over the **Charged Properties** formed the subject matter of the suit and that it was highly likely that after the judgment is delivered on 31st May 2005 the respondents will immediately proceed to discharge the securities to the "utter detriment and loss" of **Delphis**.

The fourth ground was, in short, that **Delphis** has an **arguable** appeal with good prospects of success in support of which five reasons were asserted. These were:-

(a) The Learned Judge erred in law by failing to find that the oral application for directions under **Order 17 rule 1** was made improperly in contravention of the Civil Procedure Rules.

(b) The Learned Judge erred in failing to evaluate, consider and rule on which party had the burden of proof of proving the allegations of fraud and misrepresentation.

(c) *The Learned Judge exercised his discretion in a manner that has occasioned grave injustice to the applicant.*

(d) *The Learned Judge misdirected himself when after granting leave to **Delphis** to appeal against his Ruling on the sole question as to how the trial should proceed, still proceeded to hear *ex parte* and to conclude a complex matter; and thereby effectively deny **Delphis** its opportunity to appeal.*

(e) *The Learned Judge erred by finding that the **Delphis**' application for adjournment and temporary stay of proceedings was unmeritorious and proceeding to dismiss the same.*

The fifth ground was, in short, that the intended appeal will be rendered **nugatory** if the stay is not granted. Four reasons for this assertion were then set out in the following terms:-

(a) ***Delphis** will be completely shut out from ventilating its defence and prosecuting its counterclaim for approximately Kshs.68.6 million against **the respondents** unless the High Court proceedings are stayed and the intended appeal determined.*

(b) ***The respondents** after obtaining judgment in their favour ..., will obviously proceed to discharge **Delphis**' securities. If the judgment is entered in favour of **the respondents**, as is the foreseeable situation, **the respondents** will suffer loss and prejudice and the intended appeal herein will be rendered completely nugatory.*

(c) *The sum claimed by **the respondents** in their claim against **Delphis**, standing at Kshs.16,066,334/= together with the amount of the counterclaim of Kshs.68,568,705/= plus interest on both amounts, is of such magnitude that if paid over to **the respondents**, it would adversely and seriously affect **Delphis**' operations and bring the said operations to a grinding halt.*

(d) ***Delphis** is also apprehensive that **the respondents** would not be in a position to refund the monies if the intended appeal is successful.*

The sixth ground was that the **balance of convenience**, owing to the substantial amount of money involved, clearly weighs in favour of **Delphis**. The amount involved appears to be approximately Shs.16 million claimed by **the respondents** and Shs.68.6 million claimed by **Delphis** by way of counterclaim. It was also claimed by **Delphis** that if substantial sums were paid over to **the respondents** they would be unlikely to be able to repay the money if the intended appeal was successful.

There were further interim developments in that an application was made by **Delphis** to prevent **Mr. Menezes** from representing any of **the respondents** on the ground that he had drawn the security documentation on behalf of **Delphis** and would therefore be in a conflict of interest position. This Court consisting of O'Kubasu, Waki and Deverell, JJA in a ruling dated **10th June 2005** ruled that Mr. Menezes would not be precluded from appearing for **the respondents** at the hearing of the current application dated **20th May 2005** now before us for stay. The Court, in that Ruling, further made an order extending the existing interim orders.

The current application came before this Court on **10th November, 2005** before Tunoi, Githinji and Deverell, JJA. The application was fully argued on that day by C.W. Gatonye for Delphis, Mr. P. M. Karanja for the 1st, 2nd, 3rd and 4th respondents, Mr. L. G. Menezes for the 5th respondent and Mr. F. E. Wasuna together with W. R. Gichava for the 6th respondent.

The Court ordered that the Ruling would be given on notice and extended the existing interim orders pending that Ruling.

Mr. Gatonye, the learned counsel for **Delphis**, in the application dated 20th May 2005, when it came for hearing before us on 10th November 2005, referred to the draft memorandum of appeal included in the application record in support of his submission on the issue of the arguability of the intended appeal. The

following grounds were raised in that draft memorandum:-

1. *That the learned judge erred in law by granting the order sought in the oral application to the effect that the appellants (i.e. **Delphis**) do adduce its evidence first when it was clear that the application had been made in contravention of the express requirements of law.*
2. *That the learned judge erred in law by finding that the defendant (i.e. **Delphis**) had a larger burden of proof as compared to the plaintiffs.*
3. *That the learned judge misdirected himself by proceeding with the trial ex parte when he had already granted leave to appeal against his ruling on the manner in which the trial should proceed.*
4. *That the learned judge erred in exercising his discretion against the applicant (i.e. **Delphis**) and by denying the applicant an adjournment and a temporary stay of proceedings and for thereby occasioning a miscarriage of justice.*
5. *That the learned judge erred in law and in fact by finding the applicants' (i.e. **Delphis**) case unmeritorious and dismissing the same with costs.*
6. *That in all of the circumstances of the case the learned judge failed to do justice before him.*

The express requirements of the law relevant to the first of the above grounds were those contained in **Order XV11** of the Civil Procedure Rules of which the relevant parts are as follow: -

“Rule 1. The plaintiffs shall have the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant shall have the right to begin.”

“Rule 2

- (1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce evidence in support of the issues which he is bound to prove.***
- (2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.***
- (3) After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other parties for the purposes of observing on the case or cases cited.***
- (4) The High Court may in its discretion limit the time allowed for addresses by the parties or their advocates.”***

The first requirement in **rule 1** to justify a change in the normal position that the plaintiff has the right to begin is that the defendant has admitted the facts alleged by the plaintiff.

In its defence, the defendant, in paragraph 1 of the defence denied each and every allegation in the plaint as if the same were set out in the defence and traversed verbatim and traversed seriatim.

The defendant further stated in paragraph 2 of the defence that it admitted “*the contents of paragraph 2 of the plaint in so far as the same are merely descriptive of the parties to this suit.....*” Paragraph 3 of

the defence admitted that paragraph 3 of the plaint was essentially correct. The latter paragraph merely pleaded that the plaintiffs were trading as Channan Agricultural Contractors (Kenya), which owned Land Parcel Number South/Wanga/Lureko 1892.

Paragraph 4 of the plaint was as follows:-

“On or about the seventh day of July, 1998, the plaintiffs, at the request of the defendant, executed an instrument of charge wherein the plaintiffs charged their interest in the parcel aforesaid to the defendant in consideration of the defendant agreeing to advance Kibos Sugar Industries an aggregate amount not exceeding a Kshs.22,000,000/=, full particulars whereof are in the knowledge of the defendant. The plaintiffs will refer to the said charge for its true tenor, purport, meaning and effect.”

Paragraph 5 to 13 of the plaint pleaded numerous allegations of fraudulent misrepresentations perpetrated by the defendant **Delphis**, which it was claimed, absolved the plaintiffs from liability under the said charge. **Delphis** in paragraph 4 of the defence denies that it made any of the alleged false or fraudulent misrepresentations to the plaintiffs either by itself or through its officers, directors, managers and other employees as alleged or at all and put the plaintiffs to strict proof thereof.

Having examined the pleadings in some detail we do not consider that, prima facie, there have been sufficiently material admissions by the defendant of facts alleged by the plaintiff to satisfy the initial requirement in **Order XVII Rule 1** contained in the words **“unless the defendant admits the facts alleged by the plaintiff....”** In reaching this tentative conclusion for the purposes of this interlocutory application, we have taken into account the **Agreed Issues** signed by the respective advocates for the plaintiffs and 2nd defendant to the counterclaim, the defendant/plaintiff to the counterclaim, the 3rd defendant to the counterclaim and the 1st defendant to the counterclaim on **25th April 2005** shortly before the hearing of the contentious proceedings on **4th May 2005**.

It is relevant here to consider the issues, which are set out in the Agreed Issues as follows: -

1. *Did the partners of Kibos Sugar Industries ever apply for any financial accommodation from Delphis Bank Ltd?*
2. *Was any such facility given to the partners of Kibos Sugar Industries?*
3. *If so, what are the particulars of such financial accommodation facility?*
4. *Did the partners of Kibos Sugar Industries ever request/authorize/permit/mandate or instruct Delphis Bank Ltd to disburse the sum of Kshs.40,000,000/= or any other sum to Dolphin Management Services Ltd or to anyone else?*
5. *If so in what manner were such instructions given?*
6. *Are the charges registered against land parcels number South Wanga/Lureko 1892, Kisumu Municipality Block 12/288 and Kisumu Municipality Block null and void for: - (a) Fraudulent misrepresentation, (b) Lack of consideration.*
7. *Was there any consideration for the charges created against the above three properties in favour of Delphis Bank Ltd?*
8. *Are the charges against the above three properties valid and enforceable?*
9. *Should Delphis Bank be ordered to discharge the charges registered against the three properties above described registered in the names of Rajnikant Karsandas Somaia, Charanjit Singh Hayer and Raghbir Singh Chatthe respectively, unconditionally?*
10. *Is the Bank entitled to recover any monies from Mr. Rajnikant Karsandas Somaia, Mr. Charanjit*

Singh Hayer and Mr. Raghbir Singh Chatthe respectively?

11. Is Mr. Rajnikant Karsandas Somaia, Mr. Raghbir Singh Chatthe and Mr. Charanjit Singh Hayer entitled to any payment/refund from Delphis Bank Limited with interest.

12. Did the partners Mr. Rajnikant Karsandas Somaia, Mr. Raghbir Singh Chatthe and Mr. Charanjit Singh Hayer of Kibos Sugar Industries apply to Delphis Bank Ltd for the restructuring of any loan and/or facility?

13. Did Kibos Sugar Industries of the one part, Delphis Bank Limited of the second part and Mr. Rajnikant Karsandas Somaia, Mr. Raghbir Singh Chatthe and Mr. Charanjit Singh Hayer on the third part agree that the purported liability of Kibos Sugar Industries should be apportioned between Mr. Rajnikant Karsandas Somaia, Mr. Raghbir Singh Chatthe and Mr. Charanjit Singh Hayer.

14. If yes, on what terms and conditions?

15. Was the proposed transaction ever crystallized?

16. If it was not chrystallized, did Mr. Rajnikant Karsandas Somaia, Mr. Raghbir Singh Chatthe and Mr. Charanjit Singh Hayer become liable to settle any sums allegedly due from Kibos?

We are of the tentative view that in respect of at least a quarter of these issues the burden of proof probably rests on the plaintiffs (see issues 6,7,9 and 11).

In these circumstances we believe that the applicant has made out an arguable case that the learned judge was mistaken in holding that he should force the applicant to begin particularly when there had been no prior warning from the respondent of an intention to seek an order that the applicant defendant should begin. The applicant has also raised an issue, which we consider to be arguable that the learned judge was wrong in refusing an adjournment of the hearing in these circumstances.

Mr. Gatonye submitted further that the existence of the conflict of interest arising from Mr. Menezes appearing to act for the 5th respondent Channan Agricultural Contractors when he had previously acted for the applicant Bank in drafting the charge documents was relevant. Mr. Gatonye suggested that it was likely that Mr. Menezes would be called as a witness at the trial in relation to the validity of the charges and that this raised an arguable issue in the intended appeal. It might be thought that this issue has already been resolved in the ruling delivered by the Court on 10th June 2005 above referred to but this is not so as that ruling was confined to the hearing of the application and was expressed to be on the basis that no evidence from Mr. Menezes was anticipated during the hearing of the application. The position might well be different at the substantive trial of the suit. We do not consider this issue to be frivolous.

There remains for consideration whether the intended appeal will be rendered nugatory if no stay is granted.

The Notice of Appeal lodged on 19th May 2005 states:-

“TAKE NOTICE that the defendant herein, THE DELPHIS BANK LTD, being dissatisfied with the decision of the Honourable Justice Tanui, given at the High Court at Kisumu on 4th May 2005 by which he summarily dismissed the defendant’s counterclaim, intends to appeal to the Court of Appeal against the whole of the said decision.”

The only order included in the formal order given on 4th May 2005 and issued on 19th May 2005 is:-

1. THAT the defendant be the first party to adduce its evidence.

If no stay is granted and the appeal is allowed when it comes for hearing resulting in the setting aside of

the order that **Delphis** must call its evidence first, it is very probable that judgment (hereinafter “*the second judgment*”) will already have been given in favour of the plaintiff against **Delphis** in the absence of any evidence having been adduced by **Delphis**. The successful appeal against the order of the judge will have been overtaken by events and rendered nugatory. It is true that in these circumstances **Delphis** may be able to mount a separate appeal against the second judgment but this possibility does not undo the fact that the present intended appeal will have been rendered nugatory.

For these reasons we allow the application and hereby order that, pending the lodging, hearing and determination of the applicant’s intended appeal, there be a stay of all further proceedings in Kisumu High Court Civil Case No. 164 of 2003. We order that the costs of this application be costs in the intended appeal.

Dated and delivered at Nairobi this 31st day of March, 2006.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR