REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

Civ Appli 328 of 2005

CAPTAIN MUSA HASSAN BULHAN …….....…… APPLICANT

AND

KENYA AIRWAYS LIMITED …….....……. 1ST RESPONDENT

THE OFFICIAL RECEIVER …….....…….. 2ND RESPONDENT

(Application for stay of proceedings and execution from the Judgment of the High Court of Kenya at Nairobi (Lady Justice Mary Kasango) dated the 1st December, 2005

in

Bankruptcy Cause No. 14 of 2000)

****

RULING OF THE COURT

The applicant herein, **Captain Musa Hassan Bulhan**, brings this application by way of notice of motion expressed to be under "***Section 108 of the Bankruptcy Act Cap 57*** and ***Rules 1 and 5(2)(b)*** and ***47 of the Court of Appeal Rules"***. In the said application the applicant seeks the following reliefs:-

"***1. This application is certified as urgent pursuant to rule 47 of the Court of Appeal Rules.***

2. There be a stay of any further proceedings founded on the judgment of the Honourable Lady Justice Mary Kasango dated 1st December, 2005 directing that a receiving order should be made in respect of the Estate of Captain Musa Hassan Bulhan and that the Official Receiver is constituted Receiver of the Estate of Captain Musa Hassan Bulhan and the costs of the Bankruptcy petition be borne by the debtor to be paid out of his Estate.

3. There be a stay of execution of the receiving order if one is in force at the date of the making of this order and a stay of any further proceedings by the Official Receiver if such proceedings shall have commenced at the date of the making of this order following the judgment of Honourable Lady Justice Kasango dated the 1st December, 2005.

4. The costs of this application abide the outcome of the intended appeal against the judgment and orders of the Honourable Lady Justice Mary Kasango."

The application is brought on the following grounds:-

"***(a) The applicant has an arguable appeal against the judgment and orders of the Honourable Lady Justice Mary Kasango dated 1st December, 2005.***

(b) The applicant stands to suffer irreparably if the proceedings in bankruptcy are allowed to go on.

(c) There is no prejudice to the Respondent if the stay of proceedings is granted. The Respondent is a large public company that can afford to wait while the issues that the Applicant intends to raise on appeal are ventilated in the Court of Appeal.

(d) The appeal will be rendered nugatory if the proceedings in bankruptcy and on the receiving order (if one will have been issued) are allowed to go on unchecked.

(e) The superior court failed to fully consider the impact of the unsigned and undated judgment on which the Bankruptcy proceeding were hinged.

(f) The superior court failed to adequately evaluate the authorities cited by the applicant (then debtor) and to appreciate the principle that Bankruptcy proceedings should not be used for collection of debts.

(g) The superior court erred to hold that a practice can override a written law in bankruptcy and to hold that the consideration of Order XX of the Civil Procedure Rules was irrelevant concerning the unsigned, undated and uncertified copy of the judgment used in evidence by the Petitioner.

(h) The superior court erred to find that a witness who had not sworn an affidavit in the proceedings could produce evidence.

(i) The superior court erred and ignored the fact that Your Lordships' Applicant had never been served with the alleged final decree in HCCC 1033 of 1995 or with a complete petition that had included a verifying affidavit.

(j) The court erred to find that the applicant herein had (as debtor in the superior court) retracted his statement on service of the decree in HCCC 1033 of 1995 and said that he had not been served with the decree.

(k) The superior court erred and held that a decree produced subsequent to the filing of a petition is good enough to sustain the petition and to satisfy section 3(1)(g) of the Bankruptcy Act.

(l) The matter is of concern to the Applicant's business associates and partners and to the creditors of the business he runs both locally and internationally.

(m) The application, by its very nature deserves to be heard and disposed of on priority. The applicant is to be rendered incapable of engaging in business (or even pursuing the intended appeal) unless the stay sought is granted.

(n) The superior court erred and proceeded to order the making of a receiving order and failed to find on the question of the validity of the Petitioning Creditor's (Respondent's) debt."

It would appear that the matter before us has a long history in which the applicant was involved in a bruising legal battle with **Kenya Airways Limited** *(the 1st Respondent)*. It is all to do with a debt allegedly owed by the applicant which debt the applicant disputes. The history of this dispute can be traced back to the **High Court Civil Case No. 1033 of 1995** in which **Kenya Airways Ltd.** as the plaintiff sued the applicant seeking judgment in the sum of **23,610,829.20**, costs and interest. This applicant as the defendant in that suit filed his defence but by an application for summary judgment pursuant to ***Order XXXV rules 1 & 2*** of the Civil Procedure Rules the Kenya Airways Ltd obtained

judgment against the applicant. That judgment however, bears no date and no signature of Pall J (as he was then). But that is not the judgment that the applicant is appealing against. The judgment appealed against is that of Kasango J. dated *1st December, 2005* in **Bankruptcy Case No. 14 of 2000.** In her judgment, Kasango J was alive to this issue of unsigned judgment when she stated:-

"***The main issue raised by the debtor related to the judgment of the late Hon. Justice Pall, which is on page 31, plaintiff's exhibit No. 1. That judgment is typed and at its conclusion it lacks a date a signature and it is not certified to be a copy. Debtor's counsel said that since the bankruptcy proceedings are anchored on this judgment the same must fail in view of the shortcomings of that judgment. The debtor relied on the case of FREDRICK JONES KINYUA AND PETER KIPLAGAT KOECH VERSUS WANDA BAIRD Civil Application No. NAI. 17 of 1999. In this case the appellant filed an undated judgment with the result that the record of appeal was struck out."***

Having so stated, the learned Judge nevertheless went on to rely on the decree which was issued pursuant to the unsigned judgment and came to the conclusion that the applicant had committed an act of bankruptcy when he failed to comply with a Bankruptcy Notice issued by the superior court on *13th July, 1999,* and served on him on *21st July, 1999.*

Being aggrieved by that judgment the applicant herein, through his counsel, filed a notice of appeal followed by this application for stay of execution and any further proceedings.

When the application came up for hearing before us on *12th July, 2006* Mr. Mwenesi, the learned counsel for the applicant, started his submissions by informing us that the 2nd respondent (the Official Receiver) did not oppose the applicant's application. Having so stated, Mr. Mwenesi went on to argue that his client had an arguable appeal and that if this application was refused the intended appeal would be rendered nugatory. It was Mr. Mwenesi's contention that the bankruptcy proceedings in the superior court related to a debt which was never proved. Mr. Mwenesi then considered the issue of unsigned judgment by the late Pall J. Apart from the judgment being undated and unsigned it was pointed out that the decree did not agree with the unsigned judgment. As regards the nugatory aspect, Mr. Mwenesi submitted that bankruptcy had a disabling effect in that if the applicant was declared bankrupt his appeal would be rendered nugatory since the applicant would not even be in a position to pursue his intended appeal scheduled for hearing sometimes in October on November 2006.

Ms Malik, the learned counsel for the 1st respondent, in opposing the application submitted that the intended appeal was not arguable as the applicant failed to convince the superior court judge that he was not indebted to the petitioner. Ms Malik was of the view that the learned judge of the superior court was right in making a receiving order. She pointed out that the decree was from the judgment of the late Pall J and that the debtor *(the applicant herein)* did not appeal against that decree.

On the nugatory aspect of the appeal, Ms Malik submitted that the applicant has failed to show that he is able to pay his debts. It was Ms Malik's prayer that even if the Court granted a stay the same ought to be granted on the condition that the applicant pays ***21 million shillings*** to the 1st respondent as her client has been waiting for this money for the last ten years. She concluded her submission by reminding us that the 1st respondent was a public company which was capable of repaying the said amount to the applicant if the appeal succeeded.

We have given a brief background to this application in a bid to show what the dispute is all about. The application was brought under ***rule 5(2) (b)*** of this Court's Rules ***(the Rules)***. The jurisdiction exercisable by this Court under ***rule 5(2) (b)*** of the Rules is now settled. It is original and discretionary. For the applicant to succeed, he must satisfy the twin guiding principles that the intended appeal is arguable, that is that it is not frivolous and that unless a stay or injunction is granted the appeal or intended appeal, if successful, would be rendered nugatory – see ***GITHUNGURI V. JIMBA CREDIT CORPORATION LTD*** **(No.2) [1988] KLR 838**, ***J.K. INDUSTRIES LTD V. KENYA COMMERCIAL BANK LTD*** **[1982-88] 1 KAR 1088** and ***RELIANCE BANK LIMITED (IN LIQUIDATION) V. NORLAKE INVESTMENTS LIMITED*** *– Civil Application No 98 of 2002 (unreported).*

In this application three points were raised as arguable points when the intended appeal comes up for hearing. The first point related to whether the debt had, indeed, been proved. The second point was that the judgment of the late Pall J which was relied upon in the bankruptcy proceedings was unsigned and undated. The third point related to the fact that the decree did not agree with the unsigned judgment. Since we are not dealing with the appeal we would refrain from making any firm findings on these points but what can be said as of now is that these points are not frivolous. They are clearly arguable. We must however hasten to add that being arguable does not mean that they must succeed. ***Order XX Rule 3*** of the Civil procedure Rules provides:-

"*A judgment pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it".*

(underlining provided).

There is a line of decisions of this Court touching on the issue of unsigned and or undated judgments. In ***PALACE DRY CLEANERS LTD V. ABDI AHMED ABDI*** *– Civil Appeal No. 265 of 1996 –* (unreported) this Court stated:-

"*This appeal is against the ruling of the superior court (Ringera J) which ruling is not dated. Such dating is required by the provisions in Order 20 rule 3(1) as read with Order 20 7(6). This is a mandatory requirement. In the absence of such dating this appeal is incompetent and is ordered stuck out with no order as to costs."*

In ***MOHAMED OMAR SHUNGULI V ARMIE NGIANA RAMA*** *– Civil Appeal No 16 of 1992 –* (unreported) it was stated:

*"**Mr. K'owade at the opening of the hearing of the appeal contended in limine that the judgment dated 8th June 1990 but delivered on 14th June, 1990 and unsigned on both those dates. This is a breach of the mandatory provisions of Order XX(3) (1) of the Civil Procedure Rules as it does not comply with the same and is invalid. Accordingly the appeal before us is rendered incompetent and is hereby struck out with no order as to costs".***

Finally, in the recent decision of this Court *(delivered on 22nd April, 2005)* in ***REFRIGERATION CONTRACTORS LIMITED V. JAMES O. LIETA*** *– Civil Appeal No. 76 of 2002* (unreported) this Court said:-

"***In these circumstances we find that the judgment was a nullity, or in other words, ineffectual, as a result of both the acknowledged, but uncorrected wrong dating and the non signing of the judgment at the time it was delivered in breach of order XX rule 7(1)."***

We have said enough on the question of the appeal being arguable.

As regards the nugatory aspect of the intended appeal we wish to point out that bankruptcy, as correctly argued by Mr. Mwenesi, has a disabling effect. It is our view that before a court declares one bankrupt it must be absolutely sure that the correct procedure had been complied with. Bankruptcy has very serious consequences to the person concerned. In adjudging one bankrupt, a court must be absolutely sure that the receiving order is inevitable in all circumstances of the case: In ***PAUL JOSEPH NGEI V. OFFICIAL RECEIVER*** *– Civil Appeal No. 51 of 1981* (unreported) Law JA said:-

"***More substantial are the grounds of appeal which challenge the procedure adopted by the Official Receiver in connection with his application for Mr. Ngei to be adjudged bankrupt. An adjudication in bankruptcy is a serious matter for the person affected involving very serious consequences and disabilities. I bear in mind what was said by Horne, J. in the matter of MOTA SINGH (1934) KLR 33, that:-***

"***To make a man bankrupt is a very serious matter. The power to do so is given by the Ordinance and***

because of the penal consequences, the procedure there laid down must be strictly followed."

On our part, we would emphasize that an adjudication in bankruptcy is a very serious matter for the person affected involving very serious consequences and disabilities. It is therefore no consolation for anyone to argue, as did Ms Malik, that the 1st respondent would be able to repay the amount involved in event that the intended appeal succeeded.

We reiterate that we are not hearing the main appeal. But in view of our observations can it be seriously argued that the intended appeal is frivolous and that the applicant would suffer no irreparable loss or injury if we refused this application? We do not think so.

For the foregoing reasons we allow this application and grant ***prayers 2, 3,*** and ***4*** of the notice of motion dated *7th December, 2005*. Those shall be our orders.

Dated and delivered at Nairobi this 13th day of October, 2006.

R.S.C. OMOLO

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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