



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**  
**Civ Appli 273 of 2006**

**BULK MEDICALS LTD. .... APPLICANT**

**AND**

**PARAMOUNT UNIVERSAL BANK LTD.**

**HARVEEN GADHOKE**

**DANIEL M. NDO NYE ..... RESPONDENTS**

**(Application for injunction pending the filing, hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Nairobi (Milimani) dated 27<sup>th</sup> October, 2006**

**in**

**H.C.C.C. NO. 249 OF 2006)**

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**RULING OF THE COURT**

This is an application by **Bulk Medicals Ltd.** (hereinafter “the applicant”) for an injunction pending the hearing and determination of an intended appeal from the ruling of the superior court (Kasango J) delivered on 27<sup>th</sup> October 2006 that court dismissed the application of the applicant before her.

The respondents to the application in the superior court and to the application in this Court are Paramount Universal Bank Ltd. (hereinafter “the Bank”) and **Harveen Gadhoke** and **Daniel M. Ndonye** (hereinafter referred to collectively as “the Receivers”). The Receivers had been appointed by the Bank on 10<sup>th</sup> May 2006 pursuant to powers contained in the debenture.

The application in the superior court sought orders, firstly, for the issue of a temporary injunction restraining the Receivers from taking over the control, running or management of the applicant or any of its assets, business operations, and bank accounts and secondly, to restrain the Bank and the Receivers from selling, disposing of, offering for sale or alienating in any manner whatsoever any of the Bank’s land, properties, machinery, assets, stock or any part thereof pending the hearing and determination of the superior court application.

The application in the superior court sought further orders to restrain the Receivers whether by themselves, their agents, servants or otherwise from entering the applicant's premises and properties together with a mandatory injunction to compel the Receivers to reinstate the applicant in possession of all its properties and refrain from in any manner interfering with the applicant's quiet possession and enjoyment of all its possessions pending the hearing and final determination of the suit.

The current application to this Court under **Rule (5) (2) (b)** of the Court of Appeal Rules sought the following orders:

- 1. This Honourable Court be pleased to issue an injunction restraining the respondents whether by themselves their agents, employees or otherwise howsoever from the running and management of the applicants business operations, assets and bank accounts or from acting or purporting to act as receiver, managers and finally from selling, disposing off (sic), offering for sale or alienating in any manner whatsoever any of the applicants properties, machinery, equipment, assets, stock or any part thereof pending the hearing and determination of the intended appeal.**
- 2. This court be pleased to issue a mandatory injunction compelling the respondents whether by themselves employees or servants compelling (sic) them to reinstate the applicant in the running and management of its business.**
- 3. The applicant be at liberty to apply for any such further order and or directions as it will deem fit.**
- 4. Costs of this application do abide in the intended appeal.**

The draft memorandum of appeal dated 30<sup>th</sup> October 2006 set out the following intended grounds of appeal:-

- 1. That the learned judge erred in law and fact in finding that the plaintiff had not made out a *prima facie* case to warrant a grant of an injunction.**
- 2. That the learned judge erred in law and fact in failing to consider the evidence of the payments done vis a vis the purported debt.**
- 3. That the learned judge erred in law and fact in failing to take into account the monies the receivers/ respondents had collected whilst in the suit premises alongside the bank guarantee the applicant was willing to furnish as condition for the grant of the orders sought.**
- 4. That the learned judge erred in law and fact in failing to substantially evaluate the submissions of the parties vis a vis the position of the law.**
- 5. That the learned judge erred in law and fact by failing to take into account the applicant's recalculations of the facility account.**
- 6. That the learned judge erred in law and fact in failing to take into account the malicious and oppressive manner the receivership was being exercised in order to judiciously exercise her discretion as a court of equity.**
- 7. That the learned judge erred in law and fact in failing to take into account the duress, coercion undue influence and the unequal bargaining power that was being wielded by the respondents to arm twist the applicant into accepting indebtedness whereas the contrary was true.**
- 8. That the learned judge erred in law and fact in failing to fully construe the total repayments made vis a vis the purported debt.**

9. That the learned judge erred in law and fact in failing to appreciate the oppressive, arbitrary and unilateral manner in which the respondents were purporting to effect contractual obligations.

10. That the learned judge erred in law and fact in failing to find that the applicant had made out a case for a mandatory injunction or at the very least a limited period injunction.

11. That the learned judge erred in law and fact in failing to construe the effect of the receivership in the applicant business and its reputation.

12. That the learned judge erred in law and fact in failing to find that the Central Bank of Kenya Amendment Act 2001 'Donde' Act was operative herein.

It is settled law that in considering an application such as that before this Court the Court should not grant such relief under **Rule 5 (2) (b)** of the Court of Appeal Rules unless it is satisfied that the intended appeal is arguable or, put in other words, not frivolous.

The applicant is further required to satisfy the Court that if the relief sought is not granted, success in the intended appeal will be rendered nugatory.

We have come to the conclusion that there are some arguable issues raised by the applicant that are not frivolous.

If no injunction is granted by the Court restraining the Receivers, and the applicant ultimately succeeds in its appeal against the refusal by the superior court to grant the injunctive and mandatory orders sought, the applicant's successful appeal in this Court may well prove nugatory as actions taken by the Receivers prior to any decision granting the injunction may be irreversible.

The balance of convenience must also be considered. If the injunction sought by the applicant is granted so that the Receivers are removed from the applicant's premises it is possible that by the time the intended appeal is heard and determined much of the value of the applicant company will have evaporated greatly diminishing the benefit to the Bank of the receivership.

In the superior court the applicant in apparent recognition of this aspect offered to provide a bank guarantee as a condition for the granting of an interim injunction. Mr. Majevdia, the managing director of the applicant, in his further affidavit dated 22<sup>nd</sup> June 2006 deponed:

**“That the above notwithstanding the applicant has approached one of its bankers who is willing and committed to furnish this court with an undertaking of the entire purported debt as a condition for the grant of prayer 4 of the application dated 15<sup>th</sup> May, 2006 pending the hearing and determination of this application as the loss and damage being caused by the receivership will kill the company if not urgently addressed.”**

The commitment letter of the Bank was dated 21<sup>st</sup> June 2006 exhibited as HCM 3 to the affidavit of Majevdia. This letter was from Prime Capital & Credit Ltd. which does not appear to be a bank.

It reads as follows:-

**“Re Your request for a Bank Guarantee facility – Civil Suit No 249 of 2006**

**We are agreeable to extend the Bank Guarantee facility in respect of Civil Suit No 249 of 2006 as and when required by the Court for a sum up to and not exceeding Kshs. 17,793,000/- subject to your compliance of our standard terms and conditions.”**

Having taken all of the above into consideration we have decided to and hereby grant the injunction in following terms:

**SUBJECT to Bulk Medicals Ltd first procuring the issue to Paramount Universal Bank Ltd of a guarantee in favour of Paramount Universal Bank Ltd. by a Bank or financial institution (hereinafter the Guarantor) acceptable to Paramount Universal Bank Ltd. which guarantee shall include an undertaking by the Guarantor to pay to Paramount Universal Bank Ltd. the whole amount, if any, inclusive of interest and the receivers fees as may be found by the superior court or the Court of Appeal to be due and payable by Bulk Medicals Ltd. to Paramount Universal Bank Ltd. in *High Court Civil Case No.273 of 2006.***

- a. An injunction is hereby issued restraining the respondents whether by themselves their agents, employees or otherwise howsoever from the running and management of the applicant's business operations, assets and bank accounts or from acting or purporting to act as receiver, managers and finally from selling, disposing off (sic), offering for sale or alienating in any manner whatsoever any of the applicants properties, machinery, equipment, assets, stock or any part thereof pending the hearing and determination of the intended appeal.**
- b. A mandatory injunction compelling Paramount Universal Bank Ltd. whether by themselves, their employees or servants to reinstate the applicant in the running and management of its business.**
- c. The bank guarantee to be provided within 14 days of this order.**
- d. Costs of this application shall be in the intended appeal.**

**Dated and delivered at Nairobi this 8<sup>th</sup> day of December, 2006.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**W. S. DEVERELL**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**