



**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: GICHERU, BOSIRE & O'KUBASU J.J.A)

CIVIL APPLICATION NO. NAI.47 OF 2002(UR.27/2002)

BETWEEN

**DEPOSIT PROTECTION FUND BOARD (Suing as the liquidator of
RELIANCE BANK LTD (in Liquidation).....APPLICANT**

AND

PANACHAND JIVRAJ SHAH IST RESPONDENT

DIPAK PANACHAND SHAH 2ND RESPONDENT

MRS. DIPAK SHAH 3RD RESPONDENT

**(An application for stay of execution and proceedings
pending the hearing and determination of an intended
appeal from the ruling and order of the High Court
of Kenya at Nairobi, Milimani Commercial Court (The
Honourable Mr. Justice Mbaluto) delivered on 18th
December 2001**

in

H.C.C.C.1529 OF 2001)

RULING OF THE COURT

Deposit Protection Fund Board (the applicant) as liquidator of Reliance Bank Ltd, in liquidation, took out a motion under rule 5(2)(b) of the Court of Appeal Rules (the Rules), for an order that there be a stay of execution of the order of the superior court dated "18th December 2002," although we think it should have read 2001, in its Civil Case No.1529 of 2001, and also a further order staying further proceedings in the said suit. Panachand Jivraj Shah, Dipak Panachand Shah, and Mrs Dipak Shah, the Ist, 2nd and 3rd respondents, respectively, are named the defendants in the aforesaid suit, in which, in addition to a claim for exemplary and special damages, orders are sought, for the restitution of monies allegedly fraudulently converted to their own use from Reliance Bank in which they were directors and an injunctive relief.

The aforesaid suit was filed in court on 27th September, 1999. Defence was filed sometime in October, 1999, and as no further pleadings were filed thereafter, pleading closed. Thereafter the applicant was required, under the Civil Procedure Rules, to set the suit down for hearing, but it did not, with the result

that, on 11th April, 2000, the respondents took out a motion under Order XVI rule 5 of the Civil Procedure Rules, for an order that the suit be dismissed for want of prosecution. That application was opposed, but upon hearing, Mulwa, J. did not think that in the interests of justice a dismissal of the suit was appropriate. He then proceeded to dismiss that application with costs and ordered that the applicant "take such action as is necessary to prosecute the suit within a period of three months from today." The decision was handed down on 6th March, 2001. The respondents were aggrieved. They filed a notice of appeal, but they did not take any further steps in their intended appeal.

The applicant's suit was not set down for hearing within three months or any other time thereafter. Nor was any specific step taken on record before September, 2001. What, however, appears from the record of the application before us is that by its letter dated 21st May, 2001, the applicant forwarded five sets of draft orders to the Deputy Registrar of the superior court requesting that the same be signed and sealed. And thereafter, on 15th June, 2001 its counsel on record addressed another letter to the said Deputy Registrar, complaining that they had without success tried to locate the court file, in order that they would comply with Mulwa, J.'s order made on 6th March, 2001; and requesting that the file be made available to them for that purpose. Subsequently, on 26th September, 2001 on the applicant's application, Aganyanya, J. ordered the Court file for that case to be transferred from the Civil to Commercial Division of the High Court.

But before the said file was transferred to the Commercial Division the respondents took out another motion under Order XVI rule 5, aforesaid, seeking a fresh order that the applicant's suit be dismissed for want of prosecution, on the grounds, first, that no steps had been taken since the close of pleadings to prosecute the suit; and second, that the plaintiff had failed to comply with Mulwa, J.'s order dated 6th March, 2001.

The applicant's response to that application was that the letters we alluded to earlier and the application to transfer the court file from the Civil to the Commercial Division were steps in the prosecution of its suit. Mbaluto, J. who heard the application did not agree with the applicant. His view was that those are not the type of steps Mulwa, J.'s order of 6th March, 2001, envisaged, and that they are not the sort of steps contemplated by the provisions of Order XVI rule 5, above. Consequently, he said, the interests of justice would not be served if a defendant would be burdened with a suit in which a plaintiff is "not prosecuting as diligently as the law requires." He then proceeded to allow the application, dismissed the applicant's suit for want of prosecution and awarded the respondents the costs of the suit and of the application, and thus provoked the application before us.

Mr. Mohamed Nyaoga, who with David Majanja appeared for the applicant before us, submitted that the learned trial Judge erred in principle by failing to find that the letters we alluded to earlier, and the application for the transfer of the court file constituted a step in the prosecution of the applicant's suit in the superior court. Besides, he said, the amount of money involved in the suit and the fact that the money belonged to depositors of the bank, should have constrained the Judge, as a matter of public interest, to decline to dismiss the applicant's suit.

On the other hand, Mr O.P. Nagpal for all the respondents, after citing the grounds of the applicant's intended appeal, submitted that in none of those grounds has the applicant suggested that the trial Judge erred in principle. Consequently, he said, there is no arguable point raised to entitle the applicant to a stay. In his view the applicant has shown a pattern of dilatory behaviour throughout the whole litigation and therefore does not deserve the exercise of this court's discretion in its favour.

The jurisdiction of the Court under rule 5(2)(b) of the Rules, is discretionary. It is trite law that an applicant who desires that the court exercises its discretion under that rule in its favour, must show, first, that its appeal or intended appeal is arguable or that it is not a frivolous one. Second, that unless it is granted a stay, its appeal, if successful, will be rendered nugatory. [(See *Githunguri v. Jimba Credit Corporation Limited*) (Civil Appeal Application NAI.161 of 1988)]

It is also true, to say, that in an application under Order XVI rule 5, the court exercises judicial discretion. That being so an appellate court will not interfere with exercise of judicial discretion under that rule

unless it is shown that the trial Judge erred in principle or that the Judge was plainly wrong.

On the material before us, we do not see what explanation the applicant has for not taking the necessary steps to set its suit down for hearing within the three months duration Mulwa, J. had granted it. We do not have before us a copy of the proceedings of the trial court to be able to glean from it the possible reason, if any, for its failure to set the suit down for a hearing. The reasons put forward by the applicant in that regard, on the face of it, are oblique and we doubt whether they directly relate to the prosecution of the applicant's suit. Besides, a casual reading of the ruling and order from which an appeal is intended does not, prima facie, show any error in principle or that the lower court's decision is plainly wrong. What is before us is not the intended appeal itself, and we cannot therefore, express any conclusive view on the matter. It is for that reason that we have avoided to comment on the passages from the various decisions which counsel cited to us as the points they deal with overlap with the merits or otherwise of the intended appeal.

Having come to the foregoing conclusions we do not find it necessary to deal with the nugatory aspect. In the result we are disinclined to grant the orders sought and dismiss the application dated 5th March, 2002, with costs.

Dated and delivered at Nairobi this 15th day of March, 2002.

J.E. GICHERU

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JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

E.O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR