



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 258 & 315 of 1999

TRUST BANK LIMITED..... 1ST APPLICANT

MICHAEL MUHINDI..... 2ND APPLICANT

AND

1. INVESTECH BANK LTD..... 1ST RESPONDENT

2. VINOD PATEL..... 2ND RESPONDENT

3. AJAY SHAH..... 3RD RESPONDENT

4. NITIN CHANDARIA..... 4TH RESPONDENT

**(An application for stay of execution of the decision of the High Court of Kenya
at Milimani (The Honourable Commissioner Hewett) dated the 10th day of September, 1999**

in

H.C.C.C. NO. 2411 OF 1998)

RULING OF THE COURT

Two applications under rule 5(2)(b) of the Court of Appeal Rules for stay of execution of the decree of the Superior Court in its Civil Case No. 2411 of 1998, were argued together before us. The first one of the applications viz Civil Application No. 258 of 1999, is by Trust Bank Limited, a Kenyan Bank, and Michael Muhindi, who was its statutory manager appointed under the provisions of the Banking Act; and the second application, to wit Civil Application No. 315 of 1999, by Vinod Patel, Ajay Shah and Nitin Chandaria, all three who were directors of Trust Bank Limited. In both applications, Investec Bank Limited, a South African Bank, which was the plaintiff in the aforementioned suit, is named the respondent. In that suit the respondent claimed special and general damages for breach of an alleged oral contract in which Trust Bank Limited which we shall hereafter refer to as Trust Bank, agreed to sell to the respondent 5,500,000 Deutsche Marks, by-transferring the same from its bank account which it held with Desdner Bank, Frankfurt, Germany, into Deutsche Bank, Frankfurt, the respondent's correspondent bank, in consideration of the respondent selling to it US\$ 3,272,251.31 by simultaneously transferring the same to Trust Bank's account with the Bank of America, in New York. The agreement was entered into at about

2.49 p.m. local time, on 17th September, 1998, but before either party could perform its part of the bargain, at about 4 pm on the same day, Trust Bank was placed under statutory management by the Central Bank of Kenya with Michael Muhindi, as the statutory manager. There is no evidence that either Trust Bank Limited or its statutory manager notified Investec Bank Limited of that fact. The Bank, which we shall hereafter refer to as Investec, allegedly unaware that Trust Bank had been placed under statutory management, at about 5.06 pm local time on the same day, electronically transferred US\$ 3.2m odd, to Bank of America, in New York, which in turn on the instructions of officers of Trust Bank, transferred the same to Desdner Bank, in New York. Trust Bank did not perform its part of the aforementioned oral contract, and according to Investec, it thereby became guilty of the breach on which its suit in the superior court is predicated.

The decree, the execution of which a stay is sought here followed a summary judgment which was entered by the Superior Court (Commissioner of Assize Hewett) in the above suit pursuant to a motion on notice under the provisions of O.XXXV rule (1) of the Civil Procedure Rules. The rule empowers the court, where a plaintiff has a liquidated claim, on being appropriately moved, to enter summary judgment where the defendant's defence clearly raises no reasonable triable issue, or where the defence is merely a sham. There is authority, to wit, Gupta v. Continental Builders Limited 1978 KLR 83, that in mixed claims where one of those is liquidated, then the court has jurisdiction, upon application, to enter summary judgment only on that part of the claim which is liquidated. But, in our view, that is only possible where the liquidated claim is severable from the other claims and can be dealt with separately without doing any violence to the other claims. We do not wish to say more on this as doing so might infringe on the jurisdiction of the bench that will eventually hear the intended appeals. We however wish to state that the applicants were aggrieved by the decision of the Superior Court and promptly filed notices of appeal declaring their intention to appeal against that decision.

The jurisdiction of the court under rule 5(2) (b) aforesaid, is original and discretionary, and it is trite law that to succeed an applicant has to show firstly, that his appeal or intended appeal is arguable, or put another way, it is not frivolous; and secondly, that unless he is granted a stay the appeal or intended appeal, if successful, will be rendered nugatory. Those are the guiding principles but these principles must be considered against the facts and circumstances of each case, which we now propose to set out as gleaned from the pleadings, the affidavit evidence in support of the High Court application for summary judgment, the oral evidence which was given in the course of the proceedings of that application, and the affidavit evidence in support of both the applications before us.

Trust Bank which we now know was experiencing liquidity problems about the beginning of the second half of 1998, on 17th September, 1998, contacted Investec on telephone with a request that the former sell to it 5.5 million Deutsche Marks in exchange for US dollars, which request was accepted. The exchange rate was agreed upon. On the basis of the agreed exchange rate Trust Bank would receive US dollars 3,272,251.31 for its 5.5 million Deutsche Marks, which would be electronically transferred to its bank account with its correspondent bank, Bank of America, New York Branch, on 18th September, 1998. Trust Bank would in turn electronically transfer, on the same day, the 5.5 million Deutsche Marks, to Investec's Correspondent bank, Deutsche Bank, in Frankfurt, Germany. At 4.46 p.m. local time here, on 18th September, 1998, Investec performed its part of the bargain but Trust Bank according to Investec did not, and instead, according to an affidavit on record which was sworn by one Steven Sample of Bank of America, someone from Trust Bank Nairobi, wired the latter's correspondent bank in New York on 17th September, 1998, and instructed the bank that upon receipt of Investec Money, it would immediately on the same day, transfer the same to Desdner Bank, New York Branch, for the benefit of Desdner Bank, Weserstrasse 3, Frankfurt, Germany. According to Steven Sample, those instructions were received at 10.00 a.m., New York time or 5.00 p.m. Kenyan time, which was an hour or so after Trust Bank had been placed under statutory management. The statutory manager, according to the affidavit of Glynn Burger, the Group Risk Manager of Investec, dated 11th November, 1998, physically moved into Trust Bank premises at approximately 1.30 p.m. Kenyan time long before Investec and Trust Bank struck the financial deal, the subject of this litigation. In view of that it would appear to us that whoever negotiated the deal and later the same day issued the aforementioned instructions as to payment must have done so with the sole purpose of taking the money beyond the reach of the statutory manager and for suspicious purposes. It cannot be said that the instructions were issued with the full knowledge of the statutory

manager. There is no conclusive proof as to the exact time he physically took over the management of Trust Bank's business. However, from the scanty evidence on record, he took full charge of Trust bank from about 4 pm on 17th September, 1998, and before the instructions as to payment were issued. The appointment of the statutory manager meant that the running of Trust Bank's business would be solely undertaken by the statutory manager to the exclusion of its directors. Can it, therefore, be said that it was on the statutory manager's authority that the instructions as to payment were given? Those instructions were given about an hour or so after Trust Bank was placed under statutory management. The statutory manager has in effect denied having given or authorised the giving of those instructions. The directors of Trust Bank have also, in effect denied doing so. Whether or not the person who negotiated the deal and the one who later gave the instructions were authorized officers of Trust Bank is presently unknown. Besides, whether, in view of the instructions as to payment, the money can be said to have been received by Trust Bank or Trust Bank was merely used as a conduit to divert the money is an issue which is still at large.

Counsel for Investec, Mr.Dhanji, submitted that what happened to the money after it was paid over pursuant to the terms of the contract is a matter between Trust Bank and its then directors, and cannot be said to be a triable issue in the dispute between Investec and Trust Bank regarding the money. We appreciate that there are third party proceedings between Trust Bank and its then directors, in which the two parties mutually claim indemnity from each other regarding any liability to Investec respecting the money. We appreciate, too, that Investec's money was received in Trust Bank's correspondent bank viz Bank of America in New York, but in our view, and considering the conduct of the person or persons who dealt with the money right from the time Investec agreed to be involved in the financial transaction whereby the Deutsche Marks, were paid out of Desdner Bank, New York, it is arguable whether or not the person or persons were acting for the genuine benefit of Trust Bank.

Besides, there is evidence on record that on 18th September, 1998, the statutory manager declared a Moratorium the effect of which was to stop all dealings outside the moratorium. The money the subject matter of this litigation was allegedly paid out after the moratorium had been declared. The payment of the money out of Trust Bank's correspondent Bank in America was clearly in breach of the Moratorium. The Superior Court made a finding to that effect but held that the payment would have been obviated had the statutory manager acted diligently as soon as he took over the business of Trust Bank as such manager. The Court must have had in mind the provisions of section 34(4) of the Banking Act which impose a duty on the statutory manager to discharge his duties as such manager with diligence and in accordance with sound banking and financial principles and "in particular with due regard to the interests of the institution, its depositors and other creditors-". Whether or not the finding of negligence against the statutory manager, on the basis of largely affidavit evidence, without hearing him orally could properly be made in the circumstances of this case is clearly arguable. There is also the fact that the Banking Act imposes criminal sanctions against those guilty of violation of any of its provisions. Whoever issued the instructions to transfer the amount which Investec had paid into Trust Bank's account with Bank of America, to Desdner Bank New York branch in favour of Trust Bank, did so, in our view, in violation of the Banking Act. It is also, prima facie, evident that the deal concerning the money was fraudulent. For instance, apart from what we stated earlier concerning the timing of the deal, Vinod Patel orally testified that notwithstanding the fact that he was aware of the financial deal between his bank, Trust Bank, and Investec, although he said he lacked details, withheld that information from the statutory manager, arguing that ".. he did not ask me about it." There is also the urgency with which the money was paid out of Trust Bank's account with Bank of America.

It was Investec's case in the superior court that it became aware of the appointment of a statutory manager to manage the business of Trust Bank at 4.48 p.m. Kenyan time on 18th September, 1998, through a Reuter's Report, we believe on the Inter-Net, and immediately unsuccessfully tried to recall the money in issue. It thereafter filed suit in a New York Court, against Bank of America and Trust Bank claiming the return of the money, but which suit it abandoned when it was part heard. We do not know whether the suit was actually terminated or is still in situ and might be revived later on. Be that as it may, evidence was adduced in that suit before it was abandoned, to the effect that the alleged payment to Desdner Bank was "....repayment of Desdner Bank Frankfurt loan to Trust Bank and 'any other outstandings'." There is however, affidavit evidence from Mr. Muhindi, the statutory manager, and also a telefax message dated

22nd September, 1998 from Desdner Bank, Frankfurt, to Investec, that the former never received, either on 18th September, 1998, or any other time thereafter, any payment order from Trust Bank in favour of Investec. The evidence is however, silent on whether or not Desdner received any other payment from Trust Bank either in repayment of any loan it might have owed or for any other purpose.

Investec filed suit in the superior court against Trust Bank, its statutory manager and its three directors, Vinod Patel, Ajay Shah, and Nitin Chandaria when it realized that the New York suit would not benefit them. Its case is basically based on fraudulent misrepresentation, and is summarised in paragraphs 6 and 12 of its plaint. Paragraph 6 of the plaint avers that:

"In order to induce the plaintiff to make and complete the contract and transfer the funds, the 1st Defendant acting through its Principal Officers, being the 3rd, 4th and 5th Defendants, made either the following express and/or implied representations or deliberately or otherwise omitted to inform the plaintiff of certain matters that would have affected the contract and the 1st Defendant's ability to enter into the contract to wit:

(i) That the 1st defendant was solvent and therefore able to meet its obligations under the contract.

(ii) That the 1st Defendant had or would ensure that it had sufficient funds at its correspondent bank, namely, Desdner Bank and would therefore be able to transfer the same to the plaintiff's correspondent bank namely Deutsche Bank on the maturity date of the contract.

(iii) That the 1st Defendant would do all such acts as would be necessary to enable it perform its obligations under the contract including issuing instructions on September, 17th, 1998, to Desdner Bank to effect payment to Deutsche Bank on September 18, 1998.

(iv) Failing or omitting to inform the plaintiff prior to the conclusion of the contract that the Central Bank of Kenya had placed it under de facto statutory management, on September 17, 1998, and de Jure statutory management on September 18, 1998".

The opening words of paragraph 12 aver as follows:

"By virtue of the matters referred to in paragraphs 7 to 11 (which set out the background facts as earlier on recited) hereto, the plaintiff avers that the Defendants jointly and severally made the said representations negligently and/or fraudulently either well knowing that they were false and untrue, or recklessly, not caring whether they were false or true in that:-."

If the deal in question was fraudulent, and possibly at all events not intended to benefit Trust Bank as the circumstances suggest, can Trust Bank properly be held liable to Investec? Fraud or negligence as the case may be, is a matter which, unless the facts and circumstances are clearly obvious, need oral evidence to establish. We appreciate that the superior court received oral testimony from Vinod Patel. However, because there are other players in the suit, it is clearly arguable whether, a determination of the issue is possible without hearing all the players or at least giving them the opportunity of being orally heard. The superior court appreciated this fact and held as follows:

"I have a bare 36 hours in which to write this ruling before I go on extended leave, so in the interests of brevity I do not propose to address the issues of damages for fraudulent misrepresentation and deceit. A higher standard of proof is required for fraud and there are things like the dealing sheet, the forex reconciliation, the possible cross-examination of the 2nd defendant, the source of the instructions for onward transfer of the \$ 3.2 million to Frankfurt and the bank statements of the 1st Defendant's nostro accounts in New York and Frankfurt which may well impinge upon the issue of fraud. Also to tar individuals involved in banking with the brush of fraud may be to blight their future employment prospects. I leave the issues of fraud and deceit aside and should it in practice be necessary I give all defendants unconditional leave to defend on those issues."

When one reads paragraphs 6 and 12 of the plaint together with the aforequoted excerpt of the ruling of

the superior court, and in view of the prayers in the plaint, it is clearly arguable whetherin the peculiar facts and circumstances of this case, the liquidated and unliquidated claims are severable, and whether the issue can be answered without oral testimony.

Several other issues were raised by counsel for the parties but we do not consider it essential to deal with them here as in our view they will not advance the parties' respective cases any further. Moreover, we are of the view that the issues will best be dealt with in the intended appeals.

The upshot of the foregoing is that the applicants have shown that their intended appeals are not frivolous as there are serious issues to be canvassed.

On the second limb of the applications, namely, whether unless a stay is granted, the applicants' intended appeals will be rendered nugatory, the decree upon which a stay of execution is sought being a money decree, and since the respondent in our view, is a bank with a sound financial base, we do not think that the intended appeals, if successful, will be rendered nugatory unless the stay prayed for is granted. However, the jurisdiction of the court under rule 5(2) (b), of our rules being discretionary, we consider that the respondent being a foreign bank, there might arise considerable difficulties recovering the decretal sum from it. On that ground and considering the amount of money involved, which translates to about KShs. 260 million, the balance of convenience favours the grant of a stay.

In the result we allow both the applications and order that the execution of the decision of the superior court given on 10th September, 1999, in its Civil Case No. 2411 of 1998, be stayed pending the final determination of the applicants' respective intended appeals. The costs to be in the intended appeals.

Dated and delivered at Nairobi this 17th day of January, 2000.

A.M. AKIWUMI

JUDGE OF APPEAL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR