Case Number:	Civil Appeal 279 of 2006
Date Delivered:	20 Dec 2018
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Erastus Mwaniki Githinji, Daniel Kiio Musinga, Patrick Omwenga Kiage
Citation:	Central Bank of Kenya & another v Ratilal Automobiles Limited & 10 others [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Misc. Civil Application No. 638 of 2006
Case Outcome:	Appeal partially succeeds
History County:	Uasin Gishu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL AT NAIROBI

(CORAM: GITHINJI, MUSINGA & KIAGE, JJ.A.)

CIVIL APPEAL NO. 279 OF 2006

BETWEEN

CENTRAL BANK OF KENYA .....1ST APPELLANT

ROSE DETHO.....2ND APPELLANT

AND

RATILAL AUTOMOBILES LIMITED .....1ST RESPONDENT

MAHESH TAILOR .....2ND RESPONDENT

GEMINI TAILOR .....3RD RESPONDENT

PRAMUKH ENTERPRISES LIMITED ..... 4TH RESPONDENT

CHARTER HOUSE BANK LIMITED .....5TH RESPONDENT

DEPOSITORS OF CHARTERHOUSE BANK LIMITED.....6TH RESPONDENT

SANJAY SHAH .....7TH RESPONDENT

MINISTER FOR FINANCE .....8TH RESPONDENT

KENYA BANKERS ASSOCIATION .....9TH RESPONDENT

KENYA REVENUE AUTHORITY .....10TH RESPONDENT

KARIUKI MUIGUA.....11TH RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Eldoret

(Gacheche, J.) dated 15th September, 2006

in

Misc. Civil Application No. 638 of 2006)

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JUDGMENT OF THE COURT

Introduction

1. This interlocutory appeal has been before this Court for a period of nearly 12 years, not because of any complexity in its nature or inactivity of the Court, but largely because over the years the parties have sought its adjournment from time to time for the reason that they were engaged in discussions with a view to resolving it amicably.

2. When it was last before this Court on 23rd July, 2018 counsel sought to adjourn it for the umpteenth time but the Court rejected the application for adjournment. As a result counsel for the parties largely adopted their written submissions and made brief highlights of the same.

Background of the Appeal

3. On 15th September, 2006 the 1st to 4th respondents, being the ex- parte applicants and customers of the 5th respondent, filed an application in the High Court at Eldoret, seeking leave to apply for 16 orders of mandamus, 7 orders of certiorari and 9 orders of prohibition as against the appellants and the 8th, 9th 10th respondents.

4. The ex parte applicants stated in their affidavit in support of the application, inter alia, that sometimes in March 2006 the operations of Charterhouse Bank Limited (**CHB**), the 5th respondent, were the subject of unfavourable media publications to the effect that the bank was allegedly being used for money laundering and illegal banking practices. It was further reported that investigations by the Central Bank of Kenya (**CBK**) had recommended the withdrawal of the banking licence of the 5th respondent on allegations of offences of money laundering and Value Added Tax evasion.

5. The ex parte applicants argued that they were surprised by the aforesaid recommendation as they were not aware of any law in Kenya that defined and provided for the offence of money laundering.

6. The ex parte applicants further stated that on 24th June 2006 they learnt from the media that **CHB** had been placed under statutory management and the 2nd appellant had been appointed as its statutory manager. Consequently, the ex parte applicants had no access to funds in their respective accounts at CHB, which adversely affected their business operations. The ex parte applicants contended that the acts of the statutory manager were ultra vires the terms of her appointment as contained in the Kenya Gazette Notice of 30th June 2006; that there was no basis for appointment of the statutory manager by the CBK; that the publications in the media against CHB were false and even if they were true they could not justify the actions by the CBK and the Minister for Finance to violate the ex parte applicants' rights.

7. It was on that basis that the ex parte applicants sought leave to apply for, inter alia, an order of mandamus to compel the appellants and the 8th respondent to allow them to access and operate their bank accounts held at CHB; to compel the statutory manager to accept the ex parte applicants' payments to third parties by way of cheques; to compel the appellants and the 8th respondent to bring to the High Court evidence, facts, reasons, information and documents upon which they relied in taking the decision to place CHB under statutory management; to compel the appellants to issue a certificate, letter and/or any other document sufficiently absolving CHB from the allegations that had been levelled against it; to compel the statutory manager to return all the ex parte applicants' funds as well as all the funds of the bank's depositors from CBK to CHB and to compel CBK to clear CHB from alleged involvement in any criminal activities, tax evasion or illegal transfers of money.

9. The ex parte applicants further sought leave to apply for various orders of certiorari and prohibition, inter alia, to bring before the High Court for purpose of quashing any authority, decision and/or order made by the appellants and the 8th respondent for placing CHB under statutory management; an order of prohibition to prohibit the statutory manager from exercising any functions or powers and/or interfering with the business and operations of CHB and to prohibit the Kenya Revenue Authority, (the 10th respondent) from investigating, accessing, auditing, demanding anything or making any report against the ex parte applicants and the depositors of CHB.

10. The above is just but a summary of the 32 judicial review orders the ex parte applicants intended to apply for.

11. The ex parte application for leave was argued before Gacheche, J. on 15th September 2006. In a brief ruling, the learned judge, in granting leave stated as follows:

"I have taken the submissions of counsel into account and at a glance, the application appears to comply with the requirements of order LIII of the Civil Procedure Rules. The issues raised in the application especially pertaining to the appointment of the statutory manager whether the action was well founded. Whether it was legal and based on legal principles are matters that need to be resolved/determined.

I do in the circumstances grant the applicants leave to apply for the prerogative orders which they seek in line with their prayers 2(a)-(ff). leave so granted shall operate as a stay in line with their prayers 3(a) only in so far as it relates to the transfer of funds from the bank to the 1st respondent, the withdrawal suspension (sic) of the bank from the clearing house and/or any decision, action and report made pending and/or intended by any of the respondents here, and or their servants or agents which in any way affect the rights, interest and or is adversely against the applicants, 1st and 2nd interested parties, pending the hearing and determination of the substantive application. I also grant an order of stay in line with prayer 3(b)."

Appeal to this Court

12. Being aggrieved by the aforesaid ruling, the appellants preferred an appeal to this Court. The memorandum of appeal contains 14 grounds in which the appellants faulted the learned judge for, inter alia, failing to appreciate that judicial review is concerned only with the legality of the decision making process and not the merits of the decision; applying the wrong test in granting leave to apply for judicial review; in failing to appreciate that the High Court had no power to require any evidence, facts, reasons, information or documents to be produced before it for scrutiny; in failing to appreciate that the 1st appellant does not owe any public duty to the 1st, 2nd, 3rd and 4th respondents in the operation of their bank accounts; in failing to appreciate that the 1st appellant does not owe any public duty to any person to produce any documents, data or information; in failing to appreciate that the 1st appellant cannot be compelled to absolve any person from allegations of any nature; in failing to appreciate that the 1st appellant cannot clear any person from involvement in any criminal activities, tax evasion or illegal transfer of money; in failing to appreciate **section 34** of the **Banking Act** vests on the 1st appellant the power to place a bank under statutory management if it becomes aware of any fact or circumstance which, in its opinion, warrants the exercise of that power.

14. The appellants further faulted the learned judge for failing to appreciate that the 2nd appellant, having properly declared a moratorium on the payment by the 5th respondent of its depositors and creditors, leave to apply for an order of mandamus to compel her to transfer any funds could not be granted; for failing appreciate that leave to apply for judicial review ought not to have been granted to the 1st, 2nd, 3rd and 4th respondents in the instances where they were seeking such orders on behalf of the 5th respondent or any other person; and for failing to consider and determine the veracity of each of the orders sought in the application for leave and in granting the leave as sought.

15. The appellants contended that the learned judge exceeded her jurisdiction under the provisions of **Order LIII** of **The Civil Procedure Rules** by issuing orders of stay in respect of matters way beyond the proceedings in question which orders grossly interfered with the performance of the statutory mandate of the appellants. The appellants added that the learned judge erred in failing to appreciate that the effect of the orders of stay was that the 2nd appellant was restrained ex parte from executing her statutory mandate which was for all practical purposes and intents an ex parte interlocutory mandatory injunction.

17. Lastly, the appellants argued that the learned judge, in directing that the leave granted should operate as a stay, the order was so wide, imprecise and ambiguous and in directing that the stay should cover the appellants' intended action or any action as against the 5th respondent who made no such application before her, the learned judge was in grave error of the applicable law. The appellants therefore urged this Court to set aside the entire ruling by the High Court.

18. The appeal was largely canvassed by way of written submissions and brief oral highlights by counsel. **Mr. Chacha Odera** appeared for the appellants, while **Mr. Mutiso** appeared for the 1st to 4th respondents, the 5th respondent was represented by **Ms. Migiro,** while **Mr. Musyoki** and **Mrs. Kiriba** appeared for the 11th and 9th respondents respectively. **Mr. Onyiso** appeared for the 8th respondent. There was no appearance for the 6th and

7th respondents, although **Mr. Mwangi Kigotho,** the 7th respondent's advocate had been served with a hearing notice.

19. The appellants' grounds of appeal were argued in four main clusters. The first cluster relates to the principles for grant of leave to apply for judicial review orders. It was submitted that the application did not meet the threshold for grant of such leave. The appellants' counsel cited this Court's decision in **Aga Khan Education Service v Republic and Others [2004] 1 E.A. 1,** where it was held that while the High Court is not expected to go into the matter in depth, the material before it must show prima facie evidence of an arguable case. Counsel submitted that there was no prima facie evidence of an arguable case to warrant the grant of leave to apply for the orders of mandamus. Counsel submitted that an order of mandamus compels the performance of a public duty imposed by statute. Where a person on whom the duty is imposed has failed or refuses to perform the same, the very least an applicant seeking leave to apply for an order of mandamus must do is to identify the public duty and place before the court prima facie evidence of breach, counsel added. In support of that submission this Court's decision in **Kenya National Examinations Council v Republic [1997] eKLR** was cited. It was contended that there was absolutely no evidence that either of the appellants had failed to perform any public duty imposed to them by statute and leave ought not to have been granted.

20. The appellants further contended that the denial of access to the ex parte applicants' account and refusal of acceptance of a party's cheques are matters of private law which do not fall in the realm of judicial review.

21. In the second cluster of the grounds of appeal the appellants submitted that the High Court had no power in exercise of its jurisdiction under **Order LIII** of the **Civil Procedure Rules** to scrutinize any documents or give directions for scrutiny of such documents as sought by the ex parte applicants. Further, the appellants were under no duty, public or otherwise, to absolve any person from any allegations of any nature, or to clear any person from any alleged involvement in criminal activities, tax evasion or illegal transfer of money from Kenya, and cannot be compelled to do so. Consequently, the ex parte applicants had no authority in law to apply for orders of mandamus on behalf of any person to compel the appellants to do something they have no legal mandate to engage in.

22. In the third cluster the appellants argued that before the High Court there was no other party except the ex parte applicants and no other party could validly obtain any orders from the court. However, the ex parte applicants purported to act also on behalf of the 5th respondent, for whose benefit a number of the orders were being sought. The learned judge failed to appreciate that because the 5th, 6th and 7th respondents, who were interested parties before her, did not make any application, no order could be given in their favour, yet some of the orders that were granted were in favour of the aforesaid interested parties.

23. Lastly, the appellants submitted that although the High Court has power to direct that the grant of leave shall operate as a stay, the court must exercise the discretion judiciously, on sound legal principles and on the available evidence. The appellants argued that the High Court did not offer any explanation or show the basis upon which it granted the orders of stay which were in very wide terms and had very grave consequences in the exercise of the appellants' statutory mandate under the provisions of the Banking Act. On those submissions, the appellants urged this Court to allow the appeal and set aside the High Court ruling.

24. In opposing the appeal, the 1st to 4th respondents submitted that the learned judge was alive to the fact that the issue at hand related to the propriety of the procedure leading up to the appointment of the statutory manager and not the merits of the decision. They argued that at the ex parte stage, the learned judge was not required to delve deeply into the issues raised in the application for leave. They added that CBK is a creature of statute and therefore its actions are amenable to scrutiny by the court by way of judicial review.

25. The 1st to 4th appellants further submitted that the High Court had jurisdiction in the matter and there was no failure to apply the correct principles in granting leave as sought. They added that under **section 34 (2)(a)** of the **Banking Act** the CBK has power to appoint a statutory manager for a bank and the different circumstances under which it can do so are set out in **section 34(1).** One of the circumstances in which the CBK may do so is set out in **section 34(1) (d)** as read together with **section 34(2)** and that is:

"If the Central Bank discovers (whether on inspection or otherwise) or becomes aware of any fact or circumstances which, in the opinion of the Central Bank, warrants the exercise of the relevant power in the interest of the institution or its depositors or other creditors."

26. The said respondents argued that if the CBK chooses to appoint the statutory manager under **section 34(1) (b),** a duty to act in the interest of, inter alia, its depositors and creditors is important. That being so, the CBK owed a duty to the depositors, which duty continues even after the appointment of the statutory manager. Counsel therefore submitted that the learned judge had jurisdiction to grant leave as sought.

27. On the issue whether the High Court ought to have considered and determined the veracity of each order sought, the 1st to 4th respondents submitted that at the leave stage the court is not expected nor obliged to go into the details of the dispute. They urged this Court to dismiss the appeal.

28. The 5th respondent (CHB), also opposed the appeal. It contended that CBK is a statutory body and had appointed the 2nd appellant pursuant to the provisions of **section 34** of the **Banking Act.** It accused the 2nd appellant of failing to perform the duties as required under **section 34(2)** of the **Banking Act.**

29. The 5th respondent further submitted that in granting leave to apply for judicial review orders, the trial court exercised its discretion appropriately. It cited this Court's decision in **R v Communications Commission of Kenya and 2 others ex parte East Africa Televisions Network Limited [2001] KLR 82** where the yardstick for grant of leave was stated as follows:

"If on the material available, it considers, without going into the matter in depth, that there is an arguable case for granting leave", leave may be granted.

At the leave stage, the trial court was therefore not required to go into the bona fides, reasonableness or detailed analysis of the averments made by ex parte applicants, the 5th respondent contended.

30. Defending the order that the grant of leave was to operate as a stay, CHB argued that the trial judge exercised her discretion appropriately and there was no justification in questioning the exercise of that discretion.

32. The Kenya Bankers Association (**KBA**), the 9th respondent, supported the appeal. The Association submitted that a customer of a bank such as the 1st to 4th respondents, has no relationship with KBA; that the appointment of the statutory manager had nothing to do with Kenya Bankers Association; that there was no evidence that Kenya Bankers Association played any role in the appointment of the statutory manager or declaration of the moratorium and therefore the 9th respondent was non- suited as a party in the matter.

33. Regarding the stay orders, KBA submitted that a stay can only preserve the status quo. The status quo at the time of the grant of leave was that there was a moratorium and no payments were being made by the 5th respondent. In the circumstances, the effect of the order made is not a stay but a mandatory interlocutory injunction given in favour of the 1st to 4th respondents to compel KBA to make payments which the statutory manager had stopped by the declaration of a moratorium. KBA's submission was that a stay cannot compel it to clear cheques which the statutory manager had put a moratorium on.

34. The 8th respondent also supported the appeal but did not file any written submissions.

35. We have carefully perused the record of appeal and considered the submissions on record. There are only two substantive issues for determination in this appeal. The first one is whether the learned judge was right in granting leave to the 1st to the 4th respondents to apply for judicial review orders as aforesaid; and secondly, whether the learned judge erred in directing that the leave so granted do operate as a stay of the appellants' activities complained of by the ex parte applicants.

36. It is not in dispute that the granting of leave or otherwise in judicial review applications is a discretionary exercise. That discretion has to be exercised judiciously. Again it is trite law that judicial review is concerned with the manner in which a decision is made and not the merits or otherwise of the decision. This Court can only interfere with the exercise of a judge's discretion on the principles stated in **MBOGO v SHAH [1968] E.A. 93.**

37. In judicial review proceedings the leave stage plays an important role, as was stated by this Court in **Meixner & Anor v Attorney General [2005] 2KLR 189**, that:

"The leave of court is a prerequisite to making a substantive application for judicial review. The purpose of the leave is to filter out frivolous applications. The granting of leave or otherwise involves an exercise of judicial discretion…. The test to be applied in deciding whether or not to grant leave is whether the applicant has an arguable case."

38. In **Aga Khan Education Service Kenya v Republic & Others (Supra)** this Court held:

"Once there is an arguable case leave is to be granted and the court, at that stage is not called upon to go into the matter in depth."

39. It is against that threshold that we must determine whether leave was appropriately granted by the court below. In their ex parte application, the 1st to 4th respondents challenged the manner in which CBK conducted its investigations regarding the operations of the 5th respondent; challenged the manner in which the 2nd appellant was appointed; alleged that the 2nd respondent was acting in excess of the powers conferred upon CBK by statute and urged the High Court to grant leave to apply for the 32 judicial review orders of mandamus, certiorari and prohibition.

40. The ex parte applicants supported their application for leave with lengthy affidavits that contain various annextures and a statutory statement. As this Court has stated in a number of its decisions, at the leave stage the trial court is not expected to go into a detailed consideration of all the averments made by an ex parte applicant. All the court is required to do is to ask itself whether, on the material as presented and in light of the applicable law, an arguable case for granting leave has been made out. See **R. v Communications Commission of Kenya and 2 others ex parte East Africa Televisions Network Limited** (supra).

41. The learned judge, having perused the ex parte application and considered oral submissions by the ex parte applicants' counsel, was satisfied that the application **"appears to comply with the requirements of order LIII of the Civil Procedure Rules".** She also stated that the issues raised in the application, especially pertaining to the appointment of the statutory manager, whether it was legal or not, were matters that needed to be resolved. In other words, she was satisfied that an arguable case had been made out. She therefore went on to grant leave to apply for judicial review orders.

42. In **J.B. Maina & Company Limited v Grain Bulk Handlers Limited & 2 Others [2003] eKLR**, this Court cited with approval the case of **W.E.A. Records Limited v Visions Chanel 9 Limited (1983) 2 ALL ER 589** at page **593** where **Sir John Donaldson MR** delivered himself as follows:

"As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession whether or not it assists its application, there is no basis for making a definite order and every judge knows this. He expects at a later stage to be given the opportunity to review his provisional order in the light of the evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order."

43. Taking into consideration the low threshold that an applicant requires to satisfy before grant of leave and taking into account material that was placed before the learned judge, we do not think that the learned judge can be faulted for granting leave to the ex parte applicants to apply for the judicial review orders as sought. We are unable to find that she exercised her discretion injudiciously.

44. Turning to the second broad issue, that is, whether the grant of leave should have operated as stay, the appellants argued that the learned judge was under a duty to exercise her discretion on sound legal principles but failed to do so. They argued that the orders for stay were so wide in nature that they could not possibly be implemented; and in any event, the stay orders purported to alter the existing status quo.

45. We have looked at the certified copy of the orders that were extracted pursuant to delivery of the impugned ruling. It is apparent that some of the orders appear to have been issued at the behest of CHB which was not one of the ex parte applicants but had merely been named as an interested party. For example, the effect of the stay order was to prohibit: the appellants from

interfering with the management or running of CHB; the 1st appellant from refusing to grant CHB a certificate confirming its operational status and its liquidity; KBA from refusing CHB to transact at the clearing house; the 2nd appellant from adversely exercising any functions of powers and/or interfering with the business and operations of CHB; Kenya Revenue Authority (KRA) from investigating, accessing, auditing, demanding or taking any action against CHB. The court also stayed any action or decision, investigation, reports or recommendations whatsoever regarding refusal to renew the licence of CHB. In other words, the order was interpreted to mean, inter alia, that the appellants were directed to return the control of CHB to its directors, which, in our view, could not have been the case.

46. In **Grain Bulk Handlers Limited v J.B. Maina & Company Limited and 2 others** (supra) this Court noted that the order of stay that had been granted in that matter was so wide, imprecise and ambiguous that it was doubtful whether it was capable of implementation. The Court also faulted the learned judge for failing to consider the full implications of the order of stay.

47. In the matter before us, the grant of the leave operated, inter alia, as a stay of the transfer of funds from CHB to CBK, stayed the suspension of CHB from the Clearing House, and generally rendered the intended functions and duties of the statutory manager moot. Further, in purporting to stay any investigations, demands or audit of CHB by the CBK or KRA, and staying the decision by the CBK to renew CHB's banking licence, we would agree with the appellants that the learned judge did not take into account the full import of such an order granted at an ex parte stage of the proceedings.

The order was akin to grant of an ex parte mandatory injunction which the court had no jurisdiction to grant. Consequently, the second limb of the learned judge's ruling to the effect that the grant of leave do operate as stay of all the issues as set out in prayer 3(a) and (b) of the ex parte applicants' application must be set aside, which we hereby do.

48. In view of the foregoing, this appeal partially succeeds to the extent that the order of stay is hereby vacated. We order that each party bears its own costs of the appeal.

Dated and delivered at Nairobi this 20th day of December, 2018.

E.M. GITHINJI

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR