

**THE REPUBLIC OF UGANDA**

AT THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

HCT - 00 - CC - CS - 361 - 2010

1. Hon Justice Prof. Dr. George Kanyeihamba
2. 320 others.....Plaintiffs

Versus

1. Amos Nzeyi
2. Amama Mbabazi
3. Ruhakana Rugunda.....Defendants

**BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE**

**R u l i n g**

This ruling arises from an application by Counsel for the defendants Mr Muwema that proceedings in this suit be stayed because of a Constitution Petition on the same subject now filed before the Constitutional Court which has a direct bearing on this suit before the High Court.

Counsel for the defendants submitted that Constitutional Petition No 44 of 2012 **Humphrey Nzeyi V Bank of Uganda and the Attorney General** (hereinafter referred to as the “Constitutional Petition”) is now pending before the Constitutional Court and that it would be in the better interests of the management of this suit if the Constitutional Petition is first disposed of.

Court then directed that the parties avail the Court with a copy of the Constitutional Petition and address it on the merits of the application. A copy of the Constitutional Petition was then provided to Court and parties made submissions on the application.

Mr Muwema Counsel for the defendants submitted that the subject matter in this suit and the Constitutional Petition were essentially the same namely the M/s National Bank of

Commerce Ltd (hereinafter referred to as “NBC”) which had been taken over by the Central Bank/Bank of Uganda (hereinafter referred to as “BOU”). It is the case for the defendants that the assets of the NBC which the plaintiff shareholders in this case are interested in are the same assets that are the subject of the Constitutional Petition. He submitted that one of the prayers in the plaint is for an order to the effect that M/s Kigezi Bank of Commerce (hereinafter referred to as the “KBC”) repossesses all properties that were passed on to the NBC. Counsel for the defendants submitted that the said assets were now under the control of the BOU which has sold them to M/s Crane Bank. He submitted that the Constitutional Petition sought to challenge the powers of BOU to take over the assets of the NBC and sell them. He submitted that in this respect the Constitutional Petition had to be resolved first.

Counsel for the defendants further submitted that another prayer in the plaint was for an account of proceeds (i.e. profits and losses) of the NBC. He pointed out that accounts were now part of the purchase and sale agreement of NBC that BOU had concluded with M/s Crane Bank and there is no way that the defendants can access the accounts at this time. Counsel for the defendants submitted that is the reason why the Constitutional Petition which challenges the actions of BOU should be heard first.

Counsel for the defendants submitted that the application for stay is to avoid a possibility of rendering any orders that may be granted in this suit nugatory as such Orders have a direct relation with the Constitutional Petition.

Counsel for the defendants submitted that though the dispute in this suit was in part about the change of names of KBC to NBC one of the prayers in the plaint is for repossession of property that should be given back to KBC. He submitted that if this Court made an Order today that KBC repossess these assets, there will be no possibility of enforcing that order because the properties of the bank are currently the subject of a take-over, a winding up, a liquidation and sale, under the powers of the BOU. He further submitted the defendants cannot return property that is not in their possession. Counsel for the defendants submitted that court orders should not be in vein.

Counsel for the defendants further submitted that NBC is being wound up, liquidated and is being sold by BOU and so Orders made by this Court were bound to face difficulties as it will cease to exist as a company. In this regard he showed Court a Notice of Winding up by BOU. Counsel for the defendants submitted that the actions of BOU affected the remedies being sought by the plaintiff shareholders in this suit even though NBC has not been sued directly. He further pointed out that NBC does not have a licence as this has been revoked by BOU and so NBC also did not exist anymore as a bank.

Counsel for the defendants submitted that it was not the intention of the defendants to cause delay to the present suit but that the Constitutional Petition should take precedence first.

Mr Byamugisha also Counsel for the defendant further submitted the plaintiffs had filed an action in this suit that was for an oppressed minority hence a derivative action. However the bank in which the plaintiffs were shareholders had not been made a party to the suit as would be expected in a derivative action which was an error and the plaint required amendment. He further submitted that the bank had now been wound up by BOU and the bank had first to be resurrected by the Constitutional Petition before it could be made a party to the suit.

Mr Masembe as Amicus Curiae representing BOU agreed with the submissions of Counsel for the defendants that the Constitutional Petition be heard first.

Mr Opolot counsel for the plaintiffs submitted that the request for stay of these proceedings was misconceived.

Counsel for the plaintiff submitted that the parties in the Constitutional Petition **Humphrey Nzeyi V Attorney General** were different from the current parties in this suit. He submitted that the two actions were therefore independent of each other as they involved different parties.

Secondly counsel for the plaintiff further submitted that the subject matter for determination in the Constitutional Petition was different from that in the present suit. He pointed out that the present suit was about the conversion of KBC into NBC which was a procedural matter whereas the Constitutional Petition was about the powers of BOU with regard to the regulation of the banking sector. He noted that the Constitutional Petition sought to trim the powers of BOU which this suit did not.

Thirdly counsel for the plaintiffs submitted that the present suit was about the mismanagement of the bank which is basic company law and that had nothing to do with constitutional law which is what the Constitutional Petition was about.

He finally submitted that the application for stay was designed to delay the prosecution of the present suit which should not be allowed.

I have addressed myself to the submissions of both counsels and the Constitutional Petition a copy of which was availed to court for which I am grateful.

There is no general rule in the High Court on the stay of proceedings during a trial. An example of a direct rule for stay of proceedings would be during the consolidation of suits under Order 11 rule (1) of the Civil Procedure Rules (CPR). It would also appear to me that even the institution of an appeal in the Court of Appeal does not under Rule 6 (2) of The Judicature (Court of Appeal) Rules (SI 13-10) lead to an automatic stay of proceedings. A stay of proceedings lies in the discretion of the Court of Appeal in such a situation. I have found no rule for automatic stay of proceedings in the High Court because there is a Constitutional question being handled in the Constitutional Court that may affect the trial. At least there is no such rule under the Constitutional Court (Petitions and References) Rules 2005.

Case law on stay of proceedings points to varied circumstances under which a Court may grant a stay of proceedings. All in All it is my finding that a stay of proceedings is a case management technique in the discretion of the Court. In this regard I am fortified by the decision of the Supreme Court in the case of **National Housing & Construction Corporation v Kampala District Land Board and Anor** (Civil Application No. 6 of 2002). In that case the Supreme Court further found that

*“Stay of proceedings is usually a relief in the form of suspension of proceedings in an action, which may be temporary until something requisite or ordered, is done; or permanently, where to proceed would be improper.”*

So a stay of proceedings may be temporary or permanent. It is granted by Court where it is clear that to proceed would be improper. In this situation it can be said that the case for the defendants is for a for a temporary stay; as to proceed before Constitutional Petition No 44 of 2012 **Humphrey Nzeyi V Bank of Uganda and the Attorney General** is heard and disposed of in the Constitutional Court would be improper.

The grounds for the application for stay can be summarised on three fronts. First that the subject matter in this suit and the Constitutional Petition is the same namely the NBC and there is a likelihood that orders made in this Court would be nugatory since the Constitutional Court will also deal with the same issues. Secondly that the NBC is being wound up and that process has to be reversed first through the Constitutional Petition before this case on NBC can continue. Lastly this suit is a derivative action that requires the addition of the NBC which has been wound up so this can only happen after the Constitutional Petition.

On the first front it is the case for the plaintiff that the parties to the suit and the subject matter are actually different. By subject matter I view it as more than just the bank but the cause of action as well since that is what leads to the remedies/Orders available.

Paragraph 9 of the plaint on relief requires this Court to make declarations, remedies and orders; which are 9 in total [(a) to (i)].

The relief's (a) to (i) are not well group to show which are declarations, Orders or other remedies this has to be discerned from reading each one separately. As to subject matter it is clear that this suit relates mostly to declarations that the conversion of the NBC from KBC was unlawful fraudulent and a nullity. They relate to matters that occurred in the past. As a consequence the plaintiffs pray [in prayer (d) that the Registrar of companies rectifies the register to reflect the correct position of KBC. The plaintiff's also requests that the defendants render a true account of the profits since 12<sup>th</sup> April 1997 and that the Plaintiffs be awarded damages [prayers (f), (h) and (i)]. The plaintiffs also pray [prayer h] that KBC repossess all its property it had been unlawfully disposed of as a result of the creation of NBC. The subject matter here to my mind relate to corporate governance matters.

On the other hand the Constitutional Petition seeks 12 declarations and Orders all directed at the BOU and their implementation of the Financial Institutions Act 2004 (hereinafter referred to as the "FIA"). Perhaps the most significant prayer is No 9 which reads

***"... A permanent injunction against the respondents (i.e. BOU) or their agents or employees restraining them from implementing the winding up orders of the affairs of the National Bank of Commerce issued on the 1<sup>st</sup> Respondent's public notice and correspondence suspending the Managing Director of the National Bank of commerce dated 27<sup>th</sup> September, 2012 and any further sale of National Bank of Commerce and allowing National Bank of Commerce and its shareholders a right to be heard...." (Additions mine).***

The subject matter here to my mind relates to regulatory matters of banks.

It appears to me therefore that the subject matter of this suit and that of the Constitutional Petition are different and to that extent I do not see or envisage any multiplicity of

proceedings or Orders here. Furthermore I agree with counsel for the plaintiffs that parties in the two actions are different so further reducing the possibility of multiplicity.

The second front is that NBC is being wound up by BOU and this has to be resolved first before this suit can continue. On this point the public notice from BOU dated 27<sup>th</sup> September 2012 is instructive and reads

**“... Winding up**

***Following the takeover of National Bank of Commerce***

***(U) Ltd (NBC) by the Bank of Uganda, Bank of Uganda has decided to revoke the license of NBC as a financial institution and order the winding up of its affairs under sections 17(f), 89(2)(f) & (7)(c) and 99(1) of the Financial Institutions Act, 2004.***

***In exercise of its powers as liquidator, Bank of Uganda has concluded a purchase and Assumption agreement with Crane Bank Ltd. Crane Bank Ltd has taken over the deposits of NBC in full. The Depositors' will be able to access their deposits and operate their accounts from any branch of Crane Bank Ltd and the former NBC branches at Plot 131 Kabale Road, Kabale and Cargen House, Plot 13a Parliament Avenue, Kampala with effect from Monday 1st October 2012. All former NBC borrowers must continue to service their loan obligations with Crane Bank Ltd.***

***Bank of Uganda reassures the public that it will continue to protect depositors' interests and maintain the stability of the financial sector.***

***Signed Louis Kasekende (PHD)***

***Deputy Governor...”***

A review of the law cited in this notice suggests that the BOU has taken the position that NBC is conducting business in a manner that is detrimental to the interests of its depositors and as a result has been taken over by BOU. BOU has also revoked The NBC banking licence and has commenced the process of liquidation whereby the deposits of NBC have been transferred to M/s Crane Bank.

The FIA does not have very elaborate provisions at what point the bank as a company is considered to have been dissolved following liquidation however section 107 of the FIA does provide for the release of a liquidator after the BOU is satisfied that the liquidation process is complete. For purposes of this case it cannot be said that NBC though under liquidation has been dissolved. Indeed under Section 100 (1) (a) of the FIA the liquidator may even defend an action brought under the name of the financial institution. It would appear to me that even

at this stage NBC can be a party to a suit only that BOU as liquidator will have the legal power to defend that suit.

On the third front, this is a derivative action in which the bank should be made a party. The author **L.C.B. Gower** in his book **Gowers's Principles of Modern Company Law** 4<sup>th</sup> Ed Stevens at page 651 writes

***“...the company must be made a defendant in the action...the company is the true plaintiff and if money judgement is recovered against the true defendants-the wrongdoing directors or other controllers-this will be in favour of the of the company and not in favour of the individual shareholder who is nominal plaintiff. The company cannot in fact be plaintiff because neither of its- organs the board of directors and the general meeting-will authorise suit by it. As the next best thing the court insists upon its being made the nominal defendant...”***

Looking at the remedies prayed for in the plaint I would agree that this suit is in the nature of a derivative suit and so the bank would have to be made a party to it. In the present situation then the liquidator would be obliged to defend the suit on behalf of the bank under Section 100 of the FIA.

All in all it appears to me that the existence of the Constitutional Petition involving NBC does not *ipso facto* mean that this suit should be stayed. Indeed there are many situations like this case where a law or statute is being challenged in the Constitutional Court but that did not lead to other related court cases being stayed pending the out come of the Constitutional Petition (examples application of the Leadership Code Act vide **Fox Odoi & anor V AG** CP 8 of 2003 the death penalty vide **Susan Kigula & 4 ors V AG** CP 6 of 2003 and Divorce under the Divorce Act (cap249) vide **Uganda Association of Women Lawyers & ors V AG** CP 2 of 2003).

However since I have found that an application for stay is a case management tool then that is the over ridding factor. I see that the defendants do make a point when I look at prayers 9 (d) that the Registrar of Companies rectifies the register of the company to revert to the KBC and 9 (h) that court directs that KBC repossess all its property this can be problematic when a company is under liquidation. This is because these prayers relate to the future of the bank which currently is not clear. A stay of proceedings in respect of such remedies is in order. However with regard to matters and declaration on matters that occurred in the past like whether the change of KBC to NBC was proper or that financial accounts of the past be laid before court that is still possible. I am sure minutes, resolutions and audited accounts can be discovered for this purpose. As to an award in damages and compensation for losses (under

Para 9 [f] and [i]) this can only be possible if the bank is made a nominal defendant to the suit and that requires amendment of the plaint.

It is my finding that the bulk of the suit may proceed and I accordingly order that it does but that matters that may affect the liquidation process like rectification of the company register and repossession of assets are hereby stayed. The Plaint also requires amendment to add the bank as a nominal defendant.

Costs will remain in the cause.

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Geoffrey Kiryabwire

JUDGE

Date: **02/05/2013**



02/05/13

9:40 a.m.

**Ruling read and signed in open court in the presence of:**

- Byamugisha for Defendant
- Orano for Plaintiff
- Sembatya for BOU (AC)

**In Court**

- None of the parties
- Rose Emeru – Court Clerk

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**Geoffrey Kiryabwire**  
**JUDGE**

**Date: 02/05/2013**