



**Skycrapers Africaway Company Limited & another v First Community Bank Limited & another
(Civil Case 107 of 2016) [2025] KEHC 7264 (KLR) (Commercial and Tax) (26 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7264 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 107 OF 2016
F GIKONYO, J
MAY 26, 2025**

BETWEEN

SKYCRAPERS AFRICAWAY COMPANY LIMITED 1ST APPLICANT

ENOCK OSORO KINARA 2ND APPLICANT

AND

FIRST COMMUNITY BANK LIMITED 1ST RESPONDENT

AFRICA MERCHANT ASSURANCE COMPANY LIMITED 2ND RESPONDENT

RULING

1. The late Justice Majanja delivered a judgment on 21st January 2020 through which he dismissed the applicant's suit for a permanent injunction against the 1st respondent from effecting a statutory sale over Land Reference No. Ngong/Ngong/10872 (the suit property). Dissatisfied, the applicants filed Nairobi Court of Appeal Civil Appeal No. 134 of 2020 Skycrapers Africaway Company Limited and Anor v First Community Bank Limited and Anor.
2. The appeal was fixed for case management on 21st October 2024 for the issue of a hearing date. However, the date was gazetted as a public holiday for the observance of Mashujaa Day. The 1st respondent then issued a notification of sale by public auction, which was slated for 7th November 2024.

Application dated 28th October 2024.

3. Consequently, the applicants filed the notice of motion dated 28th October 2024, under consideration. The applicants seek an injunction restraining the 1st respondent or its agents from interfering, transferring, selling or commencing and/ or proceeding with the realisation of the process of sale



either by private treaty or public auction in respect of the suit property pending the hearing and determination of their appeal.

Grounds

4. The application is based on the grounds set out in its body and the annexed affidavit sworn by the 1st applicant's director, Enock Osoro Kinara, on 28th October 2024. The applicant also filed primary and supplementary written submissions dated 18th December 2024 and 26th February 2025.
5. The applicants submitted that this court's jurisdiction to issue a temporary injunction pending appeal is sui generis recognized under Order 42 Rule 6 of the Civil Procedure Rules and Rule 5 (2) (b) of the Court of Appeal Rules 2022 as its sole purpose is to preserve the suit property, which is the substratum of the appeal, pending determination of the appeal in the event the appeal succeeds.
6. The applicants relied on the case of *Erinford Properties Limited v Cheshire County Council* [1974] ALL ER 448 for the grant of a temporary injunction sought pending hearing and determination of their appeal. They also relied on *James Juma Muchemi & Partners Ltd v Barclays Bank of Kenya Ltd* [2011] KEHC 4277 (KLR), *Madhu Paper International Ltd v Kerr* [1985] KLR 840, *Butt v Rent Restriction Tribunal* [1982] KLR 417, *Githunguri v Jimba Credit Corporation Limited* [No 2] [1988] eKLR, *Julius Musili Kyunga v Kenya Commercial Bank Limited & Another* [2012] KEHC 342 [KLR]
7. The applicants relied on *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR to assert that their appeal raises serious questions to be tried. The applicants' gravamen in the underlying dispute is that the 1st respondent cannot insist on their performance because the Musharaka contract and loan agreement between them was frustrated due to the collapse of the apartments/ project. They argue that the repayment of the facility was contingent upon them selling the units to buy back and reduce the 1st respondent's share in the property. They relied on *Davis Contractors Ltd v Fareham U.D.C* [1956] A.C. on the change of obligation test and *Tamplin Steamship Company Ltd v Anglo-American Petroleum Products Company Ltd* [1916] A.C. and *Halsbury's Laws of England* (3rd Edition) Volume 8, pages 1856 (ii) on the doctrine of frustration.
8. The applicants also relied on *Permanent Secretary Ministry of Roads & Another v Fleur Investments Limited* [2014] eKLR and *Reliance Bank Ltd v Nortake Investments Ltd* [2002] 1 EA 227 to assert that if an interim injunction is not issued, the suit property shall be disposed of, defeating the whole object of the appeal and rendering it nugatory. They further relied on *Re Estate of Harish Chandra Hindocha (Deceased)* [2021] eKLR and *Apungu v Justinice Limited (Civil Application E218 of 2023)* [2024] KECA 99 (KLR) (9 February 2024) (Ruling) to the effect that it is not enough to state that the loss can be compensated by damages.

Response

9. In opposition to the application, the 1st respondent filed a replying affidavit sworn on 31st October 2024 by Claris Ogombo and written submissions dated 26th January 2025.
10. The 1st respondent contended that the application lacks merit, and that it is an abuse of the court process. It also contended that this court cannot, at this stage, exercise jurisdiction to grant a temporary injunction under Order 40 since it has already determined the parties' rights through the judgment. It argued that in the circumstances, only the Court of Appeal can grant an injunction under Rule 5(2) (b) of the Court of Appeal Rules.



11. The 1st respondent further argued that this court's jurisdiction has since been ousted since the applicants' appeal has already been admitted in the Court of Appeal after the record of appeal was filed and directions on how the appeal will be heard issued.
12. The 1st respondent urged that the applicants are and should not be allowed to engage in forum shopping. It highlighted that the applicants filed a similar application before the Court of Appeal for consideration. It faulted the applicants for failing to attach any application filed before the Court of Appeal under urgency for the said court's consideration. It claimed that the only application they filed was an appeal challenging the denial of an injunction by this court, which appeal has already been overtaken by events after delivery of the Judgment. It asserted that as a matter of practice, a similar application can only be entertained by this court before the Court of Appeal seizes full control of the appeal or when the record of appeal is yet to be filed.
13. The 1st respondent relied on Justice Eboso's decision in *Jane Wambui & Robert Kagunya Kamau v Bernard Herman Karanja and Anor* [2022] eKLR to argue that the Erinford principle is not applicable where the trial court has rendered a final judgment determining the rights of the parties as in the present suit.
14. The 1st respondent submitted that the applicants obtained financing of KES. 43,088,591.00, from which a sum of KES. 39,600,000.00 was to finance the construction of apartments on the suit property. It submitted that the facility was secured by a charge over the property the purpose of which was to secure repayment of the principle amount. The profit and/ or loss to be realized would then be shared in the agreed ratio. This did not affect the repayment of the principal amount which was secured. The applicants breached the contract by failing to renew the All Risk Policy upon its expiry on 19th August 2015. The applicants have not made any payments towards settlement of the outstanding loan.

Analysis and Determination

15. The issue for determination is whether an injunction to preserve the suit property is merited.

Jurisdiction

16. The 1st respondent argued that the court cannot, at this juncture, exercise jurisdiction to grant a temporary injunction under Order 40 since it has already determined the parties' rights through the judgment.
17. If a court does not have jurisdiction, it must put down its tools. Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) (17 November 1989) (Judgment)
18. The applicants relied on Order 42 Rule 6 of the Civil Procedure Rules and Rule 5 (2) (b) of the Court of Appeal Rules to support the proposition that this court has the jurisdiction to order an injunction pending appeal.
19. However, the court's power to grant an injunction pending appeal is distinctive or sui generis. It falls under Section 3A of the *Civil Procedure Act*.
20. In *James Juma Muchemi* case [supra], Mabeya J observed that:-

“I have seen the Notice of Appeal filed in this court on 8th September, 2011. While I cannot delve into any of the issues which the Plaintiff seeks to agitate in the Court of Appeal as set out in the draft Memorandum of Appeal exhibited in the application before the Court of



Appeal, I am of the view that the Provisions of Order 42 Rule 6 (2) may not be applicable in its strict sense to the application before me. That Rule is for stay of execution pending appeal. If I understood Mr. King'ara well, the application has been brought under the principles of the Erinford Properties case. In that case, the issue that was considered and decided upon was whether a judge who has dismissed an injunction application can at the same time grant one pending an appeal to the Court of Appeal. Clearly, it was not an issue of a stay of any execution pending appeal. Although granting the prayer sought may amount to the same thing as stay of execution as Megarry J found, the considerations applicable in the Erinford Principle may not be the same to those under Order 42 Rule 6(2). There is no provision to grant an injunction pending appeal to the Court of Appeal under Order 42 Rule 6. My understanding is that Order 42 rule 6 (2) in its strict sense applies in a situation where a stay of execution of an order or decree is being sought whilst under the Erinford Principle, it applies where an injunction is being sought pending appeal.

An examination of the application before me will show that the prayers sought are not for stay of execution pending appeal, but grant of the declined injunction pending the hearing and determination of an application under Rule 5 (2) (b) of the Court of Appeal Rules. In my view therefore, when a court in Kenya is applying the Erinford Properties Principles, it does so under its inherent jurisdiction.”

21. The applicants conceded that the scenario that the court was faced with in the Erinford case was different from the present circumstances, which are post-judgment. Still, they asserted that a final judgment does not prevent the trial court from issuing an injunction under the Erinford principle. They referred to *Orion Property Trust Ltd v Ducane Court Ltd* [1962] 3 All ER 466 cited in *Madhupaper International Ltd v Kerr* [1985] eKLR where Pennycuick, J applied the Erinford principle “even though the action in the High Court had wholly failed and the appeal was to the Court of Appeal from it.”
22. Another prong regarding jurisdiction by the 1st respondent was that there was a similar application pending before the Court of Appeal.
23. The applicants asserted that there is no parallel application for similar relief pending before the Court of Appeal under Rule 5 (2) (b) of the COA Rules. They added that the 1st respondent’s proposition that the applicants first had to move the Court of Appeal before invoking this court’s inherent jurisdiction was not supported by any precedent. They pointed to the Court of Appeal’s observation in the Madhupaper case that:-

“It is preferable for the High Court to deal with such an application, in any event, not so much as to protect this court from a sudden inconvenient dislocation of its lists but more because this court would have the distinct advantage of seeing what the judge made of it. The learned judges of the High Court should take note of this concurrent jurisdiction which the two courts have and exercise theirs.”

24. In light thereof, the 1st respondent’s proposition that only the Court of Appeal can grant an injunction under Rule 5(2) (b) of the Court of Appeal Rules, may not pass the muster.

Forum shopping

25. The 1st respondent argued that the applicants are forum shopping because they had filed a similar application before the Court of Appeal. In the same breath, the 1st respondent submitted that the only



application the applicants filed was an appeal challenging the denial of an injunction by this court, which appeal has already been overtaken by events after delivery of the Judgment.

26. Forum shopping is a serious matter. The argument may be appropriate and potent where a party simultaneously invokes both jurisdictions-the High Court and the Court of Appeal for relief pending appeal. But, in this case, the applicants were adamant that they had not filed an application seeking similar reliefs before the Court of Appeal. There is no evidence any such application exists. The 1st respondent made the allegation, but, merely faulted the applicants for failing to attach the application filed before the Court of Appeal under urgency. He who alleges proves. The 1st respondent failed on this.
27. As such, the 1st respondent's allegation of forum shopping is not supported by evidence.
28. From the foregoing, I find that the court has jurisdiction to entertain the application.

Injunction pending appeal

29. In my view, in determining whether to grant an injunction pending appeal, the overarching principle is to exercise discretion so as to prevent an appeal from being rendered nugatory. *Butt v Rent Restriction Tribunal* [Supra]
30. The Court of Appeal in the *Madhupaper* case stated that the test is "whether or not the company has made out its claim for an injunction to preserve its property until the appeal is heard? Or is it an application which ought to fail because the appeal is frivolous or it would be worse for the company if the injunction went forth or for any other reason?"
31. The prevailing circumstances are that the applicants have filed Nairobi Court of Appeal Civil Appeal No. 134 of 2020 *Skycrapers Africaway Company Limited and Anor v First Community Bank Limited and Anor*. However, the parties are yet to take directions for the hearing. The applicants attributed the delay to the case backlog in the Court of Appeal and the postponement of the date for taking directions on the hearing due to the *Mashujaa* Holiday, which was observed on 21st October 2024.
32. The applicants submitted that they have an arguable appeal with serious questions to be tried.
33. On the other hand, the 1st respondent urged that, although the applicants have stated that they have strong grounds of appeal with high chances of success, it's only the Court of Appeal that can return such findings as this court has made its findings when it dismissed the applicants' claim in the judgment delivered on 21st January 2020.
34. An arguable appeal is one with serious questions to be tried or one that is not frivolous. I do not agree that only the Court of Appeal can determine if an appeal is arguable. *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR
35. However, I am cognizant that in determining whether the appeal has serious questions to be tried, the trial court ought not to go to great lengths. *Julius Musili Kyunga v Kenya Commercial Bank Limited & Another* [supra]
36. I have considered the grounds of appeal and I am of the considered view that the appeal raises serious questions to be tried.

Nugatory aspect

37. The next question is whether the appeal shall be rendered nugatory if the injunction is not granted.



38. The Court of Appeal in *Gulf Timber & Hardware Supplies Limited v Ngaruiya & 5 others* (Civil Appeal E203 of 2021) [2022] KECA 87 (KLR) (4 February 2022) (Ruling) (with dissent - S ole Kantai, JA) observed that: -

“As regards an appeal being rendered nugatory, this Court has held in the case of *Reliance Bank Limited v Norlake Investment Limited* [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case, and in so doing the court is bound to consider the conflicting claims of both sides. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or restrained, if allowed to happen is reversible, or if not reversible, whether damages will reasonably compensate the party aggrieved.”

39. The applicants argued that their appeal would be rendered nugatory if the injunction is not granted because the effect of permitting the statutory sale would result in irreversible prejudice to the applicants, as the suit property, which is central to the appeal, would no longer be in existence. It also argued that it is not enough to say that the loss can be compensated by damages.

40. In my considered estimation, if the injunction is not granted and the applicants succeed in their appeal, they stand to suffer greater loss than the 1st respondent, which retains and are at liberty to exercise the statutory power of sale and sell the property in the event that the appeal does not succeed.

41. I may however, state in passing that, some mortgagors, after obtaining an injunction against sale of the mortgaged property, think that they are relieved of their obligation to pay the loan under the mortgage and stop paying the loan as had been agreed, thereby causing great injury and prejudice to the mortgagee. Where this kind of behaviour is established a court of law should never grant such party any equitable remedy for the party's hands are not clean. It may also be a ground for discharging any relief that may have been granted by the court. I hope good faith will run through out a party's quest for relief.

Disposal

42. In the upshot, the court grants an injunction pending appeal in terms of prayer 3. The applicants' notice of motion dated 28th October 2024 is allowed. In the circumstances of this case, the applicants will bear the costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 26TH DAY OF MAY, 2025

F. GIKONYO M

JUDGE

In the presence of: -

Ms. Muraguri for Applicant

Onyango for Mulanya for Respondent

CA Kinyua

