



**Access Bank Kenya PLC v Mengich & another (Civil Appeal  
E003 of 2024) [2024] KEHC 5682 (KLR) (22 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5682 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CIVIL APPEAL E003 OF 2024  
RB NGETICH, J  
MAY 22, 2024**

**BETWEEN**

**ACCESS BANK KENYA PLC ..... APPELLANT**

**AND**

**MICHAEL MENGICH ..... 1<sup>ST</sup> RESPONDENT**

**WILLY KIPRPOTICH CHEROGONY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Appellant/Applicant has moved the court vide a notice of motion application dated 23<sup>rd</sup> January, 2024 brought under the provisions of Sections IA, 1 B, 3A, 75(1) (h) of the *Civil Procedure Act*, Order 43(1) (u), Order 42 rule 6 (1) and Order 51 rule 1 of the *Civil Procedure Rules* 2010 seeking for the following orders: -
  - i. Spent.
  - ii. That this Honourable Court does order stay of proceedings in Kabarnet Senior Principal Magistrate's Civil Case Number E054 OF 2023; Michael Mengich and Willy Kiprotich Cherogony v Access Bank Kenya PLC and Kolato Auctioneers, pending hearing and determination of the Appeal.
  - iii. That the costs of this application be provided for.
2. The Application is founded on the following grounds: -
  - a. In May 2015, the 1<sup>st</sup> Respondent borrowed a facility in the sum of Kshs, 1000,000/ from the Appellant/Applicant herein which was secured by way of legal Charge in respect of property Title No. Baringo/Kapropita/1692 registered in the name of the 2<sup>nd</sup> Respondent.



- b. That as early as June 2020, the 1<sup>st</sup> Respondent was in arrears in loan repayment. Subsequently, both Respondents were served with the relevant statutory notices. However, the 1<sup>st</sup> Respondent persisted with his default.
  - c. Consequently, the Appellant was entitled to exercise its statutory power of sale which was scheduled on 2<sup>nd</sup> November 2023. However, the sale was interrupted by the Court case filed in Kabarnet Chief Magistrates` Civil Case No. E054 of 2023; Michael Mengich and Willy Kiprotich Cherogony v Access Bank Kenya PLC and Kolato Auctioneers.
  - d. That Pursuant to the Court ruling delivered on 20<sup>th</sup> December 2023, the Respondents were granted interlocutory injunction restraining the Appellant from selling the suit property pending hearing and determination of the suit.
  - e. That the matter is scheduled for mention at the trial Court on 7<sup>th</sup> February 2024. However, the Respondents have persisted in their default in loan repayment.
  - f. That the Appellant has appealed against the said ruling, which appeal has reasonable chances of success and the Appellant is apprehensive that if the proceedings in the trial court are not stayed it will render the said appeal nugatory.
3. The application is supported by an affidavit sworn on the 23<sup>rd</sup> January, 2024 by one Valence Mmuka who avers that she is the Appellant's Acting head of legal department and familiar with the matters in dispute herein.
  4. She restated grounds of appeal and added that the 2<sup>nd</sup> Respondent who is the registered proprietor of the property, consented in writing and executed guarantee and in July 2015, the legal charge was duly registered and among the terms of the Charge were that the facility would attract interest at the rate of 13.21% per annum over the Kenya Bankers Reference Rate which was then at 8.54% and as early as June 2020, the First Respondent was in arrears in loan repayment.
  5. That subsequently, both Respondents were served with three (3) months' Statutory Notices dated 10<sup>th</sup> June, 2020 pursuant to section 90 of the Land Act 2012 and the 1<sup>st</sup> Respondent neither repaid the loan within said notice period nor applied for a restructuring.
  6. That consequently, the Appellant served the Respondents with a Forty (40) days Statutory Notice in October 2020 and the Respondents failed to honour the statutory notices which prompted the Appellant to instruct the Kolata Auctioneers to recover the outstanding loan which stood at Kshs. 1, 390,674.00 as at 8<sup>th</sup> November 2023.
  7. She states that the auctioneers issued the Respondents with forty-Five (45) days redemption notice in August 2023 and thereafter, the auctioneers issued a notification for sale and advertised, the property for sale in the Daily Nation Newspaper on 16<sup>th</sup> October 2023.

### **Respondent's Response**

8. In response, the Respondents filed a replying affidavit sworn on the 22<sup>nd</sup> of February, 2024 sworn by the 2<sup>nd</sup> Respondent. He avers that the application herein is frivolous, vexatious, devoid of merit and an attempt by the appellant to seize the matter and transfer it from the lower court to the high court through the backdoor and the reasons advanced to justify the grant of the orders for stay are a disguised defence.
9. That instead of lodging the application for stay and the pending appeal, the Appellant ought to have approached the trial court to have the matter set aside and or vary its orders.



10. The Respondents aver that the appellant has not satisfied the threshold to warrant the court to grant stay of execution of the lower court's decisions and the trial of the main suit which is pending before the lower court will be rendered nugatory if the orders for stay are granted on the ground that the appellant will proceed to execute and dispose off the suit property without affording the Respondent an opportunity to present their case.
11. That the orders granted by the lower court are temporary in nature and does not in any way occasion the appellant any foreseeable prejudice and grant of stay order will be tantamount to a summary judgment at the behest of the respondents thereby condemning them unheard and it will be prejudicial to the respondent whereas the appellant has not filed defence regarding the pending suit in the lower court.
12. That the appellants have approached equity with unclean hands and should not be afforded an opportunity to be heard; that it is premature to disrupt the decisions of the lower court without justifiable cause at this stage noting that the challenged order has not been attached therein.

### **Appellant's Submissions**

13. The Appellant filed submissions dated 14<sup>th</sup> March, 2024 and argues that the issue for determination is whether the Appellant has shown sufficient cause for grant of stay of proceedings in Kabarnet Senior Principal Magistrate case number E054 of 2023.
14. The appellant submits that Order 42 Rule 6(1) of the *Civil Procedure Rules* 2010 provides that no appeal or second appeal shall operate as stay of execution or proceedings and the applicant will be required to satisfy, as set out in Rule 6(2) of Order 42
  - a. that substantial loss may result to the applicant unless the order is made
  - b. that the application has been made without unreasonable delay, and
  - c. that such security as the Court may order, has been provided.
15. The Appellant/Applicant relied on the case of *Global Tours & Travels Limited* WC No. 43 of 2000 which was cited with approval in *Watu Credit v Geoffrey Mokaya Aboki & Karen Chepkurui* [2022] eKLR and submit that the Appellant has shown sufficient cause, has moved this court within a reasonable time without delay and has arguable appeal.
16. The appellant submits that the 1<sup>st</sup> Respondent received a facility from the Appellant and has defaulted in the repayment; and has not endeavored to settle the loan despite dragging the Appellant in Court and the Appellant continues to suffer loss and damage as a result of the respondent's failure to meet their obligations under the charge actualizes the property as a commodity for sale; that the Respondents did not meet the requirements to warrant the restraining of the Appellant from exercising the statutory power of sale and relied on the case of *Niazsons (K) Ltd. v China Road & Bridge Corporation (Kenya)* [2001] eKLR .
17. On whether substantial loss may result to the applicant unless the order is made, the appellant relied on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR and restated that the Appellant has demonstrated that a loan facility in the sum of Kshs. 1,000,000/- was advanced to the 1<sup>st</sup> Respondent, which loan was secured by property Title No. Baringo/Kapropita A/1692 and the 1<sup>st</sup> Respondent has defaulted in the repayment of the loan and has been in arrears and all the statutory notices were issued. Further that the Respondent did not exercise the right of redemption within the prescribed time and the exercise of statutory power of sale was set in motion.



18. That the trial court restrained the Appellant from exercising statutory power of sale to recover the arrears of Kshs. 1.390,674/- as at 8<sup>th</sup> November 2023 and restated that the respondent has continued to default and the Appellant will continue to suffer loss and damage as a result of the continued default without the ability to realize the collateral thereof.
19. On whether the Appellant has an arguable appeal, the applicant/appellant submit that they challenged the trial court's decision to issue orders of injunction for reasons that the 1<sup>st</sup> Respondent had not demonstrated the grounds for grant of interlocutory injunction.
20. The Appellant submit that service of statutory notices on the 1<sup>st</sup> respondent have not been challenged and 1<sup>st</sup> Respondent's allegation that he was making monthly repayments was not supported by any evidence and upon issuance of the statutory notices, the 1<sup>st</sup> Respondent did not make any attempt to exercise their redemption right by settling the outstanding debt. That the 1<sup>st</sup> Respondent did not demonstrate good faith and was not entitled to any orders of injunction and relied on the case of *Tengeri N. Osoro v Standard Chartered Bank & Another* HCC NO.120 of 2022(Unreported) where justice Sifuna state that a property charged as security for a loan becomes a commodity for sale.
21. That further, the Respondents did not demonstrate how the Appellant's actions infringed on any of their rights and the Respondents did not satisfy any ground for issuance of the orders of injunction. That the weight of judicial authority leans against a party who charges his property and then turns around to claim that sale of the same property would cause him irreparable harm. That further, there is no dearth in case law to the effect that damages are an inadequate remedy for a chargor aggrieved by the exercise of the power of sale. They rely on the case of *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited* [2001]eKLR and *Joyce Wairimu Karanja v James Mburu Nqure & 3 others* [2018] eKLR.
22. The appellant further argue that the Respondents did not satisfy any of the grounds well set out in the *Giella Case* and the trial court misdirected itself in issuing the orders of injunction against the Appellant and the Appellant's appeal is arguable and warrant issuance of the orders sought in this application.; and the Appellant's appeal will be rendered nugatory if orders for stay are not granted as the Respondents continue to default on the loan and it may be unable to recover the security in view of the trial court's orders and urged this court to allow the Application dated 23<sup>rd</sup> January 2024 is therefore merited and ought to be allowed.

### **Analysis And Determination**

23. I have considered arguments herein and wish to consider whether the Applicant has met the conditions for grant of orders sought.
24. The Appellant/Applicant has cited the conditions set out under order 42 Rule 6 of the *Civil Procedure Code*. Although the Sub-rule 1 mentions both the stay of execution and stay proceedings, the conditions given under Sub-rule 2 apply solely to stay of execution pending appeal and not stay of proceedings.
25. In *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR; *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000); *David*



Morton Silverstein v Atsango Chesoni [2002] eKLR: They laid down the following six principles set out hereunder: -

- a. First, there must be an appeal pending before the higher Court;
- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
- f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

26. All these factors must be considered in a given case in the spirit concisely expressed in Halsbury's Laws of England, 4th Edition, Vol. 37 at p. 330:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.”

27. In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. In the words of Ringera J. In *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000):

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity



and optimum utilization of judicial time and whether the application has been brought expeditiously.”

28. What emerges from the discussion above is that the grant of a stay of proceedings pending the hearing of an interlocutory appeal in civil matters is a rare and exceptional remedy. As a general matter, an appellate court will exercise its discretion to grant a stay of proceedings pending an appeal over an interlocutory matter before a magistrate’s Court or Tribunal only in exceptional circumstances. While it is difficult to determine with mathematical precision when the Court will use this power, it is only to be sparingly used where, in the words of *South African authors, Gardiner and Lansdown (6th Ed. Vol. 1 p. 750)*, “grave injustice might otherwise result or where justice might not by other means be attained.” As the authors correctly write, the Court will generally “hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the Court below.”
29. Hence, the propriety of granting a stay of proceedings pending an appeal over interlocutory matters is decided on the facts of each case and with due regard to the salutary general rule that appeals are not entertained piecemeal.” (*Walhaus & Others v Additional Magistrate, Johannesburg & Another*, 1959 (3) SA 113(A) at 120D; *S. v Western Areas Ltd & Others* 2005 (5) SA 214 (SCA) at 224D.
30. In the present case, it is not possible to say that the preferred appeal is not arguable. As numerous decisions have held, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. The Appeal in the instant case relates to the question of whether the Trial Court erred in law in issuing the orders of injunction to restrain the Appellant from recovering the security. This is in my view an issue that this Court will need to consider and determine at the hearing of the appeal by weighing the reasoning given by the Trial Court vis a vis the Applicant’s contestation and arrive at its own decision. In my view, the Appeal therefore passes the arguability test.
31. However, I am not persuaded that the appeal will be rendered nugatory by the fact that the trial may proceed and a judgment on merits given. A judgment given is capable of being stayed. The Question as to whether a party who had preferred an interlocutory appeal is entitled to a stay of proceedings cannot, therefore, merely be based on the fact that the trial court might consider what the appellant considers to be erroneous conclusions in its judgment. If the rule were otherwise, it would seriously impede proceedings in the trial Courts. This is because a party who is keen on obstructing a case from proceeding would simply prefer multiple appeals against interlocutory rulings by the trial court and then seek stay of proceedings in the trial court.
32. The rule is more exacting for a party requesting for a stay of proceedings. In particular, an Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal. The Applicant has not met this high threshold in this case.
33. I take note of the fact that the 1<sup>st</sup> respondent was advanced a loan guaranteed by title registered in the name of the 2<sup>nd</sup> respondent is not challenged neither is the appellant’s allegation that the 1<sup>st</sup> respondent is in default and is not paying the loan is not challenged. In my view, if the court was minded to allow injunction, it would have been fair to grant injunction with conditions so as to protect the appellant from suffering prejudice. I am of the view that even as the case proceed before court, the 1<sup>st</sup> respondent should have been directed to continue making payments.
34. From the foregoing, I uphold the stay of sale issued by the trial court against the Respondents on condition that the Respondents make half of the arrears that were due at the time the appellant/Applicant moved to realize security. From the foregoing, Application dated 23<sup>rd</sup> January, 2024 partly



succeed to the extent that the stay of execution remain on condition that the 1<sup>st</sup> respondent pay the appellants half of kshs 1,390,674 being the amount indicated as outstanding at the time the charged property was scheduled for auction. I decline to stay lower court proceedings.

35. **Final Orders: -**

1. Application dated 23<sup>rd</sup> January 2024 partly succeed
2. I decline to stay proceedings in the lower court
3. Injunction order issued by the trial court to remain in force pending hearing of this appeal on condition that half of kshs 1,390,674 is paid to the applicant within 45 days from today's date.
4. Failure to comply with order 3 above, injunction order to stand discharged.
5. Costs to abide by the outcome of the appeal.

**JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET**

**THIS 22<sup>ND</sup> DAY OF MAY 2024.**

.....

**RACHEL NGETICH**

**JUDGE**

In the presence of:

Karanja/Sitienei – Court Assistants.

Ms.Sila for the Applicant/Appellant for state

Mr.Kiptoo for the Respondents

