

**IN THE COURT OF
APPEAL AT
NAIROBI**

(CORAM: MUSINGA, (P), MUMBI NGUGI & ODUNGA, JJ.A.)

**CIVIL APPEAL (APPLICATION) NO. E220 OF
2025**

BETWEEN

**WADIA CONSTRUCTION
COMPANY LIMITED.....APPLICANT/APPELLANT**

AND

**SYNERGY INDUSTRIAL CREDIT LIMITED.....1ST RESPONDENT
PHILIPS INTERNATIONAL AUCTIONEERS 2ND
RESPONDENT**

(Being an application for injunction to restrain the respondents from selling, moving, parting with possession or transferring ownership of 49 motor vehicles and stay of proceedings in the High Court matter pending hearing and determination of the appeal against the ruling of the High Court of Kenya at Nairobi (F. Mugambi, J.) dated 20th December 2024

in

HCCOMM No. E604 of 2024)

RULING OF THE COURT

1. The applicant's notice of motion dated 19th June 2025 seeks an injunction to restrain the respondents from selling, moving, parting with possession or transferring ownership of 49 motor vehicles, whose registration numbers are stated in the application (hereinafter referred to as the vehicles), pending hearing and determination of the applicant's appeal from the ruling of the High

Court (**F. Mugambi, J.**) dated 20th December 2024 in **HCCOMM**
No. E604 of 2024.

2. The applicant also seeks stay of proceedings in the aforesaid High Court matter pending hearing and determination of the appeal.
3. The background to this application is that vide a credit facility agreement dated 29th August 2018 between the applicant and the 1st respondent, the 1st respondent financed the purchase of the motor vehicles in the sum of **Kshs. 50,000,000**, with the facility costs being **Kshs. 25,600,000**, to be repaid over a period of 36 months. The agreement also stipulated, *inter alia*, penalties for any missed or delayed instalment, among other penalties.
4. Due to default on the part of the applicant, the 1st respondent instructed the 2nd respondent to proclaim the motor vehicles, despite the applicant having paid a sum of **Kshs. 76,218,377**.
5. As a result, the applicant filed the aforesaid High Court suit against the respondents. The applicant sought to restrain the respondents from seizing, selling, moving, parting with possession or transferring ownership of the motor vehicles. The applicant argued that the credit facility agreement offended the *in duplum* rule.
6. The 1st respondent opposed the application. It contended that its relationship with the applicant was that of a hirer and finance company in a hire purchase relationship and not that of a lender and borrower and, therefore, the *in duplum* rule was not applicable.
7. The High Court established that there had been repayment delays since January 2019 and the applicant had, several times,

requested,

and had been granted accommodation to clear the outstanding amounts but had failed to do so. Therefore, the trial court dismissed the applicant's application, which prompted the applicant to prefer an appeal to this Court, on which it founds the application before us.

8. The applicant contends that its appeal is arguable and has high chances of success. The applicant argues, *inter alia*, that there was no hire purchase agreement between it and the 1st respondent; that the agreement between them violates the *in duplum* rule; and that having paid a total of kshs.75,218,377 as at 4th October 2024, it had fully repaid the principal amount and the agreed charges and is thus not indebted to the 1st respondent.
9. On the nugatory aspect, the applicant states that the respondents are in the process of selling and/or disposing of the 49 motor vehicles, which are its tools of trade in its day-to-day business operations, and that unless the orders sought are granted, the 1st respondent shall seize and sell the motor vehicles, which will occasion it irreparable loss, and the appeal will be rendered nugatory.
10. The 1st respondent opposes the application. It states that the appeal is not arguable, and even if the appeal were to succeed, it will not be rendered nugatory if the orders sought are not granted.
11. Regarding chances of success of the appeal, the 1st respondent

states that the agreement dated 29th August 2018 shows the applicant as the hirer and itself as the finance company, pages 7 to 8 is a request

for a hire purchase facility by the applicant; pages 9 to 36 are copies of the Letter of Guarantees and Undertakings on the hire purchase facility by the directors of the applicant; pages 37 to 42 are copies of the Letter of Offer; and pages 43 to 47 are Board resolutions of the applicant authorizing the request of the said facility.

12. The 1st respondent further states that the applicant has been guilty of paying instalments late; missed payments; and issuing bouncing cheques, and as a consequence, there is a huge outstanding balance, which stood at Kshs.86,477,918 as at 30th September 2024.
13. As to whether the appeal, if successful, will be rendered nugatory if the orders sought are not granted, the 1st respondent states that it is a stable company with a history of extending and providing hire purchase facilities and would be able to compensate the applicant if the appeal succeeds.
14. When this application came up for hearing on 21st October 2025, **Mr. John Tito** appeared for the applicant and **Mr. Mureithi** held brief for **Mr. Omwanza** for the respondents. The parties filed submissions that were highlighted by their respective advocates, and which we have considered.
15. It is well established that in an application under **rule 5(2)(b)** of this Court's Rules, an applicant has to show that the appeal or

intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See

Trust Bank

Limited & another vs Investech Bank Limited & 3 Others
[2000]

eKLR. An arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully. Even one arguable ground of will suffice.

- 16.** Having perused the memorandum of appeal, we think that some of the grounds of appeal are arguable. We need not say more. But that is not all. Will the appeal be rendered nugatory if we do not grant the orders sought? In **Stanley Kangethe Kinyanjui v Tony Ketter & 5**

Others [2013] eKLR, this Court held:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; of if it is not reversible whether damages will reasonably compensate the party aggrieved.”

- 17.** The applicant does not say that the 1st respondent is unable to compensate it if the appeal succeeds after the motor vehicles have already been repossessed and disposed of. On the other hand, the 1st respondent has stated that it is a reputable company and is able to compensate the applicant for any loss it may suffer if the appeal succeeds. We are persuaded that if the appeal succeeds, it will not be rendered nugatory because the loss that the applicant may have suffered is quantifiable and the 1st respondent is able to compensate the applicant.
- 18.** In the circumstances, since the applicant has not satisfied the two

limbs for grant of an order of injunction, we are unable to grant it.

19. As regards the prayer for stay of the High Court proceedings pending appeal, it is trite law that such an order cannot be granted unless it is demonstrated that there are exceptional circumstances to warrant issuance of such an order. See the Supreme Court ruling in **James**

Nthuku Kithinji v The Director of Public Prosecutions
Petition

(Application) No. 29 (E033) of 2022. No exceptional circumstance was demonstrated by the applicant. We must therefore decline to grant that prayer.

20. All in all, we find this application unmerited and dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 28th day of November 2025.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF

APPEAL MUMBI

NGUGI

REPUBLIC OF KENYA
.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.