

**IN THE COURT OF APPEAL
AT NAIROBI
CORAM: MUSINGA (P), JOEL NGUGI & ODUNGA,
JJ.A.) CIVIL APPLICATION NO. E711 OF 2025**

BETWEEN

KIRAN CHANDUBHAI PATEL.....APPLICANT

AND

SOUTHERN CREDIT BANKING

CORPORATION

LIMITED.....1ST

RESPONDENT TANUJ GULABCHAND RAJA.....

2ND RESPONDENT CHARLES KYALO MUTHAMA.....

.....3RD RESPONDENT GILBERT MACHARIA KIBE.....

.....4TH RESPONDENT

(Being an application for stay of execution of the judgment of the High Court at Nairobi (P. Mulwa, J.) delivered on 6th November 2025

in
HCCOMM CASE No. 159 OF 2004)

RULING OF THE COURT

1. The 1st respondent, Southern Credit Banking Ltd (the Bank), as the successor to Bullion Bank Limited, sued the appellant and the other respondents claiming Kshs 215,607,678.96 together with interests and costs. According to the Bank, the appellant and the other respondents (the defendants) were

directors of Eagle Aviation Limited (the principal debtor), a
company engaged

in aviation business. At the request of the defendants, the principal debtor was advanced Kshs 45,000,000 secured by a debenture and the personal guarantees of the appellant, 3rd and 4th respondents. The Bank's case was that on 10th September 1998, while an amount of Kshs 82,793,505.70 remained outstanding, the 2nd respondent, as Executive Director of the principal debtor, caused the release of the said debenture fraudulently and in breach of duty.

2. The 2nd respondent, in his defence, denied the claim, asserting that the overdraft facility was advanced at the request of the principal debtor and not the defendants personally and maintained that the release of the debenture was by the Bank's own officers. He contended that the claim against him was discriminatory as not all directors of the principal debtor were joined in the suit. The 3rd and 4th respondents also denied liability and averred that, on the strength of the memorandum of understanding dated 18th February 1997, they ceased to be directors of the principal debtor and that their liabilities were

thus extinguished. Further, they argued that the guarantee was void *ab initio* for lack of execution by the Bank.

3. On his part, the appellant, while admitting signing of the guarantee, maintained that it was invalid, unenforceable and had no legal effect due to the 2nd respondent's fraud. According to him, his guarantee was executed on the express understanding that the borrowing was secured by a debenture dated 24th April 1996, hence the release or variation of this security without his consent materially altered the terms of the agreement and discharged him from liability. In his view, he could not have bound himself to a contract tainted with fraud and that any valid guarantee was subsequently discharged by the memorandum executed between the guarantors, the principal debtor and the Bank. He also contended that the claimed sum of Kshs 215,607,678.96 exceeded his guaranteed limit of Kshs 45,000,000 and that the bankruptcy of the principal debtor annulled any debt due, thereby extinguishing his liability under the said guarantee.

4. After hearing the case, the trial court found that the Bank proved its case that the defendants executed binding guarantees, that the Bank lawfully advanced the facilities and that the loss arose from wrongful acts of the 2nd respondent. While finding that the release of the debenture was fraudulent, the learned Judge did not absolve the guarantors from their obligations under the guarantees. The defendants were found jointly and severally liable to the Bank and judgement was entered against them in the sum of Kshs 215,607,678.96 with interests at 21% per annum from 1st February 2004 until payment in full. The Bank was also awarded the costs of the suit.
5. Dissatisfied with the judgement, the applicant filed a Notice of Appeal dated 6th November 2025 and lodged the instant application dated 25th November 2025. The application is, principally, brought under rule 5(2)(b) of the Rules of this Court and seeks stay of execution of the judgement delivered on 6th November 2025 in Milimani HCCOMM Case No. 159 of 2004 pending the hearing and determination of the intended appeal.

6. In the intended appeal, the applicant will seek to persuade this Court, *inter alia*: that as per the Discharge of Debenture dated 24th September 1998, between the 1st respondent and the principal debtor, the 1st respondent acknowledged having been fully paid its debts and proceeded to discharge the principal debtor of all its obligations under the debenture; that with that discharge the applicant was no longer liable to the Bank; that the learned Judge erred in holding that the sum of Kshs 215,607,678.96 was payable by the appellant despite the same being contrary to the *in duplum* rule; that the learned Judge erred in failing to give due weight to the principle that guarantees are strictly construed and any material change in the underlying contract discharges the guarantor; that the learned Judge erred in holding him liable despite the fact that he ceased to be a director of the principal debtor upon the transfer of his shares, hence his liability could not persist in the face of new ownership and management structure of the principal debtor; and that the learned Judge misdirected himself by holding that the Bank had not authorised the release of the debenture despite the demonstration by the applicant that the Bank acted

unilaterally

and internally without the interference and control of the applicant.

7. According to the applicant, the intended appeal raises serious arguable issues.
8. The applicant further contended that the intended appeal will be rendered nugatory, absent stay of execution, due to the fact: that the execution is being pursued personally against him for a corporate debt; that there is no guarantee that the respondents will refund the said sum if the appeal succeeds; and that the applicant risks suffering substantial loss in light of the colossal amount involved in a matter where liability is heavily contested.
9. In opposing the application, the Bank averred: that it denied the allegation that it acknowledged having been fully paid its debt; that no tangible evidence has been adduced to support the claim by the applicant that the decretal sum is colossal and that if he settles the same, it will not be recoverable from the Bank; that the Bank is a financial institution governed by the Central Bank of Kenya, hence will have no difficulty in refunding the same should the intended appeal be

determined in favour of the

applicant; that there is no evidence that the applicant's shares in the principal debtor were acquired as alleged, and that in any event the acquisition of shares did not discharge the applicant of his liability as a guarantor; that the unlawful discharge of the debenture did not release the applicant from his liability as a guarantor; that the in duplum rule was not pleaded by the applicant; and that the applicant has not met the threshold for the grant of the orders sought.

10. The 1st respondent, while seeking that the application be dismissed, proposed, in the replying affidavit, that in the event this Court is amenable to grant of stay, it should be conditional upon payment of half of the decretal sum (Kshs 107,803, 839.48) to the 1st respondent within 30 days or a deposit of the entire judgment sum in a joint interest earning account in the names of the applicant and the 1st respondent within 30 days.
11. We heard the application on the Court's virtual platform on 16th December 2025 when the applicant was represented by learned counsel, **Mr Teddy Ochieng**; learned counsel, **Prof. Edwin Abuya** represented the 1st respondent; **Mr Kabaiku**,

learned

counsel, appeared for the 3rd and 4th respondents; and learned counsel, **Mr Harit Seth**, appeared for the 2nd respondent.

12. The applicant's case, as set out in the submissions and highlighted by Mr Ochieng, was: that the issues identified above were not frivolous since a single *bona fide* arguable ground suffices for the purposes of arguability of an intended appeal, and that an arguable appeal is not one that must succeed as long as it deserves consideration by this Court. According to the applicant, unless stay is granted the intended appeal, if successful, would be rendered nugatory, based on the averments in the supporting affidavit. In highlighting the applicant's submissions, Mr Ochieng stated that Southern Credit Banking Corporation does not exist as it was converted to Equatorial Commercial Bank Ltd. Counsel stressed that we should consider the colossal amount involved and the possibility of the applicant facing arrest if stay is not granted.

13. Supporting the application, Mr Seth also asserted that Southern Credit Banking Corporation does not exist and is now known as Spire Bank, although he was unaware of

the circumstances

under which the Bank changed hands. Learned Counsel disclosed that Spire Bank however sold its assets and liabilities to Equity Bank and no longer has a license. Mr Kabaiku similarly supported the application, submitting that the learned Judge disregarded the evidence that the defendants were released from liability.

14. On his part, Prof. Abuya for the Bank submitted: that the applicant failed to demonstrate that he has an arguable appeal since none of the grounds advanced by the applicant warrants further scrutiny by this Court, in light of the evidence adduced before the trial court; that while the Memorandum of Satisfaction was admittedly signed, its execution was engineered by the 2nd respondent who was the chairman of the Bank although the Bank never received any money; that the discharge of the debenture was not properly done; and that the submissions by Mr Seth disclosed the metamorphosis of the Bank since 2004 and today, it is called Spire Bank. On the second condition, it was submitted that no evidence was adduced to support the allegation that the 1st respondent's assets are unknown or that

the sum involved is colossal and may send the applicant into bankruptcy. Learned Counsel however drew our attention to the conditions proposed in the replying affidavit in the event that we are amenable to allowing the application and clarified that he had no objection to half the decretal sum being deposited in a joint interest earning account.

15. We have considered the foregoing. The principles guiding the grant of stay pending appeal or intended appeal are now settled. They were aptly crystallised and summarized by this Court in **Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR**, as follows: that the Court has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if the interim orders sought were denied; that 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; that the term “nugatory” has to be given its full meaning and does not only mean worthless, futile, or invalid but also means trifling; that 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, or if it is not reversible, whether damages will reasonably compensate the party aggrieved if the appeal is successful; and that in considering whether an appeal will be rendered nugatory, each case must depend on its facts and peculiar circumstances.

16. In this case, the applicant contends that the learned Judge erred in not taking into account *in duplum* rule in arriving at his judgement and that, further, he did not take into account the law on enforceability of guarantees where the contract is altered. Without delving into the details of these issues, we are of the view that the grounds intended to be canvassed before this Court on appeal are not frivolous. They are arguable.
17. Regarding the second condition, which the applicant must also satisfy, it is contended that the amount in question is colossal and if the applicant is compelled to pay, he might be forced into bankruptcy. It is further contended that, a contention conceded by Prof. Abuya, that the 1st respondent has undergone several transformations and is no longer

known as Southern Credit

Banking Corporation but is called Spire Bank. While we appreciate that in monetary decrees the Court is usually reluctant to grant stay, this Court in **Kenya Hotel Properties Limited v Willesden Properties Limited** [2007] eKLR had this to say:

“The decree is a monetary decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a monetary decree so long as the court ascertains that the respondent is not a man of straw, but is a person who, on the success of the appeal would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on the grounds that the decree is a monetary decree. The court however was emphatic that in considering such matters as hardship, a third principle in law was not being established at all. Hence the cases such as Oraro & Rachier Advocates vs Cooperative Bank of Kenya Limited - Civil Application No. NAI 358 of 1999 (unreported) where it was held by this Court that if an applicant is compelled to pay the decretal amount in a money decree, the hardship that the applicant may undergo may be unbearable...It does appear to us that in considering the question as to whether the success of the intended appeal will be rendered nugatory were we to refuse the application for stay, the main requirement is to weigh the position of the parties before the Court with the background of ensuring justice in mind.”

18. The sum involved in this matter is Kshs 215,607,678.96 with interests at 21% per annum from 1st February 2004 until payment in full. It is clear that the said sum of money is colossal. However, as restated by this Court in **African Safari Club Limited v Safe Rentals Limited [2010] eKLR:**

“...it is incumbent upon the Court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

19. In other words, this Court is under a statutory duty whenever it exercises its discretion, pursuant the overriding objective in sections 3A and 3B of the **Appellate Jurisdiction Act**, to take into account the principle of proportionality. Balancing the interests of the applicant with those of the Bank, we are of the view that a conditional grant of stay would be the most appropriate relief to grant in these circumstances. Consequently, we grant stay of execution of the judgement delivered on 6th November 2025 in Milimani HCCOMM Case No. 159 of 2004 pending the hearing and determination of the intended appeal, on condition that the applicant secures a bank guarantee from a

reputable bank for half of the decretal sum within 60 days from the date of this ruling. In default of compliance, the application to stand dismissed.

20. The costs of this application will be in the intended appeal.

Dated and delivered at Nairobi this 27th day of February, 2026.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF

APPEAL JOEL

NGUGI

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

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

Signed _

DEPUTY

REGISTRAR.