Wilcox & another v NCBA (K) PLC (Civil Application E539 of 2025) [2026] KECA 384 (KLR) (27 February 2026) (Ruling)

Neutral citation: [2026] KECA 384 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E539 OF 2025

DK MUSINGA, JM NGUGI & GV ODUNGA, JJA

FEBRUARY 27, 2026

BETWEEN

ADRIAN PETER WILCOX ..... 1ST APPLICANT

ABERDAIR AVIATION LIMITED ..... 2ND APPLICANT

AND

NCBA (K) PLC ..... RESPONDENT

(Being an application for stay of execution of the of the Judgment and Decree of the High Court of Kenya at Nairobi (Musyoki, J.) delivered on 11th July 2025 in HCCOMM Case No. E556 of 2020)

RULING

1. Before this Court is a Notice of Motion dated 5th September 2025 which is brought under the provisions of Article 25 (c) of *the Constitution*, section 3, 3A and 3B of the *Appellate Jurisdiction Act*, as well as rule 5(2)(b) of the Rules of this Court. The applicant seeks stay of execution as against the execution of the judgment and decree of B. M. Musyoki, J. delivered on 11th July 2025 in the High Court of Kenya at Nairobi, Milimani Law Courts, Commercial & Tax Division in HCCOMM Case No. E556 of 2020 pending the hearing and determination of the appeal as against the said judgment and decree.

2. The background to this application is that the respondent filed suit against Adrian Peter Wilcox and Aberdair Aviation Limited (the 1st and 2nd applicants respectively) for recovery of outstanding sums arising from loan facilities advanced between 2010 and 2011. The respondent sought USD 236,986.44 and Kshs. 37,639.70 plus interest, contending that a construction loan advanced to the 1st applicant and guaranteed by the 2nd applicant remained unpaid.

3. While the applicants admitted the facilities were advanced, they contended that all the loans had been taken over by Equity Bank in 2015 and that the securities were duly discharged, thereby extinguishing

their liability. They further relied on estoppel, waiver, and acquiescence, pointing to the discharge of charge and the bank's delay in making demands.

4. After reviewing the evidence, the court found that although a discharge of charge dated 20th January 2016 was executed, the surrounding correspondence and professional undertakings from Equity Bank clearly showed that the takeover related only to facilities advanced to the 2nd applicant and not the construction loan granted to the 1st applicant. The court held that a discharge of charge does not, by itself, extinguish an underlying debt unless there is clear proof of full settlement or intention to release the borrower. Whereas the respondent had failed to show that the discharge was executed by mistake, the applicants had equally failed to demonstrate that the construction loan was included in the takeover or fully repaid. The court also rejected the estoppel argument, noting that the applicants continued servicing the loan after the alleged takeover and that mere delay in demanding payment does not extinguish a contractual debt.

5. On liability, the court concluded that the construction loan remained outstanding and that the 2nd applicant, as guarantor, was jointly and severally liable for that debt. However, the court found that the respondent had not proved the pleaded figure of USD 236,986.44 and instead established an outstanding balance of USD 197,426.19. The court also allowed recovery of Kshs. 37,639.70 from the 1st applicant only, being debits arising from the operation of the current account. Judgment was, therefore, entered for USD 197,426.19 against both applicants jointly and severally with interest, and for Kshs. 37,639.70 against the 1st applicant with interest at court rates, together with costs of the suit.

6. The applicants, being aggrieved and dissatisfied with the judgment of the High Court, intends to lodge an appeal to this Court as evinced by the Notice of Appeal dated 22nd July 2025.

7. In this application which is supported by the grounds appearing on the face thereof and in the affidavit in support sworn by the 1st applicant, who also doubles up as the Chief Executive Officer and Director of the 2nd applicant, the applicants contend that their intended appeal raises multiple grounds of appeal that are not only arguable but have a high likelihood of success.

8. In the draft memorandum of appeal annexed to the affidavit in support of the application, the applicants contend that the learned judge erred in law and in fact by, inter alia: holding that the discharge of charge dated 20th January 2016 did not cover all facilities secured over LR No. 214/792, including the construction mortgage loan, despite the express and unequivocal representations that all monies had been fully repaid; finding that the appellants remained liable for USD 197,426.19 notwithstanding evidence that the respondent received full settlement from Equity Bank and voluntarily released all securities in 2016; failing to give due weight to the clear terms and legal effect of the discharge of charge and the receipt and discharge confirming full payment and release of securities; failing to find that, having executed and registered the discharge of charge, the respondent acknowledged full settlement, released the appellants from liability, and was estopped from asserting further claims.

9. Additional grounds of appeal are that the learned judge erred in law and in fact by concluding that there was no promise or representation of settlement despite the unequivocal wording of the discharge instruments; by misapplying and failing to properly give effect to the doctrines of estoppel, waiver, and acquiescence arising from the appellants' reasonable reliance on the respondent's representations and prolonged inaction; by permitting the respondent to resile from its clear and formal representations in circumstances that occasion manifest injustice; by placing undue reliance on the Equity Bank and advocate undertakings of December 2015 over the respondent's own discharge documents; by relying on loan statements that did not comply with sections 176 and 177 of the *Evidence Act*; by failing to enforce the corporate guarantee clause requiring duly signed statements as conclusive proof

of indebtedness; and by failing to find that all facilities secured by LR No. 214/792, including the construction mortgage loan, were taken over by Equity Bank in December 2015.

10. On the nugatory aspect, it is contended that unless a stay is granted, the respondent will proceed with immediate execution of the impugned judgment by attaching and selling the 2nd applicant's aircraft and aviation equipment, an action that would effectively paralyze its operations in a highly regulated industry. Such execution would occasion irreparable harm through loss of goodwill, disruption of ongoing and prospective business and termination of critical contractual relationships thereby crippling the applicants' ability to continue trading and earn a livelihood and ultimately rendering the intended appeal nugatory.

11. It is further contended that execution of the judgment jointly and severally against the applicants would expose the 1st applicant to severe personal hardship, including the imminent risk of attachment of his personal assets and possible committal to civil jail. Given the substantial decretal sums involved and the existence of clear and arguable grounds of appeal, the applicants contend that the intervention of this Court is necessary to preserve the subject matter of the appeal and to forestall irreversible prejudice that cannot be adequately remedied by damages.

12. The application is opposed by the respondent vide a replying affidavit sworn by Christine Wahome, a Senior Legal Counsel at the respondent bank. The respondent avers from the onset that the applicants have failed to satisfy the twin requirements under rule 5(2)(b) of the Rules of this Court. The respondent avers that the intended appeal raises no arguable issues as the High Court fully considered and correctly rejected the applicants' contention that the discharge of charge dated 20th January 2016 extinguished the underlying debt and properly found that the discharge related only to facilities advanced to the 2nd applicant and not the construction loan advanced to the 1st applicant. The respondent maintains that a discharge of charge does not extinguish a debt absent cogent proof of repayment, and relies on various decisions from this Court including John Gachanja Mundia vs. Francis Muriira alias Francis Muthika & Another [2016] eKLR and Housing Finance Company of Kenya vs. J. N. Wafubwa [2014] eKLR to buttress that argument.

13. On the nugatory aspect, the respondent avers that the applicants have not demonstrated that the appeal would be rendered nugatory since the decretal sum is a liquidated amount and the respondent, being a Tier One bank, is fully capable of refunding the sums paid should the appeal succeed. The respondent asserts that no evidence of the applicants' impecuniosity or risk of irrecoverability of the money has been shown, and that execution, even if commenced or completed, does not of itself render an appeal nugatory as restitution remains available. The respondent therefore characterizes this application as an attempt to delay recovery of a long-outstanding debt through unmeritorious proceedings and urges this Court to dismiss it.

14. At the hearing of this application, learned counsel Mr. Miano appeared for the applicants, while the respondent was represented by learned counsel Mr. Kabaiku. Both counsel made brief oral highlights of their respective clients' written submissions, which was reiteration of the positions articulated hereinabove. It, therefore, serves no useful purpose for us to rehash the oral arguments.

15. We have considered the application, the submissions, as well as the applicable law. It is trite law that in an application of this nature an applicant must satisfy this Court that the appeal or the intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR. Even one arguable ground of appeal will suffice. See Damji Pragji Mandavia Vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

16. On arguability, the applicants contend, inter alia, that the learned judge erred in law and in fact by holding that the discharge of charge dated 20th January 2016 did not cover all the facilities secured over LR No. 214/792, including the construction mortgage loan, despite clear and unequivocal representations that all monies had been fully repaid; by finding the appellants liable for USD 197,426.19 notwithstanding evidence of full settlement by Equity Bank and the voluntary release of all securities; and by failing to give proper effect to the discharge of charge and receipt and discharge, and to the doctrines of estoppel, waiver, and acquiescence arising from the Respondent's representations and subsequent conduct. These grounds of appeal, among others, do not appear idle. They require interrogation on appeal. We are, therefore, satisfied that the intended appeal is arguable.

17. Turning to the nugatory aspect, this Court stated in Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others (supra) 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. The applicants contend that execution will cripple the 2nd applicant's aviation business through attachment and sale of aircraft and equipment and will also expose the 1st applicant to personal hardship. While these concerns are weighty, they must be weighed against the nature of the decree sought to be stayed and the overall circumstances of the case.

18. The decree appealed against is purely monetary. It is now well settled that where the subject matter of an appeal is a money decree, an appeal will not ordinarily be rendered nugatory unless the applicant demonstrates that the respondent would be unable to refund the decretal sum if the appeal ultimately succeeds. In the present case, no averments or evidence were placed before this Court to shift the evidential burden to the respondent on the issue of impecunity as contemplated in International Laboratory for Research on Animal Diseases v Kinyua [1990] KLR 403. On the contrary, the applicants did not controvert the respondent's assertion that it is a Tier One commercial bank with financial capacity to refund the entire decretal sum in the event the appeal succeeds.

19. Further, we are not persuaded that the applicants have placed before this Court cogent evidence to demonstrate that execution would irreversibly destroy the substratum of the appeal. The mere apprehension of attachment and sale of assets, without more, does not of itself render an appeal nugatory, particularly where the law provides adequate remedies in restitution. Even where execution has been carried out, a successful appellant is not without recourse as the court retains the power to order repayment or restitution of sums recovered pursuant to an impugned decree.

20. We are, therefore, not persuaded that the applicants have satisfied the second limb under rule 5(2)(b) of the Rules of this Court. Whereas the intended appeal is arguable, we are not satisfied that unless stay of execution is granted, the appeal, if successful, would be rendered nugatory. Consequently, this application is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2026.

D. K. MUSINGA (PRESIDENT)

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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.