Magnoy Communications Ltd v Absa Bank Kenya PLC & another (Civil Application E477 of 2025) [2026] KECA 705 (KLR) (25 March 2026) (Ruling)

Neutral citation: [2026] KECA 705 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E477 OF 2025

PO KIAGE, LA ACHODE & WK KORIR, JJA

MARCH 25, 2026

BETWEEN

MAGNOY COMMUNICATIONS LTD ..... APPLICANT

AND

ABSA BANK KENYA PLC ..... 1ST RESPONDENT

REGENT AUCTIONEERS LTD ..... 2ND RESPONDENT

(Being an application for stay of execution and injunction pending appeal arising from the judgment of the High Court of Kenya at Nairobi (F. Gikonyo, J.) dated 21st July 2025 and confirmed on 24th July 2025 in HC Comm. No. E434 of 2025)

RULING

1. In the motion dated 29th July 2025 and premised on the grounds contained in the supporting affidavit of Mohamed Ahmed, the applicant seeks an order staying the execution of the ruling and/or orders issued by F. Gikonyo, J. on 21st July 2025 and confirmed on 24th July 2025 in Nairobi HC Comm. No. E434 of 2025 pending the hearing of an intended appeal. The applicant also seeks an order of temporary injunction restraining the respondents, their servants and agents from selling, disposing off or otherwise interfering with the suit property, Title No. Nairobi Block 47/1704 – Miotoni Area, Karen (the suit property), pending the hearing and determination of the intended appeal.

2. In summary, the applicant, Magnoy Communications Ltd, had obtained an Islamic Sharia-compliant Musharaka financing from the 1st respondent, ABSA Bank Kenya PLC, in which the suit property formed part of the security arrangement. Owing to economic disruptions and cash flow constraints, the applicant fell into arrears on the repayments. Prior to the ruling of 21st July 2025, the applicant had made partial repayments and had engaged in negotiations with the 1st respondent in a bid to regularize the account. However, the 1st respondent instructed the 2nd respondent, Regent Auctioneers Limited,

to advertise and sell the property by public auction, prompting the applicant to move the High Court seeking injunctive relief. The applicant was unsuccessful.

3. It is the High Court ruling that is the subject of this application. The applicant averred that it has an arguable appeal against the impugned ruling and that there was an impending threat of execution by the respondents through the sale by public auction of the suit property valued at Kshs.150,000,000. The applicant highlighted grounds of appeal, including misapplication of the Musharaka Islamic Financing arrangement; failure to consider the partial payments already made; and erroneous application of the doctrine of res judicata. The applicant maintained that, unless the orders of stay are granted, it will suffer highly prejudicial consequences that will render the appeal nugatory, thereby subverting the ends of justice. The applicant also averred that the timelines for repayments issued by the High Court were insufficient due to the prevailing challenging economic situation in the country.

4. The application was opposed by the affidavit of Samuel Njuguna, an employee of the 1st respondent. Through the affidavit, it was averred that the applicant has defaulted on the loan and all notices sent using its postal address did not yield any positive response; that prior to filing the suit, which gave rise to the impugned ruling, the applicant had filed an application in Nairobi HC Comm. No. E016 of 2025 seeking an injunction to stop the sale, which Muya, J. dismissed on 30th January 2025; that prior to withdrawing Nairobi HC Comm. No. E016 of 2025, the applicant sought 30 days to deposit Kshs. 10,000,000 in court as a demonstration of goodwill, but failed to do so; and that the applicant later filed another application, in which the court, on 3rd July 2025, instructed the applicant to pay Kshs. 4,000,000 to the 1st respondent and Kshs. 1,000,000 to the 2nd respondent within 14 days, but the applicant did not comply with these directives, and despite the court extending the timelines to 24th July 2025, the applicant did not comply.

5. The respondents challenged the validity of the Notice of Appeal upon which this application is premised, averring that it has never been served on them, rendering the Court without jurisdiction pursuant to rule 5 (2) (b) as read with rules 77 (2) and 79 of the Court of Appeal Rules. The respondents also averred that the intended appeal is not arguable as the grounds raised by the applicant are not matters that the learned Judge considered in arriving at his decision. It is also the respondents' deposition that the intended appeal, were it to eventually succeed, would not be rendered nugatory, as any loss suffered by the applicant can easily be quantified and compensated by an award of damages. The respondents reiterated that the applicant acknowledged its indebtedness to the 1st respondent, and having persistently defaulted on payment, should not be allowed to frustrate the recovery of the funds owed to the 1st respondent through an order of stay or injunction. The respondents, therefore, prayed that the application be dismissed.

6. When the application came up for hearing, learned counsel Mr. Abdirazak appeared for the applicant, while learned counsel Ms. Wameyo appeared for the respondents. At the hearing, counsel made oral highlights in addition to the filed written submissions.

7. Urging the case for the applicant, Mr. Abdirazak invoked the decision in Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR to point out that an arguable appeal is not one that must necessarily succeed, but one that is not frivolous and ought to be argued fully before the Court. Urging that the intended appeal is arguable, counsel submitted that the issues to be raised include the unilateral variation of the interest rate by the 1st respondent, misapprehension of the Islamic Musharaka financing arrangement by the learned Judge, the question whether the respondents' affidavit ought to have been struck out, and failure to serve statutory and auction notices by the respondents. As to whether the appeal will be rendered nugatory, counsel urged that the subject

property is prime land worth Kshs.150 million. Its sale by auction would permanently deprive the applicant of ownership, a loss not compensable by damages. He referred to Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Ltd [1999] eKLR to argue that where the substratum of the appeal is in danger of being lost, a stay is warranted. Citing Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227, counsel submitted that once land is sold, it may be transferred to third parties, making reversal impracticable and rendering the appeal nugatory. Counsel maintained that the balance of convenience lies in preserving the property pending appeal. Mr. Abdirazak finally asserted that the respondents stand to suffer no prejudice if the sale is delayed, as the applicant is willing to deposit security and continue settlement discussions.

8. For the respondents, learned counsel Ms. Wameyo set off by arguing that the Court lacked the jurisdiction to entertain the present application. Citing Kikambala Development Company Limited & 4 Others vs. Director of Public Prosecutions & 4 Others; Kikambala Development Company Limited & 10 Others (Interested Parties) [2022] KECA 1374 (KLR), counsel submitted that the application is fatally defective since the notice of appeal was belatedly served on 18th August 2025 on the respondents outside the timelines prescribed by the rules of the Court. Counsel referred to Ufanisi Freighters (K) Limited vs. I & M Bank Limited & 3 Others [2025] KECA 296 (KLR) and Oyaro vs. Kenya Electricity Generating Company PLC (KENGEN); National Council for Persons with Disability (Interested Party) [2023] KECA 1352 (KLR) to reiterate that the requirement for service of the notice of appeal is mandatory and must be strictly followed. Still arguing on the defectiveness of the application, counsel submitted that the applicant has advanced new arguments in the application, which arguments should be considered inadmissible in limine.

9. Turning to the substantive issues, counsel argued that the application has not met the threshold for the grant of an order of stay or injunction. Counsel submitted that since the applicant has admitted to owing money to the 1st respondent, and the loan not being serviced, it was not entitled to an order stopping the sale of the charged property. Counsel pointed out that despite alleging that it has been servicing the loan or making attempts to regularise the account, the applicant did not tender any proof to substantiate that averment. Addressing the arguability aspect, counsel rejected the applicant's faulting of the learned Judge for not referring the dispute to the Sharia Board, asserting that clause 47 of the Charge conferred jurisdiction on the High Court. She also submitted that the issue of res judicata was not a determinative point in the impugned ruling. Additionally, counsel argued that the courts' approach to interlocutory injunctions is governed by well-settled legal principles: the establishment of a prima facie case; the likelihood of irreparable harm; the balance of convenience, and that the applicant had not satisfied these conditions.

10. Turning to the nugatory aspect of the application, counsel submitted that should the intended appeal succeed, it will not be rendered nugatory because the applicant can be compensated by an award of damages. Further, that the applicant has not demonstrated or even alleged that the respondents would be unable to pay any damages awarded. Additionally, counsel urged us to rigorously interrogate whether granting the relief sought would advance or undermine public interest. In that regard, counsel maintained that the public interest is served by not impeding a secured creditor's right to realise the security, particularly where the underlying debt is undisputed. Citing Mrao Ltd vs. First American Bank of Kenya [2003] KECA 175 (KLR), counsel warned that allowing debtors to evade lawful payment obligations would cripple banks, drive them from the market, and deter serious investment by rendering the courts havens for defaulters. As a result, counsel urged us to dismiss the application with costs.

11. We have reviewed the pleadings and submissions by counsel. Before we consider the application on merits, the respondent has raised a few jurisdictional hurdles that the applicant must surmount. The

first hurdle concerns the validity of the notice of appeal upon which the application is premised. On this issue, we wish to point out that in addressing an application for stay, the rules, specifically rule 5(2), refer to "notice of appeal" and not "a valid notice of appeal". In our view, in dealing with an application for stay, the Court is not enjoined to venture into the validity or otherwise of a notice of appeal. At any rate we very much doubt that an otherwise valid notice of appeal ceases to be so by reason only of non-service. The notice if valid when lodged would remain so until invalidated on application.

12. Our statement is fortified by the holding of the Court in National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another [2006] KECA 333 (KLR), thus:

> " The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of Rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under Rule 5 (2) (b) is being considered."

13. This view aligns with Mutune vs. Republic [2025] KECA 496 (KLR), where the validity or otherwise of the notice of appeal was contested, and the Court held that:

> " Much as an obviously invalid or defective notice of appeal may not pass muster, our view is that contested facts about a notice of appeal, as is the case in the applications before us, does not give room to the Court to venture into the validity or otherwise of the notice of appeal."

14. The other jurisdictional hurdle concerns whether the Court can grant the orders sought when the impugned ruling was negative in nature. It is settled law that an order which merely dismisses a suit or application, without directing any party to do or refrain from doing any act, is a negative order. The Court has restated these principles in numerous of its decisions including in Western College of Arts and Applied Sciences vs. Oranga & Others [1976] KLR and Kanwal Sarjit Singh Dhiman vs. Keshavji Jivraj Shah [2008] eKLR. In this case, the Court merely dismissed the applicant's application. It did not order the applicant or the respondent to undertake any step. In the circumstances, there is nothing for the Court to stay. As such, an order of stay cannot issue. This second jurisdictional hurdle ends the applicant's quest for a stay order.

15. The applicant has a prayer for an order of injunction. The order of injunction sought being one brought under rule 5 (2) (b) would, like the prayer for stay of execution, have to pass the twin test of demonstrating an arguable appeal, and that the appeal would be rendered nugatory if the order sought is not granted. A perusal of the grounds of appeal exhibited by the applicant easily leads to the conclusion that the applicant has an arguable appeal. On the nugatory aspect, the respondents averred, without any comeback by the applicant, that should the intended appeal succeed, any loss suffered by the applicant is quantifiable, and the 1st respondent is capable of meeting any damages awarded to the applicant. In such circumstances, the intended appeal is not likely to be rendered nugatory. It is necessary to point out that during the hearing of this application, we asked the learned counsel, Mr. Abdirazak, to implore his client to deposit the agreed amount by consent, or even the principal amount, to no avail. In the circumstances, and given that the debt is acknowledged, the application must fail. We might have been prepared to give a conditional injunction but we choose not to exercise our discretion in that manner given the applicant's intransigent refusal to countenance a deposit of the sums defaulted. We have said enough to show that this application is for dismissal, and we dismiss it.

16. Regarding costs, the Court notes that when this application came up for hearing, we pointed out to learned counsel, Mr. Abdirazak, the shortcomings of his client's application and gave him time to reconsider his stance on the application, but he came back recharged and persistent in soldiering on with the application. The respondents were therefore taken through an unnecessary hearing. In the

circumstances, the respondents are entitled to the costs of the application, and they will have costs from the applicant.

17. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MARCH 2026.

P. O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR