Shah & another v Diamond Trust Bank of Kenya Ltd & another (Civil Application E466 of 2025) [2026] KECA 704 (KLR) (25 March 2026) (Ruling)

Neutral citation: [2026] KECA 704 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E466 OF 2025

DK MUSINGA, M NGUGI & GV ODUNGA, JJA

MARCH 25, 2026

BETWEEN

HARSHA ATUL MAGANLAL SHAH .... 1ST APPLICANT

NEEL ATUL SHAH .... 2ND APPLICANT

AND

DIAMOND TRUST BANK OF KENYA LTD .... RESPONDENT

AND

TUSKER MATTRESSES LTD .... INTERESTED PARTY

(An application for injunction from the Judgment of the High Court at Milimani (F. Mugambi, J.) delivered on 22nd April 2025 in HCCC No. E387 OF 2022))

RULING

1. By a Notice of Motion dated 20th June 2025, the applicants seek, in substance, an order of injunction restraining the respondent from disposing of and/or transferring any interest in the property, House No. 9, Magnolia hills, situated on LR No. 2951/2011 (Original Number 2951/122/2) (the suit property) on the basis of the impugned 45 days redemptive notice dated 29th April 2025 pending the hearing and determination of the appeal.

2. In support of the application, Harsha Atulkumar Maganlal Shah, the 1st applicant, swore an affidavit on 18th June 2025 in which he deposed: that the applicants are the registered proprietors of the suit property; that they filed a suit against the respondent challenging their indebtedness to the respondent as well as the statutory notices dated 9th May 2022 and 19th August 2022 and seeking an order for discharge of the charge registered against the suit property; that they also sought an injunction restraining the respondent from disposing of the suit property on the basis of the said statutory notices as well as the costs of the suit; that together with the suit they sought temporary orders of injunction

which were granted on 29th September 2023; and that after hearing the suit, the learned Judge, on 2nd April 2025, dismissed it with costs.

3. It was further averred: that following the dismissal of the suit, the respondent, on 30th April 2025, served the applicants with a 45 days redemption notice under rule 15(d) of the Auctioneers Rules, 1997; that the applicants, aggrieved by the decision of the trial court, on 2nd May 2025, filed and served a Notice of Appeal; that without waiting for the 45 days to lapse, the respondent instructed Auctioneers to proceed with the auction sale which was scheduled for 8th July 2025; that in the notice of sale it was indicated that the sale would be based on a valuation dated 21st July 2016, in violation of section 97(2) and 98(5) of the *Land Act*, 2012; that despite the respondent's witness admitting in court that as at 25th July 2024, the interested party only owed the respondent Kshs 1,642,062,903.30, the respondent sought to recover from the applicant the sum of Kshs 2,562,461,949.35 as at 9th May 2022.

4. According to the applicants: the applicants' appeal is arguable with excellent chances of success since the respondent's right to tack and consolidate was not noted against the register in violation of paragraph 19 of the charge and in violation of section 83(2) of the *Land Act*; that in the premises, the respondent had no right to consolidate the applicant's loan account together with any other loan accounts advanced to the interested party without the applicants' consent. Further, the term loan having been admittedly cleared in full, the respondent had no right to continue holding the subject security or to purport to sell it by public auction. The learned Judge, it was averred, therefore erred in holding that the charge secured all the consolidated facilities and that the applicants' right of redemption had not arisen. Further, the learned Judge erred in failing to appreciate that the respondent's acts or omissions amounted to a clog and fetter of the applicants' right of redemption. According to the applicants, the sale of the applicants' property will wrongly benefit the respondent contrary to public policy and will render the appeal nugatory as the substratum of the appeal is likely to be lost should the sale lead to the transfer of the suit property to a third party. It was the applicants' view that the balance of convenience tilts in favour of preserving the substratum of the suit pending the determination of the appeal.

5. In a replying affidavit sworn on 28th October 2025 by Faith Ndonga, the respondent's Manager in the Legal Department and Recovery Unit, it was averred: that the applicants have sought and obtained similar orders in a fresh suit filed before the Environment and Land Court being ELC Case No. E318 of 2025; that in the judgement entered on 22nd April 2025, the trial court held that the respondent's right to consolidate and tack multiple facilities under the applicant's charge instrument is enforceable; that on 29th April 2025, the respondent instructed Dalali Traders Auctioneers to issue a 45 days Redemption Notice pursuant to rule 15(d) of the Auctioneers Rules, 1997 in exercise of its statutory duty; that prior to the auction, the applicants moved to the trial court seeking an order of stay which application was struck out on 7th July 2025; and that the auction was however stopped following the filing of ELC Case No. E318 of 2025.

6. According to the respondent, the applicants have not satisfied the threshold for grant of the stay orders sought since there is no potential arguable point as the law on tacking and consolidation of charge instruments is well settled. In any case, it averred, the time for lodging the record of appeal has lapsed; and further, the subject matter of the suit is a property whose value has been ascertained for the purposes of the intended auction, hence the applicants may be compensated by an award of damages or restitution. The respondent's view was that the grant of the orders sought in this application will only further frustrate the respondent's recovery statutory right which has crystallized hence it would not be fair and in the interest of justice to grant them.

7. We heard the application on the Court's virtual platform on 10th December 2025 when learned counsel, Mr Chrispin Bosire, appeared for the applicants while learned counsel, Mr Biko Angwenyi, appeared with Mr Mwangi for the respondent. Learned counsel relied on their written submissions as highlighted before us.

8. On behalf of the applicants, it was submitted: that the suit property is the applicants' home and is the 1st applicant's matrimonial home, hence its status is elevated beyond a commercial property and ought to be afforded significant and advanced protections by this Court; that it has not been contested that the facility for which the suit property was given as security was fully repaid by the applicants; that the applicants intend to challenge the learned Judge's findings that the 2018 charge operates as a continuing security for facilities subsequently extended to the interested party without the applicants' authority as well as the finding that the respondent validly exercised or is entitled to exercise a statutory power of sale over the suit property; that the learned Judge erred in failing to accord proper weight to the equity of redemption and the effect of full repayment of the original 2017 facility; that while the general principle is that parties are bound by their contracts, the principle does not permit a chargee to ignore the *Land Act* and constitutional safeguards; and that the applicants' memorandum of appeal raises several bona fide issues of law and fact and meets the threshold of the first condition in line with this Court's decision in Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union [2012] eKLR.

9. On the nugatory aspect, it was argued: that where the subject matter is charged land and particularly a residential or family home, the courts have consistently treated the threatened loss of such property and the corresponding extinction of the chargor's equity of redemption with special caution; that jurisprudence under rule 5(2)(b) of the Rules of this Court recognizes that, in such cases, the dispute cannot always be reduced to a mere money claim and that the Court must carefully balance the interests of both parties as held in Kenya Shell Limited v. Benjamin Karuga Kibiru & Another [1986] KLR 410; [1982- 88] 1 KAR 1018 and Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR; that in this case, if the sale proceeds before the appeal is heard, the applicants will permanently lose their home and their equity of redemption whereas the respondent, a commercial bank, faces only a delay in the realisation of its security; that if the respondent proceeds to sell the suit property, the applicants' equity of redemption will be extinguished, with the risk of the title passing to a third-party purchaser rendering it extremely difficult, if not impossible, to restore the status quo ante, by which time the applicants would have lost their home; and that damages against a bank, many years down the line, are not an adequate substitute for the loss of one's home and the extinguishing of proprietary rights.

10. It was submitted by the applicants that the contention that the application is an abuse of the court process because they have also filed proceedings in the Environment and Land Court (ELC) and obtained interim orders there, has no basis in fact or in law, since the two sets of proceedings are jurisdictionally and substantively distinct. They explained that the instant appeal and application arise from the judgment in Milimani HCCC No. E387 of 2022 and concern the correctness of that judgment and the respondent's entitlement as between the parties to that suit to realise the suit property under the charge. The ELC suit, by contrast, includes additional defendants (including the auctioneer and other individuals) and the challenges are on different grounds. In their view, this Court's jurisdiction under rule 5(2)(b) is not ousted merely because a litigant has obtained or is seeking interim relief in another court in relation to related but distinct aspects of the matter since the ELC orders may be varied, discharged or may lapse.

11. On behalf of the respondent it was submitted: that the application failed to meet the twin principles set in Stanley Kangethe Kinyajui v Tony Ketter & 5 others [2013 eKLR, to wit, that the applicant

has an arguable appeal, and that the appeal, if successful, will be rendered nugatory should the order of stay of execution not be granted; that the applicants are not in a position to advance an appeal despite having filed a Notice of Appeal due to the fact that the time for filing the Record of Appeal has lapsed and no application for extension of time has been made; that the applicants filed a Notice of Appeal on 22nd April 2025 and the typed proceedings were ready on 15th May 2025 but to date, the applicants are yet to file the Record of Appeal; that the order for stay pending appeal is being sought in peculiar circumstances where the applicants have not taken steps to file the appeal even where there is nothing impeding them from doing so; that instead, the applicants have filed yet another suit in the Environment and Land Court and secured an injunction that serves the same purpose as the order being sought before this Court; that none of the issues raised in the proposed grounds of appeal disclose an arguable appeal warranting the grant of stay; that the contention that the learned Judge erred in upholding the respondent's right to tack and consolidate facilities, on the basis that such right was not registered against the title pursuant to section 83(2) of the *Land Act*, is wholly misconceived; that the respondent reserved the right to consolidate and tack the charges under the charge instrument, while the appellants, exercising their freedom of contract, allowed the interested party to secure further advances under the suit property through tacking rather than consolidation; that under section 82 of the *Land Act*, 2012, there is no obligation to separately register each further advance where the charge operates as a current or continuing account, as is the case here; that the issues raised by the appellants concerning their alleged discharge of liability and purported right of redemption are equally without merit; and that on the authority of the case of Trust Bank Limited & Another v Investech Bank Ltd & 3 others [2000] KECA 11 KLR, there is no risk that the appellant's intended appeal, if successful, would be rendered nugatory. We were urged to dismiss the application dated June 20, 2025 with costs.

12. We have considered the foregoing. The principles guiding the grant of stay of execution pending appeal or intended appeal are settled. As crystallised and summarized by this Court in Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others (supra) they are: that the Court has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal, if successful, would be rendered 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; and that in considering whether an appeal will be rendered nugatory, each case must depend on its facts and peculiar circumstances. It is also clear that for an applicant to benefit from the reliefs in rule 5(2)(b) of the Rules, both conditions must be satisfied. The failure to satisfy one condition disentitles an applicant to the relief sought.

13. In the intended appeal, the applicants intend to argue, inter alia, that the learned Judge erred in finding that the charge operated as a continuing security for facilities subsequently extended to the interested party without the applicants’ authority. Considering the low threshold this Court adopts in determining whether or not the intended appeal is arguable, we form the view that that issue is not frivolous. It may not necessarily succeed but is worthy of consideration by the Court.

14. Regarding the second limb, it is true that what is in dispute is the recovery, by way of the exercise of the respondent’s statutory power of sale, of the facility secured by the suit property. The value of the charged property is determinable. The mere allegation that a property tendered as security is matrimonial property does not automatically entitle an applicant to an injunction pending an appeal. If the applicants’ intended appeal succeeds, the remedies of restitution and damages are available to the applicants, and it is not contended that the respondent, a bank, will be unable to pay such damages.

15. Apart from the foregoing, it is indubitable that the applicants are enjoying conservatory orders courtesy of the fresh proceedings instituted before the Environment and Land Court. Clearly therefore, there is no danger, at present, of the property being sold. The existence of those orders renders the grant of the orders sought herein unnecessary. Discretionary orders, such as the ones sought in this application, ought not to be granted to an applicant who intends to use them for speculative purposes. In applications such as the one before us, discretion ought to be exercised in favour of a party intending to benefit instantly and not where its benefit is contingent upon future happenings.

16. In the foregoing premises, we find no merit in this application which we hereby dismiss with costs to the respondent.

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

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR .