

**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: TUIYOTT, LAIBUTA & NGENYE,

JJA.) CIVIL APPLICATION NO. E068 OF 2025

BETWEEN

**KENYA COMMERCIAL BANK LIMITED
(NOW KCB BANK KENYA LIMITED).....APPLICANT**

AND

**TANZANIA NATIONAL ROADS AGENCY 1st
RESPONDENT KUNDAN SINGH CONSTRUCTION LIMITED
(IN RECEIVERSHIP)..... 2ND
RESPONDENT**

*(Being an application for stay of execution pending appeal against
the Ruling and Orders of the High Court of Kenya at Mombasa
(Gregory Mutai, J.) dated 11th July 2025*

in

HCCC No. 8 of 2010)

RULING OF THE COURT

1. By a plaint dated 22nd March 2010 and amended on 24th May 2022, the 1st respondent, Tanzania National Roads Agency, filed suit against the applicant, KCB Bank Kenya Limited, and the 2nd respondent, Kundan Singh Construction Limited (In Receivership) in the High Court of Kenya at Mombasa in HCCC No. 8 of 2010 for the alleged breach of obligations arising from a road construction

contract entered into between the 1st and the 2nd respondents, and from the associated bank guarantees.

2. Under the Contract aforesaid, the 2nd respondent was required to furnish the 1st respondent with bank guarantees, which it did through the applicant bank.

3. The 1st respondent's case was that the 2nd respondent acted in breach of the contract prior to the expiry of the guarantees furnished by the applicant and, therefore, the applicant was bound to honour the terms thereof.

4. In its defence, the applicant admitted having furnished the guarantees in issue, but contended that they had expired and that, therefore, they were unenforceable.

5. On its part, the 2nd respondent opposed the 1st respondent's claim and averred that the dispute between them was pending arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce in Sweden; and that the guarantees had expired by effluxion of time.

6. In its judgment dated 20th September 2024, the High Court (Olga Sewe, J.) found that the applicant was liable under the guarantees and issued a mandatory order compelling the applicant to honour the 1st respondent's demand notice in terms of the bank guarantees in the sum of Tshs. 2.746,387,500. In addition to the principal sum aforesaid, the learned Judge awarded the 1st respondent interest on the decretal sum from 8th February 2010 until payment in full as well as costs of the suit.

7. Aggrieved by the learned Judge's decision, the applicant filed a notice of appeal to signify its intention to appeal the impugned judgment.

8. By a Notice of Motion dated 8th November 2024, the 1st respondent sought: orders that the High Court determines the applicable commercial rate of interest and refer the matter to the Deputy Registrar to assess the amount payable on interest; leave to proceed with execution to recover the principal sum of Tshs.2,746,387,500 together with interest as assessed by the Deputy Registrar before taxation; and that costs be provided for.

9. The 1st respondent's Motion was supported by the annexed affidavits of Justinian Byabato and Joseph Munyithia sworn on 7th November 2024 and 8th November 2024 respectively. The deponents proposed to apply the various annual commercial rate of interest for the period between 2010 to 2024 based on data from the Central Bank of Kenya

10. In opposition to the 1st respondent's Motion, the applicant filed Grounds of Opposition dated 25th February 2025 and a replying affidavit of Lilian Sogo, the applicant's Legal Manager, sworn on 25th February 2025. According to the applicant, the court was *functus officio* and lacked jurisdiction to determine the rate of interest post- judgment; and that execution prior to taxation of costs was unjustified. Notably, the 2nd respondent did not respond to the 1st respondent's Motion.

11. In its ruling dated 11th July 2025, the High Court (G. Mutai, J.) allowed the 1st respondent's application with costs and fixed the commercial interest rate as proposed by the 1st respondent. In addition, the learned Judge referred the matter to the Deputy Registrar to determine the quantum of interest payable, but declined

to allow execution before taxation.

12. Dissatisfied with the learned Judge's decision, the applicant moved to this Court on appeal on 7 grounds set out in its undated draft memorandum of appeal. According to the applicant, the learned Judge erred in law and fact by: determining and fixing interest rates, yet the same was not done by the trial Judge; not appreciating that the 1st respondent's application was a disguised appeal on the judgment dated 20th September 2024; not appreciating that the 1st respondent did not seek orders of review of the said judgment; losing sight of the fact that the 1st respondent had prayed for commercial rates of interest, but the same was not determined/granted by the trial Judge; and in not appreciating that the court was *functus officio* after the judgment and lacked jurisdiction to grant the orders sought in the 1st respondent's application.

13. By a Notice of Motion dated 31st July 2025 made pursuant to rule 5(2) (b) of the Court of Appeal Rules, 2022 the applicant seeks stay of execution of the impugned ruling pending hearing and determination of its intended appeal. The grounds on which the application is made are that the applicant has an arguable appeal

with good prospects of success; that the appeal will be rendered nugatory if stay is not granted since the Registrar will proceed to execute the learned Judge's orders, and the 1st respondent may thereafter enforce the judgment as rendered with inordinately high rate of interest thereby extinguishing the substratum of the intended appeal; that the applicant stands to suffer irreparable loss as the 1st respondent is a foreign entity under the Government of Tanzania; that recovery thereof on successful appeal will be extremely difficult and virtually impossible in view of the usual bureaucracies and policies of government operations; and that no prejudice will be occasioned to the 1st respondent if the orders sought herein are granted.

14. The applicant's Motion is supported by the annexed affidavit of Lilian Sogo, the applicant's Legal Manager, sworn on 31st July 2025 essentially reiterating the grounds of the intended appeal as well as substantiating the grounds on which the application is made.

15. In support of the Motion, learned counsel for the applicant, M/s. Nyachoti & Company, filed written submissions, a list and

digest of authorities dated 13th August 2025 citing 5 authorities,
two

of which are relevant to applications under rule 5(2) (b), namely: **Roimen & Another v Equity Bank of Kenya Limited & Another** [2025] KECA 90 (KLR) for the proposition that an arguable appeal is not one that must succeed, but one which ought to be argued fully before the Court; and **Brookside Pearl Limited v Alexander Julius Verhoef & Another** [2025] KECA 283 (KLR) for the principle 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.

16. The 1st respondent oppose the applicant's Motion vide the replying affidavit of Justinian Byabato, a legal counsel in the employ of the 1st respondent, sworn on 6th August 2025 contending, among other things, that the applicant's appeal is not arguable; and that, even if execution were to proceed and the applicant succeeds on appeal, interest can be re-calculated and any resultant overpayments refunded to the applicant. Accordingly, he requested us to dismiss the application with costs.

17. On their part, counsel for the 1st respondent, M/s. Munyithia, Mutugi, Umara & Muzna, filed written submissions dated 20th August 2025 citing 7 judicial authorities, four of which are relevant to applications under rule 5(2) (b) of this Court's Rules. These are: **Butt v Rent Restriction Tribunal** [1979] KECA 22 (KLR); and **Chris Munga v Richard Nyagaka Tong'i & 2 Others** [2013] eKLR for the proposition that an intended appeal must raise serious or non-frivolous issues with reasonable prospects of success; **HFCK v Sharok Kher Mohammed Ali Harji & Another** [2015] eKLR; and **Kenya Shell Limited v Benjamin Karuga Kibiru & Another** [1986] KECA 94 (KLR) for the principle that the applicant must demonstrate that the appeal, if successful, will be rendered nugatory due to irreparable harm or substantial loss. According to counsel, the applicant has failed to satisfy the twin principle for grant of the orders sought. They urged us to dismiss the Motion with costs.

18. It is noteworthy that the 2nd respondent did not reply to the applicant's Motion or file any written submissions.

19. As this Court pronounced itself time and again, for an applicant to merit stay orders pursuant to rule 5(2) (b) of the Court

of Appeal Rules pending appeal, he or she must demonstrate to
the

satisfaction of the Court that he or she has an arguable appeal; and that the appeal (or intended appeal as the case may be), if successful, would be rendered nugatory absent stay. The two requirements constitute what is commonly referred to as the twin principles that must be satisfied before such orders can avail (see **Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC** [2020] eKLR; and **Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 Others** [2014] eKLR).

20. A cursory look at the applicant's draft memorandum of appeal in the backdrop of the record as put to us reveals a number of substantive issues of law and fact deserving of the Court's inquiry on appeal. Moreover, and as this Court has often stated, even one bona fide ground of appeal is adequate to satisfy the first limb of the twin principle. **University of Nairobi v Ricatti Business of East Africa** [2020] eKLR is a case in point.

21. With regard to the second limb of the twin principle, the term "nugatory" was defined in **Reliance Bank Ltd v Norlake Investments Ltd** [2002] 1 EA p.227 at p.232 as "**worthless, futile**

or invalid". It also means "trifling". Having concluded that the

applicant's intended appeal is arguable, the remaining question is whether the intended appeal, if successful, would be rendered nugatory if the stay orders sought were not granted.

22. We take to mind the fact that what is sought to be stayed is a money decree, and that it is not enough for the applicant to suggest that, if the sums decreed are paid out, recovery thereof will be bureaucratic and time-consuming. Moreover, the applicant does not specify or elaborate on what it refers to as "usual bureaucracies and policies of government operations". Crucially, we have not been told that the 1st respondent is impecunious and incapable of refunding the decretal amount should the appeal succeed. Accordingly, we are not persuaded that the intended appeal would be rendered worthless or futile if we declined to grant the orders sought (See ***Antoine Ndiaye v African Virtual University*** [2015] eKLR).

23. Having carefully examined the impugned ruling, the applicant's Motion, the grounds on which it is anchored, the affidavits in support and in reply thereto, the written and oral submissions of learned counsel for the applicant and of the 1st respondent as well as the cited authorities, we form the view that

the intended appeal, if

successful, would not be rendered worthless or futile if stay of execution of the impugned judgment is not granted. In effect, the applicant has failed to satisfy the conjunctive limbs of the twin principles for grant of stay orders under rule 5(2) (b) of the Rules of this Court. Accordingly, its Motion dated 17th July 2025 fails and is hereby dismissed with costs to the 1st respondent.

Dated and delivered at Mombasa this 15th day May of 2026.

F. TUIYOTT

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR