SBM Bank Kenya Limited v D Union De Banques Arabes Et Francaises – UBA & 2 others (Civil Application E443 of 2024 & Civil Appeal (Application) E653 of 2024 (Consolidated)) [2025] KECA 70 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KECA 70 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E443 OF 2024 & CIVIL APPEAL (APPLICATION) E653 OF 2024 (CONSOLIDATED)

P NYAMWEYA, LA ACHODE & WK KORIR, JJA

JANUARY 24, 2025

BETWEEN

SBM BANK KENYA LIMITED ..... APPLICANT

AND

D UNION DE BANQUES ARABES ET FRANCAISES – UBA . 1ST RESPONDENT

CHASE BANK KENYA LIMITED (IN RECEIVERSHIP) ..... 2ND RESPONDENT

KENYA DEPOSIT INSURANCE CORPORATION (AS THE RECEIVER OF CHASE BANK KENYA LIMITED (IN RECEIVERSHIP) ..... 3RD RESPONDENT

(Being applications for stay of execution pending appeal of the Judgment and decree of the High Court at Nairobi Commercial and Admiralty Division (Freda Mugambi J) dated 5th July 2024 in HCCC 206 OF 2019)

RULING

1. On 5th July 2024, the High Court at Nairobi, (Freda MugambiJ) delivered a judgment in HCCC 206 of 2019 in favour of Union De Banques Arabes et Francaises (U.B.A.F.). The ruling was against the SBM Bank Kenya Limited (SBM Bank), Chase Bank Kenya Limited (Chase Bank) (in receivership), and Kenya Deposit Insurance Corporation (KDIC) (As the liquidator of Chase Bank Kenya Ltd).
2. The learned Judge held that the principles and doctrines of equity are applicable in Kenya and can override the statutory framework in the *Kenya Deposit Insurance Act*; that the U.B.A.F. had established the elements of a Quistclose Trust; and that the U.B.A.F.'s claim stands in priority to all other general creditors, pursuant to the Letter of Credit No. 013ULC160340001 issued on 4th February 2016.
3. The learned Judge made the following orders amongst others;

a. A declaration that Chase Bank, KDIC and SBM Bank are liable to account to U.B.A.F for the sum of USD 4,999,888.30 together with interest as constructive trustees;

b. Chase Bank, KDIC and SBM Bank to provide all necessary accounts and inquiries to enable U.B.A.F. trace and recover the sum of USD 4,999,888.30;

c. Delivery up of payment or transfer to U.B.A.F of the sum of USD 4,999,888.30 together with interest;

d. Chase Bank, KDIC and SBM Bank to pay U.B.A.F the sum of USD 73,331.70 being the interest accrued in relation to the extension from 10th August 2016 to 8th December 2016 together with interest herein at 14% per annum from 8th December 2016 until payment in full.

e. U.B.A.F. to have costs of the suit and interest thereon at 14% per annum from the date of the judgment until payment in full.

4. Aggrieved by the judgment, SBM Bank, Chase Bank and KDIC filed appeals against the judgment in this Court, in which they have raised a plethora of grounds on which they fault the learned Judge for the findings and orders set out above. Subsequently SBM Bank filed a Notice of Motion application being Civil Application No. E443 of 2024 dated 29th August 2024, while Chase Bank and KDIC filed Notice of Motion application in its appeal, being Civil Appeal (Application) No. E653 of 2024 also dated 29th August 2024, which were both seeking a stay of execution of the said judgement, pending hearing and determination of the appeals.

5. The two applications were listed together for hearing on 15th October 2024. Learned counsel appeared as follows; Mr. Chege for SBM Bank, Mr. Issa Mansur for Chase Bank and KDIC and Mr. Allen Gichuhi for U.B.A.F. During the hearing in plenary, and by consent of the parties, the two applications were consolidated and Civil Application No. E443 of 2024 became the lead file. SBM Bank is thus the 1st applicant, Chase Bank the 2nd applicant, KDIC the 3rd applicant, and U.B.A.F the sole respondent in the consolidated applications.

6. SBM Bank, the 1st applicant, and Chase Bank, the 2nd applicant, are limited liability companies incorporated in Kenya and licensed under the *Banking Act* (Chapter 488 Laws of Kenya). KDIC, the 3rd applicant is a body corporate established under the *Kenya Deposit Insurance Act*, 2012 (KDI Act). The respondent, U.B.A.F., is a banking institution incorporated in France.

7. A synopsis of the dispute is that by a Trade Credit Agreement No. OM_0116_03_05, dated 27th January 2016, Chase Bank agreed to provide a United States dollar trade credit facility by way of a Letter of Credit (LC). It also agreed to issue an irrevocable 180-day LC for USD 4,999,888.30, in favour of Louis Dreyfus Commodities MEA Trading, (LDC-MEA), for the account of Louis Dreyfus Commodities Kenya (LDCKL). A confirming bank was designated to confirm the LC. If LDCKL chose to repay early, it was eligible for a discount based on an interest rate of 3.75% per annum. The payment was made to Chase Bank's account at Deutsche Bankers Trust Company in New York, USA (DBTC), upon which Chase Bank issued a notification confirming full payment and discharge of obligations.

8. Chase Bank issued the LC for USD 4,999,888.30 in accordance with the Uniform Customs and Practice for Documentary Credits (2007) Revision, International Chamber of Commerce Publication No. 600. The confirming bank had the authority to discount the LC at the request of LDC-MEA, with the exception of overdrafts and expired credit. It was also entitled to claim reimbursement upon presentation of documents that strictly complied with the terms of the LC. On 10th February 2016, U.B.A.F. added its confirmation to the LC.

9. LDC-MEA presented the requisite documents under the LC to U.B.A.F. which forwarded them to Chase Bank. On 12th February 2016, Chase Bank confirmed that the documents were acceptable, allowing U.B.A.F. to claim reimbursement of USD 4,999, 888.30 from a specified bank account; DBTC Americas, New York, which held Chase Bank's account. On 17th February, 2016, U.B.A.F. transferred the full amount of USD 4,999, 888.30 to LCD-MEA to meet the terms of the LC. On 18th February 2016, Chase Bank acknowledged the pre-payment based on the provisions of the Trade Credit Agreement.

10. According to U.B.A.F, this resulted in the creation of a Quistclose trust as the prepaid amount was not part of the general deposits of Chase Bank. It was kept separately for a specific purpose. After U.B.A.F. paid off LDC-MEA, Chase Bank held the money in trust for U.B.A.F. to ensure that it would be used to meet the payment obligations under the LC when due.

11. On 3rd August 2016, DBTC, New York, indicated that it could not honour U.BA.F.'s reimbursement claim as it no longer held a valid authority under the LC. On 10th August 2016, U.B.A.F. sought reimbursement from Chase Bank under the LC but, unable to honour the bill drawn on it, Chase Bank sought an extension of 120 days to 8th December 2016, which U.B.A.F. approved at an all-interest rate of 4.4% p.a. (USD 73,331.70), and a further extension of 150 days on 1st December 2016 which U.B.A.F also approved. Meanwhile, on 7th April 2016, the Central Bank of Kenya placed Chase Bank in receivership and appointed KDIC as the official receiver.

12. On 4th January, 2018, the Central Bank and KDIC accepted a binding offer from SBM Bank to acquire some assets and liabilities of Chase Bank, which were transferred to SBM Bank. Chase Bank, KDIC, and SBM Bank acknowledged receipt of a pre-payment of USD 4,888,240.79 from U.BA.F to Chase Bank, confirming that the funds can be traced to them.

13. U.B.A.F. held that Chase Bank, having received the money belonging to U.B.A.F., were only acting as a "constructive trustee", and were responsible for the misappropriated funds since they were aware that the money was linked to a breach of trust but failed to return it. U.B.A.F also held KDIC and SBM Bank accountable for funds in their possession tied to the breach, and issued a demand notice for repayment, which was not honoured. U.B.A.F obtained permission to file suit under Section 56 (2) of the *Kenya Deposit Insurance Act* on 29th July 2019, and sued Chase Bank, KDIC and SBM Bank in the High Court, seeking to hold them liable for their actions and recover the funds.

14. Chase Bank and KDIC filed a statement of defence dated 30th September 2019, acknowledging the contractual obligations under the Trade Agreement and LC. However, they denied that these dealings created a Quistclose, Resulting or Constructive Trust as claimed, or that the USD 4,999,888.30 was held in trust, or that there was misappropriation of funds, fraudulent breach of trust, or failure or neglect to pay the money. SBM likewise filed a defence dated 4th October 2019, in which it admitted assuming certainly liabilities and acquiring certain assets from Chase Bank under the provisions of the *Kenya Deposit Insurance Act*, but denied assuming any of the liabilities of Chase Bank due to general creditors, other than an assumption of some of the moratorium deposits, and consequently did not assume any of the sum alleged to be due and owing from Chase Bank and KDIC to U.B.A.F in the sum of USD 4,888,240.79 or at all.

15. The above facts provide the context of the impugned judgment and the applications before us. The application filed by SBM is supported by affidavits sworn by its Legal Manager, Kevin Kimani on 29th August 2024 and 9th September 2024, while the application filed by Chase Bank and KDIC is supported by the affidavit of George Nyakundi, the Liquidation Agent of KDIC, sworn on 29th August 2024. The grounds in the two motions begin by rendering a summary of the dispute that is already

captured above and need not be reproduced here. We set out the remaining grounds advanced by the three applicants once, because they are replicated word for word in the two motions. A summary of the grounds is as follows:

1. That, as admitted by all the parties, none of Chase Bank's accounts were acquired by SBM Bank and in any event the SBM Bank was not under any obligation to acquire all the assets and assume all the liabilities of U.B.A.F and/or any creditors of Chase Bank.

2. That, by Kenya Gazette notice dated 16th April 2021 Chase Bank's banking license was revoked, the Bank placed under liquidation and KDIC appointed the liquidator. Thus, no Quistclose Trust or otherwise could rise against SBM Bank who did not acquire U.B.A.Fs assets/accounts, or assume liabilities in the first instance.

3. That, the appeal is meritorious and raises arguable points of law that ought to be determined by the Court of Appeal for reasons that, the learned Judge erred in law and in fact:

    a. By entering judgment against SBM Bank based on presumptions without an iota of evidence whatsoever, and backdating interest to 8th December 2016 while the acquisition Gazette Notice No. 6833 is dated 6th July 2018.

    b. By failing to appreciate uncontroverted evidence and admissions on record to the effect that SBM Bank did not take over U.B.A.F's account from Chase Bank.

    c. By failing to make a determination of liability between SBM Bank and U.B.A.F and Chase Bank, notwithstanding a notice of claim against co- defendants dated 9th September 2021 being on record.

    d. By holding that a Quistclose Trust was created in the Letter of Credit Agreement with U.B.A.F and was enforceable under the Doctrines of Equity against SBM Bank, Chase Bank and KDIC.

    e. By elevating the applicability of Doctrines of Equity, and disregarding the provisions of Section 3(1) of the *Judicature Act* read together with Section 3 of the *Kenya Deposit Insurance Act* that provide that doctrines of equity do not apply in so far as they conflict and/or are inconsistent with the provisions of the KDI Act.

    f. By failing to consider that the Letter of Credit dated 4th February 2016 is not a deposit as defined by Section 2 of the KDI Act.

    g. By misinterpreting and misconstruing the provisions of Article 10 (2) (b) of *the Constitution* to hold that Doctrines of Equity override Kenyan statutes.

    h. By holding that a Quist Close Trust was created in the Letter of Credit Agreement between U.B.A.F and was enforceable under the Doctrines of Equity against SBM Bank and Chase Bank and KDIC.

    i. By finding that U.B.A.F's claim did not form part of the general pool of assets available to the creditors and failing to appreciate that the effect of Chase Bank being placed under receivership under Sections 44 and 45 of the KDI Act, is that there is no statutory distinction of its assets available to creditors.

    j. By disregarding Section 57 of the KDI Act in finding that U.B.A.F's debt ranks in priority over the other creditors and effectively affording preferential treatment contrary to the statute.

k. By finding that the Letter of Credit was irrevocable and therefore, enforceable and payable and should be honoured regardless of Chase Bank being in liquidation.

By making a mandatory order for execution of judgment contrary to the provisions of Sections 56 (2) (3) and 73 (2) of the KDI Act, thereby disregarding the liquidation process already in place and the moratorium imposed by the Central Bank of Kenya restricting payments to creditors and depositors.

m. That, the learned Judge granted a stay of only sixty (60) days to lapse on 5th September 2024, and unless the order for stay of execution is granted, U.B.A.F proceed to execute the judgment. Being a foreign bank incorporated in France, the applicants will not be able to recover the money in a foreign jurisdiction, hence rendering the appeal nugatory and merely academic. It is therefore just, mete, and in the interest of justice for this Court to grant the orders sought

16. Ahlidja Romaric, the Deputy General Manager of U.B.A.F, swore two replying affidavits both dated 4th September 2024, which were filed in opposition to the applications for stay. He averred that on 9th June 2022, Okwany J. partially allowed U.B.A.F's application that sought to preserve its funds, observing that it was not disputed that the applicants herein are holding U.B.A.F's funds. That they too admitted in their defence that they hold those funds but contend that U.B.A.F is an ordinary creditor who can only be paid after settlement of other ranking liabilities that take precedence as provided under section 50(9) of the *Kenya Deposit Insurance Act*, 2012. Therefore, a "prima facie" case was established for the preservation of the funds.

17. Ahlidja deposes that UBAF is an international bank capable of obeying any court order to refund the decretal amount if the same is ordered to be refunded; the court already ordered for the preservation of USD 4,888,240.79; Chase Bank and SBM Bank admitted in the court proceedings that they owe UBAF the undisputed sum of USD 4,888,240.79; while SBM Bank acquired the business of Chase Bank. He avers further, that the applicants having admitted in the past that the money is lawfully owed to U.B.A.F, they have not demonstrated how the appeal would be rendered nugatory.

18. He avers further that this Court has jurisdiction to dismiss the application, or allow it conditionally and order that the entire decretal amount inclusive of interest to date be deposited in a joint interest earning escrow account, pending the determination of the appeals. In addition, costs have not been taxed and there is no imminent threat of execution. Lastly, that U.B.A.F has been kept out of its funds since 2016 and it would be against the interest of justice and equity if the decretal amount is not paid.

19. M/S Omolo and Gachoka Advocates filed written submissions dated 11th September 2024 on behalf of SBM Bank and states that their application meets the threshold for the stay to be granted. They rely on the case of *Cabinet Secretary Ministry of Health vs Aura and 13 Others (E583 of 2023*) 2024) KECA 2 KLR, to urge that indeed, one ground is sufficient to render an appeal arguable. That the Applicant's memorandum of appeal raises 11 grounds of appeal to demonstrate that the appeal is arguable. They have reproduced the grounds in the intended appeal and we need not reproduced them.

20. Counsel submits that in its pleadings in the superior court, U.B.A.F admitted by way of an affidavit sworn by Ahlija Aromaric, that the funds in issue are not held by SBM Bankand are therefore, bound by their pleadings as stated in Ndishu and Anor *vs Muriungi (Civil Appeal No.3 of 2020*) [2022] KECH2 KLR. Counsel proceeded to urge in reliance of the case of David Sironga Ole Tukai vs Francis Arap Muge and 2 others [2018] eKLR, that Doctrines of Equity do not override express statutory provisions, and in reliance of Kenya Deposit Insurance Corporation vs. Richardson and David Limited

[2017] eKLR, that being under receivership, Chase Bank is subject to statutory protection hence its funds are protected.

21. On whether the appeal will be rendered nugatory, SBM Bank contends that U.B.A.F is a foreign bank with no assets in Kenya, and if it proceeds to execute the judgement, SBM Bank will not be able to recover the funds from it should the appeal succeed. That execution of the judgment will force the SBM Bank to pay monies which they never received and which are allegedly held by Chase Bank and KDIC in trust. Counsel cited the decision in Oraro and Rachier Advocates vs Co-operative Bank of Kenya Ltd [2000] eKLR to submits that the balance of convenience tilts in favour of granting the stay of execution, as the disruption upon SBM Bank in paying the money will be irreversible should the appeal succeed.

22. M/S Issa and Company advocates filed written submissions dated 9th September 2024 for Chase Bank and KDIC. He elucidated on the two principles necessary for an application to succeed under rule 5(2) (b) of the Court of Appeal Rules. These are that the intended appeal is arguable and that it will be rendered nugatory if the appeal succeeds absent stay. He relied on the cases of Stanely Kangethe Kinyanjui vs Tony Ketter and others [2015] eKLR and Dickson Sinkeet Mapi (suing as the personal representative of Benjamin Mapi Ole Partimo - deceased vs Mutunkei (Civil Appeal (Application) E041 OF 2020) 2021 KECA 235 (KLR) to advance their arguments.

23. Counsel argued that although English doctrines of equity are applicable in Kenya, they do not supersede statute law, and are only applicable where circumstances allow and are always subject to statute. They urge that under section 3 of the *Kenya Deposit Insurance Act*, the QuistClose Trust doctrine is not applicable to any Bank under receivership or liquidation, and that in case of conflict between the Act and any other law, the *Kenya Deposit Insurance Act* should prevail. They too rely on David Sironga Ole Tukai (supra) to fortify the argument that the *Judicature Act* does not allow a court of law to ignore an express statutory provision under the guise of applying the doctrines of equity.

24. Counsel further contended that; the funds paid to Chase Bank by LDC-MEA under the Trade Credit Agreement were not set apart from the other Bank funds so as to create a trust; the funds were available for use as a financial advancement subject to the payment of the requisite interest for a period of about 6 months pending the maturity of the LC; the Trade Credit Agreement as well as LC facility transaction did not meet the requirements of creation of a Quist Close Trust; and the Central Bank of Kenya revoked Chase Bank's banking license, placed it under liquidation and appointed KDIC as its liquidator. Reliance was placed on Kenya Deposit Insurance Corporation vs. Richardson and David Limited [2017] eKLR, sections 33 and 73 of the *Kenya Deposit Insurance Act*, and Kwanza Estates Limited vs. Dubai Bank of Kenya Limited in (liquidation) [2016] eKLR to submit that in those circumstances the Chase Bank could not act as creditor or depositor as provided under section 50 (9) of the Act.

25. On whether the appeal will be rendered nugatory counsel urged that the trial court ordered Chase Bank to pay USD 4,999,888.30 plus interest to U.B.A.F., and Chase Bank and KDIC are apprehensive that unless a stay of execution is granted, U.B.A.F, a foreign bank with no assets in Kenya, will proceed to execute the judgement. Also that the enforcement of the judgement will give preferential treatment to U.B.A.F., contrary to the law and will affect the ongoing liquidation process, rendering the appeal nugatory. Therefore, that forcing them to pay the sum as ordered will cause them harm that cannot be undone if their appeal succeeds, as they may not be able to recover the money, making the appeal pointless. Further, that delaying the payment is unlikely to cause significant harm to U.B.A.F, and it is more reasonable to grant the stay of execution.

26. U.B.A.F. filed written submissions dated 5th September 2024, through Wamae and Allen LLP Advocates in opposition to the application. Counsel submitted that it is not in dispute that U.B.A.F. is an international bank capable of obeying any court order to refund the decretal amount if the Court so orders; the trial court ordered the preservation of USD 4,888,240.79; Chase Bank and KDIC admitted in court proceedings that they owe U.B.A.F. the said sum; and that U.B.A.F. sought an indemnity from Chase Bank and KDIC.

27. Counsel referred to the Supreme Court case of Shah and 7 Others v Mombasa Bricks & Tile Limited and 5 Others (Petition 18 (E020 of 2022) [2023] KESC 106 (KLR) to urge that when someone acts unconscionably, the law can impose a trust to ensure fairness. This helps prevent unjust enrichment and ensures equitable outcome. He also cited this Court's case of Willy Kimutai Kitilit v Michael Kibet [2018] eKLR which held that *the Constitution* had by virtue of Article 10 (2) (b) elevated equity as an important constitutional principle.

28. On the nugatory aspect, counsel submitted that SBM, Chase Bank and KDIC failed to show how their appeals would be rendered ineffective if the money owed is not withheld, the trial court having noted that the money was preserved in trust as of June 2022. Counsel cited the cases of Shah v Mombasa Bricks (supra) and Kitilit v Kibet (supra) to urge that even in applications for stay, there is a duty to uphold equity. That since the monies are held in trust, the court has the option of dismissing the application, or granting a conditional stay requiring the disputed amount to be deposited in an interest-bearing escrow account pending the outcome of the appeal. He also relied on the cases of Cieni Plains Company Limited & 2 Others v. Ecobank Kenya Limited [2018] eKLR and Ryan Properties Ltd v. Philip Jalango Nairobi Civil Application No. E523 of 2021 to stress the need to balance justice and prevent delays.

29. Lastly, counsel submitted that U.B.A.F. has been kept out of its funds since 2016 and it would be against the interest of justice and equity for SBM, Chase Bank and KDIC to unjustly enrich themselves and refuse to settle the decretal amount. In addition, the courts should prioritize fairness and justice particularly in trust-related disputes, and use tools like escrow accounts to ensure equitable outcomes.

30. We have duly considered the pleadings and legal arguments put forth by the parties herein. To succeed in an application made under rule 5(2) (b) of this Court's Rules, an applicant must satisfy the twin principles namely; that the appeal is arguable, and secondly, that absent stay, the intended appeal if successful, will be rendered nugatory. See - David Morton Silverstein vs. Atsango Chesoni [2002] eKLR.

31. On arguability, this Court in Transouth Conveyors Limited vs.Kenya Revenue Authority & Another [2007] eKLR, observed that a single point will suffice and that an applicant need not establish a multiplicity of arguable points. Neither is the applicant required to show that the ground will succeed. It only needs to be a ground that raises a serious question of law worthy of consideration by the Court, or one in respect of which a reasonable argument can be put forward in support.

32. The applicants herein have annexed to their applications draft memoranda of appeal raising a raft of grounds among them, that the learned Judge erred in: elevating the applicability of the doctrines of equity, and disregarding the provisions of section 3(1) of the *Judicature Act* read together with section 3 of the *Kenya Deposit Insurance Act* which provide that the doctrines of equity do not apply in so far as they conflict or are inconsistent with the provisions of the Act, in her interpretation of what comprises a Quistclose Trust, and, in finding that the U.B.A.F. had proven the existence of a Quistclose Trust under the Trade Credit Agreement as well as the LC facility between the Chase Bank and U.B.A.F. In our view, these are not idle arguments and we are therefore satisfied that the intended appeal is arguable.

33. On the second limb as to whether the intended appeal will be rendered nugatory, the applicants urge that the trial court ordered payment of USD 4,999,888.30 plus interest to the respondent by Chase Bank. The applicants are apprehensive thatU.B.A.F., a foreign bank with no assets in Kenya, will proceed to execute the judgement and they may not be able to recover the money should the appeal succeed. Further, that the enforcement of the judgement will give preferential treatment to U.B.A.F., contrary to the law and will affect the ongoing liquidation process.

34. In rebuttal, U.B.A.F. urges that it was not disputed that it is an international bank capable of obeying any court order to refund the decretal amount if it is so ordered, or that the court ordered the preservation of USD 4,888,240.79, or that the applicants admits in court proceedings that they owe U.B.A.F. the sum of USD 4,888,240.79.

35. In the often cited case of Stanley Kangethe Kinyanjui v Tony Keter and 5 others, CA. No. 31 of 2012 this Court differently constituted stated as follows:

> "...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."

36. In view of the fact that U.B.A.F is a foreign bank with no assets in Kenya, we find merit in the applicants' fear that should it proceed to execute the judgment, the applicants might find it difficult to recover the money if the appeal succeeds. Consequently, we find that the applicants have satisfied the twin principles under Rule 5(2)(b) of the Court of Appeal Rules 2022.

37. The applications by SBM Bank, Chase Bank and KDIC are therefore allowed, with the result that a stay of execution of the judgment and decree of the High Court at Nairobi delivered by Freda Mugambi J. on 5th July 2024 in HCCC No. 206 of 2019is hereby granted, pending the hearing and determination of the appeals therefrom. The costs of the applications shall abide the outcome of the appeals.

38. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025

P. NYAMWEYA

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