



Zingo Investment Ltd v National Bank of Kenya Ltd (Civil Application E164 of 2024) [2025] KECA 101 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KECA 101 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E164 OF 2024
F TUIYOTT, JW LESSIT & A ALI-ARONI, JJA
JANUARY 24, 2025**

BETWEEN

ZINGO INVESTMENT LTD APPLICANT

AND

NATIONAL BANK OF KENYA LTD RESPONDENT

(Being an application for an injunction upon orders made by the High Court – Commercial and Tax (J.W.W. Mongare, J.) dated 14th March 2024 in Milimani HC. Comm. No. E102 of 2019)

RULING

1. In a judgment delivered on 14th March 2023, the High Court (J.W.W. Mongare, J.) found that Zingo Investment Ltd (the applicant or Zingo) had failed to prove its case against the respondent, National Bank of Kenya Ltd (the Bank) and held:

“The plaintiff has in its evidence acknowledged the existence of the debt but faults the manner in which it was disbursed. The Plaintiff places blame on the failed business venture on the Defendant. It is with no doubt that the dispute on the interest charged and the illegal penalties cannot be a basis for non-payment of the loan amount, which continues to accrue interest. I find that while the Plaintiff is justified in challenging the so-called illegal levies and interest, the Plaintiff is under an obligation to continue paying the principal amount pending the resolution of the illegal penalties and the extra interest charged. In default, the Defendant is within its rights in seeking to exercise the statutory power of sale, and can only be stopped if the debt is repaid in full.”

2. Zingo is dissatisfied with that ruling and evinced an intention to appeal against it by lodging a notice of appeal dated 10th March 2024 at the trial court.



3. Zingo is now before us through a notice of motion dated 5th April 2024 seeking an order to restrain the Bank either by itself, employees, servants, or agents from exercising any statutory power of sale, either by public auction or private treaty and/or otherwise advertising, further advertising, recommending or proceeding with any realization process in respect of all property known as LR No. 9363/98 (IR No. 14628/98) and LR Nos. 209/8628 or any other property chattels or debentures offered by the applicant as security on account of any loan advanced to it by the Bank pending the hearing and determination of his intended appeal.
4. From the grounds on the face of the motion and the affidavit sworn by one Robert Njoka Muthara on 5th April 2024 in support of the motion, Zingo proffers the reasons why it seeks protection of the Court in its Rule 5(2)(b) jurisdiction. It states that it has promptly filed the record of appeal; its appeal has high chances of success; it is exposed to the likelihood of the Bank proceeding with the sale of securities as Keysian Auctioneers issued a 45 days' notice on 20th June 2024; the Bank intends to sell the properties at a throw-away price of Kenya shillings 450 million whereas they are valued at Kenya shillings 1.0 billion; the Bank may also sell chattels and assets charged to it through a floating charge; the Bank may call up the personal guarantees of the directors of the applicant; the Bank has not issued a 90 days proclamation notice or 40 days' notice after the judgment was delivered; the respondent will lose its equity of redemption; the appeal is arguable; it should continue to enjoy the status quo order it had obtained prior to the judgment; and that it will suffer irreparable loss and damage which cannot be compensated by way of damages rendering the appeal nugatory and a mere academic exercise.
5. Importantly he avers that it is in the public domain that the Bank is suffering financial woes and has been sold for a second time in less than 4 years.
6. The Bank opposes the application.
7. The principles for the grant of stay of execution under Rule 5(2)(b) of the Court of Appeal Rules, 2022 which have time and time again been restated, are well settled. The Court must be cognizant of the twin principles, that is, the intended appeal must be arguable, that is to say it is not frivolous; and secondly, that if the stay is not granted, the intended appeal or appeal, if successful will be rendered nugatory. See the case of *Trust Bank Limited & Another v Investech Bank Ltd & 3 Others* [2000] eKLR where this Court stated:

“The jurisdiction of the court under rule 5(2) (b) aforestated, is original and discretionary, and it is trite law that to succeed an applicant has to show firstly, that his appeal or intended appeal is arguable, or put another way, it is not frivolous; and secondly, that unless he is granted a stay the appeal or intended appeal, if successful, will be rendered nugatory. Those are the guiding principles but these principles must be considered against the facts and circumstances of each case, which we now propose to set out as gleaned from the pleadings, the affidavit evidence in support of the High Court application for summary judgment, the oral evidence which was given in the course of the proceedings of that application, and the affidavit evidence in support of both the applications before us.”
8. Even if we were to accept that the appeal has good chances, still we would not grant the injunction sought as Zingo has not demonstrated that the appeal will be rendered nugatory if the charged properties and chattels are sold and if the personal guarantees are called up. In the first place having offered the properties and other assets as security for borrowing, Zingo opened up those assets to the possibility of sale in the event of default. In the circumstances, a sale of the assets cannot imperil the outcome of the intended appeal even if Zingo is to succeed.



9. There is then the allegation by Zingo that the Bank is facing a financial crisis which is a matter in the public knowledge. An allegation that was not specifically rebutted by Mr. Paul K. Chelanga in his affidavit sworn on 11th April 2024 made in response to the motion. Whereas we agree with Mr. Kirimi, learned counsel appearing for Zingo, that once his client had made an allegation questioning the financial ability of the Bank, then ordinarily, the Bank ought to have led some evidence to debunk that allegation (see *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR and *Kenya Hotel Properties Limited v Willisden Investments Limited & 6 others* [2013] eKLR). The evidence placed before us by Zingo itself to support its assertion extricates the Bank. Zingo produced evidence that the KCB Group which is the parent company of the Bank was in the process of selling the Bank to Access Bank PLC at Kshs.13.2 billion. There is no allegation that the purchasing Bank is financially weak. In addition, as correctly pointed out by Mr. Chege appearing for the Bank, any fear that the sale of the Bank will render the appeal nugatory is allayed by the provisions of section 9(1)(2) and (3) of the *Banking Act* which provides;

“9. Amalgamations and transfers of assets and liabilities

1. No amalgamation or arrangement which involves an institution as one of the principal parties to the relevant transaction, and no arrangement for the transfer of all or any part of the assets and liabilities of an institution to another person, shall have legal force except with the prior written approval of the Cabinet Secretary.
2. The Cabinet Secretary may grant his approval under subsection (1) if—
 - a. he is satisfied that the transaction in question will not be detrimental to the public interest;
 - b. in the case of an amalgamation, the amalgamation is of institutions only; or
 - c. in the case of a transfer of assets and liabilities which entails the transfer by the transferor institution of the whole or any part of its business as an institution, such transfer is effected to another institution approved by the Cabinet Secretary for the purpose of the said transfer.
3. Upon the coming into effect of a transaction effecting the amalgamation or acquisition of one institution by another institution, or effecting the transfer of all or part of the assets and liabilities of one financial institution to another institution pursuant to this section—
 - a. all the assets and liabilities of the amalgamating institutions or, in the case of a transfer of assets and liabilities, those assets and liabilities of the transferor institution that are transferred in terms of the transaction shall vest in and become binding upon the amalgamated institution or, as the case may be, the receiving institution;



- b. the amalgamated institutions or, in the case of the transfer of assets and liabilities, the receiving institution shall have the same rights and be subject to the same obligations as those which the amalgamating institution or, as the case may be, the transferor institution may have had or to which they or it may have been subject immediately before the amalgamation or transfer;
- c. all agreements, appointments, transactions and documents entered into, made, drawn up or executed with, by or in favour of any of the amalgamating institutions or, as the case may be, the transferor institution and in force immediately prior to the amalgamation or transfer, but excluding such agreements, appointments, transactions and documents that, by virtue of the terms and conditions of the amalgamation or transfer, are not to be retained in force, shall remain in full force and effect and shall be construed for all purposes as if they had been entered into, made, drawn up or executed with, by or in favour of the amalgamated institution or, as the case may be, the receiving institution or person to whom the assets and liabilities in question are transferred; and
- d. any bond, pledge, guarantee or instrument to secure future advances, facilities or services by any of the amalgamating institutions or, as the case may be, by the transferor institution, which was in force immediately prior to the amalgamation or transfer, shall remain of full force and effect and shall be construed as a bond, pledge, guarantee or instrument given to or in favour of the amalgamated institution or, as the case may be, the receiving institution or person to whom such assets and liabilities are transferred, as security for future advances, facilities or services by that financial institution or person except where, in the case of such transfer, any obligation to provide such advances, facilities or services is not included in the transfer.”

- 10. We have no evidence that supports the apprehension by Zingo that the Bank will not be able to repay the value of the assets should it be eventually held that a sale was wrongful or at an undervalue.
- 11. Ultimately, we dismiss the notice of motion dated 5th April 2024 with costs to the Bank.

DATED AND DELIVERED IN NAIROBI THIS 24TH DAY OF JANUARY 2025.

F. TUIYOTT



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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

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

Signed

Deputy Registrar

