



REPUBLIC OF KENYA



**ABSA Bank Kenya PLC v Omusala & another (Civil Appeal (Application)
E605 of 2023) [2025] KECA 388 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KECA 388 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E605 OF 2023
DK MUSINGA, M NGUGI & F TUIYOTT, JJA
FEBRUARY 28, 2025**

BETWEEN

ABSA BANK KENYA PLC APPLICANT

AND

DAVID ABAI OMUSALA 1ST RESPONDENT

NEW MEGA AFRICA LIMITED 2ND RESPONDENT

(Being an application for stay of further proceedings under Rule 5(2)(b) of the Court of Appeal Rules 2022 pending the hearing and determination of an appeal from the Ruling and/or Order of the High Court of Kenya at Nairobi (J. W. Mongare, J.) given on 12th June 2023 in Commercial & Admiralty Division HCCC No. E082 of 2023)

RULING

1. This ruling is in respect of the applicant's notice of motion dated 6th November 2024 where the applicant seeks stay of proceedings in HCCC No. E802 of 2023 pending hearing and determination of Civil Appeal No. E605 of 2023. The applicant also urged that the appeal be set down for hearing and determination on priority basis.
2. The brief background to the application is that the applicant granted various financial facilities to the 2nd respondent and as of 21st March 2023 they totaled up to Kshs.92,859,126.05. The facilities are secured by a fixed charge dated 25th August 2020 over a property known as Title Number 17/267 situate in Kitisuru, Nairobi (the suit property), and a first further charge dated 10th May 2021 granting the applicant authority to sell the charged property upon default by the 2nd respondent.
3. The 2nd respondent defaulted in servicing the loan and the applicant sought to exercise its statutory power of sale of the suit property, having issued the appropriate statutory notice.



4. To forestall the intended sale, the respondents filed HCCC No. E082 of 2023 and sought an order of injunction to restrain the applicant from selling the suit property. The respondents alleged that the applicant unreasonably rejected the respondents' request for restructuring of the loan facilities; and that one of the applicant's employees was leaking the second respondent's confidential financial position to third parties, which had dire consequences on the company's business operations because its creditors and suppliers descended on it, demanding immediate payment.
5. On 12th June 2023, the trial court granted the injunctive orders sought by the respondents, holding that the applicant had not exhausted the option of appointing a receiver under the debentures before seeking to sell the suit property.
6. Aggrieved by the said ruling, the applicant filed a notice of appeal dated 14th June 2023 and subsequently lodged the record of appeal on 4th August 2023.
7. The applicant contends that the appeal is arguable; that unless the trial court's proceedings are stayed, the trial court shall proceed to hear and determine the matter before the appeal is heard and determined, which would render the appeal nugatory.
8. The respondents do not contest that the appeal is arguable, but argue that the appeal shall not be rendered nugatory if the orders sought are not granted. They contend that the suit in the trial court raises serious issues against the applicant and should be allowed to proceed as scheduled. The Court was told that on 17th December 2024, the hearing commenced, but only one witness was heard, and that further hearing is scheduled for 25th May 2025.
9. We have considered the application and the written submissions by the parties that were highlighted by their respective counsel. The principles that guide this Court in an application of this nature are well settled. An applicant must demonstrate that the appeal or intended appeal is arguable, and that if the orders sought are not granted, the appeal, if successful, shall be rendered nugatory. Further, in an application for stay of proceedings pending appeal, this Court has consistently held that an applicant has to demonstrate existence of exceptional circumstances which make stay of the lower court's proceedings warranted, because stay of proceedings is a serious, grave, and fundamental judicial action that interferes with the right of a party to conduct litigation. See the *Permanent Secretary Ministry of Roads & Another v Fleur Investments Limited* [2014] eKLR, and *Waitbaka v Tribunal Appointed to Investigate the conduct of the Honourable Lady Justice Njoki Waitbaka* [2000] KECA (571) (19 June 2020) (Ruling).
10. In our determination of this application we must be careful not to pre-empt either the proceedings before the trial court or the appeal that is yet to be heard.
11. It is not disputed that the appeal is arguable. However, we are not satisfied that the appeal, if successful, shall be rendered nugatory unless we grant the orders sought. Whereas it cannot be denied that valuable judicial time of the trial court will have been wasted, the success of the appeal shall not take away the appellant's right to sell the suit property if the outstanding debt shall not have been settled. The applicant will only have suffered some delay in the exercise of its statutory right, but it cannot be argued that the appeal will become worthless, futile or invalid. See *Reliance Bank Limited v Norlake Investments Limited* [2002] 1 EA 227.
12. In addition, the applicant did not demonstrate any exceptional circumstances to warrant stay of the proceedings that have already commenced before the trial court.
13. We find this application devoid of merit and hereby dismiss it.



Each party shall bear its own costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR.

