



**Equity Bank (Kenya) Limited v Fitidis Group of Companies Limited & 2 others (Civil Appeal (Application) E419 of 2024) [2025] KECA 165 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KECA 165 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E419 OF 2024  
PO KIAGE, K M'INOTI & WK KORIR, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**EQUITY BANK (KENYA) LIMITED ..... APPLICANT**

**AND**

**FITIDIS GROUP OF COMPANIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**LIGHT STEEL BUILDING (K) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**CIVICON COMPANY LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Application for stay of execution pending appeal from the ruling and order of the High Court of Kenya at Machakos (Odunga, J.) dated 27th June 2022 in HCCC No. 56 of 2015)*

**RULING**

1. By an extempore ruling delivered on 24<sup>th</sup> September 2024, the Court dismissed with costs an application dated 19<sup>th</sup> June 2024 by Equity Bank Kenya Ltd. (the applicant) and reserved the reasons for 2<sup>nd</sup> February 2025. These are the reasons for the dismissal of the said application.
2. The application was taken out principally under rule 5(2) (b) of the Court of Appeal Rules and prayed for an order of stay of execution or maintenance of the status quo pending appeal from the ruling and order of the High Court of Kenya at Machakos (Odunga, J., as he then was), dated 27<sup>th</sup> June 2022. There is on record a notice of appeal dated 24<sup>th</sup> January 2024, guaranteeing the applicant a jurisdictional foothold to canvass its application in this Court. The notice of appeal was filed after the applicant obtained extension of time from a single judge of this Court on 17<sup>th</sup> May 2024.
3. By the ruling dated 27<sup>th</sup> June 2022, the High Court dismissed with costs an application by the applicant in its capacity as garnishee, to be discharged in garnishee proceedings.



4. The background to that application before the High Court is that on 5<sup>th</sup> February 2020 the High Court entered judgment against the 3<sup>rd</sup> respondent, Civicon Co. Ltd. (hereafter “Civicon”) in favour of the 1<sup>st</sup> respondent, Fitidis Group of Companies Ltd. (hereafter “Fitidis”) and the 2<sup>nd</sup> respondent, Light Steel Building (K) Ltd. (hereafter “Light Steel”) for a sum which ultimately amounted to Kshs. 46, 270, 732.51.
5. On 21<sup>st</sup> December 2020, the High Court issued a garnishee order nisi against five bank accounts belonging to the Civicon and held by the applicant in its Lavington Branch, Nairobi to secure the said sum of Kshs. 46, 270, 732.51. By a further order dated 2<sup>nd</sup> September 2021, the High Court made the garnishee order nisi absolute and ordered the applicant to release to Fitidis and Light Steel the moneys it held in favour of Civicon in the said five bank accounts, plus two additional bank accounts.
6. On 10<sup>th</sup> March 2021, the applicant applied to set aside the garnishee order absolute. That application was dismissed on 1<sup>st</sup> September 2021 and the applicant ordered to pay to Fitidis and Light Steel all the money it held in Civicon’s accounts or such sums as were sufficient to satisfy the decree.
7. On instructions from Fitidis and Light Steel, Messrs. Upstate Kenya Auctioneers proclaimed and attached the applicant’s goods on 7<sup>th</sup> September 2021 to recover the said amount of Kshs. 46, 270, 732.51. The applicant then moved the High Court on 13<sup>th</sup> September 2021 for an order of stay of the proclamation and attachment and for an order of discharge upon remitting to Fitidis and Light Steel all the money it held on behalf of Civicon. That was the application that the High Court dismissed on 27<sup>th</sup> June 2022, leading to the application for stay of execution now before the Court.
8. It is apt to point out that after the dismissal of the application by the High Court, on 5<sup>th</sup> July 2022 the applicant applied for an order of review of the ruling of the High Court on the ground of error apparent on the face of the record. The application for review was dismissed on 19<sup>th</sup> January 2024 but the court granted the applicant a conditional stay of execution for 90 days upon deposit of Kshs 1,000,000.00 in a joint account in the names of its advocates and those of Fitidis and Light Steel. It is common ground that as at the date of the hearing of the application before us, the applicant had not complied with the condition.
9. In support of the application for stay of execution, the applicant submitted that its intended appeal is arguable because the High Court erred, inter alia, by ignoring evidence that showed the applicant had truthfully disclosed all transactions conducted by Civicon in its bank accounts and that the said accounts had insufficient funds; and by making the applicant liable for Civicon’s debts. It was contended that the applicant, as the garnishee, was not the judgment debtor and that it was erroneous to attach the property of the garnishee. In support of the latter submission the applicant relied on *Barclays Bank of Kenya Ltd v. Kepha Nyabera & 191 Others* [2013] eKLR and *Maurice M. Munya & 148 others v. CFC Stanbic Bank Ltd* [2019] eKLR.
10. The applicant further submitted that execution was imminent and unless an order of stay of execution is granted, its intended appeal will be rendered nugatory because it will be forced to satisfy the garnishee decree absolute from funds made up of deposits by third parties. Such an eventuality will result in irreparable loss and damage and leave the applicant without any meaningful remedy. It was also contended that it was in the interest of justice that the order of stay of execution be granted and that Fitidis and Light Steel stood to suffer no prejudice.
11. These contentions were further elaborated in the applicant’s written submissions dated 6<sup>th</sup> September 2024, which were highlighted by Ms. Kyumu, learned counsel, who held brief for Mr. Muchemi for the applicant.



12. Fitidis and Light Steel opposed the application vide a replying affidavit sworn on 20<sup>th</sup> September 2024 by Christakis Fitidis and written submissions dated 23<sup>rd</sup> September 2024. The substance of the response was that the intended appeal is not arguable because the applicant was duly notified and served with the garnishee order nisi and a notice to appear in court on 27<sup>th</sup> January 2021, which the applicant ignored. As a result of the applicant's failure to appear in court, the garnishee decree nisi was made absolute.
13. It was also contended that the applicant had come to the court with unclean hands as it had deliberately failed to make full and correct disclosure about Civicon's and Light Steel's accounts in its possession and had also failed to comply with the condition upon which the High Court had granted it an order of stay of execution.
14. Fitidis and Light Steel concluded by submitting that the applicant had failed to demonstrate how the intended appeal would be rendered nugatory and that it was in the interest of justice that they should be allowed to enjoy the fruits of the decree in their favour.
15. Having carefully considered the application, the impugned ruling of the High Court, the submissions by the parties and the authorities cited, we recall that the principles on which this Court grants a remedy under rule 5(2)(b) of the Court of Appeal Rules are well settled and comprehensively summarised in the ruling of this Court in Stanley Kangethe Kinyanjui v. Tony Ketter & Others [2013] eKLR. The applicant has to satisfy the Court that the intended appeal is arguable or that it is not frivolous, and that unless the relief sought is granted, the appeal will be rendered nugatory if it succeeds.
16. We have no doubt in our minds that the intended appeal raises several arguable points, which are not frivolous. Those points need not succeed when the appeal is heard. It is sufficient that they raise even one issue deserving the considered opinion of the Court. On whether an arguable appeal exists, the Court is not required to say much, least it prejudices the issue, which is properly the domain of the bench that hears the intended appeal. (See Central Bank of Kenya Deposit Protection Fund Board v. Uhuru Highway Development Ltd & Others, CA No. 95 of 1999).
17. As regards whether the intended appeal risks being rendered nugatory, we bear in mind that whether or not an appeal or intended appeal will be rendered nugatory depends on the peculiar circumstances of every application. (See Reliance Bank Ltd v. Norlake Investments Ltd [2002] 1 EA 227). But the overarching concern of the Court is to ensure that should the appeal or intended appeal finally succeed, it will not be a mere pyrrhic victory. (See Ahmed Musa Ismael v. Kumba ole Ntamorua & 4 Others [2014] eKLR).
18. In its entire application the applicant has not even suggested that Fitidis and Light Steel are incapable of repaying the amount in the garnishee order absolute. But the greater concern for us is the conduct of the applicant, which is seeking an equitable remedy from the Court. When asked by the Court at the hearing of the application whether the applicant had allowed Civicon to continue transacting in its accounts after service of the garnishee order, counsel answered in the affirmative.
19. The High Court found for a fact that the applicant had approached it with unclean hands by allowing Civicon to continue transacting in the accounts that were subject to the garnishee order and by failing to provide truthful and accurate statements on the status of those accounts. A party who seeks an equitable remedy must show themselves to be worthy of such remedy.
20. In Eric Makokha & 4 others v Lawrence Sagini & 2 Others [1994] eKLR, this Court reiterate that an application under rule 5(2)(b) invokes the equitable jurisdiction of the Court and therefore grant



of a remedy under that rule must be based on principles established by equity. And in David Kamau Gakuru

- v. National Industrial Credit Bank Ltd., CA No. 84 of 2021, the Court affirmed that an equitable remedy cannot be granted to party who has demonstrated openly by his conduct that he is undeserving of the equitable relief.
21. The applicant was obliged to satisfy both considerations under rule 5(2)(b). (See Jaribu Holdings Ltd. v. Kenya Commercial Bank Ltd., CA No. 314 of 2007). Having failed to satisfy both considerations, there was no basis for granting the order of stay of execution.
22. The above therefore, are the reasons for dismissal, on 24<sup>th</sup> September 2024 of the applicant's notice of motion dated 19<sup>th</sup> June 2024, with costs to Civicon and Light Steel.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY FEBRUARY 2025.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

