



REPUBLIC OF KENYA



KENYA LAW
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Nyoro Construction Company Limited v Kenya Commercial Bank Limited (Civil Application E626 of 2024) [2025] KECA 157 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KECA 157 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E626 OF 2024
DK MUSINGA, M NGUGI & F TUIYOTT, JJA
FEBRUARY 7, 2025**

BETWEEN

NYORO CONSTRUCTION COMPANY LIMITED APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED RESPONDENT

(Being an application for stay and/or injunction against the orders of the High Court of Kenya at Nairobi Commercial & Tax Division (P. Mulwa, J.) dated 7th November 2024 in Commercial & Tax Division Case No. E327 of 2023)

RULING

1. The applicant's notice of motion dated 14th November 2024 seeks the following two prayers:
 - i. ...
 - ii. That the order of Hon. Justice Peter Mulwa in the High Court of Kenya at Nairobi, commercial and tax division case No. E327 of 2023 discharging earlier orders for temporary injunction granted on 7th November be stayed.
 - iii. That in the alternative the respondent by itself, its agents and/or servants be restrained from auctioning, selling, or disposing of the applicant's assets and land parcel LR 209/10806 Nairobi pending the hearing and determination of the intended appeal.
2. From the applicant's affidavit in support of the application, it is not in dispute that the respondent advanced various banking facilities to the applicant, amounting to almost Kshs.1.5 billion, as working capital for construction of various roads, pursuant to contracts that had been awarded to the applicant by the Government of Kenya. Due to various reasons, among them delay by the Government of Kenya in paying the applicant for the road construction projects, the applicant defaulted in servicing the



banking facilities. As a result, the respondent sought to realise its security, including by way of sale of LR No. 209/10806 Nairobi (the suit property).

3. The applicant has stated in its affidavit in support of the application that it approached the Government of Kenya to undertake direct payments to the respondent; that the respondent accepted that arrangement and has received from the Government of Kenya some payments, but that notwithstanding, the respondent still intends to exercise its statutory power of sale of the suit property.
4. The applicant contends that its intended appeal is arguable, and that unless the orders sought are granted, it shall suffer irreparable harm by way of sale by public auction of the various properties charged to the respondent; in which event its reputation will suffer an irreparable dent.
5. In its submissions dated 27th January 2025, the respondent argues that the applicant has not demonstrated that it has an arguable appeal since there is an undisputed debt and undisputed default in settlement of the same.
6. On the nugatory aspect, the respondent submits that it is a reputable commercial bank and it has not been alleged that it will be unable to compensate the applicant in the event that its appeal is successful. We were therefore urged to dismiss the application.
7. We have considered the application, the affidavits and the submissions on record. In an application for stay of execution pending appeal, the applicant must demonstrate that the appeal or intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, will be rendered nugatory. See *Multimedia University & Another v Professor Gitile Naituli* [2014] eKLR
8. On the first limb, we are not satisfied that the applicant has an arguable appeal. It is not in dispute that the applicant is heavily indebted to the respondent. It is also not in dispute that the applicant has defaulted in its repayment of the advanced sums of money. Whereas it may be true that the applicant's default in servicing its debt to the respondent has been contributed to by the failure of the Government of Kenya to pay the applicant for services rendered, that per se is not sufficient ground to warrant grant of an injunction in favour of the applicant. The learned judge cannot therefore be faulted for discharging the order of injunction that had earlier been granted in favour of the applicant.
9. In *John Nduati Kariuki t/a Jobester Merchants v National Bank of Kenya Ltd* [2006] eKLR, this Court held:

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed to Court...”
10. Having found that the appeal is not arguable, we need not consider the second limb, that is, whether the appeal, if successful, shall be rendered nugatory. But even if we were to pronounce ourselves on the second limb, we would hold that it has not been demonstrated that the respondent, which is a reputable commercial bank, is unable to compensate the applicant in damages in the event that its appeal is successful.
11. In conclusion, therefore, we find this application unmeritorious and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH 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.

