



Equip Agencies Limited v I&M Bank Limited (Civil Application E103 of 2025) [2025] KECA 585 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KECA 585 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E103 OF 2025
DK MUSINGA, M NGUGI & GV ODUNGA, JJA
MARCH 28, 2025**

BETWEEN

EQUIP AGENCIES LIMITED APPLICANT

AND

I&M BANK LIMITED RESPONDENT

(Being an application for stay and injunction pending hearing and determination of the appeal from the entire Ruling and Order of the High Court of Kenya at Nairobi (F. Mugambi, J.) delivered on 24th February 2025 in H.C.C.C. No. 420 of 2016)

RULING

1. As we will shortly demonstrate, the applicant has engaged both the High Court and this Court over the last nine (9) years in a multiplicity of suits and appeals, all in an effort to delay or frustrate the respondent's statutory power of sale of the applicant's properties that were charged to the respondent to secure banking facilities that were granted to the applicant by the respondent some years ago. The parties have been in our courts since 2017.
2. By way of a notice of motion dated 25th February 2025, the applicant seeks, pending hearing and determination of an intended appeal, stay of execution of the ruling and orders of the High Court (Mugambi, J.) delivered on 24th February 2025 in Nairobi HCCOMM No. 420 of 2016. The applicant also seeks an order to restrain the respondent, its agents and/or servants from exercising its statutory power of sale in respect of LR. No. MN/V1/3074; LR. No. 209/4535; LR No. 209/8755, Pate Road, Industrial Area, Nairobi; LR. No. 214/172, Muthaiga, Nairobi, (suit properties), including advertising for sale, selling vide public auction and/or private treaty of the suit properties pending hearing and determination of an intended appeal.
3. In its affidavit in support of the application sworn by Divyesh Indubhai Patel, the applicant's managing director, the applicant states that on 24th February 2025, the High Court vacated an injunctive order



that had been granted in favour of the applicant restraining the respondent from selling the suit properties. The applicant states that the respondent has since commenced steps to exercise its statutory power of sale of the suit properties and had scheduled the sale for 14th March 2025, but the applicant's counsel told the Court that the sale is now slated to be held on 31st March 2025.

4. The applicant states that its intended appeal raises substantial questions of law and fact, and the balance of convenience favors preservation of the status quo pending determination of the intended appeal. The applicant has annexed to his affidavit a draft memorandum of appeal. In that memorandum, the applicant states that the learned judge erred in law by vacating the injunctive relief; by misapplying the doctrine of res judicata; by failing to consider the balance of convenience which favoured maintenance of the injunctive relief pending final resolution of the matter; and by failing to properly consider the "in duplum" rule under section 44 of the *Banking Act*. For those reasons, the applicant urges this Court to grant the orders sought.
5. In response to the applicant's affidavit, Andrew Muchina, the respondent's senior manager, legal department, stated in his replying affidavit that the intended appeal is not arguable and the appeal, even if it were to succeed, will not be rendered nugatory. Mr. Muchina's contention that the appeal is not arguable is based on the fact that the dispute between the parties is res judicata. He set out the following arguments in support thereof.
 - a. The appellant filed a similar application for injunction in the High Court which application was dismissed by lady Justice Nzioka on 1st November 2017. A copy of the ruling is exhibited at page 1 to 33.
 - b. The appellant filed an appeal against the said Ruling in Civil Appeal No. 111 of 2018: *Equip Agencies Limited vs I&M Bank Limited* but withdrew the said appeal by consent. A copy of the consent is exhibited at page 34.
 - c. The withdrawal of the said appeal was informed by the Deed of Settlement dated 10th June 2021 between the appellant and respondent which marked the appeal and the case in the High Court fully settled. A copy of the Deed of Settlement is exhibited at page 35 to 44.
 - d. After withdrawal of the said appeal, the High Court entered judgment in two cases with a similar subject matter pursuant to the terms of the said Deed of Settlement. The said judgments are as follows:
 - i. Judgment dated 30th September 2022 by Justice Majanja in HCC No. 87 of 2019: *Equip Agencies Limited vs I & M Bank Limited & 2 Others*. A copy of the judgment is exhibited at page 45 to 62.
 - ii. Judgment dated 16th June 2023 by Justice Majanja in HCCC No. 417 of 2018: *Equip Agencies Limited vs I&M Bank Limited & 2 Others*. A copy of the judgment is exhibited at page 63 to 66.
 - e. The appellant also filed a similar application for injunction in HCCC No. E943 of 2021: *Equip Agencies Limited & 5 Others vs I&M Bank Limited & Another seeking inter alia to restrain the Bank from exercising its statutory power of sale of the charged properties*.



- f. By a ruling dated 3rd June 2022, Justice Chacha Mwita dismissed the application on inter alia grounds that it was res judicata. A copy of the ruling is exhibited at page 67 to 95.
- g. The appellant filed a further application seeking inter alia an injunction against the Bank's exercise of statutory power of sale pending the hearing and determination of Civil Appeal (Application) No. E361 of 2022: *Equip Agencies Limited & 5 Others vs I&M Bank Limited & Another* being the appeal against the ruling of Justice Mwita dated 3rd June 2022 above.
- h. By a ruling dated 19th September 2024, Justice Mulwa dismissed the said application and set aside interim orders of injunction on inter alia grounds that the appellant had sat on interim orders for over two (2) years and neglected to prosecute the appeal as well as the application for stay in the Court of Appeal. A copy of the ruling is exhibited at page 96 to 108.
 - i. The appellant filed yet another application dated 3rd October 2024 before Justice Mulwa seeking inter alia similar orders of injunction against the Bank's exercise of statutory power of sale which was slated for 18th October 2024 pending the hearing and determination of Civil Appeal (Application) No. E361 of 2022: *Equip Agencies Limited & 5 Others vs I&M Bank Limited & Another*.
 - ii. The bank filed a preliminary objection dated 11th October 2024 on inter alia grounds of res judicata. A copy of the said preliminary objection is exhibited at page 109 to 111.
- (k) By a ruling delivered on 17th October 2024, Justice Mulwa dismissed the said application and gave the Bank the greenlight to sell the properties on 18th October 2024. A copy of the Ruling is exhibited at page 112 to 114.”

6. Mr. Muchina further argues that the appeal is an abuse of the court process for the following reasons:

- “a. Despite the fact that Civil Appeal (Application No. E361 of 2022: *Equip Agencies Limited & 5 Others vs I&M Bank Limited & Another*) was filed way bank on 17th June 2022, the same has never been prosecuted to date.
- b. In fact, when the said application came before the Court of Appeal under Certificate of Urgency on or about 22nd June 2022, the Court of Appeal declined to certify it urgent but directed as follows:
 - i. The applicant to serve the respondent with the application;
 - ii. Parties are directed to file and exchange submissions and any other documents in support of or in opposition to the application within 30 days.
 - iii. All submissions should be limited to three (3) pages. A copy of the said directions is exhibited at page 115.



- c. The appellant never bothered to file and serve submissions as had been directed by the Court of Appeal because it was then enjoying interim orders granted on 6th June 2022 in HCC No. E943 of 2021: Equip Agencies Limited & 5 Others vs I&M Bank Limited & Another.
 - d. The said orders having been discharged by the Ruling of 19th September 2024, the appellant filed another application seeking another injunction to stop the sale of the charged properties.
 - e. The said application was dismissed through a ruling dated 24th February 2024 which is the subject of this appeal. A copy of the ruling is exhibited at page 116 to 118.
 - f. Plaintiff has now obtained further interim orders in this suit.”
7. The respondent further states that in the circumstances, as demonstrated, the respondent cannot be restrained from exercising its statutory power of sale, and that the bank will suffer great prejudice if the application is allowed because the applicant’s debt, which is admitted, is now over Kshs.2.5 Billion.
 8. When this application came up for hearing on 19th March 2025, Mr. Odegi, Mr. Kingára and Ms Mari appeared for the applicant, while Mr. Wawire appeared for the respondent. Counsel highlighted their respective clients’ submissions, which we need not rehash.
 9. To succeed in an application of this nature, the applicant must satisfy this Court that the appeal or intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. (See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] KECA 378 (KLR).
 10. Having considered the numerous rulings and judgments that have been rendered by the High Court and this Court in respect of this same dispute, we do not entertain any doubt that the intended appeal is frivolous and not arguable. As rightly submitted by the respondent, the matter is res judicata. The applicant’s indebtedness to the respondent cannot be disputed. The applicant had expressly admitted the debt and executed a Deed of Settlement way back on 10th June 2021 but has so far failed to honour the same.
 11. But even if we were to assume that the intended appeal is arguable, it will not be rendered nugatory if we do not grant the orders sought. The value of the suit properties is known and the respondent is a reputable commercial bank that is able to pay any damages in the event that the applicant’s intended appeal succeeds. We are satisfied that the applicant’s application is unmeritorious and ought to be dismissed, which we hereby do. The applicant shall bear the costs of the application.

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

D. K. MUSINGA, (PRESIDENT)

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL



G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

