



Bank of Africa (K) Limited v Juja Coffee Exporters Limited & 7 others (Civil Appeal (Application) E185 of 2024) [2025] KECA 864 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KECA 864 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E185 OF 2024
LA ACHODE, KI LAIBUTA & GWN MACHARIA, JJA
MARCH 21, 2025**

BETWEEN

BANK OF AFRICA (K) LIMITED APPLICANT

AND

JUJA COFFEE EXPORTERS LIMITED 1ST RESPONDENT

T.S.S TRANSPORTERS LIMITED 2ND RESPONDENT

T.S.S INVESTMENT LIMITED 3RD RESPONDENT

**THE EXECUTORS OF THE ESTATE OF TAHIR SHEIKH SAID
AHMED 4TH RESPONDENT**

KAAB INVESTMENTS LIMITED 5TH RESPONDENT

ABDULMAJID MOHAMED HAJI ADAM 6TH RESPONDENT

SHAMI MOTORS LIMITED 7TH RESPONDENT

I.F.I PARADISE PROPERTIES LIMITED 8TH RESPONDENT

(Being an application for an injunction and stay of further proceedings pending appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Mombasa (S. Kibunja, J.) dated 24th July 2024 in E.L.C Case No. E049 of 2023)

RULING

1. The precis of the Motion before us is that the applicant moved to this Court on appeal from the ruling and orders of the Environment and Land Court at Mombasa (the ELC) (S. Kibunja J.) dated 24th July 2024. By the impugned ruling, the learned Judge determined three interlocutory applications, namely: (i) the 1st, 2nd, 3rd, and 4th respondents' Notice of Motion dated 13th December 2023; (ii) the applicant's



Notice of Motion dated 19th January 2024; and (iii) a Notice of Motion dated 26th January 2024 filed by Peter Nyaga Njoka and Helen Wanjiru Nyaga (Njoka and Nyaga), who are not party to the appeal or to the applicant's instant Motion.

2. The three Motions aforesaid and the ruling thereon are the genesis of the appeal and the instant application. The proceedings and the impugned ruling and orders of the ELC sought to be stayed are predicated on ELC Case No. E049 of 2023 in which the 3rd respondent filed suit against the applicant to restrain it from advertising for sale in purported exercise of its statutory power of sale over the 3rd respondent's properties known as Mombasa/Block XXI/1X7, 1X5, 5X6, 5X7, 5X6 and Mombasa/Block XXVI/3X1, (the suit properties) alleged to have been charged to the applicant as security under respective Charges and Guarantees in favour of the applicant to secure repayment by the 1st respondent of various bank facilities allegedly advanced to it, all of which are contested in the suit pending in the ELC.
3. In the absence of a statement of defence in the record as put to us, we can only gather from the multiple applications, the affidavits in support and in reply, and from the evidential documents on record, that the dispute continued to take turns and twists raising numerous issues relating to the contested banking facilities, the existence and validity of the alleged securities and guarantees, the contested liability for the mortgage debts, the pivotal contest over the ELC's jurisdiction to hear and determine the suit, the alleged want of locus standi on the part of the 1st to 4th respondents, and contentions that certain of the competing claims were res judicata.
4. It is noteworthy that the competing claims aforesaid are still pending determination on their merits in the case whose proceedings are sought to be stayed as prayed in the applicant's Motion. We hasten to observe that it would be improper for us to say more on the parties' competing claims and interests aforesaid lest we encroach on the merits or lack thereof to the embarrassment or possible pre-emption of the trial court. The only twofold question that begs our answer is: how did the parties get here; and whether the applicant merits the orders sought.
5. Turning to the interlocutory proceedings culminating in the impugned ruling and orders, it is noteworthy that, by a Notice of Motion dated 13th December 2023, the 1st to 4th respondents sought and obtained as against the applicant temporary injunction from further advertising for sale, selling by public auction or private treaty, or in any other way disposing of parcel Nos. 5X6 and 5X7 Section XXI Mombasa Island and Title No. Mombasa/Block XXVI/3X1 (the suit properties) pending hearing and determination of ELC Case No. E049 of 2023; temporary injunction as against the 6th, 7th, and 8th respondents to restrain them from interfering with plot Nos. 1X7 Section XXI Mombasa Island, plot No. 154 Section XXI Mombasa Island, plot No. 44 Section XXI Mombasa Island, and plot No. 5X6 Section XVII Mombasa Island, pending hearing and determination of the suit, which orders were granted as prayed.
6. Second was the Motion dated 19th January 2024 by which the appellant mainly sought orders: to set aside/discharge interim orders of injunction granted to the 1st to 4th respondents on 14th December 2023; to restrain the 1st to 4th respondents from filing further fresh suits, applications or appeals from the suit, and from interfering with or defeating the applicant's rights to statutory power of sale in respect

of parcel Nos. 5X6 and 5X7 Section XXI Mombasa Island, Title No. Mombasa/Block XXVI/3X1, plot Nos 44, 1X7, 3X1 and 1X54 Mombasa; that the 1st to 4th respondent's application be struck out; that the firm of M/s. Muriu Muigai & Company LLP be barred from representing the 1st to 4th respondents on account of their alleged abuse of court process by filing a multiplicity of similar suits;



- that the 1st to 4th respondents be declared vexatious litigants and restrained from filing future suits without leave of the court; and that the 1st to 4th respondents bear the applicant's costs in the application and in the suit on an indemnity basis.
7. In the 3rd Motion, Njoka and Nyaga sought to be removed from the proceedings between the applicant and the respondents; and that the suit against them be struck out with costs against the applicant and the 1st to 4th respondents jointly and severally.
 8. In determination of the three applications, the learned Judge delivered the impugned ruling dated 24th July 2024 and allowed the 1st to 4th respondents' application for interim injunction as prayed in its Notice of Motion dated 13th December 2023 as well as the Motion by Njoka and Nyaga, but dismissed the applicant's Motion dated 19th January 2024 to the effect that the interim injunction remained in force pending hearing and determination of the substantive suit on its merits.
 9. It is the outcome of the three motions aforesaid that the applicant challenges on appeal to this Court and, pending hearing and determination of its appeal, that this Court do order stay of execution of the impugned ruling, orders and proceedings in the ELC. That is the gist of the applicant's Notice of Motion dated 3rd October 2024.
 10. The applicant's Motion is supported by the annexed affidavit of Victor Keitany, the applicant's Senior Recoveries Officer, sworn on 3rd October 2024 essentially deposing to 8 albeit argumentative grounds on which the Motion is anchored, primarily faulting the learned Judge for: holding that the High Court has jurisdiction to determine the genuineness of the loan facilities advanced to the 1st to 4th respondents while contradicting himself by holding that the same court had no jurisdiction to determine the applicant's right to exercise its statutory power of sale relating to the same facilities; holding that the primary issue for determination was the alleged fraudulent and illegal transactions; failing to appreciate that it is those alleged illegal transactions that created the Charge from which the right to exercise the statutory power of sale arose; disregarding the doctrine of stare decisis; holding that the matter was not res judicata; holding that the 1st to 4th respondents had locus standi while they had no such locus as they were not chargors in respect of the suit properties already transferred to the 6th to 8th respondents; holding that the 4th respondent had locus standi as executor of the Will of Tahir Sheikh Said Ahmed (Deceased); holding that the 1st to 4th respondents had established a prima facie case despite lack of jurisdiction and locus standi; finding that the 1st to 4th respondents would suffer irreparable loss if an interim injunction was not granted despite their knowledge that the properties stood to be sold in the event of default on the mortgage debt; disregarding the fact that it is the applicant who stood to suffer loss and gross inconvenience on account of delay in the recovery process in consequence of which the debt would outstrip the securities; and for failing to bar the 1st to 4th respondents from filing further suits and applications in the proceedings.
 11. With reference to the orders sought pursuant to rule 5(2) (b) of the Court of Appeal Rules, learned counsel for the applicant submitted that it has an arguable appeal for the reasons set out in the composite 2nd ground numbered "(b)" in support of its Motion. In summary, the applicant wishes to advance for determination on appeal the issues, inter alia, as to: whether the trial court had jurisdiction to hear and determine the suit; whether the suit was res judicata; whether the 1st to the 4th respondents had locus standi to file the suit; and whether they had established a prima facie case to merit the interim injunction complained of. The remaining grounds go to the merits of the suit on which we refrain from commenting.
 12. According to the applicant, its appeal would be rendered nugatory if the stay orders sought are not granted. The reasons given in support of its proposition in this regard are argued at length in Ground



- “(c)” on the face of its motion, and relate to the perceived consequences of the suit in the ELC proceeding to hearing and determination. It is for this reason that the applicant seeks: (i) stay of the impugned ruling and orders; and (ii) stay of proceedings in ELC Case No. E049 of 2023 pending hearing and determination of its appeal.
13. In ground “(d)”, the applicant goes on to argue how it will suffer irreparable loss if the stay orders sought are not granted. With due respect to counsel and their client, grounds “(e)” to “(h)” have no bearing on the orders that this Court may grant in determination of applications under rule 5(2) (b) of the Rules of this Court and, accordingly, no useful purpose would be served by pronouncing ourselves thereon.
 14. In support of the applicant’s Motion, learned counsel M/s. Wamae & Allen LLP filed written submissions dated 5th November 2024 citing no judicial authorities other than those referred to in their argumentative grounds on which the applicant’s Motion is founded, none of which have a bearing on the twin principles for grant of stay orders under rule 5(2) (b) of the Rules of this Court with which we are presently concerned.
 15. Opposing the applicant’s Motion, Nurein Tahir Sheik Said, a director of the 1st to 3rd respondents, swore a replying affidavit on 25th October 2024 for and on behalf of the 1st to the 4th respondents. In it, the deponent contends, inter alia, that the applicant’s Motion has no merit and should be denied for the reasons: that they (the 1st to 4th respondents) filed an application dated 3rd October 2024 seeking to have the applicant’s notice and record of appeal struck out, and that, if determined, the applicant’s Motion stand to be moot; that prohibitory injunctions are not liable to stay orders; that grant of the orders sought would be tantamount to determining the merits of the appeal at the interlocutory stage; that no exceptional reasons have been advanced to merit the stay orders sought; that the applicant’s appeal would not be rendered nugatory if the orders sought are not granted; and that no reasons have been advanced to warrant stay/interruption of the proceedings in the trial court.
 16. Counsel for the 1st to 4th respondents, M/s. Muriu Mungai & Company filed written submissions, a list of authorities and case digest dated 7th November 2024 citing 6 judicial authorities, namely: Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives v Mehta International Limited & Another (2023) KECA 462 (KLR); CFC Stanbic Bank Limited v John Kung’u Kiarie & Dyer & Blair Investment Bank Limited (2016) KECA 368 (KLR); Delta Connection Limited v. Delta Airlines Incorporated (2009) KECA 302 (KLR); Katangi Developers Limited v Prafula Enterprises Limited & J. O. Josiah T/A Nyaluoyo Auctioneers (2018) KECA 695 (KLR); David Morton Silverstein v Atsango Chesoni [2002] eKLR; and UAP Provincial Insurance Co. Limited v Michael John Beckett (2004) KECA 26 (KLR), whose judicial authority we have duly considered.
 17. In order to succeed in an application under Rule 5(2) (b) of the Court of Appeal Rules for stay of execution or of proceedings pending appeal, an applicant has to satisfy the twin principles enunciated in numerous decisions of this Court, namely that: an applicant must demonstrate that they have an arguable appeal; and that the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the decree, order or proceedings is not stayed.
 18. On the first limb of this twin principle, this Court held in David Morton Silverstein v Atsango Chesoni [2002] eKLR that, for an order of stay to issue, the applicant must first demonstrate that the appeal or intended appeal is arguable, that is, it is not frivolous, and that the appeal or intended appeal would be rendered nugatory absent stay. The two conjunctive requirements constitute what is commonly referred to as the twin principles that must be satisfied before such orders can avail (see Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC [2020] eKLR; and Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 Others [2014] eKLR).



19. Regarding the sufficiency of the pleaded grounds of appeal to warrant stay of execution of the impugned orders and of the proceedings in the trial court, we call to mind this Court's decision in *Yellow Horse Inns Ltd v A.A Kawir Transporters and 4 others* (ibid) where the Court observed that an applicant need not show a multiplicity of arguable points to merit stay orders pending appeal. In effect, one arguable point would suffice (see *Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others* [2014] eKLR).
20. Simply defined, an arguable appeal is one that raises a bona fide arguable point that deserves to be considered and determined by the Court. In other words, an arguable appeal is one that is not frivolous (see *Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union* [2018] eKLR).
21. A cursory look at the record as put to us clearly shows that the applicant's Motion heralding the appeal discloses such weighty grounds as to, inter alia, whether the ELC has jurisdiction to hear and determine disputes relating to the validity of charges and guarantees, and the enforcement of such securities; whether the 1st to 4th respondents' suit in the trial court was res judicata; and whether the four respondents had locus standi to file the suit whose proceedings are also sought to be stayed pending appeal against the impugned ruling in which conservatory orders were granted pending hearing and determination of the suit. Those contentious grounds, among others, are by no means idle. Put simply, the appeal is arguable, and that satisfies the 1st limb of the twin principle for grant of orders under rule 5(2) (b).
22. Turning to the 2nd limb of the twin principle, the question is as to whether the appeal would be rendered nugatory if the orders sought are not granted. The term 'nugatory' was defined in *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA p 227 at p 232 thus: 'it does not only mean worthless, futile or invalid. It also means trifling. The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each case.
23. On the authority of *Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives v Mehta International Limited & Another* (2023) KECA 462 (KLR), learned counsel for the 1st to 4th respondents submitted that an interlocutory order which would have the effect of determining the substance of the intended appeal is outside the ambit of rule 5(2) (b) of the Court of Appeal Rules, 2022.
24. We take to mind the fact that the ruling and orders sought to be stayed were conservatory in nature and merely restrained the applicant from exercising its statutory power of sale in respect of the suit properties with intent to enforce the securities whose validity is contested in the suit. The impugned conservatory orders were issued pending determination of the 1st to 4th respondents' suit, whose proceedings we have also been asked to stay pending determination of the appeal.
25. In the afore-cited case of *Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives v Mehta International Limited & Another* (ibid), this Court held that orders of stay of execution or of further proceedings, or of injunctive relief pursuant to rule 5(2) (b) of this Court's Rules pending appeal do not avail in circumstances where to grant such orders would have the effect of nullifying such orders at the interlocutory stage in the proceedings, a decision that can only be made in determination of the appeal.



26. Addressing itself to the question as to whether stay of an order of injunction pending appeal sought by an applicant pursuant to rule 5(2) (b) of the Court's Rules avails, this Court in *Consolidated Bank of Kenya & 2 other v Usafi Limited* [2006] eKLR observed:

“We consider that under the rule in its present form there are only three types of orders permitted to be made under rule 5(2) (b) namely:

- i. A stay of execution.
- ii. An injunction.
- iii. A stay of any further proceedings

'A stay of an injunction' is not included in that provision. The omission may well have been intended by the Rules Committee since to grant a stay of an injunction would have the effect of nullifying the injunction before the appeal against its grant had been heard.”

27. In view of the foregoing, we reach the inescapable conclusion that stay of the impugned ruling and orders of Kibunja, J. is not merited. Granting such an order would be tantamount to reversing the effect of the impugned ruling and orders at an interlocutory stage. Put differently, a stay thereof would effectively nullify the conservatory orders thereby allowing exercise by the applicant of its statutory power of sale already challenged on appeal. Accordingly, granting such orders at the interlocutory stage would be intrusive on the merits of the appeal. In conclusion, the applicant's Motion for orders to stay the impugned ruling and orders fails.

28. The remaining question for our determination is whether the applicant merits stay of proceedings in the trial court pending determination of its appeal, which has already been filed.

29. We share the view expressed by the High Court of Kenya at Meru in *Kenya Wildlife Service v James Mutembei* [2019] eKLR where

Gikonyo, J. correctly drew a clear distinction between stay of execution and stay of proceedings thus:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on [the] right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”

30. Whether or not to grant a stay of proceedings as prayed is a matter of judicial discretion to be exercised in the interest of Justice. The decisive question is whether it is in the interest of justice to order a stay of proceedings and, if so, on what terms. To answer this question, we have weighed the pros and cons of granting or declining the orders sought. In doing so, we have taken to mind, inter alia: the need for expeditious disposal of the suit in the trial court and the appeal to this Court; the prima facie merits of the applicant's appeal in the sense of not whether it will probably succeed or not, but whether it is arguable; the scarcity and optimum utilization of judicial time and resources; and whether the application has been brought expeditiously. It is not lost on us that the discretionary power to order a stay of proceedings is a power which ought to be exercised sparingly, and only in exceptional cases.



31. We also take to mind the threshold for stay of proceedings, which was enunciated in Halsbury's Laws of England (4th Edn) Vol. 37 pp.330 and 332 thus:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

32. In our considered view, the instant case is one of those exceptional cases which merit stay of proceedings pending appeal. To allow the proceedings in the trial court to proceed in tandem with the appeal in the face of the jurisdictional challenge and other arguable grounds advanced in the appeal would essentially render the appeal worthless and a mere academic misadventure. Put differently, were the trial and the appeal proceed in tandem, and the appeal succeeds, the proceedings in the trial court would have been in vain and, conversely, the appeal would have been futile or inconsequential. Moreover, having concluded that the applicant's appeal is arguable, it would defeat reason not to stay proceedings in the ELC in a case where its jurisdiction and the locus standi of the 1st to 4th respondents to file the suit are the subject of appeal to this Court, not to mention the applicant's contention that the suit is res judicata. Whether those grounds will hold is not for us to judge. Suffice it to observe that the applicant's Motion satisfies the 2nd limb of the twin principle for grant of orders under rule 5(2) (b).

33. Having considered the record as put to us, the applicant's Notice of Motion, the grounds on which it is anchored, the affidavits in support thereof and in reply thereto, the rival submissions, the cited authorities and the law, we reach the inescapable conclusion that the applicant's Motion succeeds in part. Accordingly, we hereby order and direct that:

- a. The applicant's Motion for stay of execution of the ruling and orders of the ELC (S. Kibunja, J.) dated 24th July 2024 be and is hereby dismissed;
- b. There be stay of proceedings in ELC Case No. E049 of 2023 pending hearing and determination of the applicant's appeal; and
- c. That costs in the application do abide the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

DR. K. I. LAIBUTA CARB, FCIARB.

JUDGE OF APPEAL

L. ACHODE

JUDGE OF APPEAL

G. W. NGENYE-MACARIA

JUDGE OF APPEAL

