



**Stanbic Bank Kenya Limited v Bank of South Sudan & another (Civil Application E592 of 2024) [2025] KECA 495 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KECA 495 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E592 OF 2024  
M NGUGI, P NYAMWEYA & WK KORIR, JJA  
MARCH 21, 2025**

**BETWEEN**

**STANBIC BANK KENYA LIMITED ..... APPLICANT**

**AND**

**BANK OF SOUTH SUDAN ..... 1<sup>ST</sup> RESPONDENT**

**AIR AFRIK AVIATION LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of execution and proceedings pending the hearing and determination of an intended appeal from the ruling and /or order of the High Court of Kenya (Prof. (Dr.) Nixon Sifuna, J.) dated 7th October 2024 in NAI HC. COMM No. 413 of 2018)*

**RULING**

1. The applicant, Stanbic Bank Kenya Ltd, has moved the Court through the notice of motion dated 28<sup>th</sup> October 2024 brought under section 3 of the *Appellate Jurisdiction Act* and rules 1 (2), 5 (2) (b), 47 and 49 of the *Court of Appeal Rules* seeking an order staying further proceedings in Nairobi H.C. COMM. No. 413 of 2018; *Air Afrik Aviation Ltd vs. Stanbic Bank Kenya Ltd & Another* pending the hearing and determination of an intended appeal against the ruling issued by Prof. Sifuna J. on 7<sup>th</sup> October 2024. The applicant also prays that the costs of the application be provided for. The application is premised on the grounds elucidated on its face as well as the deposition in the supporting affidavit sworn on 28<sup>th</sup> October 2024 by Janet Wanjohi Kabiru, the head of the applicant's Legal Department. Two further affidavits were sworn in response to the 1<sup>st</sup> respondent's replying affidavit by the applicant's counsel, Diana Ogula, on 14<sup>th</sup> November 2024, and Senior Counsel Kamau Karori on 15<sup>th</sup> November 2024.
2. Briefly, the applicant had filed before the trial court an application dated 2<sup>nd</sup> October 2024 seeking the recusal of Prof. Sifuna J. from hearing the claim that had been filed by Air Afrik Aviation Ltd (the 1<sup>st</sup> respondent herein), against it as the 1<sup>st</sup> defendant and the Bank of South Sudan (the 2<sup>nd</sup> respondent



- herein) as the 2<sup>nd</sup> defendant. In a ruling delivered on 7<sup>th</sup> October 2024, the learned Judge dismissed the application.
3. In support of the motion, the applicant contends that it has an arguable appeal against the ruling, averring that the learned Judge erred both in fact and law. The applicant listed 18 grounds of appeal both in the application and in the annexed draft memorandum of appeal. The applicant avers that if the proceedings are not stayed, it will effectively be denied the right to be heard by an impartial court, which right is protected by Article 50(1) of the Constitution. The applicant's plea is that an order of stay be issued to preserve the subject matter of appeal. It is the applicant's assertion that the respondents will not be prejudiced by the issuance of a stay order. Finally, the applicant discloses that a notice of appeal has been filed against the impugned ruling and a request for the typed proceedings has been made.
  4. The 1<sup>st</sup> respondent opposed the application through a replying affidavit sworn by its director, Eric Agolla Lugalia, on 14<sup>th</sup> November 2024. The deponent gave a historical perspective of the proceedings before the High Court and maintained that the intended appeal is not arguable. He also opposes the application on the grounds that an order staying the proceedings will negatively impact the 1<sup>st</sup> respondent's right to access justice and the right to be heard without unreasonable delay, noting that the matter was filed over 8 years ago. The deponent faults the applicant for the delays occasioned in the progression of the suit before the trial court. It is the 1<sup>st</sup> respondent's position that the intended appeal will not be rendered nugatory since the applicant will have an opportunity to file an appeal before the Court should it be aggrieved by the final outcome of the matter.
  5. The 2<sup>nd</sup> respondent also filed an affidavit of Hon. Biong Pieng Kuol Arop sworn on 22<sup>nd</sup> November 2024, opposing the application. However, the same was withdrawn since it had been filed outside the timelines provided in the Court's directions.
  6. When the application came up for hearing, Mr. Kamau Karori, Senior Counsel and learned counsel Ms. Ogula appeared for the applicant, learned counsel Mr. Kagwimi Kangethe appeared for the 1<sup>st</sup> respondent while Mr. Ahmednasir Abdullahi, Senior Counsel, appeared for the 2<sup>nd</sup> respondent. Counsel for the applicant and the 1<sup>st</sup> respondent relied on their filed submissions while also making brief oral highlights at the hearing. Counsel for the 2<sup>nd</sup> respondent made oral submissions, having withdrawn the filed submissions upon application by counsel for the applicant for having been filed late.
  7. Relying on the submissions dated 14<sup>th</sup> November 2024, counsel for the applicant appreciated that an arguable appeal must raise bona fide grounds worthy of a response from the other side and warranting the Court's consideration on appeal and that even a single bona fide issue raised is sufficient for this Court to find that the appeal is arguable. In urging the Court to find that the applicant has an arguable appeal, counsel referred to the application and the draft memorandum of appeal to submit that the issues raised therein are weighty and touch on the applicant's inalienable right to a fair hearing and protection of the law as enshrined in Articles 48 and 50 of the Constitution. Regarding the nugatory aspect of the application, counsel submitted that where it is alleged that the proceedings in the trial court are a continuing violation of a party's constitutional rights, the Court is obliged to exercise its discretion to stay the proceedings until it determines whether the proceedings are in accord with the provisions of the Constitution.
  8. Counsel urged that if the proceedings before the High Court are not stayed and judgment is rendered, only for the applicant's appeal to later succeed, it would result in a significant waste of valuable judicial time and public resources and would reduce the appeal to a purely academic exercise and cause the applicant great prejudice. Counsel further submitted that unless a stay of further proceedings was granted, the matter was set to be concluded on 26<sup>th</sup> November 2024, rendering the intended appeal



moot. Counsel urged that the impact of such a decision cannot be remedied through damages or reversed as the violation of the applicant's right to a fair hearing will be complete. According to counsel, were the proceedings to be stayed, the respondents would not suffer any prejudice. It was Senior Counsel's plea that the application be allowed as prayed. To buttress the submissions, counsel relied on the case digests dated 14<sup>th</sup> November 2024 and 25<sup>th</sup> November 2024, which we have perused.

9. In opposition to the application, counsel for the 1<sup>st</sup> respondent, relying on the submissions dated 18<sup>th</sup> November 2024, commenced by appreciating the grave nature of an order staying proceedings and urged that the discretion should be exercised with great care. Turning to the substance of the motion, counsel argued that the intended appeal was not arguable as none of the grounds of appeal had been sufficiently established. On the nugatory aspect, counsel urged that all the parties were entitled to a fair hearing and that staying the trial would infringe on his client's right to an expeditious resolution of its case, thus violating Article 159 of the Constitution. According to counsel, even in the absence of stay orders, the applicant will still have an opportunity to pursue an appeal against the judgment of the trial court, should the judgment go against it. Counsel argued that should the intended appeal succeed, the applicant can be compensated by an award of costs and the proceedings before the High Court set aside. Counsel further submitted that the present application has failed to satisfy the dual limbs for stay of execution or proceedings and should be dismissed with costs. To buttress these submissions, counsel relied on a case digest dated 18<sup>th</sup> November 2024, which we have reviewed.
10. On his part, counsel for the 2<sup>nd</sup> applicant submitted that since the applicant did not annex the application that gave rise to the impugned ruling, this Court lacks the tools for analyzing whether the instant application under rule 5 (2) (b) has met the two tests of an arguable appeal and the nugatory aspect. Counsel submitted that because the applicant was pursuing an alleged breach of a constitutional right, the correct procedure is to file a fresh suit before the High Court instead of filing a rule 5 (2) (b) application before this Court. Counsel also urged that some of the points alleged to be arguable by the applicant relate to a ruling that is not subject to the intended appeal. Regarding the nugatory aspect, counsel submitted that the applicant had not established that the appeal would be rendered nugatory because it has not been established that the learned Judge would rule in favour of the 1<sup>st</sup> respondent.
11. At the conclusion of the hearing, we gave an interim order of stay in order to preserve the integrity of the application before us.
12. In order to benefit from the Court's discretionary power under rule 5 (2) (b) of the Court of Appeal Rules, an applicant must demonstrate that the intended appeal or appeal is arguable and not frivolous and that were it to eventually succeed, it will be rendered nugatory should stay orders not be issued. In that regard, it was held in Chris Munga N. Bichage vs. Richard Nyagaka Tongi, Independent Electoral & Boundaries Commission & Robert K. Ngeny [2013] KECA 141 (KLR) that:

“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”
13. We will first address the question whether the intended appeal is arguable. It must be noted that the intended appeal relates to the ruling of the High Court delivered on 7<sup>th</sup> October 2024. All parties agree that the question raised in the application subject of that ruling was the recusal of the trial Judge. It is



also an established legal principle that even a single bona fide issue is sufficient for the Court to return a finding that an appeal is arguable. Additionally, in dealing with an application for stay, the Court need not interrogate the grounds of appeal and pronounce itself conclusively on those grounds, for that task belongs to the bench that will hear and determine the substantive appeal. This principle of law finds support in the holding of the Court in *Stanley Kangethe Kinyanjui vs. Tony Ketter and 5 Others* [2013] KECA 378 (KLR).

14. We have reviewed the grounds of appeal as found in the application and the draft memorandum of appeal and note that the applicant has raised several allegations touching on the exercise of judicial function by the learned trial Judge. For instance, the applicant alleges wrong application of the legal principles for recusal, a review of a previous ruling in the impugned ruling, and misrepresentation of facts by the learned Judge. In our view, these are issues that warrant the exercise of this Court's jurisdiction of appeal to review and assess the impugned ruling prior to affirming it or setting it aside. Consequently, without saying more, we are satisfied that the intended appeal is arguable.
15. Turning to the question as to whether the intended appeal is likely to be rendered nugatory absent stay orders, we start by observing that it is not enough for an applicant to aver that the appeal or intended appeal will be rendered nugatory. Instead, an applicant is required to demonstrate that should the application for stay be declined, the appeal or intended appeal, if successful, will be rendered worthless. Additionally, as was held in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* (*supra*), in considering whether an appeal will be rendered nugatory, the Court is called upon to determine whether or not what is sought to be stayed, if allowed to happen, is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved.
16. On the nugatory aspect of the application, the applicant's case is that if an order of stay is not granted, the High Court will proceed with the hearing, further infringing its right to a fair hearing. The applicant referred to the ruling in *Waitbaka vs. Tribunal appointed to investigate the conduct of the Honourable Lady Justice Lucy Njoki Waitbaka & Another; Kenya Magistrates & Judges Association (Interested Party)* [2020] KECA 571 (KLR) to urge that where further proceedings are likely to perpetuate the violation of a party's right, then an order of stay will issue. Conversely, the 1<sup>st</sup> respondent relied on the ruling in *Taib A. Taib Advocates vs. Nanji (Legal Representative of the Estate of Shamsudin Gulambusein Nanji (Deceased))* [2024] KECA 1581 (KLR) for the proposition that stay of proceedings should not be imposed unless it is established, beyond reasonable doubt, that the proceedings ought not be allowed to continue. The respondents unanimously opposed the application, citing a corresponding potential breach of the right to expeditious resolution of disputes under Article 159 of the *Constitution*.
17. There is no dispute that proceedings before the High Court commenced in 2016 and were at an advanced stage. From the evidence put forth by the parties herein, what emerges is that various applications have been made before the trial court, contributing to the delay in the finalization of the suit. At the centre of this application is the competing rights of all parties to a fair hearing and expeditious resolution of disputes. The applicant makes a sound case that were the appeal to succeed after the High Court has rendered its judgment, the judgment would be vacated, resulting in a waste of precious judicial resources. However, we believe such an eventuality would not render the appeal futile. Even in such an eventuality, the applicant will have an opportunity to have its case determined by a different judge. Among the courts' constitutional duties is the dispensation of justice through expeditious determination of cases. Therefore, the High Court's doors will remain open to the parties if the appeal succeeds. An order for rehearing of the matter is available as a remedy, saving the appeal from being futile or worthless.



18. An argument can be made that the applicant will suffer extra costs, but this, too, can be remedied by an award of costs or even damages in appropriate circumstances. It is also appreciated that as has been held by this Court in *David Morton Silverstein vs. Atsango Chesoni* [2002] eKLR and *Marriot Africa International Ltd vs. Margaret Nyakinyua Marigu & 4 Others*, CA No. Nai. E152 of 2022, an order staying proceedings should be a weapon of last resort. We are thus not persuaded that the applicant has established that should the intended appeal eventually succeed, it will be rendered nugatory.
19. Consequently, the notice of motion dated 28<sup>th</sup> October 2024 lacks merit and is hereby dismissed. The costs of the application shall abide the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH, 2025.**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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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

