



**Manji Villas Limited v Middle East Bank Kenya Limited (Civil Application
E236 of 2024) [2025] KECA 672 (KLR) (11 April 2025) (Ruling)**

Neutral citation: [2025] KECA 672 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E236 OF 2024
F SICHALE, A ALI-ARONI & LA ACHODE, JJA
APRIL 11, 2025**

BETWEEN

MANJI VILLAS LIMITED APPLICANT

AND

MIDDLE EAST BANK KENYA LIMITED RESPONDENT

*(An application for stay of any further proceedings pending hearing and determination
of the appeal against the Ruling and Order of the High Court of Kenya at Nairobi
(Okwany, J.) delivered on 16th December 2021 in Petition No. E015 of 2020)*

RULING

1. Before the court is a notice of motion dated 17th May 2024 brought under sections 3, 3A, and 3B of the *Appellate Jurisdiction Act* and rule 5(2)(b) of the Court of Appeal Rules, 2022, seeking orders of stay of proceedings in insolvency Petition No. E015 of 2020, before the High Court, pending the application and appeal hearing and determination, and for costs.
2. The application is predicated on the grounds stated on the face of the application, which state that the respondent lodged a petition dated 11th August 2020 in the High Court's Commercial Division, being Petition No. E015 of 2020 against the applicant based on a statutory demand notice, where the respondent claimed Kshs. 197,972,047.92; on 29th September 2020, the applicant lodged an application seeking to strike out the petition on the grounds that the debt forming the basis of the petition was substantially denied and disputed; the applicant's application was dismissed in a ruling delivered on 16th December 2021; on 17th December 2020 the applicant lodged a notice of appeal and on 24th February 2022 it filed its record of appeal in Civil Appeal No. E083 of 2022; the appeal is arguable, and unless this application is granted, it will be rendered nugatory, as the High Court may hear and determine the petition before the appeal is heard and determined.



3. The application is further supported by the affidavit of Zulekha Amin Gwaderi, a director of the applicant company, sworn on 17th May 2024, on behalf of the applicant. She deposed that the applicant had previously lodged an application dated 25th February 2022 for orders of stay of proceedings in the Insolvency petition dated 11th August 2024, which application was dismissed vide the ruling and order of the court delivered on 15th March 2024 by the trial court because the threshold to be met under rule 5(2)(b) of the Court of Appeal Rules apply to this Court alone.
4. She further deposed that the insolvency petition, which forms the subject of the applicant's appeal, is based on a substantially disputed and denied debt of Kshs. 197,972,047.92, and the applicant stands to suffer irreparable and substantial loss. Further, the respondent is neither a going concern, nor a company with attachable assets or the financial capacity to refund the applicant the disputed amount and costs that may be assessed if the pending appeal is successful. It is doubtful that the respondent would suffer prejudice if the application were granted. Furthermore, granting this application serves the interest of justice and aligns with the court's overriding objective.
5. Elizabeth Ong'are, the respondent's credit manager, swore an undated affidavit in August 2024 on behalf of the respondent in response. She deposed that the respondent is a limited liability company incorporated in Kenya and licensed to carry on banking business by the Central Bank of Kenya; since the year 1981; and it has continued to carry on banking business in Kenya as shown in its financial statement audited by Price Waterhouse and that the total capital of the respondent was Kshs. \$ 2,103,959,000.00 at the end of 2023.
6. It was further deposed on behalf of the respondent that the applicant has been inactive for over 20 years and currently does not have a registered office. The applicant's directors have not filed any statutory returns with the companies' registry since 1997. The applicant intends to delay the outcome of the winding-up petition in the High Court in order to transfer assets registered in its name. Furthermore, the respondent has been denied payment of an amount justly owed since 2002. If the hearing and the winding-up petition are postponed, the respondent may never recover the amount still due and payable by the applicant.
7. The applicant's manager, Zulekha Amin Gwaderi, swore a further affidavit on 15th August 2024 and deposed that, consequent to the filing of the instant application, the High Court issued directions for the disposal of the insolvency petition, which required the applicant to file a response to the petition.
8. Learned counsel for the applicant filed submissions dated 14th August 2024 and a digest of authorities dated 21st August 2024. Regarding whether the applicant has an arguable appeal, the applicant argued that the appeal should not be one that is likely to succeed, but rather one that raises a serious question of law or presents a reasonable argument deserving consideration by the court. In support, he cited Dennis Mogambi Mang'are vs. Attorney General & 3 Others [2012] eKLR and Attorney General & Another vs. Nafula *¶ 5 Others; Attorney General (Interested Party) (Civil Application E121 ¶ E120 of 2021 (Consolidated))* [2021] KECA 647 (KLR).
9. Learned counsel further submitted that, whilst a single bona fide, arguable ground of appeal is sufficient to satisfy the requirement of arguability, the applicant has set out nine grounds as follows; first, the court failed to grant the application to strike out the insolvency petition and the statutory demand despite acknowledging that the debt underlying the petition was substantially disputed. Second, the learned judge incorrectly concluded that the determination of the petition's success depended on evidence when it is well-established that insolvency proceedings should only address confirmed and undisputed debts. In this regard, he relied on the case of Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd (Civil Application No. Nai 345 of 2005).



10. Learned counsel further argued that by allowing the petition to proceed based on a disputed debt, the court essentially transformed the insolvency petition into a debt collection proceeding. Additionally, the decision was flawed as it improperly applied the Civil Procedure Rules 2010. In support of the contention, he cited the case of *DT Dobie and Company Limited vs. Muchina* (1982) KLR 1.
11. On whether the appeal will be rendered nugatory, counsel cited the case of *NIC Bank Limited & 2 Others vs. Mombasa Water Products Limited* [2021] eKLR, where the court observed that it was essential to consider the conflicting claims of both parties in applications under rule 5(2)(b). Each case has to be determined on its merits. Further, the issue of the disputed debt is live in the appeal and is the subject of the petition before the trial court; proceeding with the petition is tantamount to condemning the applicant to settle the disputed debt since, at that stage in insolvency proceedings, the issue of whether the debt is disputed or not does not arise. The applicant relies on the case of *Alma Tuju & 4 Others vs. East African Development Bank & 2 Others* [2020] eKLR, where the court held that unless the insolvency proceedings are stayed, the appeal would be rendered nugatory, as the issue in the trial court was still live in the appeal.
12. Further, learned counsel contends that even though the decree resulting from the petition is monetary, the hardship the applicant is likely to face would be irreversible, as it remains uncertain whether the respondent would refund the amounts. Counsel cited in support the case of *Housing Finance Company of Kenya Limited vs. Sharok Kher Mohamed Ali Hirji & Another* [2015] eKLR, where the court held that undue hardship would be caused to the applicants if the stay was refused purely on the grounds that the decree is a money decree.
13. The applicant also relied on the case of *East African Cables Limited vs. Public Procurement Complaints Review and Appeals Board & Another* [2007] eKLR, where it was held that the court should maintain a utilitarian stance in applications under rule 5(2)(b) taking the path of least harm in light of the likely consequences.
14. On the part of the respondent, learned counsel filed submissions dated 5th September 2024. He submitted that whether the court should grant a stay is a purely discretionary matter to be exercised judiciously. To support this contention, he also relied on the case of *HFCK vs. Sharok Kher Mohamed Ali Hurji* (supra), where the court restated the principles from the case of *Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited*, Civil Application No. 93/02 (UR).
15. Further learned counsel submitted that the applicant bears the burden of demonstrating to the court that a valid case has been made for granting a stay. In this instance, the only evidence supporting the application consists of two affidavits sworn by the applicant's director: the affidavit in support of the application, a further affidavit, a certified copy of the order, and the memorandum of appeal against the ruling delivered on 16th November 2021. The respondent points out that the applicant failed to include the application seeking to strike out the petition or any evidence presented before the High Court, as well as the impugned ruling, for this Court's review. This absence renders it impossible for the court to determine whether there is even a single bona fide, arguable point raised in the attached memorandum of appeal. Additionally, the submissions made by the applicant do not constitute evidence. To fortify his contention, learned counsel cited the case of *Robert Ngande Kathathi vs. Francis Kivuva Kitonde* [2020] eKLR, where the court held that submissions do not amount to evidence unless expressly adopted as such. That evidence should not be introduced through submissions. In that case, the court relied on the case of *Erastus Wade Opande vs. Kenya Revenue Authority & Another*, Kisumu HCCA No. 46 of 2007, *Ng'ang'a & Another vs. Owiti & Another* [2008] 1KLR, and *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR, amongst others, where the court held



that submissions concretize and focus on the case of each side to win the court decision, and that submissions cannot take the place of evidence.

16. Learned counsel, relying on the case of *Universal Hardware vs. Africa Safari Club* [2013] eKLR, submitted that the applicant repeatedly stated that the debt on which the petition is grounded is disputed. However, the grounds for such dispute were not disclosed.
17. Learned counsel also contended that the applicant has failed to demonstrate that it will suffer irreparable harm if a stay is not granted, nor has it shown that the appeal would be rendered ineffective. In support, he relied, inter alia, on the case of *Silverstein vs. Chesoni* [2002] 1 EA 296, where the court held that in deciding whether an appeal will be rendered nugatory, each case must be decided on its own facts.
18. To succeed in an application under rule 5(2)(b) of the Court of Appeal Rules, an applicant has to satisfy the twin principles that are enumerated in many decisions of this Court, namely:
 - i. An applicant must demonstrate that they have an arguable appeal; and
 - ii. That the intended appeal (or appeal, if already filed) will be rendered nugatory if the execution of the decree or order of proceedings is not stayed.
19. We note that counsel for the applicant has argued that the grounds of appeal ought to raise serious questions of law. This is not correct. This Court held in *David Morton Silverstein vs. Atsango Chesoni* [2002] eKLR, that for an order of stay to be issued, 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 in the absence of stay, be rendered nugatory.
20. The applicant did not attach the impugned ruling or order that is the subject of the appeal to the application. Secondly, the applicant did not present any material to demonstrate that the amount in question is disputed or the basis of that dispute. The applicant has made our task of appreciating the grounds of appeal more difficult by failing to provide the court with crucial information. There is, therefore, no way to tell whether the grounds of appeal are arguable or not.
21. The appellant contended that if the hearing at the High Court proceeds and a decree is issued against it, and a successful appeal is made, the respondent may not be able to repay the decretal sum; hence, the need for a stay of the High Court proceedings. The respondent denied the allegation and produced evidence that it continues to operate as a bank, which indicates that it is financially stable enough to repay the sums. The financial statement was not challenged.
22. Ultimately, we find that the applicant has failed to demonstrate both the necessary limbs; we decline to grant the orders and dismiss the application with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL, 2025.

F. SICHALE

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

