



REPUBLIC OF KENYA



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**Nakuru Steros Services Co Ltd v National Bank of Kenya (Civil Application
E007 of 2025) [2025] KECA 653 (KLR) (9 April 2025) (Ruling)**

Neutral citation: [2025] KECA 653 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E007 OF 2025
JM MATIVO, PM GACHOKA & GV ODUNGA, JJA
APRIL 9, 2025**

BETWEEN

NAKURU STEROS SERVICES CO LTD APPLICANT

AND

NATIONAL BANK OF KENYA RESPONDENT

*(An application for injunction pending the filing of an intended appeal
against the ruling and order of the High Court of Kenya at Nakuru (H.
M. Nyaga, J.) delivered on 16th December 2024 in HCCC No. 19 of 2014)*

RULING

1. Before us is the applicant's Notice of Motion dated 21st January 2025 made under Rule 5(2) (b) of the [Court of Appeal Rules](#). It seeks inter alia:
 - a. ... Spent;
 - b. That pending the hearing and determination of this application inter-parties, the Honourable Court be pleased to issue a temporary injunction restraining the defendant/respondent by its management, agents, employees and/or servants from in any way selling/auctioning the plaintiff/applicant's parcel of land Nakuru Municipality Block 5/81;
 - c. That pending the hearing and determination of the applicant's appeal, the Honourable Court be pleased to issue an order of temporary injunction restraining the defendant/respondent by its management, agents, employees and/or servants from in any way selling/auctioning the plaintiff/applicant's parcel of land Nakuru Municipality Block 5/81;
 - d. That in the alternative to prayer (3) above, the Court be pleased to grant orders of status quo pending the hearing and determination of the appeal.



2. The application is supported by the grounds on the face of it and further by the annexed affidavit of Joseph M. Wakubwa sworn on 21st January 2025. The main grounds raised by the applicant are: that the applicant applied for a loan of Kshs. 165,750,000.00 to purchase the property namely L.R Nakuru Municipality Block 5/81; that the interest rate was capped at 13% which the respondent could increase but with notice to the applicant; that the property was incomplete, a fact that was known to the respondent and; that the applicant fell into arrears and informed the respondent; that the applicant subsequently applied for rescheduling of the loan and a further sum of Kshs. 60 million to cover renovation expenses; that the respondent increased the interest rate without notice; that a sum of Kshs. 81,153,711.62 has been illegally debited into the account; that on 21.11.2019, the parties entered into a consent to the extent that the recoverable principal sum was capped at Kshs. 158,655,770.00; that though the applicant is facing financial challenges, it has been paying a sum of Kshs. 700,000.00 per month to offset the loan; the 90 days notice is about to expire and the respondent will proceed to instruct the auctioneers to sell the property by public auction; that it is still making the monthly payments; and that it has always intended to furnish a full proposal on payment upon determination of the interest.
3. We note that this application arises from the ruling of the High Court where H. M. Nyaga, J. held as follows:

“ 56. The above consent was adopted as an order of the court on 12th November 2019.

57. The respondent claims it is entitled to recover the principal amount, alleging that the applicant is in violation of clause 1(b) of the consent due to inconsistent, irregular and erratic payments made towards the settlement of the principal amount. The respondent deposed that the applicant deposited Ksh.1,500,270/=, Ksh.1,000,000/= and Ksh.500,000/= in December 2019, January 2020 and February 2020 respectively. Conversely, the applicant maintains that it has complied with the terms of the consent.

58. At paragraph 7 of its supporting affidavit, the applicant averred that it complied with the terms of the consent order by paying Ksh.4,500,000/= within the stipulated time. However, after perusing the annexure marked as JMW on pages 81 and 82 of the supporting affidavit, I note that the applicant did not deposit the amounts as alleged. While it is undisputed that the applicant complied in December 2019 by depositing the requirement amount, in January 2020, only Ksh.1,000,000 was deposited as evidenced by the customer transaction receipt dated 31st January, 2020. Regarding February 2020, the applicant has stated that it deposited ksh.523,000 and that a cheque replacement was made in March for Ksh.958,000.

59. It is therefore evidence from the above that the applicant is in violation of clause 1(b) of the consent. The argument that the dishonoured cheque was replaced in March does not negate the fact that the applicant breached the express terms of the consent.

60. So is the respondent entitled to recover the principal amount? The answer is yes as per clause 1(c) of the consent.

68. According to the email extracts marked as JMW7 by the applicant, it is evident that the respondent was not claiming the interest on the principal amount



but rather claiming the outstanding principal amount due to the breach of the aforesaid contract. Therefore, the applicant's assertion that the claim of Ksh.165,050,009.44 in interest, which exceeds the principal amount, violates section 44A of the *Banking Act* is misplaced.

91. To avoid further litigation on the same issue, it is ordered that the application (sic) shall not be entitled to move to the court again over the loan in question unless it has updated its loan account in full by paying up all the loan instalments as required.
92. Lastly, I direct that the plaintiff/applicant moves to prosecute the suit within the next six months. In that regard, the court will fix a month (sic) date to fix a suitable hearing date."

4. Aggrieved by the said ruling, the applicant filed a notice of appeal dated 24th December 2024. The applicant's advocates, Raydon Mwangi & Co. Advocates, filed written submissions on 4th February 2025. In their submissions, it is argued that the applicant has an arguable appeal with chances of success, and that the appeal will be rendered nugatory unless the order for injunction is granted. The applicant further submits that it stands to suffer breach of its constitutional right as the learned Judge ordered that it should not file any other application in the High Court and that in the event the appeal succeeds, an award of damages will not be sufficient to restore him against the impending loss of the suit premises.
5. On its part, the respondent, through Sisule & Co. Advocates, filed a replying affidavit sworn on 29th January 2025 by Morris Tiema, the respondent's manager in the Remedial and Recoveries department. In the replying affidavit, the respondent states that the applicant is in default of a consent order that had been signed between the parties on the repayment of the loan. The respondent also filed written submissions dated 5th February 2025. It submits that the loan and the default is not disputed, and that the applicant had sought for time to continue servicing the loan. The respondent submits that the applicant has not demonstrated how he would suffer irreparable or substantial loss if the orders sought are not granted; that the applicant has no arguable appeal; and that his conduct does not meet the approval of a court of equity. It's the respondent's submission that the intended appeal is calculated at delaying the recovery process and would cause prejudice and more hardship to the respondent.
6. 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, order or proceedings is not stayed.
7. On the first limb of this twin principle, this Court held in *David Morton Silversein vs. 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 in the absence of stay, be rendered nugatory.
8. Regarding the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay of the orders sought, this Court in *Yellow Horse Inns Ltd vs. A.A Kawir Transporters and 4 others* [2014] eKLR observed that an applicant need not show a multiplicity of arguable points as one arguable point would suffice. Neither is the applicant required to show that the arguable point would succeed, as this Court held in *Kenya Commercial Bank Limited vs. Nicholas Ombija* [2009] eKLR.



9. On the arguability of the appeal, the applicant has raised 5 of grounds in its memorandum of appeal dated 14th January 2025, stating that the learned judge did not properly analyze the principles for grant of an interlocutory injunction; that the learned judge erred in holding that it had breached the terms of the consent order and yet the respondent accepted the payments; that the learned judge erred in barring it from filing any other application; that its submissions and authorities were not considered and that the dismissal of its application was wrong.
10. It is trite that even one bona fide arguable ground is enough for a party to satisfy the first limb on arguability. However, where an application is on the face of it outrightly frivolous, the Court should not shy in saying so. Having considered the grounds of appeal and the admission of default in the repayment of the loan, we are not persuaded that the grounds are arguable. Therefore, the applicant has failed to satisfy the first limb of the twin principles.
11. Having failed on the first principle, it is not necessary to consider the second principle. However, even assuming that the applicant had satisfied the first principle (which it did not) it would still have failed to jump the second hurdle on the nugatory aspect. This Court in *Reliable Bank Ltd vs. Norlake Investments* [2002] 1 EA defined the word “nugatory” in the following words: “it does not mean only worthless, futile, or invalid, it also means trifling.” The Court also expressed the view that what may render the success of the appeal nugatory must be considered within the circumstances of each case.
12. The court notes that the applicant offered the charged property as a security for the loan. A valuation was done before the charge was created and therefore, even if it is sold, the value can be established. Consequently, the resultant damage, if any, is capable of compensation as the respondent is a licensed banking institution. It has not been argued or demonstrated that the respondent is not capable of compensating the applicant in the event that it is successful. This Court has addressed this issue in the case of *Elizabeth Jerono vs. Consolidated Bank of Kenya Limited & Another* [2019] eKLR where it was held as follows:

“The 1st Respondent is a reputable bank. It has not been suggested that should the intended sale found to be wanting, it may not be able to pay the applicant the damages that may be awarded. We reiterate that once a property has been given as security for financial accommodation, it becomes a commodity for sale and therefore sentimental attachment to the same becomes inconsequential and must be sold in accordance with the law.”
13. The upshot of the foregoing is that this application does not satisfy the twin principles for grant of an order for stay under Rules 5(2) (b) of the *Rules of this Court*. Consequently, we dismiss the application with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 9TH DAY OF APRIL 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCI Arb.

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JUDGE OF APPEAL

G. V. ODUNGA

.....



JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

