



**Absa Bank Kenya Plc v Mwangi (Civil Appeal (Application)  
E207 of 2024) [2025] KECA 809 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 809 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E207 OF 2024  
F TUIYOTT, KI LAIBUTA & GWN MACHARIA, JJA  
MAY 9, 2025**

**BETWEEN**

**ABSA BANK KENYA PLC ..... APPLICANT**

**AND**

**THOMAS MACHARIA MWANGI ..... RESPONDENT**

*(Being an application for stay of execution pending appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Mombasa (M. Mbaru, J.) delivered on 1st October 2024 in E.L.R.C Cause No. E065 of 2023)*

**RULING**

1. Before us is the applicant's Notice of Motion dated 6<sup>th</sup> November 2024 in which Absa Bank Kenya PLC seeks stay of execution of the judgment of the ELRC (M. Mbaru, J.) dated 1<sup>st</sup> October 2024 pending hearing and determination of its appeal.
2. The applicant's Motion filed pursuant to rule 5(2) (b) of the *Court of Appeal Rules*, 2022 is supported by the annexed affidavit of Milka Gachanja, the applicant's legal counsel, sworn on 6<sup>th</sup> November 2024 essentially deposing to the background of the appeal and to a whopping 18 grounds on which the Motion is founded, but which we need not replicate here, save to single out those relevant to the issues that fall to be determined under rule 5(2) (b).
3. Briefly stated, the background of the application as deposed to in the affidavit in support of the Motion is that the respondent, Thomas Macharia Mwangi, successfully sued and obtained judgment against the applicant in Mombasa ELRC Cause No. E065 of 2023 in the total sum of Kshs. 8,320,512 in general damages, unpaid bonuses, notice pay, and unpaid salary increments, as well as a declaratory order that his constitutional rights had been violated by the applicant by alleged breach of his privacy. That is as far as the brief background goes as discerned from the scanty record, which does not include a transcript of the proceedings in the trial court or the impugned judgment.



4. The other grounds relevant to the Motion are that the respondent has commenced execution proceedings and has proclaimed the applicant's movable assets for sale by public auction; that the appeal raises triable issues; that it is necessary to stay execution to preserve the substratum of the appeal; that the applicant stands to suffer grave prejudice in view of the colossal amount of money involved; that the respondent is a man of unknown means, and that the decretal amount is unlikely to be recovered in the event that the appeal succeeds; that the applicant is ready to deposit security for costs together with the decretal amount; that the appeal, which is arguable, has high chances of success; and that it would be rendered nugatory and a mere academic exercise if stay is not granted.
5. In support of the Motion, learned counsel for the applicant, M/s.Mohammed Muigai LLP, filed written submissions, a digest and bundle of authorities dated 3<sup>rd</sup> December 2024 citing the cases of *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR where the Court laid down the twin principles for grant of orders under rule 5(2) (b), namely that the applicant must show that the appeal (or intended appeal) is arguable, and that it would be rendered nugatory absent stay; *Printing Industries Limited v Bank of Baroda Kenya Limited* [2014] eKLR for the proposition that an arguable appeal is not one that will necessarily succeed, but one which ought to be argued fully before the Court; and *Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 Others* [2014] eKLR for the principle that "stays or injunctions are not automatic. Rather, they are granted to preserve the integrity of the appellate process so as to render any eventual success a mere pyrrhic victory devoid of substance or succour by reason of intervening loss".
6. Opposing the Motion, the respondent filed a replying affidavit sworn on 4<sup>th</sup> December 2024 stating that the application is moot and no longer constitutive of a live controversy between the parties; that the applicant paid to him a sum of Kshs. 6,091,558/40 on 8<sup>th</sup> November 2024, but which was applied to offset a loan facility previously advanced to him; that what remains to be paid on the decretal sum is Ksh. 2,228,953/60; that, having settled part of the decretal amount, the applicant's prayer for stay is nothing more than an invitation to this Court to act in vain; that the intended appeal is neither competent nor arguable, or otherwise capable of success; that there is nothing to be rendered nugatory in the absence of an order for stay; and that he is able to refund the decretal amount in the event that the appeal succeeds.
7. Learned counsel for the respondent, M/s. MMD Advocates LLP, filed written submissions, a list of authorities and case digest dated 4<sup>th</sup> December 2024 citing, inter alia, the cases of *Chepkonga v Kuikui & 2 Others* [2024] KECA 631 (KLR), highlighting the principle that stay of execution cannot be granted where the application has been overtaken by events; *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] KECA 94 (KLR), arguing that stay can only be granted where the respondent cannot refund the decretal sum upon success in the appeal; and *Kuko & Another v Ali & Another* [2024] KECA 305 (KLR), highlighting the twin principles to be satisfied for orders under rule 5(2) (b).
8. The twin principles applicable in exercise of the Court's unfettered discretion under rule 5(2) (b) of the *Court of Appeal Rules*, 2022 to grant an order of stay are well settled. Firstly, an applicant has to satisfy the Court that he or she has an arguable appeal; and, secondly, demonstrate that, unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles have been restated time and again as enunciated by this Court in the afore-cited case of *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others*.
9. We also take to mind the fact that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous and ought to be argued fully (see *Akul & Another v Ondieki & 2 Others* [2022] KECA 702 (KLR); and *Wasike v Swala* [1984] eKLR). Further, we need not overemphasise the fact



that even a single bona fide arguable ground of appeal would suffice (see *Damji Pravgi Mandavia v Sara Lee Household and Body Care (K) Limited* Civil Application No. 345 of 2004 (UR)).

10. With regard to the 1<sup>st</sup> limb of the twin principles, the applicant's appeal is anchored on six (6) grounds set out on the face of its Motion faulting the learned Judge for, inter alia: awarding the respondent general damages despite the court's lack of jurisdiction to determine claims in defamation; failing to appreciate that the applicant's claim in defamation had not been pleaded and particularised as required under the *Defamation Act*, Cap. 36; and for awarding the respondent notice pay, allegedly unpaid bonuses, and unpaid salary increments.
11. To our mind, the grounds advanced in the appeal cannot, with all fairness, be wished away as undeserving of scrutiny by this Court. Put differently, they are not frivolous. However, whether or not the appeal will succeed is not for us to judge. All we need to say for the moment, as we hereby find, is that the appeal is arguable and, therefore, the applicant has satisfied the 1<sup>st</sup> limb of the twin principles for grant of stay orders under rule 5(2) (b) of the Rules of this Court.
12. Turning to the 2<sup>nd</sup> limb of the twin principles, to wit, the nugatory aspect, it was held in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (supra) that whether or not an appeal will be rendered nugatory depends on whether or not what is or ought to be stayed, if allowed to happen, is reversible; or, if not reversible, whether damages would reasonably compensate the aggrieved party. We are also guided by the observations made in *Reliance Bank Limited v Norlake Investment Limited* (2002) 1 EA 227 that factors which render an appeal nugatory are to be considered within the circumstances of each case and, in so doing, the Court is bound to consider the conflicting claims.
13. The applicant contends that if the outstanding balance of the decretal amount is paid to the respondent, he would not be able to refund in the event that its appeal succeeds. According to the applicant, the respondent is a person of unknown means by which the decretal amount could be repaid.
14. We need to point out, though, that it behoves the respondent to discharge the burden of proof that, if the decretal amount or any part thereof is released to him, he will be able to refund it in the event the appeal succeeds. We need not overemphasise this Court's decision in *NIC Bank Ltd v Aquinas Francis Wasike & Another* (supra) where the Court held that:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”
15. In response to the applicant's contention, the respondent submitted that the applicant had applied a substantial amount of the decretal amount payable to him to offset part of a financial facility previously advanced to him, and that he would be able to repay the remaining sum of Ksh. 2,228,953/60 if the applicant's appeal were to succeed. However, the respondent did not disclose what resources he has to his name, or demonstrate his ability to repay.
16. We hasten to observe that whether or not the amount in issue is colossal is immaterial. What matters is the decree holder's ability (or lack thereof) to repay the decretal amount in the event the appeal succeeds. This Court in *G. N. Muema P/A Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another* [2018] eKLR had this to say on the matter:

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the



decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

17. Having carefully considered the applicant’s Motion, the grounds on which it is made, the affidavits in support and in reply thereto, the rival submissions of the respective counsel, the cited authorities and the law, we find that the applicant has satisfied the conjunctive twin principles for grant of the orders sought. Accordingly, we hereby order and direct that:
- a. Execution of the judgment and decree of the ELRC at Mombasa (M. Mbaru, J.) dated 1<sup>st</sup> December 2024 be and is hereby stayed pending hearing and determination of the applicant’s appeal; and
  - b. That the costs of the application do abide the outcome of the appeal.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF MAY 2025.**

**F. TUIYOTT**

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARB, FCIARB.**

**JUDGE OF APPEAL**

**F. W. NGENYE-MACHARIA**

