United Airlines Limited & 2 others v Kenya Commercial Bank Limited (Civil Application E016 of 2021) [2025] KECA 806 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 806 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E016 OF 2021

DK MUSINGA, M NGUGI & GV ODUNGA, JJA

MAY 9, 2025

BETWEEN

UNITED AIRLINES LIMITED ..... 1ST APPLICANT

ELKANA MUGALA ALUVALE ..... 2ND APPLICANT

VALENTINE MULIRU WENDOH ..... 3RD APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED ..... RESPONDENT

(Being an application for stay of execution pending the lodging, hearing and determination of an intended appeal against the judgment of the High Court of Kenya at Nairobi (Tuiyott, J. (as he then was) delivered on 26th October 2020 in HCCC No. 4077 of 1994 consolidated with HCCC No. 388 of 1998)

RULING

1. By a further amended plaint filed at the High Court in Nairobi on 3rd September 1999 in Civil Suit No. 4077 of 1994, the 1st applicant, United Airlines Limited, sued the respondent, Kenya Commercial Bank Limited (the Bank), seeking several reliefs which, for the purposes of this ruling, we need not set out here. That suit was consolidated with HCCC No. 388 of 1998 filed by the respondent against the 2nd and 3rd applicants, and which arose from the same cause of action as Civil Suit No. 4077 of 1994.

2. It was the 1st applicant's case that it applied for a loan facility of Kshs. Twelve million (Kshs. 12,000,000) for the purpose of purchasing an aircraft from Canada. That it was a term of the said contract that the money was not to be released and/or exposed to the aircraft vendor, Canadian General Aircraft, or any other person until the aircraft, which constituted the 1st applicant's security, was delivered in Nairobi, registered in Kenya and evidence to that effect availed to the 1st applicant. However, this was not done

and the money was released before the aircraft was delivered. As a result of the failure by the vendor to make delivery on time, the 1st applicant did not benefit from the facility.

3. The respondent's defence was that it disbursed the loan of Kshs.12,000,000 as and when directed by the 1st applicant to Canadian General Aircraft, through the 1st applicant's agent, the Royal Bank of Canada. According to it, it was that agent who released the funds to the Canadian General Aircraft before the respondent gave disposal instructions hence the 1st applicant must take full responsibility for the actions of its agent.

4. The respondent, together with its defence, counterclaimed for the sum of Kshs.33,480,950.70 together with compound interest thereon, calculated at revisable rates from time to time at 13.75% last applied on 31st March 1998, as being the amount due in respect to the loan. This amount was also sought jointly and severally from the 2nd and 3rd applicants who had, separately, guaranteed the facility granted by the respondent to the 1st applicant and which was the subject of the claim in HCCC No. 388 of 1998.

5. After hearing the case, the learned Judge dismissed the 1st applicant's case with costs and entered judgement for the respondent against the applicants jointly and severally for Kshs. 33,480,950.70 with compound interest at 13.75% per annum last applied on 31st day of March 1998. The respondent was also awarded the costs of the counterclaim and its claim in HCCC No. 388 of 1998.

6. Aggrieved, the applicants lodged a Notice of Appeal dated 29th October 2020. They also filed a Notice of Motion dated 21st January 2021 in which they seek an order that pending the hearing and determination of their intended appeal, this Court be pleased to order a stay of execution of that judgement and any subsequent orders issued in furtherance of the said judgment. It is that application that is the subject of this ruling.

7. The application is premised on grounds that: the applicants have applied for certified copies of the judgment and proceedings; the applicants have an arguable appeal with a very high probability of success; that the applicants are at risk of execution of the said judgment and consequential decree unless the same is stayed by an order of this Court; that unless this application is heard and determined at this Court's earliest convenience, the intended appeal, even if successful, will be rendered nugatory and the applicants will suffer substantial loss and hardship; that the applicants are ready and willing to provide a Bank guarantee of Kshs 5,000,000 as a sign of good faith and security; that the respondent will not suffer any prejudice if the orders sought are granted; that this application has been brought timeously and without unreasonable delay; and that it is in the interest of fairness and justice that the orders sought herein be granted.

8. Elkana Mugala Aluvale, the 1st applicant's director, swore the supporting affidavit in which he reiterated the said grounds of the application. Attached to the affidavit was a draft Memorandum of Appeal dated 21st January 2021 setting out 13 grounds of appeal.

9. In opposition, the respondent's Principal Legal Counsel- Litigation, Lilian Sogo, swore a replying affidavit dated 17th March 2022 wherein she averred: that the Memorandum of Appeal is frivolous and does not meet the first test of being arguable; that the decree intended to be appealed against is a money decree, thus the intended appeal will not be rendered nugatory as the respondent has a solid financial standing capable of refunding the decretal sum should it be necessary; and that the application is an abuse of the court process; lacks merit and should be dismissed with costs.

10. We heard this application on 19th March 2025 during which learned counsel, Mr Lubullellah, appeared for the applicants while learned counsel, Ms Natalie Obago, held brief for Mr Mbaluto for the respondent. Both counsel relied on their written submissions which they briefly highlighted.

11. The applicants submitted that their draft Memorandum of Appeal raises substantial arguable issues of law that have overwhelming prospects of success and are not frivolous and they relied on the principles set by this Court in Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others [2013] eKLR.

According to the applicants, unless the stay orders sought are granted, the intended appeal will be rendered nugatory as compliance with the final orders of the court would result in injustice, irreparable harm and that an irreversible state of affairs will accrue to the applicants. According to the applicants, the decretal sum is colossal and should stay be declined, the applicants stand the risk of having their assets attached, filing for insolvency/bankruptcy, breaching their contractual obligations as well as the loss of their livelihoods.

In this regard they relied on the case of Mukuma v Abuoga [1998] eKLR 645.

12. The applicants submitted that the status of the 1st applicant was that of a borrower from the respondent, a fact which is prima facie acknowledged by the respondent throughout the proceedings in the High Court. This status, it is submitted, establishes that the 1st applicant was needy, financially, thus the hardship that will be occasioned to the applicants in the event the orders for stay are not granted, greatly outweighs the hardship (if any) that will be suffered by the respondent. In this regard, the applicants cited Reliance Bank Ltd v Norlake Investments Ltd [2002] eKLR as and Oraro & Rachier Advocates v Co-operative Bank of Kenya Limited [2000] eKLR.

13. In the applicants' view, the balance of convenience favours the applicants, thus they pray that the Court grants stay without any terms and/or on conditions similar to those in the case of Oraro & Rachier Advocates vs Co-operative Bank of Kenya Limited (supra). However, in the event that the Court is inclined to grant stay on terms, the applicants submitted that they are able to furnish security by way of a Bank guarantee in the sum of Kshs 5 million which is reasonable. Reliance was placed on Krystalline Salt Limited v Water Resource Management Authority [2018] eKLR, CMA CGM (K) Limited v Commissioner of Domestic Taxes [2020] eKLR, Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another [2018] eKLR and Bontempi Luigi & another v Sharrif Mohamed A. Omar & Another [2011] eKLR in support of that submission.

14. The applicants further contended that the appeal would be rendered nugatory if the conspicuous and outrageous flaw of the High Court in its choice to admit evidence, which was falsified and manually generated and made by the respondent's advocates, is overlooked. According to the applicants, choosing to ignore the same gives validity to the said judgment and decree, thus rendering this appeal nugatory, yet it has extremely high likelihood of success. In this regard, the applicants cited Ugandan Court of Appeal decision in Teddy Sseezi Cheeye v Enos Tumusiime Civil Application No.21 of 1996. According to the applicants, the appeal would be rendered nugatory by giving validity to the erroneous judgment on account of its stark contravention of the In Duplum Rule.

15. The respondent, on the other hand, submitted that the applicants did not establish any single bona fide ground of appeal that raises serious question of law or a reasonable argument deserving consideration by the Court. It was submitted, on the authority of the case of Kenya Hotel Properties Limited v Willesden Investments Limited [2007] eKLR, that the decree intended to be appealed against is a money decree, thus the appeal will not be rendered nugatory. The respondent noted that there was no averment by the applicants that the respondent is "a man of straw" and that they had failed to demonstrate the respondent's inability to refund the decretal sum should the intended appeal succeed. The respondent cited the case of Meteine Ole Kilelu & 19 Others v Moses K. Nailole [2009] eKLR and submitted that it had demonstrated its financial soundness by annexing its financial statement which demonstrated its solid financial standing. It was submitted that the hardship likely to be suffered should the stay orders be declined has not been averred in the applicants' supporting affidavit, thus the

argument, raised for the first time in the written submissions, cannot succeed. Citing the case of Rashid K.Too v Fred I Imbatu [2019] eKLR, the respondent urged this Court to dismiss the application with costs.

16. We have considered the application and the submissions made before us. This Court's jurisdiction under rule 5(2)(b) was restated by the Supreme Court in Okoiti & 3 others *v Cabinet Secretary for the National Treasury and Planning & 10 others (Application E029 of 2023*) [2023] KESC 69 (KLR) (8 September 2023) (Ruling) where it was held that:

> "It is well settled that the purpose of rule 5(2)(b) is to preserve the substratum of an appeal or intended appeal before the Court of Appeal. Equally, the Court of Appeal in issuing orders under rule 5(2)(b) exercises original and discretionary jurisdiction. It does not dispose of the appeal or intended appeal before it. In other words, it does not make definitive findings on the substantive merits of the appeal or intended appeal."

17. The basis for the exercise of this Court's jurisdiction under rule 5(2)(b) of this Court's Rules is crystallised by numerous case law emanating from this Court. This Court's decision in Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others (supra) sets out the principles for grant of stay of execution as follows:

> "This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied. From the long line of decided cases (although none was cited by counsel, perhaps due to their notoriety) on Rule 5(2) (b) aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized as follows:
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> i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Ruben & 9 Others v Nderitu & Another (1989) KLR 459.
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> ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
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> iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.
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> iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.
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> v. An applicant must satisfy the court on both of the twin principles.
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> vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.
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> vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph

Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.

viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. Damji Pragji (supra).

ix. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.

x. Whether or not an appeal will be rendered nugatory depends on 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.

xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403."

1. Before us it is contended that the learned Judge erred in determining that the Royal Bank of Canada was the 1st applicant's agent, in the absence of any probative evidence and thereby misdirected himself on a critical aspect of the applicants' case. That the record clearly showed that the Royal Bank of Canada was simply the aircraft supplier's Bank and had no relationship whatsoever with the applicants. We agree that the status and the role of the Royal Bank of Canada in the transaction may well be crucial to the appeal. We therefore find that the intended appeal is arguable and we do not have to look for further grounds.

2. Regarding the second condition, whether or not the intended appeal will be rendered nugatory, it depends on the facts and the circumstances of a particular case. It is the applicant, in an application of this nature, who bears the legal burden of satisfying the Court that its intended appeal, will be rendered nugatory, absent stay. This position stems from the fact that a successful party is prima facie entitled to the fruits of his judgement and as held in the case of African Safari Club Limited v Safe Rentals Limited [2010] eKLR:

> "...it is incumbent upon the Court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

20. Where the allegation is that the respondent will not be able to refund the decretal sum if paid in satisfaction of the decree, the burden is upon the applicant to lay a basis for that contention. That was

the position adopted in Caneland Ltd & 2 Others v Delphis Bank Ltd [2000] eKLR where this Court expressed itself as follows:

> " Let us say at once that it was nowhere alleged by the applicants in the supporting affidavits or otherwise that the respondent will be unable to refund to the defendants any sums of money paid in satisfaction of the decree. The onus was on the applicants to satisfy the court on this issue."

21. This Court, however, appreciates that it may not be possible for the applicant to know the respondent's financial means. Therefore, all that an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal sum if it is paid over and the intended appeal was to succeed. It is not expected that the applicant will go into the bank accounts, if any, held by the respondent to see if there is any money there. See Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua [2001] eKLR,

22. To succeed, the applicant must establish factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant's status as the successful party in the appeal, should that happen. Being a factual matter, the allegation of the likelihood of the intended appeal being rendered nugatory ought to be deposed to in the supporting affidavit since it is the irreversibility of the results of the execution that renders the appeal nugatory. In this case, after deposing to the arguability of the appeal, the 2nd applicant averred:

> " 23. That I am advised by our advocates, which advise I verily believe to be sound that there is currently no order staying execution of the said Judgement. As such, the Respondents are likely to extract the decree of the Judgement and to immediately proceed with the execution to the extreme detriment of the Applicants.
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> 24. That for the foregoing reasons, I believe that unless an order of stay of execution is granted by this Honourable Court, the Respondent is likely to proceed with the execution against the Applicants before the intended Appeal is lodged, heard and determined.
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> 25. That the Applicants are apprehensive that unless this Honourable Court issues the order sought herein, the intended Appeal, even if successful, will be rendered nugatory and only of academic significance.
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> 26. That the Applicants are ready and willing to provide a Bank guarantee of Kshs 5,000,000 (Kenya Shillings, Five Million) as a sign of good faith and security."

23. From the foregoing averments, the applicants' belief that the intended appeal will be rendered nugatory if execution of the judgement is not stayed is based on the fact that the respondent is likely to extract the decree and execute the judgement before the appeal is heard and determined. In our view, the mere fact that the respondent intends to execute the decree, which is a right bestowed upon it by law, cannot, by itself and without more, be said to render an intended appeal nugatory. The applicant must therefore establish other factors, other than the fact of execution, which show that the execution will irreparably negative his right as the successful party in the appeal.

24. In this case, nowhere in the affidavit is it alleged that either the respondent will be unlikely to refund the decretal sum, or that the payment of the decretal sum may be onerous on the part of the applicants by affecting their commercial viability or otherwise. Whereas it was submitted that the applicants stand

the risk of having their assets attached, filing for insolvency/bankruptcy, breaching their contractual obligations as well as the loss of their livelihoods, these factual averments ought to be in the affidavit and not in the submissions.

25. The holding in Caneland Ltd & 2 Others v Delphis Bank Ltd (supra) applies to the circumstances in this case. In that case, the Court found that:

> "Upon a careful consideration of all the material available to us we are unfortunately not satisfied that this onus has been discharged. There is nothing to show that the appeal will be rendered nugatory if a stay is not granted. On the contrary, it appears to us that the respondent is not a bank of straw and can meet or refund any sums of money paid to it. That being the case and our view of the matter, we are satisfied, on a balance of probabilities, that if a stay is not granted the appeal will not be rendered nugatory. The applicants having failed to satisfy us on this condition, their application must fail. It is not necessary for us to consider the first condition, namely, whether the applicants have an arguable appeal."

26. We have stated enough to show that the applicants have failed to prove that their intended appeal, should it succeed, will be rendered nugatory. Consequently, as the applicants have failed to meet the threshold for grant of stay of execution pending an appeal under rule 5(2)(b) of this Court's Rules, we dismiss the Notice of Motion dated January 21, 2021 with costs to the respondent.

27. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.