Okello & 2 others v Fin Tea Limited & another (Civil Appeal (Application) E053 of 2024) [2025] KECA 1099 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1099 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) E053 OF 2024

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JUNE 20, 2025

BETWEEN

SAMUEL ONYANGO OKELLO ..... 1ST APPLICANT

EXHIBITION DEVELOPMENT LIMITED ..... 2ND APPLICANT

UMAMI TRADING COMPANY LIMITED ..... 3RD APPLICANT

AND

FIN TEA LIMITED ..... 1ST RESPONDENT

CITI BANK N.A ..... 2ND RESPONDENT

(Being an application for injunction pending hearing and determination of the appeal against the Judgement and Decree of the High Court of Kenya at Mombasa (P. J. Otieno, J.) delivered on 14th April 2023 in Civil Suit No. 86 of 2005)

RULING

1. Before us is a Notice of Motion dated 13th December 2024 brought pursuant to rules 5(2) (b), 43, 44 and 45 of the Court of Appeal Rules, 2022 and sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9. The applicants, Samuel Onyango Okello, Exhibition Development Limited and Umami Trading Company Limited seek orders: that pending the hearing and determination of this appeal, this Court be pleased to issue a temporary injunction restraining Citi Bank N.A (the 1st respondent), whether by themselves, their employees, servants, agents and/or auctioneers, from enforcing the Legal Charge dated 20th November 1998 (registered on 24th November 1998), taking possession of, advertising for sale, selling, whether by public auction or private treaty and/or in any way disposing of, alienating or otherwise howsoever interfering with the 1st appellant's ownership or quiet possession of all that parcel of land known as Plot No. 1191, Section I, Mainland North Mombasa; and that costs of the application be borne by the 1st respondent.

2. The brief background to the application is that the applicants filed a suit in the High Court of Kenya at Mombasa challenging the 1st respondent's decision to exercise its statutory power of sale over Plot No. 1191, Section I, Mainland North Mombasa (the suit property), for the recovery of unsecured sums allegedly owed to it; that they offered additional properties as security, being L.R. No. 1/1148 Flat No. 60 Sumo Apartments in Kilimani Nairobi; L.R. No. 330/797 Flat No. 806, L.R. No. 330/797 Flat No. 607 and Flat No. 330/797 Flat No. 306 all located at Dhanjay Apartments in Lavington, Nairobi (hereinafter the Kilimani and Lavington apartments); and that, despite not advancing the facility of USD300,000 as stated in its letter of offer dated 25th August 1998, the 1st respondent created a legal charge over the suit property.

3. The applicants prayed that the trial court do issue orders: restraining the 1st respondent from interfering with the suit property; for rectification of the register in respect of the suit property; and for the return of the documents being held by the 1st respondent in respect of the Kilimani and Lavington apartments registered in the names of the 2nd and 3rd applicants.

4. The 1st respondent filed a defence and counterclaim in which it averred, inter alia, that, by a letter dated 25th August 1998, it extended four facilities to Fin Tea Limited (the 2nd respondent), one of them being of USD300,000, and that the Legal Charge was to be over the suit property; and that due to the non-repayment of the facilities, the 1st respondent requested for additional securities for which the 1st applicant offered titles to the Kilimani and Lavington apartments, registered in the names of the 2nd and 3rd applicants.

5. In its counterclaim, the 1st respondent claimed that the applicants owed it Kshs.43,410,785 and USD1,352,973 together with interest at 21.25% p.a. and 31.2% p.a. respectively from 21st August 2004, being the sums advanced to the 2nd respondent. The 1st respondent further prayed for a declaration that it holds equitable charges/mortgages over the titles of all the properties offered as security to it by the 1st applicant.

6. The learned trial Judge (P. J. Otieno, J.) found merit in the 1st respondent's counterclaim but dismissed the applicants' suit. He held that there was no intention to create a legal relationship between the applicants and the 1st respondent over the titles in the Kilimani and Lavington apartments, and thus ordered for their release. He entered judgement against the 2nd respondent for: repayment of USD1,421,939.10; Kshs.22,084,274.80; a declaration that the legal charge created over Plot No. 1191, Section I, Mainland North Mombasa, in favour of the 1st respondent is valid and duly enforceable in law; and costs of the counterclaim.

7. Aggrieved by the decision, the applicants filed a Notice of Appeal and the instant Motion, seeking the afore-stated orders. The Motion is premised on the grounds set out on its face, and which have been reiterated in the affidavit sworn by the 1st applicant on13th December 2024 in support of the Motion.

8. Apart from restating the background to the application, the 1st respondent further deposed that they (the applicants) have filed a Record of Appeal dated 27th March 2024, which was served upon the respondents on 29th March 2024.

9. As to the merit of the appeal, the 1st applicant deposed that, among the grounds of appeal that the applicants intend to argue, include: that the Judge erred in his interpretation and application of Section 35 of the *Limitation of Actions Act* and proceeded to hold that the 1st respondent's counterclaim dated 20th December 2007 was not statute barred; that the Judge erred in declaring that the charge dated 20th November 1998 created over Plot No. 1191, Section I, Mainland North Mombasa was valid and enforceable while there was no loan facility of USD300,000 extended to the 2nd respondent; and

that the Judge erred in his application of Section 44A of the *Banking Act*, Cap 488 by not properly ascertaining the alleged principal debt, the interest accrued thereon (if any) before awarding the 1st respondent the said sum of USD1,421,939.10 and Kshs.22,084,274.80.

10. As to whether the appeal will be rendered nugatory if the orders sought are not granted, the applicants contended that if the orders are not granted, the 1st respondent will proceed to sell the suit property to the 1st applicant's detriment, thereby rendering the hearing of the appeal an academic exercise.

11. Opposing the application, Linda Muthoni Muturi, the 1st respondent's Head of Risk, swore an affidavit dated 19th December 2024. It is her case that the instant application is a scheme by the applicants to deny it its rightful enforcement of the court's judgement which amounts to USD1,421,939.10 and Kshs.22,084,274.80, which the applicants have failed to settle despite numerous opportunities to do so; that the charge over the suit property was lawful; that the 1st applicant has ignored the 90-days Statutory Notice issued on 6th August 2024 and a subsequent Statutory Notice to Sell issued on 11th November 2024; and that the appeal is not arguable since the 1st applicants benefited from the advanced facilities, and that they cannot escape the obligation arising from the benefit received.

12. As to whether the appeal will be rendered nugatory if the orders sought are not granted, the 1st respondent contends that, this being a money decree, the money can be reimbursed and the applicants can be awarded damages in the event that the appeal succeeds; that it is a reputable financial institution which can satisfy any damages awarded by the Court if the appeal is successful without incurring any undue hardship or financial strain; and that the applicants have not demonstrated the prejudice they stand to suffer if an injunction is not granted.

13. The 1st respondent emphasised that, in determining whether an appeal will be rendered nugatory, the court has to consider the conflicting claims of both parties and that, in so doing, each case has to be considered on its own merits; and that, for the foregoing reasons, the application should be dismissed with costs.

14. We heard this application on 29th January 2025. Learned counsel Mr. Kere appeared alongside Ms. Njuguna for the applicants, learned counsel Mr. Njoroge Regeru and Ms. Mutinda were present for the 1st respondent, while learned counsel Mr. Willis Otieno appeared for the 2nd respondent.

15. Mr. Kere highlighted the applicants' written submissions dated 15th January 2025. Counsel basically restated the grounds upon which the application is hinged, and which were also duplicated in the supporting affidavit. For this reason, we shall not replicate them. Suffice it to state that counsel relied on the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others (2013) KECA 378 (KLR) for the submission that the applicants' appeal is arguable, and that even one bona fide ground would satisfy the requirement of an arguable appeal; and that, whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen, is reversible or, if not reversible, an award of damages can reasonably compensate the aggrieved party; Trust Bank Limited & Another vs. Investech Bank Limited & 3 Others (2000) KECA 11 (KLR) for the proposition that a stay order should be granted where a foreign bank is involved as difficulties may arise in recovering the decretal sum.

16. On its part, the 1st respondent relied on written submissions dated 14th January 2025. In highlighting the submissions, Mr. Njoroge Regeru posited that the consistent jurisprudence of this Court is that there should be minimal or no interference with a lender's exercise of statutory power of sale conferred by statute. Reliance was placed on Supreme Court's decision of Kenya Hotel Properties Limited vs. Attorney General & 5 Others (2020) KESC 6 (KLR) for the proposition that an application of this

nature can only succeed if it is demonstrated that the proposed arguable grounds are not frivolous; that the appeal is not arguable since it revolves around the argument that the legal charge dated 20th November 1998 over the suit property is unenforceable on the basis that there was no consideration given by the 1st respondent in exchange for the securities given for the credit facilities; that the factual position is that it was proved that there was money moved to the 2nd respondent's account though transfer or settlement cheques; that the applicants have approached the Court with unclean hands; and that the applicants having benefited from the credit facilities, and having failed to repay, are not entitled to equitable reliefs in form of stay of execution or injunction pending appeal.

17. On whether the appeal will be rendered nugatory if the orders sought are not granted, the 1st respondent submitted that the decree herein being monetary in nature was reversible, and that the applicants have not demonstrated what prejudice they would suffer. It relied on the decision of this Court in Boniface vs. Iqbal (Sued as the Personal Representative of the Estate of Ghulam Rasool Janmohammed) (2024) KECA 185 (KLR) in submitting that, it was a reputable financial institution with substantial financial resources and is capable of satisfying any damages that may be awarded in the event that the appeal succeeds; and African Safari Club Limited vs. Safe Rentals Limited (2010) eKLR for the argument that, in this case, it is incumbent upon the Court to pursue the overriding objective to act fairly and justly, which in this case tilts towards the dismissal of the application.

18. The 2nd respondent, which supported the Motion, relied on written submissions dated 15th January 2025. As to the arguability of the appeal, the 2nd respondent urged that, in addition to the grounds set out by the applicants, it shall also raise the issue of the applicability of Section 44 of the *Banking Act*, Cap 488.

19. On the nugatory limb, the 2nd respondent submitted that no prejudice would be suffered by any party if the substratum of the appeal is maintained. For this submission, counsel relied on two decisions for which full citation was not disclosed, and for which reason we shall not make reference thereto in our ruling. Finally, the 2nd respondent contended that the party which is unlikely to suffer any prejudice if the application is allowed is the 1st respondent. We were accordingly urged to allow the application.

20. We have considered the application, the response, the authorities relied upon by the respective parties and the law. It is settled law that the jurisdiction of this Court to grant stay of execution or of proceedings, or to grant an injunction pending appeal is hinged on rule 5(2) (b) of this Court's Rules, 2022 and is discretionary. We are alive to the fact that, in this case, the applicants are seeking injunctive orders. Rule 5(2) (b) provides that:

> In any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

21. A party who seeks relief under rule 5(2) (b) must satisfy the twin principles, namely that the appeal or intended appeal is arguable and that, if the orders sought are not granted, the appeal would be rendered nugatory. In Chris Munga N. Bichage vs. Richard Nyagaka Tongi & 2 others (2013) KECA 141 (KLR), this Court held as follows:

> " 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."

22. We take to mind the fact that an arguable appeal is not one which must necessarily succeed, but one which is not be frivolous, but should be worthy of consideration. In Cleophas Wasike vs. Mucha Swala (1984) KECA 55 (KLR), this Court held that an applicant need not show that his appeal has an overwhelming probability of success; an applicant just needs to show that there is merit in his appeal.

23. In addition, this Court in Housing Finance Company of Kenya vs. Sharok Kher Mohamed Ali Hirji & another (2015) KECA 447 (KLR) made reference to the decision of Carter & Sons Ltd vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997 (UR) which we find instructive as follows:

> " ...the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay ...the applicant must establish a sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security, and the application must, of course, be made without unreasonable delay."

24. We have perused the grounds of appeal raised by the applicants. The question as to whether the charge was in relation to the original amount, and whether there was money advanced to the applicants as alleged by the 1st respondent are arguable grounds. Whether or not the said grounds will succeed will be a subject of consideration by the bench that will hear the appeal.

25. Turning to the second limb of the twin principles, which is whether the appeal will be rendered nugatory if an injunction is not granted, we bear in mind that the decree herein is a monetary decree. The different positions taken by the opposing parties is on the legality of the charge over the suit property, which has not been discharged. In Kenya Hotel Properties Limited vs. Willesden Investments Limited (Civil Application 322 of 2006) [2007] KECA 401 (KLR) (9 March 2007) (Ruling), this Court had the following to say in respect to instances where a money decree is involved:

> " The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle in law was not being established at all. Hence the cases such as of Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Ltd. – Civil Application No. Nai. 358 of 1999 (unreported) where it was held by this Court that if an applicant is compelled to pay the decretal amount in a money decree, the hardship that the applicant may undergo may be unbearable".

26. This Court in East African Cables PLC vs. Equity Bank (Kenya) Limited (2025) KECA 901 (KLR) had this to say as concerns the refusal of granting stay orders (or in granting an injunction) in similar circumstances as in the instant case where a money decree is involved:

> " The worst that can happen to the applicant is for those properties to be sold and it to be found, eventually, that the exercise of the statutory power of sale was improper. Yet, such a

sale would not render the intended suit nugatory because of the provisions of section 99(4) of the *Land Act* cited to us by counsel for the Bank. This provides: -

> " A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.'

That is the complete answer to any person who offers his or her property as security in exchange of a Bank facility and pleads that the lender is acting improperly. It must be in the contemplation of a chargor that the chargee could exercise the power of sale in an unauthorised, improper or irregular manner but the only remedy available for such infraction is a relief in damages. The ability of the Bank, a tier 1 Bank, to pay the damages is not doubted and there can be no reason to hold it back from exercising its statutory power of sale even in circumstances where the debt is contested."

27. As was held in the foregoing decisions, the applicants had the obligation to demonstrate that the 1st respondent is an institution which would not be able to repay them the decreed sums in the event that the appeal succeeds. The 1st respondent deposed that it is a reputable bank capable of paying damages in the event that the appeal succeeds. This averment was not rebutted by the applicants. In our view, it is the 1st respondent bank which has more to worry about since the loan facility has been non-performing since the year 2018. Issuing an injunction would mean that it does not pursue its statutory power of sale to which it is entitled and which, in effect, places it in a disadvantaged position.

28. Ultimately, we find that the applicants have failed to satisfy the two-prong test for granting injunctive orders under rule 5(2) (b) of the Court of Appeal Rules, 2022. Accordingly, the Notice of Motion dated 13th December 2024 fails and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT MALINDI THIS 20TH DAY OF JUNE, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR