Nuru Chemists Limited & another v National Bank of Kenya Limited (Civil Appeal (Application) E144 of 2025) [2025] KECA 1466 (KLR) (25 August 2025) (Ruling)

Neutral citation: [2025] KECA 1466 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E144 OF 2025

AO MUCHELULE, JA

AUGUST 25, 2025

BETWEEN

NURU CHEMISTS LIMITED ..... 1ST APPLICANT

JAMES ISABOKE ..... 2ND APPLICANT

AND

NATIONAL BANK OF KENYA LIMITED ..... RESPONDENT

(Being an application for Stay of execution of the Judgment delivered at Nairobi, (D.S. Majanja J.) dated 5th July 2024 in Civil Appeal No. 695 of 2019)

RULING

1. The applicants, Nuru Chemists Limited and James Isaboke, being aggrieved by the judgment in Civil Appeal No. 695 of 2019 moved this court under Rule 5(2)(b) of this Court's Rules seeking to stay the orders of the superior court pending hearing and determination of the appeal. The matter was placed before me for certification on urgency. Upon consideration of the certificate of urgency, the affidavit in support, the application and the accompanied affidavit, I was not persuaded to certify the matter as urgent. Pursuant to Rule 49(5) of this Court's Rules the applicants' counsel wrote to the Registrar of the Court seeking to have the application placed before me for an inter parte hearing on the question of urgency.

2. In support of the issue at hand, the applicants' counsel filed submissions, albeit with respect to the application seeking a stay of execution and not the issue of urgency. The matter was fixed for hearing on the 25th August 2025, and despite service of the hearing notice dated the 19th August 2025, the respondent failed to file documents in opposition to the application.

3. At the hearing of the application, Ms. Wangeci learned counsel for the applicants urged that the application be certified as urgent as the respondent seeks to execute the impugned judgment. Although the respondent is capable of reimbursing the value of the suit property in question, the applicants

would have lost out on the idealness of the location of the suit property if the appeal were successful. In opposing the certification, Mr. Wanjohi argued that the applicants have failed to demonstrate any exceptional circumstance as to why the application ought to be certified urgent.

4. Briefly, by way of a background to this matter, before the trial court, the Bank (the respondent herein) had claimed that sometime in 1996, it took over all debts, liabilities, obligations and duties of Standard Chartered Bank Kenya Limited, Kisii Branch (Standard Chartered). That by an agreement dated 16th August 1993, the 1st applicant applied for and was granted a loan of Kshs.2,000,000.00 by Standard Chartered, attracting interest at the rate of 37% per annum. The loan was to be repaid on demand at any time at Standard Chartered Bank's discretion. The Bank further claimed that by an instrument of guarantee and indemnity dated 16th June1993 ("the guarantee"), the 2nd applicant guaranteed the 1st applicant's indebtedness to Standard Chartered up to the sum of Kshs.3,500,000.00. It was the Bank's further claim that 1st applicant maintained and operated a current account and a loan account with it. The Bank claimed Kshs.5,937,231.70 due as at 31st May 2001 in respect of the loan and overdraft facilities provided to the 1st applicant together with interest at 26% and Kshs.3,500,000.00 from the 2nd applicant payable under the guarantee. In their defense, the applicants specifically denied ever operating a current and loan account with the Bank or having any knowledge that the Bank had taken over the debts, liabilities, obligations and duties of Standard Chartered. Whereas they agreed taking up the loan with Standard Chartered, they averred that the said facility was repaid in full by the 1st applicant through the facility obtained by Barclays Bank of Kenya (Barclays Bank). On the guarantee, the applicants stated that it ought not to have been altered or in any other way varied without their full consent or knowledge. The applicants further averred that the Bank fraudulently colluded with Standard Chartered to have the executed transfer of charge transferred to the Bank without their knowledge, consent and/or authorization. In response, the Bank reiterated its position and stated that there was a contractual relationship between the applicants and Standard Chartered and upon the Bank taking over the debts, liabilities, duties and responsibilities of Standard Chartered, the applicants became legally liable to pay the Bank for any outstanding debts owed to Standard Chartered.

5. The trial court in its judgment held that there were serious discrepancies in the manner in which the account was taken over from Standard Chartered as the applicants did not seem to be in the know. That the failure by the Bank to call for and adduce evidence from Standard Chartered created a gap in the Bank's case and there was no flow created to prove its case as required by law. It further held that the Bank sent auctioneers to the 1st applicant's premises and this is why the 2nd applicant wrote letters promising to pay the sums claimed by the Bank. That the procedure adopted in transferring the property did not meet the threshold set out in law, and that this ought not to have been done when the 1st respondent was not appearing in the list of debtors taken over by the Bank from Standard Chartered.

6. Aggrieved by the above decision, the Bank proffered an appeal to the superior court. The superior court, upon considering the appeal, held that the trial court had erred in finding that the Bank had failed to prove its case against the applicants. It was observed that through letters to the Bank dated 9th May 1996 and 26th April 1999, the 1st applicant expressly admitted indebtedness and sought the indulgence of the Bank to be able to repay the same in varied installments. While the 2nd applicant testified that he wrote the letter of 1999 under duress as auctioneers were at the 1st applicant's doorstep, he did not deny and actually admitted that he was still indebted to the Bank as he asked the Bank to restructure the loan. This was confirmed by the Bank's offer letter dated 12th May 1999 which was produced by the applicants where it is indicated that their outstanding loan as at that date was Kshs.3,450,256.75 and that the Bank had agreed to restructure the existing facility. The superior court allowed held that the 1st applicant was indeed indebted to the Bank in the sum of Kshs.4,560,281.90 and an applied interest rate

of 22% as per the letter of offer dated 12th May 1999. Since the guarantee was not disputed, judgment is entered against the 2nd applicant for Kshs.3,500,000.00.

7. The applicants aggrieved by the above decision now proffer an appeal to the Court of Appeal.

8. From the onset, it is to be noted that my mandate for now is very limited. It is confined to merely forming an impression from the pleadings placed before me, whether this matter is urgent and deserves to jump the queue to be heard on priority basis and not wait to be heard in the ordinary course of business. I am being called upon to exercise a discretion, which discretion is to be exercise judiciously, where there is good reason and to ensure the ends of justice are met. I am not expected to delve into the merits of the matter at this juncture.

9. In the case of Equip Agencies Ltd -vs- Abdullahi Kassam Esmail and Others (2015) eKLR this Court held as follows:

> "An application will not be certified urgent on an applicant's or his advocates' say – so, without more. This is the reason for the requirement not only of a certificate of urgency by the applicant or his advocate, but evidence as well by way of a sworn affidavit in proof of the imminence of the threat and risk apprehended. Such risk must be real and immediate. It must portend a present danger to rights and interests.
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> Without a clear demonstration of real, clear and present peril of harm, I apprehended that it would be a misuse and abuse of the Rule 47 mechanism to certify an application as urgent and thereby have it leap-frog other application previously filed or have the equally deserving business of the Court placed aside or otherwise re-organized to pave way for its hearing. Such queer – jumping, in my way of thinking, must be in the most deserving of case."

10. Having considered the certificate of urgency, the motion and the affidavit in support, and bearing in mind the history of the dispute as outlined in the foregoing, I am not persuaded that the applicants have shown such actual or imminent peril or harm that they are threatened with, which should make their matter to jump the que, as it were.

11. I still decline the request to certify the application as urgent. The application shall be listed for hearing in the usual manner.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF AUGUST 2025.

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.