



**KCB Bank Kenya Limited v Kanji & another (Civil Appeal (Application)  
E151 of 2023) [2024] KECA 120 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 120 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E151 OF 2023  
S OLE KANTAI, KI LAIBUTA & GV ODUNGA, JJA  
FEBRUARY 9, 2024**

**BETWEEN**

**KCB BANK KENYA LIMITED ..... APPLICANT**

**AND**

**ALNOOR ABDULMALIK KANJI ..... 1<sup>ST</sup> RESPONDENT**

**KAMAL ANANTROY BHATT ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of the Ruling of the High Court of Kenya at  
Mombasa (Magare, J.) dated 7th September, 2023 in HCCC No E063 of 2023)*

**RULING**

1. The applicant, KCB Bank Kenya Limited, by motion on notice brought under various provisions of law, including rule 5(2) (b) of the [Court of Appeal Rules](#), asked in the main that, pending hearing and determination of an appeal, we be pleased to grant an order staying the ruling of the High Court at Mombasa (Magare, J.) delivered on September 7, 2023 and stay further proceedings in Mombasa HCCC No E063 of 2023. In the grounds advanced in support of the application, and in a supporting affidavit of Oscar Obuna, Head of Support Unit of the applicant it is said amongst other things that the applicant, is the stated amongst other things, that the applicant is the holder of a debenture over all assets of ITCO Investment Limited (ITCO) trading as Pinewood Beach Resort and Spa in consideration of the applicant advancing credit facilities upto a maximum amount of Kes 225,000,000 to Pearl Beach Hotels Limited; that Pearl Beach Hotels Limited defaulted in its repayment obligations to the applicant and that it was placed under receivership by the applicant on May 31, 2022 with a view to pursue recovery of an outstanding debt totaling approximately Kes 5,200,000,000; that following the placement of the said company under receivership the applicant's rights to enforce the debenture crystallized; and that the applicant had appointed the 2<sup>nd</sup> respondent (Kemal Anantroy Bhatt) as Receiver and Manager. Further, that the 1<sup>st</sup> respondent (Alnoor Abdulmalik Kanji) applied



for interlocutory injunction against the applicant and the 2<sup>nd</sup> respondent on the grounds that the applicant had appointed a Receiver and Manager over their land known as LR No Kwale/Egalu/Kinondo/796 (the land) without complying with section 90 of the *Land Act*, and requested that the applicant and the 2<sup>nd</sup> respondent be restrained from dealing with the land or the operation and management of Pinewood Hotel. Further, that, apart from claiming that he was a director and shareholder of Pinewood Hotel, the 1<sup>st</sup> respondent had not offered any evidence of the ownership of that name but that the applicant and the 2<sup>nd</sup> respondent had produced documents to show that ITCO traded and carried on business in the name of Pinewood Beach Resort & Spa; that the Judge had found that there was no evidence of registration of the trade name Pinewood Beach Resort & Spa and in the event issued an injunction against the applicant and ITCO, the latter not being a party to the suit. It is said that the 1<sup>st</sup> respondent obtained the injunction by perjury, misrepresentation and suppression of material facts; that the intended appeal is arguable and various grounds of appeal are set out. The applicant further states that the intended appeal will be rendered nugatory because the effect of the ruling by the Judge is that the applicant's rights under the debenture which had crystallized were negated; that Pinewood Hotel was the main asset that was charged to the applicant under the debenture, and that the orders restraining the applicant from enforcing the debenture against Pinewood Hotel exposed the applicant to losses which could not be recovered in damages; that money owed by ITCO was significant and continued to accrue interest with the risk that it may exceed the value of Pinewood Hotel, amongst other reasons.

2. In a replying affidavit, the 1<sup>st</sup> respondent depones that the issue before the High Court was the question of what the debenture assets were as opposed to the charged asset; that we lack jurisdiction to stay the ruling and orders of the High Court; that, if the application was allowed, he (the 1<sup>st</sup> respondent) stood to suffer prejudice and irreparable loss over the land, as we were being asked by the applicant to make definitive final findings; that a stay of proceedings is a grave judicial action which interferes with a litigant's right to conduct litigation. Further, that Pearl Beach is not in default and the conflict is the subject of ongoing cases in various courts; that he is the registered owner of the land; that ITCO was not a party to the litigation at the High Court; and that the applicant has not satisfied the requirements for a grant of stay pending appeal.
3. When we heard the Motion on October 25, 2023 we issued an order that:

“Pending the formal ruling to be delivered by this Court on the March 8, 2024, there shall be a stay of all proceedings and the ruling delivered on September 7, 2023 in Mombasa High Court Civil Case No E063 of 2023 *Alnoor Abdulmalik Kanji v KCB Bank Kenya Limited and another*.”
4. Here are the reasons why we made that order and our ruling on the Motion.
5. The Motion was moved by learned counsel George Oraro, SC with learned counsel Miss Noella and was supported by learned counsel Mr. Munyau for the 2<sup>nd</sup> respondent but was opposed by learned counsel for the 1<sup>st</sup> respondent Mr. Maloba who appeared with learned counsel Mr. Mingo and Mr. Mwaura.
6. The principles that govern grant or otherwise of an application under rule 5 (2) (b) of the *Court of Appeal Rules* are well known. For an applicant to succeed, it must be demonstrated that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the appeal is not frivolous. The applicant must, in addition, show that the appeal would be rendered nugatory absent stay – See the case of *Stanley Kangethe Kinyanjui v Tony Ketter & others* [2013] eKLR. We were informed by learned counsel for the applicant that an appeal, being Civil Appeal No. E151 of 2023,



had already been filed. It is to be argued on appeal, for instance, that the Judge misdirected himself on the 1<sup>st</sup> respondent's application which was based on the claim that the 2<sup>nd</sup> respondent was appointed as a receiver under a legal charge over the land when the appointment was on a debenture issued to ITCO. It is also to be argued on appeal that the Judge erred in law and in evidence in shifting the burden of proof to the applicant, the 1<sup>st</sup> respondent having only alleged that he was a director and shareholder of Pinewood Hotel, but failed to rebut the evidence offered by the applicant. These we find to be arguable points on appeal and, as was held by this court in *Damji Pramji Mandaria v Sarah Lee Household and Body Care (K) Limited*, Civil Application No 345 of 2004 (UR) a single arguable point will suffice as an applicant need not show a multiplicity of arguable points.

7. The applicant submits on the nugatory aspect, and we agree, that its rights under the debenture had crystallized, but that the effect of the ruling was to negate the debenture and grant the 1<sup>st</sup> respondent rights over the assets covered by the debenture including the business of Pinewood Hotel. The applicant further states, and we again agree, that Pinewood Hotel is the main asset that was charged to the applicant under the debenture, and that the orders restraining the applicant from enforcing the debenture against Pinewood Hotel expose the applicant to losses which cannot be recovered in damages particularly as ITCO holds no other assets apart from Pinewood Hotel.
8. The applicant satisfied the principles on which this kind of application is considered. We allow the motion. The proceedings in Mombasa HCCC No. E063 of 2023 are hereby stayed pending hearing and determination of Civil Appeal No E151 of 2023. Costs of the motion will be in that appeal.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**G. ODUNGA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

