



**Guardian Bank Limited & 8 others v Shivali Investments Limited & 3 others (Civil Application E085 of 2023) [2024] KECA 309 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KECA 309 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E085 OF 2023  
DK MUSINGA, A ALI-ARONI & JM MATIVO, JJA  
MARCH 15, 2024**

**BETWEEN**

- GUARDIAN BANK LIMITED ..... 1<sup>ST</sup> APPLICANT**
- CHANDARIA ALIAS AMIT DINESHKUMAR CHANDARIA ALIAS AMIT DINESH CHANDARIA HETUL CHANDARIA AND BHAVNISH CHANDARIA ALIAS BHAVNISH DINESH CHANDARIA (SUED AS THE EXECUTORS OF THE ESTATE OF MAGANLAL MOTICHAND CHANDARIA). 2<sup>ND</sup> APPLICANT**
- NISHA DINESH CHANDARIA W/O DINESH MAGANLAL CHANDARIA (SUED AS PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE DINESH MAGANLEL CHANDARIA) ..... 3<sup>RD</sup> APPLICANT**
- MAHESH MAGANLAL CHANDARIA ..... 4<sup>TH</sup> APPLICANT**
- CONIFERS TRADING LIMITED ..... 5<sup>TH</sup> APPLICANT**
- CHANDARIA HOLDINGS LIMITED ..... 6<sup>TH</sup> APPLICANT**
- DIMA LIMITED ..... 7<sup>TH</sup> APPLICANT**
- GOLDERA LIMITED ..... 8<sup>TH</sup> APPLICANT**
- KEVIS INVESTMENTS LIMITED ..... 9<sup>TH</sup> APPLICANT**

**AND**

- SHIVALI INVESTMENTS LIMITED ..... 1<sup>ST</sup> RESPONDENT**
- NAVAL HOLDINGS LIMITED ..... 2<sup>ND</sup> RESPONDENT**
- KETTY INVESTMENTS LIMITED ..... 3<sup>RD</sup> RESPONDENT**
- SAAF HOLDINGS LIMITED ..... 4<sup>TH</sup> RESPONDENT**



*(An appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (Mabeya, J.) delivered on 17th February, 2023 pending the hearing and determination of the appeal in Commercial Case No. 560 of 2005)*

**RULING**

1. The applicants, (the appellants herein), aggrieved by the judgment of the High Court (Mabeya, J.) delivered on the 17<sup>th</sup> of February, 2023 in Nairobi High Court Commercial Case No. 560 of 2005, preferred Civil Appeal No. E145 of 2023 to this Court and moved the Court under rule 5(2) (b) of this Court's Rules for a stay of execution of the judgment and decree pending hearing and determination of the appeal, for the applicants to be at liberty to seek for further orders and/or directions, and for costs of the application to abide by the outcome of the appeal.
2. A brief history of the case is that the 2<sup>nd</sup> to 9<sup>th</sup> applicants and the respondents entered into a Memorandum of Understanding (MoU) dated the 13<sup>th</sup> of October 1999, where the 2<sup>nd</sup> to the 9<sup>th</sup> applicants agreed to purchase a total of 200,000 shares in Guilders International Bank Limited (Guilders Bank) from the respondents for the sum of Kshs.196 million; the MoU was subject to a formal contract being entered into; subsequently the parties entered into an agreement for the sale of the shares in Guilders Bank dated 30<sup>th</sup> December 1999; and an agreement for the sale of assets and business dated 31<sup>st</sup> December 1999; Guilders Bank also executed a net worth computation which set out the negative net worth of the company at Kshs.165, 268,000.
3. The sale was conditional on the warranties listed being true and accurate and not misleading in any material aspect; the respondent complying fully with their obligations; or having procured the performance by themselves or by Guilders Bank of all covenants and agreements to be performed by them; and having no materially adverse change in business and assets of Guilders Bank between the date of the agreement and the completion date of 30<sup>th</sup> December 2000.
4. Further, the various agreements and the MoU provided that payment of the consideration was to be paid in ten (10) equal installments, of each successful year from 31<sup>st</sup> December 2001, subject to deduction, if any, of non-performing and irrecoverable loans, which had been classified as recoverable and performing as at the date of execution of the agreement; the cut-off date for establishing the non-performing accounts was 31<sup>st</sup> December 2001 after which the net assets of Guilders Bank would be confirmed as negative.
5. Subsequently, there was a merger between Guilders Bank and Guardian Bank Limited, and the 2<sup>nd</sup> to 9<sup>th</sup> applicants took the position that no further sums were due to the respondents, which aggrieved the respondents, and as a result, they preferred the suit subject of this appeal seeking various orders as follows: -
  - a. The sum of Kshs.196,000,000/- being the consideration for the sale of 200,000 shares in Guilders Bank.
  - b. An order/or directions that the appellants do render accurate and comprehensive account of the amounts collected and/or received by the appellants from debtors, of Guilders Bank International Bank Limited and/or from proceeds of sale of tangible security given by the respondents to the appellants under the agreements.



- c. An order/and or directions that a forensic audit of the said accounts, as well as the appurtenant documents held by the appellants relating to the amounts collected and/or received by the appellants from the debtors of Guilders International Bank Limited and/or from proceed of sale of the tangible securities be conducted by a reputable forensic auditor to be agreed upon by the parties and in default to be appointed by the court within which duration the court will deem appropriate.
  - d. The amount payable by the appellants to the respondents on account of recoveries made in loans in excess of 'deficit in net worth and/or from the proceeds of sale of tangible securities given by the respondents to the appellants under the agreements herein.
  - e. An inquiry into the amounts collected and/or collected by the appellants from the debtors of Guilders International Bank Limited in respect of the collections made by Guardian Bank Limited for which purpose this Court be pleased to appoint a receiver for payment thereof to the respondents.
  - f. Interest on Kshs.196 Million until payment in full.
  - g. Interest on amount recovered and recoverable by Guardian Bank Limited on behalf of Guilders International Bank Limited.
  - h. Discharge and return of securities specified in the MoU.
  - i. Costs.
6. The respondents on their part opposed the suit by filing a joint further defence and an amended counterclaim. The counterclaim included damages for breach of contract and misrepresentation. In the counterclaim the applicants sought a sum of Kshs.799,895,388/- being the debit balance in the respondents' account, interest at 22% p.a. compounded monthly, and costs.
  7. In the end, the High Court entered judgment in favour of the respondents as against the applicants jointly and severally, awarding the respondents the sum of Kshs.196,000,000/- together with interest at the rate of 12% p.a. from 1<sup>st</sup> January, 2022 and a blanket order for the return of securities valued at Kshs.380 million.
  8. The application is based on the grounds on the face thereof, and the supporting affidavit of Hetul Chandaria dated the 10<sup>th</sup> of March, 2023 wherein, the appellants argue that the appeal will be rendered nugatory unless a stay is granted; further, that the respondents have applied and sought warrants of attachment of the applicants' movable property even before filing of the respondents' bill of costs, and without leave of the court; that in the application for execution, the respondents sought Kshs.2,174,400,000/- which was neither in the judgment nor decree; that the respondents have also included the sum of Kshs.380 million as the alleged value of the blank securities, yet the securities they provided to the applicants was valued at Kshs.252 million, some of which were sold to third parties with the consent of the respondents while others were surrendered to the Chief Land Registrar for cancellation for having been unlawfully and illegally acquired and/or charged; that the applicants stand to suffer loss and damage and they will be forced to settle the huge sum being claimed, and the fear is exacerbated by the fact that the respondents' common director, Rajendra Ratilal Sanghani, has several debts and has instituted insolvency proceedings in the High Court; there is published vide Gazette Notice No. 12735 on 7<sup>th</sup> December 2018, where the Registrar of Companies informed the public that the 3<sup>rd</sup> respondent has been dissolved.



9. Further the applicants fault the trial court on several fronts, including, failing to recognize the tenor, purport and effect of the MoU vis-a-vis the agreement for sale and purchase of shares in Guilders International Bank Limited dated 30<sup>th</sup> December 1999; failing to recognize MoU dated 13<sup>th</sup> October, 1996 was a preliminary agreement 'subject to contract' and could not supersede the agreement between the parties; ignoring and not making reference to Clause 15:2 of the agreement; failing to give primacy and importance to the MoU as opposed to the agreement of 30<sup>th</sup> December 1999; failing to recognize that the 1<sup>st</sup> applicant was not a party to the MoU or the agreement for sale; entering judgement against the 1<sup>st</sup> applicant jointly and severally with 2<sup>nd</sup> to 9<sup>th</sup> applicant; for the payment of the consideration price, interest thereon and return of the securities, when there was no such obligation under the MoU or the agreement; failure to appreciate that the consideration price was subject to adjustments under Clause 7 and 8 of the agreement and would fall due and become recoverable as provided by Clause 6; while appreciating the purport and effect of the cut-off date of 31<sup>st</sup> December, 2001, the court erred by failing to find that all the loans classified as performing and recoverable but not recovered as of the cut-off date automatically became irrecoverable and were subject to deductions from the consideration price of Kshs.196 million; in holding that the applicants did not demonstrate there were unrecovered loans; erred by holding that there was no notice to the respondents of any loans that had become non-performing and irrecoverable; and erred by holding that the applicants did not prove the effects undertaken to recover the loans before the cut-off date.
10. The application was opposed by the respondents by way of a replying affidavit of Rajendra Ratilal Sanghani dated 23<sup>rd</sup> March 2023, wherein he deposed that the appeal is frivolous; and that he had waited for over 23 years to receive payments of the purchase of shares by the applicants under the MoU dated 13<sup>th</sup> October 1999 and the agreement for sale dated 30<sup>th</sup> December 1999; that the judge relied on the said documents to arrive at his determination; that the 1<sup>st</sup> applicant was rightly adjudged, it was a necessary party and further the issue did not arise; that the share price was Kshs.196,000,000/-; that the judge considered evidence of both parties and declined the applicants' submissions, further, that the respondents can refund the decretal amount in the event the appeal succeeds; and; should the court be inclined to grant a stay it should be conditional.
11. In his submissions, learned counsel for the applicants pointed out that the memorandum of appeal raises several grounds and is neither frivolous nor idle, and that there are germane issues which merit further consideration by the Court.
12. On the nugatory aspect, counsel submitted that the amount involved is huge, Kshs.196,000,000/- which the respondents have escalated to Kshs.2,543,900,234.25; the respondents have obtained warrants of attachment and sale issued on 16<sup>th</sup> March 2023 to the Ply Auctioneers; and the applicants are likely to suffer grave, irreparable loss and damage if the stay order is not granted.
13. On the part of the respondents, learned counsel submitted that the memorandum of appeal is frivolous and does not raise any arguable appeal. Counsel rehashed the averments in the affidavit in opposition.
14. On the nugatory aspect, learned counsel submitted that this is a monetary decree and therefore the appeal will not be rendered nugatory if the stay is not granted, as the applicants can be adequately compensated if the appeal succeeds. Further, the applicants have not demonstrated that the respondents are incapable of refunding the decretal sum. It was further urged that should the court be inclined to grant a stay, security be furnished.



15. Parties made passionate and elaborate submissions before us. The only issue for determination is whether or not to grant a stay of execution pending the hearing and determination of the appeal. Rule 5 (2) (b) of this Court’s Rules provides that:

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:

- a. ...
- b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

16. For an application such as the one before us to succeed, an applicant must satisfy the Court on two principles. Firstly, that the appeal is not frivolous and is arguable. One arguable ground alone is sufficient; it need not be demonstrated that the ground is likely to succeed in the end. Secondly, the Court has to be satisfied that if the stay is not granted the appeal, if successful, will be rendered nugatory. Both principles must be satisfied for such an application to succeed. The two principles were summarized in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103]* eKLR where this court stated;

“That in dealing with Rule 5(2)(b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court. The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

In the case of *Guardian Bank Limited vs. Book point Limited & Another [2018]* eKLR, the Court stated:

“29. Mindful, as we are, that an arguable appeal is not one that must necessarily succeed but simply one that is deserving of the Court’s consideration, [See *Dennis Mogambi Mong’are vs. Attorney General & others [2012]* eKLR], we do not think that the issues identified by counsel for the applicant as summarized above are frivolous. There is for instance the question whether the amended decree on the basis of which execution against the applicant is sought is indeed a decree of the court.

In the case of *Reliance Bank Ltd vs. Norlake Investment Ltd [2002]* 1 E.A. where this Court stated:

“..... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

17. The applicants mounted a memorandum of appeal with 26 grounds. The grounds cannot be said to be trifling or frivolous. In our view, therefore, the appeal is arguable.



18. As we consider the second limb, that is, whether the appeal is likely to be rendered nugatory, we take note that this is a monetary decree. In the case of Kenya Hotel Properties Limited vs. Willesden Properties Limited Civil Application Nai. No. 322 of 2006 (UR 178/06) the Court stated:

“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”.

19. It is not lost to us that the sums involved herein are colossal; over 2 billion shillings. Further, the appeal has already been filed, and we also note the circumstances under which the impugned judgment is said to have been arrived at; the fact that the applicants' property is under threat of attachment; and the hardship and damage likely to be suffered by the applicants if a stay is denied. We are inclined in the circumstances of this case to grant a stay of execution pending the hearing and determination of the appeal. We are also of the considered opinion that a case was not made for granting a conditional stay of execution of the impugned judgment.

20. In the end we grant a stay of the judgment and decree of the High Court dated 17<sup>th</sup> February 2023. Further, we direct that the appeal be set down for hearing on a priority basis.

21. The costs of the application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MARCH 2024**

**D.K. MUSINGA, (P.)**

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**JUDGE OF APPEAL**

**ALI-ARONI**

.....

**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**SIGNED**

**DEPUTY REGISTRAR**

