



**Family Bank Limited v Karanja & another (Civil Application
E150 of 2023) [2024] KECA 440 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 440 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E150 OF 2023
K M'INOTI, DK MUSINGA & M NGUGI, JJA
APRIL 12, 2024**

BETWEEN

FAMILY BANK LIMITED APPLICANT

AND

DEBORAH NGUGI KARANJA 1ST RESPONDENT

CENTRAL BANK OF KENYA 2ND RESPONDENT

*(Application for stay of execution pending the hearing and determination
of an appeal from the judgment and decree of the High Court of Kenya at
Nairobi (Mabeya, J.) dated 24th March 2023 in HCCC No. E274 of 2020)*

RULING

1. On 3rd August 2020, the 1st respondent, Deborah Ngugi Karanja, filed a suit in the High Court of Kenya at Nairobi against both the applicant, Family Bank, and the 2nd Respondent, the Central Bank of Kenya. She pleaded as against the applicant, with whom she had a customer-bank relationship, that it had breached its contractual and fiduciary duty to her. As against the 2nd respondent, the 1st respondent averred that it had violated its supervisory and regulatory duties over the applicant.
2. The background to the suit was that the 1st respondent had a facility of Kshs 24,200,000 from the applicant which was secured by a charge over her property known as LR No. Ruiru /East Block 5/118 (the suit Property). She had also guaranteed to the applicant payment of a loan of Kshs 3,000,000.00 to a Mr. Jackson Migwi Kirika t/a Quan Systems (Mr. Kirika).
3. After failing to service the loan and to honour the guarantee, the suit property was ultimately sold by public auction on 18th February 2020. The applicant contended in her suit that she signed the guarantee on the applicant's false representation; that the applicant received payment of the Kshs 3,000,000.00 on account of Mr. Kirika; and that the applicant unlawfully allowed him to withdraw the entire amount



- and wrongfully demanded that she honours the guarantee. It was her contention that there was a conspiracy between the applicant and Mr. Kirika and that the guarantee was tainted by fraud.
4. The applicant filed a defence in which it pleaded that the moneys in question were well and truly owed by the 1st respondent and that under the contract between the parties, in the event of default the applicant reserved the right to consolidate all the 1st respondent's accounts without notice.
 5. On its part, the 2nd respondent filed a defence and denied that its supervisory duties extended to regulating contractual relations between banks and their customers.
 6. After taking evidence, by a judgment dated 24th March 2023, the trial court found that the applicant was in breach of its fiduciary and contractual duty to the 1st respondent and awarded her a total of Kshs 47,526, 945.00, being the value of the suit property, the guaranteed amount together with penalties and interest, and special damages. The court dismissed the claim against the 2nd respondent.
 7. The applicant was aggrieved and lodged a notice of appeal on 28th March 2023. Immediately thereafter the applicant filed the Motion on Notice now before us, seeking stay of execution of the judgment of the High Court.
 8. The 1st respondent did not file a replying affidavit and in her written submissions dated 10th July 2023, she stated that she was not opposed to the application for stay being granted, but on condition that the applicant deposited the decretal amount in an interest earning account.
 9. When the parties appeared to argue the application on 18th December 2023, Mr. Namada, learned counsel for the 1st respondent, readily conceded that the intended appeal was arguable. The Court therefore directed the parties to restrict themselves to whether the intended appeal risked being rendered nugatory.
 10. Mr. Thige, learned counsel for the applicant, submitted that the decretal amount was substantial and that the 1st respondent was not capable of refunding the same if it was paid to her. He relied on an affidavit sworn on 17th April 2023 by Mr. Eric Kori Murai, the applicant's Company Secretary and Chief Legal Officer. As evidence of the 1st respondent's inability to refund the money, the deponent adverted to a demand for payment of outstanding mortgage charges of Kshs 1,147,132.71 which she has been unable to pay.
 11. Counsel further submitted that the applicant is a Tier 2 Bank in Kenya, with the ability to pay the decretal amount should its appeal fail. He relied on the applicant's Bank Supervision Annual Report, 2021 prepared by the 2nd respondent, which indicates the applicant's healthy financial status.
 12. As we have already indicated, the 1st respondent did not file a replying affidavit to controvert the applicant's averments. Her learned counsel, Mr. Namada, indicated to the Court that the applicant was not opposed to the application for stay of execution so long as the applicant deposited the decretal amount in an interest earning account.
 13. Counsel further submitted that although the applicant was a bank, the 1st respondent had a judgment in her favour and that all parties before the Court must be treated equally.
 14. We have carefully considered this application. The 1st respondent readily concedes that the applicant's appeal is arguable. The only issue for now is whether the appeal risks being rendered nugatory if it were to succeed absent an order of stay of execution.
 15. The applicant's averments on the 1st respondent's ability to repay the money and its own ability to pay the decretal amount is not disputed by the 1st respondent, who did not file a replying affidavit. The Court of Appeal Rules do not make deposit of the decretal amount a condition for grant of an order



of stay of execution. Under rule 5(2)(b), the Court is empowered to issue the order “on such terms as the Court may think just.” The Court will normally order deposit of the decretal amount or part thereof pending appeal where it considers it in the best interest of the parties to secure the money or where it has doubt about an appellant’s ability to pay the money should the appeal fail. In this case, we entertain no doubt on that issue.

16. Accordingly, we allow the notice of motion dated 17th April 2023 and order stay of execution of the judgment and decree of the High Court of Kenya dated 24th March 2023, pending the hearing and determination of the applicant’s appeal. Costs of this application shall abide the outcome of the appeal. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY APRIL, 2024.

D. K. MUSINGA, (P).

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

