



KCB Bank Formerly Kenya Commercial Bank Limited & 2 others v Datini Mercantile Limited & 3 others (Civil Application E122 of 2024) [2024] KECA 885 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KECA 885 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E122 OF 2024
S OLE KANTAI, JW LESSIT & PM GACHOKA, JJA
JULY 26, 2024**

BETWEEN

**KCB BANK FORMERLY KENYA COMMERCIAL BANK
LIMITED 1ST APPLICANT
JOSEPH KAMANDE MUIRURI 2ND APPLICANT
PATRICK MAINA KAMAU 3RD APPLICANT**

AND

**DATINI MERCANTILE LIMITED 1ST RESPONDENT
ASHUT ENGINEER LIMITED 2ND RESPONDENT
GENERAL PLASTICS LIMITED 3RD RESPONDENT
JOHN KIARIE 4TH RESPONDENT**

(Being an application for stay of execution pending the hearing and determination of the intended appeal against the Judgment and Decree of the High Court of Kenya, Commercial and Admiralty (F.Mugambi, J.) delivered on 1st March 2024 in H.C. Commercial Case No. 411 of 2008)

RULING

1. KCB Bank Kenya Limited, Joseph Kamande Muiruri and Patrick Maina Kamau, the applicants herein, vide a Notice of Motion application dated 14th March 2024, brought pursuant to, inter alia, rule 5 (2)(b) of the [Court of Appeal Rules](#), seek an order of stay of execution of the judgment and decree of the High Court of Kenya Commercial & Admiralty Division, (F.Mugambi, J.), delivered on 1st March 2024, pending the hearing and determination of the intended appeal.



2. A brief background of the matter is that the 1st respondent filed a suit via Plaintiff dated 22nd July 2008 and amended on 5th February 2010 against the applicants, 2nd, 3rd and 4th respondents and sought for a declaration that the sale of its assets by Kenya Commercial Bank was null and void, and that the applicant was thus entitled to damages under section 69B of the *Transfer of Property Act*; a declaration that the sale of the suit property to the 2nd and 3rd respondents was a nullity; that the appointment of the receiver/managers was premature or in the alternative their functions were taken over by Kenya Commercial Bank and the 4th respondent. The Amended Plaintiff further sought the name of the 3rd respondent be replaced with that of the 1st respondent and that the facility offer agreement dated 30th September 1998 signed between Kenya Commercial Bank and the 1st respondent be declared a nullity; special damages; costs and interest at court rates; and such further or other relief that the court deemed fit to grant.
3. By the judgment of the trial court dated 1st March 2024, F. Mugambi, J. found merit in the 1st respondent's suit and awarded damages to the tune of Kenya Shillings One Hundred and Seventy Two Million (Kshs 172,000,000/-) together with interest from the date of judgment until payment in full and costs. Being aggrieved with the judgment the applicants lodged a Notice of Appeal and filed this application.
4. We heard the application through the virtual platform on the 30th April 2024. Present for the applicants was learned counsel Ms. Anne Mathenge whereas learned counsel Ms. Muzna Jean appeared for the 1st respondent, and learned counsel Mr. Daniel Kimani was present for the 2nd respondent. Mr. Kimani informed us that the matter did not concern the 2nd respondent and therefore it was not participating in the proceedings
5. Ms. Mathenge for the applicants relied on written submissions dated 25th March 2021. Counsel urged that the intended appeal is arguable with high chances of success as was evident in their memorandum of appeal annexure to the supporting affidavit raising four (4) grounds of appeal with the main contention being that the amount awarded that of Kshs 172,000,000/- was unsubstantiated and exorbitantly high in the circumstances, reason being that the learned trial Judge did not give an explanation of how she arrived at the figure. Secondly, that the learned trial Judge validated the debenture but failed to consider the effects of the debenture that was the security in place with respect to the facility that had been granted to the 1st respondent, that it provided for both appointment of Receivers Managers and forfeiture of statutory notices. That having overlooked aspects of the debenture, the learned Judge did not go into the depth of it so as to confirm that the 1st respondent had actually breached the terms, and that the bank properly exercised its power of sale of the company's assets.
6. On the nugatory aspect, the applicants state that the temporary order of stay for a period of thirty (30) days issued by the trial court is bound to lapse on or about 1st April 2024 and that unless orders of stay of execution are granted, the applicants are apprehensive that the 1st respondent may at any time execute the impugned judgment and decree against them thus rendering their intended appeal nugatory. Further, that the applicants are bound to suffer substantial loss in view of the uncertainty of the 1st respondent's ability to refund the decretal amount which amount is colossal, in the event the appeal succeeds. The reason for that being the 1st respondent is no longer a going concern and has not demonstrated that in the event the appeal succeeds they would be in a position to refund the money.
7. On the other part, counsel urged that KCB bank has demonstrated that it is a commercial bank and in a position to pay the decretal sum in the event the appeal is not successful. Lastly, Ms. Mathenge



submitted that no prejudice will befall the respondents if the orders sought are granted as the applicants are willing and ready to abide by any condition(s) the Court might give for grant of stay.

8. Ms. Muzna for the 1st respondent relied on their written submissions dated 27th March 2024, and the replying affidavit sworn on 20th March 2024 by Kenneth Kimani Nyoike, the 1st respondent's director. Counsel urged that the applicants have not demonstrated the existence of an arguable appeal and that what the applicants wish to bring before this Court is a total non-issue, a frivolous and vexatious appeal. The 1st respondent also avers that the second limb is equally dead on arrival and adds that without prejudice of the foregoing, if the Court concludes that there be stay of the decretal sum, then the 1st respondent seeks that this Court grants a conditional stay. In conclusion, the 1st respondent avers that the application is for dismissal with costs and urges the Court to do so.
9. We have carefully considered the application together with the supporting affidavit, replying affidavit, written and oral submissions by the parties as well as the applicable law. It is trite law that for an application under rule 5 (2)(b) the applicant must satisfy this Court on two (2) limbs; firstly, that the appeal or the intended appeal is arguable, and secondly; that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR. Both limbs must be proven to exist.
10. In considering this application, we are mindful that in determining whether the appeal is arguable, it is sufficient if a single *bona fide* arguable ground of appeal is raised.

See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd* Civil Application No Nai 345 of 2004. Further, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court, one which is not frivolous. See *Joseph Gitahi Gachau & another v Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No 124 of 2008.
11. On the arguability of the intended appeal, by a cursory perusal of the issues raised in the applicants' submissions and in the memorandum of appeal, we are of the view that the same are not idle, they are arguable. For instance, the issue whether the 1st respondent had breached the terms of the debenture, and that the bank properly exercised its power of sale of the company's assets; and whether the amount awarded as damages was unsubstantiated and exorbitant as to warrant variation. Therefore, we are satisfied that the applicants have established this limb to Court's satisfaction.
12. On the second limb of the nugatory aspect, the term "nugatory" has to be given its full meaning. It does not only mean worthless, futile, or invalid. It also means trifling. This was the holding in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.
13. This Court in *International Laboratory for Research on Animal Diseases v Kinyua* [1990] eKLR held that where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's impecunity, the onus shifts to the respondent to rebut the allegation. The Court further held that such allegation calls for rebuttal evidence from the respondent. In this case, the applicants have urged that they are bound to suffer substantial loss in view of the uncertainty of the 1st respondent's ability to refund the decretal amount, which amount is colossal, it being no longer a going concern, in the event the appeal succeeds. Ms. Muzna has acknowledged that the 1st respondent did not put forward any evidence to show its financial capability to refund the decretal sum if paid and further that the same was not raised in its replying affidavit hence a position that she could not comment on. Given the admission that the respondents had nothing to say regarding the ability to



refund the decretal amount if the stay is declined and the appeal eventually succeeds, we are satisfied that in the circumstances, the applicant has met the threshold of establishing the second limb.

14. In the upshot, we are satisfied that the applicants have established the twin principles as required under rule 5 (2)(b) of the Court Rules. Consequently, we grant an order of stay of execution of the judgment and decree of the High Court of Kenya Commercial & Admiralty Division dated 1st March 2024 pending the hearing and determination of the intended appeal. The costs of this application shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024

S. ole KANTAI

JUDGE OF APPEAL

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J. LESIIT

JUDGE OF APPEAL

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M. GACHOKA, C.Arb, FCIArb.

JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

