



Kenya Deposit Insurance Corporation v ABSA Bank Kenya PLC (ABSA) (Civil Application E195 of 2024) [2024] KECA 1753 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KECA 1753 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E195 OF 2024
MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA
DECEMBER 6, 2024**

BETWEEN

KENYA DEPOSIT INSURANCE CORPORATION APPLICANT

AND

ABSA BANK KENYA PLC (ABSA) RESPONDENT

(Being an application for stay of execution of the Ruling and Order of the High Court at Nairobi (Commercial & Tax Division) (Sifuna, J.) dated 15th March 2024 in Civil Suit No. E411 of 2022)

RULING

1. Before us is a Notice of Motion dated 23rd April 2024, in which Kenya Deposit Insurance Corporation, (“the applicant”), seeks for an order of stay of execution of the ruling and order of the High Court pending the hearing and determination of its intended appeal. The ruling was delivered on 15th March 2024 by Sifuna, J. of the Commercial & Tax Division of the High Court at Nairobi, in Civil Suit No. E411 of 2022. By the said ruling, the court dismissed the applicant’s application which sought for the enlargement of time for the filing of the defence as well as to arrest the pending ruling. Besides, the learned Judge went ahead suo moto to declare sections 13A and 21 of the Government Proceedings Act unconstitutional.

Dissatisfied with the ruling and order, the applicant evinced its intention to challenge the same by filing the notice of appeal pursuant to which it filed the instant application.

2. The application is pursuant to sections 3, 3A, and 3B of the Appellate Jurisdiction Act and rule 5 (2) (b) of this Court’s Rules.

3. The application is supported by the grounds on its face and the supporting affidavit of Hellen C. Chepkwony, the Chief Executive Officer of the applicant dated 23rd April 2024. It is the applicant’s case that its intended appeal is arguable, raising cogent and weighty issues of law as demonstrated in the draft memorandum of appeal annexed to the supporting affidavit. Among the grounds that the applicant



intends to present before this Court on appeal include but are not limited to: that the learned Judge erred in law and fact in endorsing a request for entry of interlocutory judgment against the applicant in the sum Kshs. 215,346,841.00 plus interest to be applied prospectively towards the respondent's annual contribution to the applicant from date of the judgment of the court till payment in full; in endorsing and entering interlocutory judgment against the applicant despite a formal application that was lodged by the applicant in good time to enlarge time; by reaching a finding that the delay to file the defence by the applicant was unexplained, contrary to evidence tendered by the applicant to explain the delay; in making an order that contradicts section 2(6) of the Kenya Deposit Insurance Act which expressly prohibits a reduced or adjusted contribution by a financial institution on the basis of a claim by such institution against the applicant; by delving into and pronouncing himself suo moto on the constitutionality of sections 13A and 21 of the Government Proceedings Act, that was neither pleaded nor submitted on by the parties and declared those sections unconstitutional.

4. Furthermore, the applicant posits that the ruling expressly contradicts the recent judgment rendered by this Court on 12th April 2024 in Civil Appeal No. E290 of 2023: Five Star Agencies Limited vs. National Land Commission & National Bank of Kenya, where the Court reaffirmed the law on execution of decrees against the Government and specifically, that section 21 (4) of the Government Proceedings Act prohibits execution against the Government.
5. On the nugatory aspect, the applicant's case is that unless this Court intervenes immediately the applicant's appeal will be rendered nugatory and a mere academic exercise. This is further worsened by the fact that the applicant is a State Corporation dealing with the protection of depositors in the financial sector and does not hold funds of its own to transact business, thus substantial loss will occur if the decretal sum was to be paid out. That the consequence of the ruling nullifying section 21 of the Government Proceedings Act, exposes the National as well as County Governments to execution proceedings to the detriment of the larger public.
6. The application was opposed by the respondents through the replying affidavit of Michael Massawa, legal counsel to the respondent dated 20th May 2024. He deposes that the intended appeal is frivolous and not arguable at all having been premised on the constitutionality of sections 13A and 21 of the Government Proceedings Act, which has been overtaken by events and is now moot. That the allegation involving an avalanche of executions against the National and County Governments is unsubstantiated and irrelevant to these proceedings. That any alleged impact that the ruling of the Court may have falls outside the scope of consideration by this Court in exercising its discretion to grant a stay of execution. In the premises, the applicant had failed to establish the arguability of the intended appeal.
7. On the nugatory aspect, it is the contention of the respondent that the applicant had not demonstrated in which manner the appeal will be rendered nugatory. That in the ruling, the High Court held that the decretal sum of Kshs. 215,346,841.00 awarded to the respondent would not accrue immediately, rather, it would be applied prospectively towards the respondent's annual contribution from the date of the ruling until payment in full. That there is no real danger that the respondent will proceed with execution of the decree as to require the intervention of this Court. Accordingly, nothing in the ruling prevents the applicant from discharging its mandate. Moreover, it is important to note that the sum awarded to the respondent is a compensatory sum for overpayments of depository contributions made by the respondent to the applicant.

Consequently, the applicant does not stand at risk of being out of pocket for any reason whatsoever and by the same token, the intended appeal cannot be rendered nugatory therefor.

8. The application was canvassed by way of written submissions with limited oral highlights. At the hearing of the application on 10th June 2024, Mr. Waweru Gatonye, SC teaming up with Mr. Paul



Wanga, learned counsel appeared for the applicant whereas Mr. Mohammed Nyaoga, Mr. Mogere, Ms. Wambui Muigai, and Ms. Brenda Nyabinge appeared for the respondent. In highlighting the applicant's submissions, Waweru Gatonye, SC submitted while relying on the cases of Trust Bank Limited and Another vs. Investech Bank Limited and 3 Others [2000] eKLR, that the applicant had met the twin principles required for the grant of the order sought. He reiterated and expounded on the grounds in support of the motion and what had been deposed to in the supporting affidavit of the applicant. We need not therefore rehash the same.

9. Similarly, the respondents through Mr. Mohammed Nyaoga, SC reiterated the averments in their replying affidavit, which we need also not rehash.
10. Has the applicant satisfied the requirements for granting an order for stay of execution under rule 5(2) (b) of this Court's Rules? Before we go into the merits of the application, there is a peripheral issue we need to address. As indicated at the beginning of this ruling, the applicant's application in the trial court which sought for the enlargement of time for the filing of the defence as well as to arrest the pending ruling was dismissed. Ordinarily, a dismissal order would not attract an order of stay of execution from this Court. This is because a negative order is not capable of being stayed since it is incapable of execution. See *Kanwal Sarjit Singh Dhiman vs. Keshavji Juvraj* [2008] eKLR and *Co-operative Bank of Kenya Ltd vs. Banking Insurance & Finance Union (Kenya)* [2015] eKLR. However, besides the dismissal, the trial court went out of its way to declare sections 13A and 21 of the *Government Proceedings Act* unconstitutional. Much as the order was suo moto and peripheral, it is nonetheless a positive order with far-reaching ramifications and therefore capable of being stayed.
11. Back to the merits of the application. This Court has in several decisions set out the parameters to be met before an order under rule 5 (2) (b) of this Court's Rules can be granted. For instance, in the case of *Alfred Mincha Ndubi vs. Standard Limited* [2020] eKLR, this Court held, that to succeed in an application under rule 5 (2) (b), the applicant has to establish the twin principles that: the appeal is arguable; and is likely to be rendered nugatory if the order is not granted and appeal eventually succeeds. See also *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & Others* [2013] eKLR, where this Court held that in dealing with rule 5 (2) (b) application, the Court exercises original and discretionary jurisdiction; and the discretion is wide and unfettered, if it is just to do so.
12. On the first principle, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* (supra), this Court described an arguable appeal in the following terms:
 - vii). 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."

In our view, the appeal is arguable inter alia, whether the court erred in law in reaching a finding that the delay to file the defence by the applicant was unexplained, and whether there was an error in law and in fact by the learned Judge in delving into and pronouncing himself suo moto on the constitutionality of sections 13A and 21 of the *Government Proceedings Act*. We say so well aware that an arguable point is not necessarily one that must succeed, but merely one that is deserving of ventilation.

13. On the nugatory aspect, again in *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* (supra), this Court stated that:
 - x). 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.



14. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. In the instant application, the applicant is apprehensive that granted the go-ahead, the ruling would have far-reaching implications on several institutions, let alone the applicant, given the orders for instance, suspending certain provisions of the law. There is also the possibility of wanton attachments of National and County Governments assets which hitherto had been shielded from attachment by the provisions of law that have been impugned. Then there is a question of the ruling contradicting section 2(6) of the [Kenya Deposit Insurance Act](#) which expressly prohibits a reduced or adjusted contribution by a financial institution on the basis of a claim by such institution against the applicant. In our view, these fears are not idle. In *Housing Finance Company of Kenya Limited vs. Sharok Kher Mohamed Ali Hirji & Another* [2019] eKLR this Court stated as follows:

“With time it became necessary to put certain riders to the 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”.

15. By parity of reasoning, it is clear that the applicant will be prejudiced by the ruling when the appeal is yet to be heard and determined. In *Reliance Bank Ltd vs. Norlake Investments Ltd* [2002] E.A. 227, this Court stated:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”

16. In the circumstances of the instant application, we are persuaded that the applicant has demonstrated an arguable appeal which will be rendered nugatory, absent stay. The applicant has thus satisfied both limbs of the requirements under rule 5 (2) (b) of this Court’s Rules. The upshot is that the Notice of Motion dated 23rd April 2024 is allowed. Costs shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

