



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Fidelity Commercial Bank Ltd v Shah & 3 others (Civil Application
E038 of 2022) [2023] KECA 72 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 72 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E038 OF 2022
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
FEBRUARY 3, 2023**

BETWEEN

FIDELITY COMMERCIAL BANK LTD APPLICANT

AND

MAHENDRAKUMAR CHANDULAL SHAH 1ST RESPONDENT

KIRTIBALA MAHENDRAKUMAR SHAH 2ND RESPONDENT

MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS 3RD RESPONDENT

ARYA LIMITED 4TH RESPONDENT

(Being an application for conservatory orders and stay of execution of the decision of the High Court at Mombasa pending the lodgment, hearing and determination of the intended appeal from the judgment delivered by PJO Otieno, J. on 25th May 2022 in Civil Case No. 212 of 2011 As consolidated with Civil Suit No. 130 of 2012)

RULING

1. The applicant who is the intended appellant herein has brought this Notice of Motion application dated June 22, 2022. It is expressed to have been brought pursuant to rule 1 (2), rule 5 (b) and rule 43 of the *Court of Appeal Rules* (hereinafter *Rules*). The applicant seeks stay of execution of the judgement delivered by PJO Otieno, J on the May 25, 2022 in Mombasa High Court Case No 212 of 2011, as consolidated with Civil Suit No 130 of 2012, pending the lodgment, hearing and determination of an intended appeal.
2. A brief summary of the facts is that the 1st and 2nd respondents guaranteed a loan advanced by the applicant to Mahek Limited (that was not a party to the proceedings before the High Court), and secured by a charge dated April 6, 2009, over Land Title No Mombasa/Block XII/45, belonging to the 1st and 2nd respondents. Upon default by Mahek Ltd, the applicant sought to realize the security in the



suit property. In an effort to offset the loan balance and save their property, the 1st and 2nd respondents approached financiers and at the same time requested for a loan statement from the applicant. The 1st and 2nd respondents discovered anomalies in the loan statement and as a consequence there was a stalemate between the 1st and 2nd respondents and the financiers.

3. The applicant proceeded to have the suit property auctioned by way of private treaty to the 4th respondent, through the 3rd respondent. The 1st and 2nd respondents being aggrieved by the said sale filed suit against the applicant and the 3rd respondent, and eventually against the 4th respondent. In their suit, the 1st and 2nd respondents sought as against the applicant, a permanent injunction to restrain the applicant from selling, disposing or interfering with the suit property; a declaration that the 1st and 2nd respondent have been discharged from their obligation under the charge dated April 6, 2009; an order that the applicant do forthwith execute a discharge of the charge and deliver the same to the 1st and 2nd respondent for registration.
4. The High Court, in its judgment delivered on May 23, 2022, found in favour of the 1st and 2nd respondent and, inter alia, declared that the auction by private treaty was in violation of section 77(1) of the [Registered Land Act](#); the sale by auction was invalidated and it was ordered that the same be reversed so that the status of the register be restored as at the date of the invalidated sale. Special damages being the cost of acquisition of the suit property, was awarded to the 4th respondent to the tune of Kshs 26,556,347/-.
5. The applicant was dissatisfied with the decision rendered and filed a Notice of Appeal dated June 8, 2022. The grounds for the application are, *inter alia*, that the order of the court has the effect of depriving the applicant of the suit property and, if executed then the substratum of the appeal will be dissipated. It was urged that the High Court ordered payment of decretal amount for breach of contract contrary to the principles of law; and that the High Court made orders against a person who was not a party to the suit.
6. The application was heard on the virtual platform on the July 27, 2022. At the hearing, learned counsel Mr Wilberforce Akello was present for the applicant, learned counsel Mr David Oyatta was present for the 1st and 2nd respondents and learned counsel Mrs Kibe was present for the 4th respondent. There was no appearance for the 3rd respondent despite service with the hearing notice.
7. Mr Akello relied on the submissions dated July 7, 2022 in support of the application, that were filed by Robson Harris Advocates LLP. Learned Counsel submitted that the applicant was seeking stay of execution of the judgment of the High Court pending institution of the appeal. He relied on the Memorandum of Appeal which he urged attests to the arguability of the appeal; that the appeal challenges the finding in favour of a non-party to the suit; the orders made nullifying and reversing transfer of ownership of the suit property, as well as varying letters of offer contrary to principles of law. Regarding the nugatory test, counsel urged that it had been met on the ground that if the suit property were transferred then the substratum of the appeal will be removed from the court. Mr Akello pointed out that the applicant will not be able to recover the colossal decretal sum of Kshs 29,556,347/-, from the 4th respondent if the orders sought are not granted was the appeal to succeed. To counsel, if stay of execution is not granted then the applicant will suffer irreparable loss.
8. Mr Oyatta opposed the application. He relied on the replying affidavit sworn on behalf of the 1st and 2nd respondents dated July 25, 2022. He urged that the High Court did not nullify the charge but rather indicated that the amounts payable by the 1st and 2nd respondents be calculated between the parties, and that if the parties did not agree the property could be sold. Counsel urged that the application had been



- overtaken by events since the judgment was executed and the suit property reverted to the names of the 1st and 2nd respondent, and the money held in Escrow accounts released to the 1st and 2nd respondents.
9. Mrs Kibe for the 4th respondent raised technical issues concerning the validity of the application for failure to comply with rule 79 of this court's Rules, for failure to serve the Notice of Appeal. We shall not consider that argument by the 4th respondent for two reasons. It is true that the filing of a Notice of Appeal is a pre-requisite to the grant of stay under rule 5(2)(b) of the [Court of Appeal Rules](#). However, there is no formal application before us for striking out of the Notice of Appeal.
 10. Mrs Kibe argued that the application was overtaken as the part of the judgment that was in favour of her client was executed and the decretal sum paid to the 4th respondent, which counsel urged was the purchase price paid to the applicant in 2011, for the purchase of the suit property, which sale the High Court nullified in its judgment. She urged that her client had adduced evidence in its replying affidavit that it had the means and was capable of refunding the money paid out to him in the judgment, if the applicant's appeal succeeded.
 11. We have considered the motion, the affidavits both in support of and in opposition thereto and the submissions made both in writing and orally before us. The principles that guide consideration of an application of this nature are well settled. The applicant has to demonstrate the twin principles that the appeal is arguable and secondly, that it will be rendered nugatory were it to succeed and the orders sought are not granted. In regard to an arguable appeal this Court held as follows in [Somak Travels Ltd v Gladys Aganyo](#) [2016] eKLR:

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”
 12. In regard to the issue whether the intended appeal is arguable, it was the applicant's argument that all they needed to establish is one ground of appeal which, he urged, will suffice. In support of that proposition, counsel relied on [Commissioner of Customs v Anil Doshi](#) [2007] eKLR and [Regnoil Kenya Ltd v Wilfred Njeri Karanja](#) [2019] eKLR.
 13. The applicant has urged that in their draft memorandum of appeal it has set out numerous grounds, inter alia, that the learned trial judge erred in law and fact in rewriting the contract between the appellant and Mahek International Ltd, who was the borrower but was not enjoined as a party to the suit. He urged that further, the learned High Court erred in making a finding in favour of a person not party to the suit despite the fact the prayers granted were never sought. We are satisfied that the appeal is arguable. It is not frivolous.
 14. In regard to the second principle of whether the appeal will be rendered nugatory if the order for stay is not granted and the appeal succeeds; we are guided by the decision in [Stanley Kangethe Kinyanjui v Tonny Keter & others](#) [2013] eKLR where the court summarized what should guide the court as follows:
 - xii. The term 'nugatory' has to be given its full meaning. It does only mean worthless, futile or invalid. It also means trifling.



- xiii. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.
 - ix. Where it is alleged by the applicant that the appeal will be rendered nugatory on account of the respondent's impecuniosity, the onus shifts to the latter to rebut by evidence the claim. ”
15. On the nugatory aspect, Mr Akello, Counsel for the applicant argued that the trial court ordered the revocation of sale and transfer of the suit property. That if stay is not granted and the judgment is executed, the substratum of the appeal will be lost. Counsel urged that if the orders of the judgment of the Superior Court are enforced, and the entries with respect to the transfer in favor of the 4th respondent nullified, the appeal will be rendered nugatory. For that proposition, Counsel cited the case of *Regnoil Kenya Ltd v Wilfred Njeri Karanja* [2019] eKLR.
 16. Counsel also urged that the decretal amount is also a colossal amount to the tune of Kshs 29, 556,347/- together with interest for more than 10 years, and that in the event the intended appeal succeeds, the appellant may face a difficulty in recovering the decretal amount and that will render the appeal nugatory.
 17. We have already considered what the 1st and 2nd respondents have stated in their replying affidavit, which is to the effect execution has already taken place, and everything sought to be stayed overtaken by events. The 1st respondent annexed documents as proof thereof as ‘MKS’1.
 18. Mr Oyatta for the 1st and 2nd respondents relied on two cases, *Mistry Premji Kanji (Investments) Ltd v Kenya National Highways Authority* Mombasa Civil Application 40 of 2017 and *Municipal Council of Kitale v Nathan Fedha*, Nairobi Civil Appeal No 7 of 1983, (both unreported), for the proposition that once a case is dismissed by the High Court, there is nothing to stay and further that the intended appeal will not be rendered nugatory if the stay orders sought are not granted.
 19. Whether an appeal will be rendered nugatory if the order of stay sought is not granted depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved. The situation will be different if what is sought to be prevented has already taken place.
 20. We note that the orders sought to be stayed have already been overtaken by events, as they have already been executed. That being the case, the order sought by the applicant in this application cannot issue. The application has no merit and is for dismissing which we do, with costs to the 1st, 2nd and 4th respondents.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF FEBRUARY, 2023.

S. GATEMBU KAIRU, FCIArb

.....
JUDGE OF APPEAL

.....
P. NYAMWEYA
JUDGE OF APPEAL

.....



J. LESIIT

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

