



**SBM Bank (Kenya) Limited v Afrasia Bank Limited (Civil Application
E327 of 2022) [2023] KECA 366 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 366 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E327 OF 2022
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA
MARCH 31, 2023**

BETWEEN

SBM BANK (KENYA) LIMITED APPLICANT

AND

AFRASIA BANK LIMITED RESPONDENT

(Being an application for stay of execution pending appeal and an application to strike out the aforesaid application and the Record of Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (W. Okwany, J.) delivered on 21st July 2022 in Misc. App. No. E386 of 2021)

RULING

1. Before us are two applications. The first in time is the Notice of Motion dated September 8, 2022 filed by the applicant, SBM Bank (Kenya) Limited, under rule 5(2) (b) of the [Court of Appeal Rules](#) seeking stay of execution of the judgment and decree of the High Court of Kenya at Nairobi (W Okwany, J) dated July 21, 2022 in Nairobi HC Misc App No E386 of 2021 pending hearing and determination of the intended appeal.
2. The applicant's Motion is supported by the annexed affidavit of George Odete (the Director, legal and company secretary of the applicant bank) sworn on September 8, 2022, and is anchored on the grounds, inter alia: that by the impugned judgment, the applicant was held liable to pay to the respondent a colossal sum of Usd7,500,000, which was not part of the assets or liabilities transferred to it by, or assumed on takeover of, Chase Bank; that the decretal amount has been confirmed as domiciled in Chase Bank; that, if the decretal sum is allowed to leave the jurisdiction of this Court to the benefit of the respondent, there is real and present danger that, even if the applicant's appeal is successful, such success will be purely academic; that the applicant will be able to make provision for the decretal sum and pay any sums so adjudged should its intended appeal fail; that the respondent will suffer no prejudice if the orders sought are granted; that the applicant has an arguable appeal with a probability of success; and that the appeal, if successful, would be rendered nugatory if the stay sought is not granted.



3. The Motion is opposed vide the replying affidavit of Veemul Ramdenee, (the Senior Relationship Manager – financial institutions of the respondent bank), notarized on September 16, 2022 in which he states: that the application raises no arguable points; that this Court lacks jurisdiction to entertain the application on the basis that the same is res judicata; that the application is an abuse of the court process; that the applicant has not demonstrated that it would suffer any substantial loss if the stay order is not granted; that no documentary evidence has been tendered by the applicant to prove that the respondent will not be able to refund the decretal sum in the event that the appeal is successful; and that they are a reputable bank capable of refunding the decretal amount should the appeal succeed. The respondent urged us to dismiss the application with costs.
4. The second application is the notice of motion dated September 22, 2022 filed by the respondent, Afrasia Bank Limited, praying that the applicant’s Motion aforesaid and the substantive record of appeal filed on September 15, 2022 in Civil Appeal No E620 of 2022 be struck out with costs pursuant to rule 86 of this Court’s Rules.
5. The respondent’s Motion is supported by the annexed affidavit of Veemul Ramdenee notarized on September 22, 2022. The Motion is also anchored on the grounds, inter alia: that this Court lacks jurisdiction to entertain the applicant’s Motion and its record of appeal given that section 35 of the Arbitration Act (the Act) does not provide a party, who is aggrieved by a decision of the High Court in exercise of the powers conferred by that provision, a right of appeal to the Court of Appeal; that no leave was sought or obtained from this Court pursuant to section 39(3) of the Act; that the applicant’s Motion is res judicata as the issues raised therein have been directly or conclusively determined in the High Court; and that the record of appeal is an abuse of the Court process and raises no arguable points.
6. In support of the Motion, learned counsel for the respondent, Githii & Company, filed written submissions, list of authorities and case digest dated March 6, 2023 citing four (4) authorities, including: Nyutu Agrovet Limited v Airtel Networks Kenya Limited & others [2019] eKLR on the right of appeal from the High Court to the Court of Appeal under section 35 of the Arbitration Act; and Micro House Technologies Limited v Cooperative College of Kenya [2017] eKLR on the interpretation of section 39(3) of the Arbitration Act. They urged us to allow the application and strike out the applicant’s Motion and substantive appeal.
7. The respondent’s Motion is opposed vide the replying affidavit of George Odete sworn on February 24, 2023. Mr Odete contends that this Court has jurisdiction to entertain the applicant’s Motion as well as the substantive appeal; that the applicant has an automatic right of appeal from the judgment of the High Court pursuant to section 75 of the Civil Procedure Act; and that the respondent’s allegation that the Motion and the substantive appeal offend the doctrine of *res judicata* is misconceived.
8. Opposing the respondent’s Motion, learned counsel for the applicant, M/s Walker Kontos, filed written submissions dated March 6, 2023. On the authority of Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR; Memphis Limited v Kenya Ports Authority [2022] KECA p105 (KLR); and Nyutu Agrovet Limited v Airtel Networks Kenya Limited & Others [2019] eKLR, the applicant submitted that they had the right of appeal to this Court. They urged us to dismiss the Motion with costs.
9. The factual background of the two applications is that the respondent filed suit against the applicant in the High Court of Kenya at Nairobi, claiming Usd7,500,000 which the respondent had deposited with Chase Bank in March 2016 for a period of one (1) month at an interest rate of 2.35% per annum. Soon thereafter, Chase Bank was placed in receivership by the Central of Kenya on April 7, 2016; that Chase Bank re-opened for business on April 27, 2016 under the management of Kenya Commercial



- Bank(KCB); that the applicant subsequently acquired some assets and liabilities of Chase Bank; that the applicant and the respondent consented to arbitration, whereupon the arbitrator dismissed the respondent's claim; that the respondent successfully moved the High Court to set aside the arbitration award; and that judgment was entered against the applicant in favour of the respondent.
10. Aggrieved by the decision of the High Court (Okwany, J.), the applicant moved to this Court on appeal on, among other grounds: that the learned Judge had no jurisdiction to entertain the respondent's application; that the learned Judge erred in reviewing matters of fact arising from the arbitral award; that the learned Judge erred in law in holding that the *Transfer of Businesses Act* applied to the transaction between the applicant and the respondent; that the learned Judge erred in law and in fact by concluding that the assets and liabilities of Chase Bank had been acquired by the applicant; that the learned Judge erred in finding that the sum claimed by the respondent was a deposit; and that she erred in law in determining the application before her on grounds of public policy.
 11. It is incumbent upon us to first determine the respondent's Motion, whose outcome will determine whether or not to proceed and pronounce ourselves on the applicant's Motion on its merits.
 12. We take to mind the fact that the jurisdictional grounds on which the respondent's Motion is founded and the contention that the applicant's Motion and substantive appeal is res judicata are substantially the same as those advanced in opposition to the applicant's Motion. The jurisdictional challenge in the respondent's Motion is one of the main grounds advanced in the appeal. We hasten to observe that determination of the jurisdictional issue raised in the respondent's Motion would be tantamount to determination of the appeal in Civil Appeal No E620 of 2022 at an interlocutory stage. In effect, this Court would prematurely shut its doors on an appellant whose appeal raises substantial issues deserving of the Court's inquiry.
 13. Rule 86 of the Rules of this *Court*, under which the respondent's application is made, sets out the grounds on which an application to strike out an appeal may be made. That rule reads:
 - “ 86. A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—
 - (a) that no appeal lies; or
 - (b) that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:...”
 14. It is common ground that the respondent does not take issue with the applicant's compliance with paragraph (b) of rule 86. The issue in contention is whether an appeal lies from the impugned judgment. In our considered view, that issue is central to the outcome of the substantive appeal, and it would be remiss of us to pronounce ourselves on that issue on an interlocutory application. Suffice it to say that the arbitration proceedings were not pursuant to an arbitration agreement between the parties. The applicant argued that the governing legislation was section 59 of the *Civil Procedure Act* and Order 46 rule 1 of the *Civil Procedure Rules*, and that it sought and obtained leave from the High Court to lodge an appeal to this Court.



15. As Ringera, J (as he then was) correctly observed in *Airland Tours and Travel Limited v National Industrial Credit Bank* [2003] eKLR–

“In an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law.”
16. Having carefully considered the respondent’s Notice of Motion dated September 22, 2022, the affidavits in support and in reply thereto, the written and oral submissions of learned counsel for the respondent and for the applicant, and the cited authorities, we find that the respondent’s Motion invites us to do what we cannot do at this stage in the proceedings. Accordingly, we reach the inescapable conclusion that the same lacks merit and is hereby dismissed with no orders as to costs.
17. Returning to the applicant’s Notice of Motion dated September 8, 2022, counsel for the applicant filed written submissions, case digest, list and bundle of authorities dated September 22, 2022 citing five (5) authorities, including *ICEA Lion General Insurance Company Limited v BOG, Rioma Mixed Secondary School & 24 others* [2019] eKLR highlighting the principle that even one arguable point would suffice to merit grant of stay of execution pending appeal.
18. Opposing the Motion, learned counsel for the respondent filed written submissions and case digest dated September 28, 2022. However, counsel cited authorities on the contentious jurisdictional issues and the effect of sections 35 and 39 of the *Arbitration Act* relating to the competing claims, all of which suggest that the applicant’s appeal is arguable and deserving of the Court’s inquiry on the issues raised.
19. We have considered the rival submissions of learned counsel for the applicant and for the respondent and wish to observe that applications under rule 5(2) (b) can only succeed if the applicant satisfies the twin principle to wit that the appeal (or intended appeal) is arguable; and that the appeal, if successful, would be rendered nugatory if stay is not granted (see *Anne Wanjiku Kibeb v Clement Kungu Waibara and IEBC* [2020] eKLR; and *Yellow Horse Inns Limited v AA Kawir Transporters & 4 Others* [2014] eKLR).
20. In our considered view, the grounds set out in the applicant’s memorandum of appeal dated September 8, 2022 are neither idle nor frivolous. To the contrary, they are arguable and deserving of the Court’s inquiry. Moreover, even if only one of those grounds was arguable, that would satisfy the first limb of the twin principle for grant of stay under rule 5(2) (b) (see *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR).
21. As to whether the appeal, if successful, would be rendered nugatory absent stay, counsel for the applicant submit that if the decretal amount were settled, and the appeal succeeded, recovery of such a colossal amount out of jurisdiction would occasion considerable difficulty. They relied on the case of *Trust Bank Limited & Another v Investech Bank Limited & 3 Others* [2000] eKLR where this Court observed that the respondent being a foreign bank, there might arise considerable difficulties recovering the decretal sum.
22. The respondent’s case is that it is a reputable bank capable of paying back the decretal amount in the event that the applicant’s appeal succeeded. On the other hand, counsel for the respondent submit that the respondent has been “out of pocket since it paid the deposit with the said Chase Bank (Kenya) Limited, which amount is quite substantial. As a result, the Respondent’s financial position has adversely been affected which has in turn affected its operations.” To our mind, this statement casts doubt on the respondent’s liquidity and ability to refund the decretal amount, if paid, and the appeal succeeds. In effect, the appeal would be rendered nugatory. In our view, the applicant’s Motion



satisfies the second limb of the twin principle for grant of orders under rule 5(2) (b) of this Court's Rules. In conclusion, we find that the applicant's Notice of Motion dated September 8, 2022 succeeds. Accordingly, we hereby order and direct that:

- (a) there be stay of execution of the judgment and decree of the High Court of Kenya at Nairobi (W Okwany, J) dated July 21, 2022 pending hearing and determination of Civil Appeal No E620 of 2022; which appeal should be heard and determined on priority basis, and
- (b) that the costs of the application do abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

H. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

