



**First Community Bank Limited v Isaac Investments Limited (Civil Application 386 of 2021) [2023] KECA 319 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 319 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 386 OF 2021  
HM OKWENGU, K M'NOTI & F SICHALE, JJA  
MARCH 17, 2023**

**BETWEEN**

**FIRST COMMUNITY BANK LIMITED ..... APPLICANT**

**AND**

**ISAAC INVESTMENTS LIMITED ..... RESPONDENT**

*(Being an application for stay of execution of the Ruling and Orders of the High Court pending hearing and determination of an intended appeal from the Ruling of the High Court (Ngenye, J) delivered on 13th October 2021 in HCCC No. E356 of 2020)*

**RULING**

1. On July 22, 2021, the High Court (Ngenye-Macharia, J) (as she then was), delivered a ruling in which the following orders were made:
  - (i) In terms of Clause 25 of the letter of offer dated November 7, 2011 the dispute between the plaintiff and the defendant is referred to arbitration.
  - ii. An order be and is hereby issued that the parties shall agree on an arbitrator knowledgeable and competent in sharia law in view of the unique nature of the finance agreement signed between both parties within 60 days.
  - iii. That pending the reference of this dispute to arbitration, herein and determination thereof, the defendant/respondent by itself, its officers, employees, servants, and/or agents or otherwise howsoever, are hereby restrained from transferring the suit property known as LR No Dagoretti Riruta 3129 Nairobi or any unit of apartment comprised therein, that remains alienated as at today.
  - (v) Costs of the application shall abide the outcome of the arbitration.”



2. The applicant, First Community Bank (the Bank), who was the defendant in the High Court applied for review of the orders of July 22, 2021 but the learned Judge (Ngenye, J), by a ruling dated October 13, 2021 dismissed the application for review. Consequently, the Bank filed a notice of appeal on October 18, 2021 against the Ruling of October 13, 2021. It also lodged in this Court, a notice of motion dated November 10, 2021, under sections 3A and 3B of the [Appellate Jurisdiction Act](#), and Rules 5(2)(b) & 42 of the [Court of Appeal Rules, 2010](#), seeking orders that pending the hearing and determination of the intended appeal, first an order of stay of execution of the Ruling and Orders delivered on October 13, 2021 to issue, and secondly, an order for the status quo ante the Ruling dated July 22, 2021, to subsist during the pendency of the appeal.
3. The application is grounded on an affidavit sworn by Claris Ogombo, who is the legal officer of the Bank, and grounds stated on the face of the motion. In brief, the Bank contends that following a ruling that was delivered in the same suit on July 30, 2020 by the High Court (Nzioka, J), declining to reinstate an interlocutory injunction restraining the sale of the suit property, the Bank proceeded to sell the suit property by public auction on September 17, 2020. Therefore, the subsequent Ruling of Ngenye, J exposes the Bank to re-litigation on disposal of a portion of its security (15 apartments), which have already been sold pursuant to a sale sanctioned by the court. The Bank urged that it would be against the principle of finality of litigation and sanctity of court orders to refer the dispute to arbitration; that the successful purchasers who were bona fide purchasers for value, protected under section 99 of the [Land Act](#), have not been enjoined; and it is in the interest of justice that the Court issues an order for status quo ante (before) the impugned ruling. The Bank argues that the respondent's equity of redemption in the 15 apartments was extinguished at the fall of the hammer following the auction held on September 17, 2020, and the only remedy available to the respondent is to file a suit for damages against the Bank. The Bank faults the learned Judge (Ngenye, J) in issuing an order of injunction.
4. The Bank further contends that the respondent has already moved the High Court through an application filed under certificate of urgency, for Hon Sukyan Omar the Deputy Chief Kadhi to be appointed as the arbitrator to determine the dispute between the Bank and the respondent, and that unless the orders sought are issued, the Bank will suffer irreparable loss, and the intended appeal will be rendered a mere academic exercise.
5. The Bank has filed written submissions in which it contends that it has an arguable appeal as the impugned decision of the High Court essentially annuls the proceedings conducted before another High Court Judge (Nzioka, J), whose orders remain unchallenged either by way of review or appeal, and that the orders of Ngenye, J offends the principle of res judicata and aids the respondent in its illegal quest at forum shopping.
6. In addition, the Bank contends that its intended appeal will be rendered nugatory if the orders sought are not granted, as the Ruling of the High Court (Ngenye, J), of July 22, 2021 will have the effect of annulling the sale of the 15 apartments and the Bank will be subjected to huge financial costs as well as loss of precious time in litigation, and the prejudice suffered therefrom cannot be compensated by an award of damages. On the other hand, the respondent will not suffer any loss if the order of stay is granted. The Bank also urged the Court to consider and protect the interest of the innocent purchaser for value who acquired proprietary interest in the 15 apartments following the auction sale, as this would be consistent with the protection provided under Section 99 of the [Land Act](#).
7. The respondent objected to the application through a replying affidavit sworn by Ali M Isaac (Ali), a director of the company. According to Ali's affidavit, the Bank is a licensed bank whose main objectives is to be carried out in strict compliance with the principles of Sharia law, including conducting the



business of banking in all aspects, but without charging or paying any interest on the principle amount lent, deposited or borrowed by its customers.

8. The respondent being the registered owner of the suit property, approached the Bank and applied for Musharaka finance facility for the purposes of developing the suit property; that the Bank advanced to the respondent, banking facilities of Musharaka amounting to a total of approximately 245 million; and that the respondent offered the suit property as security and a charge was executed over the said property.
9. Subsequently, the respondent built 90 apartments on the suit property, 70 of which were sold and the Bank recovered approximately Kshs. 380 million from the sale proceeds, which included the advanced principal amount of Kshs. 245 million. Thereafter, the Bank demanded more money from the respondent alleging that the respondent had defaulted in the repayment of the loan, and purported to exercise its statutory power of sale in regard to 20 apartments to recover the disputed outstanding loan amount of approximately Kshs. 184 million.
10. This dispute led to the respondent filing a civil suit in Milimani Chief Magistrate's Court together with a notice of motion in which it sought an order suspending the public auction of the 15 apartments scheduled for August 10, 2018, and a temporary injunction restraining the Bank from advertising, offering for sale, selling or transferring the apartments. The respondent eventually withdrew the civil suit before the application for injunction was heard.
11. Since the Bank was still actively marketing the remaining apartments, the respondent filed another suit in the High Court together with a notice of motion, in which it sought to have the dispute referred to arbitration in accordance with Clause 25 of the Musharaka Finance Agreement. It also sought orders that pending the commencement, hearing and determination of the arbitration proceedings, an injunction be issued restraining the Bank from advertising, selling or in any way interfering with the apartments. It is this application that was heard by Ngenye, J, resulting in the impugned Ruling of July 22, 2021. The respondent maintained that the Bank did not file any appeal against the Ruling/ Order of July 22, 2021, but filed an application dated August 19, 2021 seeking to have the Ruling and orders reviewed. That application was heard and dismissed by Ngenye, J on October 13, 2021. It is then that the Bank filed a notice of appeal against the order of dismissal of the application for review, and anchored its application for stay of execution on that notice.
12. The respondent deposed that in the Ruling of October 13, 2021, Ngenye, J merely dismissed the application for review and did not issue any order capable of execution or enforcement; that the Court has no power or jurisdiction to issue an order of stay against the negative order; and that the Bank's prayers in particular prayer for stay of execution of the Ruling and orders delivered on October 13, 2021 and prayer for status quo ante the Ruling of July 22, 2021 (that is prayers (ii) and (iii)) were incompetent; and that to the extent that the Bank has not filed a notice of appeal in regard to the ruling delivered on July 22, 2021, the respondent is entitled to proceed with execution of the orders that were issued.
13. In addition, the respondent stated that the Bank has not demonstrated that the intended appeal is arguable and not frivolous, or that if the stay is not granted, the success of the intended appeal will be rendered nugatory. The Respondent faulted the Bank for failing to demonstrate any grounds of appeal which it intended to prefer, and urged that the Bank did not establish any grounds upon which the application for review could be granted. Finally, the respondent urged that the application is incompetent and lacks any merit and should therefore be dismissed with costs.
14. The respondent also filed written submissions in which it reiterated that the Bank's intended appeal is frivolous and not arguable; that the Court should not interfere with the exercise of discretion by



Ngonye J; that the Bank had failed to demonstrate that if an order of stay of execution is not granted, the intended appeal will be rendered nugatory; and that the Court should dismiss the Bank's motion not only because it was fatally defective and incompetent, but also because it lacks merit.

15. The principles upon which an application under Rule 5(2)(b) of the *Court of Appeal Rules* is determined are now well settled. In *Stanley Kangeche Kinyanjui v Tony Ketter & 5 others* [2013] eKLR, the principles were distilled and restated as follows:

- i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 others v Nderitu & Another* (1989) KLR 459.
- ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75 *Halai & Another v Thornton & Turpin* (1963) Ltd (1990) KLR 365.
- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No Nai 189 of 2001.
- v. An applicant must satisfy the court on both of the twin principles.
- vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004.
- 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. *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008.
- viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji* (supra).
- ix. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
- 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.
- xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua* [1990] KLR 403."

16. On the issue of arguability, it is evident that the Bank has not filed any notice of appeal against the Ruling delivered on July 22, 2021, instead the Bank has filed a notice of appeal against the Ruling delivered on October 13, 2021 that dismissed the application seeking to review the Ruling of July 22, 2021. The main issue in regard to that appeal is whether the learned Judge erred in exercising her discretion in dismissing the application for review. However, the application for stay of the Ruling of July 22, 2021 cannot be anchored on the appeal against the order dismissing the application for review



of the Ruling of July 22, 2021. If the Bank was aggrieved by the Ruling and orders made on July 22, 2021, it ought to have filed an appeal against that order.

17. The effect of the Ruling of July 22, 2021 is that the dispute between the Bank and the respondent is now subject of arbitration proceedings, and the court can only intervene in accordance with the *Arbitration Act*. The orders issued by the High Court on July 22, 2021 were interim preservative orders issued in accordance with Rule 6 of the *Arbitration Act*. The Court explained in part, the rationale upon which the orders were issued as follows:

“...On account that the Respondent has already sold the greater chunk of the Applicant’s property speaks volumes that the Bank may have substantively recovered its debt. The noble thing to do, as the anchor of justice, is for the court to preserve the remaining property pending resolution of the dispute by a Tribunal. Furthermore, the dispute revolves around the amounts owed to the Respondent and/or whether the Applicant has overpaid. If the court does not preserve the suit property, it implies that the Defendant will sell the remaining units at the risk of recovering more than is entitled to it.”

18. We do not see how the execution of the orders referring the dispute to arbitration, or the interim orders during the pendency of the arbitration proceedings, restraining the Bank from selling or transferring the disputed properties, can lead to the Bank’s intended appeal against the order of dismissal for review being rendered nugatory. The Bank has raised the issue of third party claims, but no such third party has been enjoined in the proceedings, nor was anything produced to demonstrate the interest of the alleged third parties.

19. In addition, the order that the Bank intends to appeal against, is an order of dismissal of the application for review of the order of July 22, 2021. In *George Ole Sangui v Kedong Ranch Limited* [2015] eKLR this Court dealing with a similar application stated:

“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

20. Needless to state, an order staying execution of the order of dismissal that was made on October 13, 2021 will not have the effect of staying the orders that were issued on July 12, 2021, the execution of which is already in progress through arbitration proceedings. In the circumstances before us, the Bank has not met the threshold for granting orders of stay of execution under Rule 5(2)(b) of the *Court of Appeal Rules*. Without complying with the principles in this Rule, the Bank cannot seek refuge under section 3A and 3B of the *Appellate Jurisdiction Act*, that requires the Court to facilitate the just, fair, expeditious, proportionate and accessible resolution of disputes.

21. Accordingly, the Bank’s notice of motion dated November 10, 2021 is dismissed with costs

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

**HANNAH OKWENGU**



.....  
**JUDGE OF APPEAL**  
**K. M'INOTI**

.....  
**JUDGE OF APPEAL**  
**F. SICHALE**

.....  
**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

