



**Central Bank of Kenya v Doshi & 2 others (Civil Application  
E094 of 2022) [2023] KECA 611 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 611 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E094 OF 2022  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
MAY 26, 2023**

**BETWEEN**

**CENTRAL BANK OF KENYA ..... APPLICANT**

**AND**

**ASHOK L. DOSHI ..... 1<sup>ST</sup> RESPONDENT**

**AMIT A. DOSHI ..... 2<sup>ND</sup> RESPONDENT**

**IMPERIAL BANK LIMITED (I. R) ..... 3<sup>RD</sup> RESPONDENT**

*(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from the ruling and order of the High Court at Mombasa (Njoki Mwangi J.) delivered on 25th November 2022 in Mombasa H.C. Commercial Case No. 36 of 2016)*

**RULING**

1. The application that is the subject of this ruling was precipitated by orders granted by the High Court of Kenya at Mombasa (Njoki Mwangi J) in a ruling delivered on November 25, 2022 in Mombasa HC Comm Case No 36 of 2016- Ashok L. Doshi and another v Central Bank of Kenya and Imperial Bank Limited (IR) as follows:
  - i. That leave is hereby granted to the plaintiffs to have this application, any subsequent application and main suit heard when the 2<sup>nd</sup> defendant is in liquidation.
  - ii. That within 30 days of this ruling, the defendants shall jointly and severally give a binding undertaking to pay any sums adjudged due and payable to the plaintiffs after full adjudication and determination of the main suit; and



- iii. That the exparte order granted on December 22, 2021 staying the 1<sup>st</sup> defendant’s decision to appoint Kenya Deposit Insurance Deposit Corporation as liquidator of the 2<sup>nd</sup> defendant shall stand discharged upon execution of the order made in paragraph (ii) above
    - iv. That the costs of this application shall abide in the main suit.
  2. The plaintiffs in the suit in the High Court were Ashok L. Doshi and Amit A. Doshi, the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein, while the 1<sup>st</sup> and 2<sup>nd</sup> defendants therein were the Central Bank of Kenya, the applicant herein, and Imperial Bank Limited (in liquidation), the 3<sup>rd</sup> respondent herein respectively. The Central Bank of Kenya (hereinafter “the applicant”) has now filed an application in this court dated December 20, 2022, in which it seeks a stay of execution of the orders and ruling made by the High Court on November 25, 2022 pending the hearing and determination of its intended appeal therefrom. The said applicant is in this regard required to demonstrate firstly, an arguable appeal and secondly, that unless an order of stay is granted, its appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this court in various decisions and most notably in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
  3. The pertinent facts leading to the ruling by the High Court are that on December 8, 2021, the applicant put the 3<sup>rd</sup> respondent under liquidation pursuant to the provisions of section 54 (1) (a) of the *Kenya Deposit Insurance Act* No. 10 of 2012. Subsequently, on December 20, 2021, the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein filed an application in the High Court of even date seeking to stay the applicant’s decision, on the ground that the 3<sup>rd</sup> respondent should not be placed under liquidation unless and until, the applicant and the 3<sup>rd</sup> respondent deposit USD 7,277,314.91/- in a joint interest earning account in the names of the advocates on record as security for any decrees that may ultimately be passed by the High Court. In the alternative, to the order above the applicant and the 3<sup>rd</sup> respondent be ordered to jointly and severally give a binding undertaking to pay any sums adjudged and payable to the 1<sup>st</sup> and 2<sup>nd</sup> respondents after full adjudicating and determination of the suit. The said application was made on the basis of consent made between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and 3<sup>rd</sup> respondent in the High Court on July 15, 2016, in which the 3<sup>rd</sup> respondent gave an undertaking to pay any sums adjudged due and payable to the 1<sup>st</sup> and 2<sup>nd</sup> respondents after full adjudication and determination of this suit. The High Court, after hearing the parties on the application of December 20, 2021, proceeded to grant the impugned orders on November 25, 2022 in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  4. The applicant, being aggrieved by the said ruling, filed a notice of appeal dated November 30, 2022 and avers that it has an arguable appeal with high chances of success. The grounds which it intends to argue in the intended appeal are as follows:
    - a. The learned judge erred in law and in fact in holding that the consent entered into between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent dated July 15, 2016 was equally binding to the appellant.
    - b. The learned judge erred in law and in fact in finding that upon the 3<sup>rd</sup> respondent under receivership the appellant took over control of the 3<sup>rd</sup> respondent by operation of the law.
    - c. The learned judge erred in law and in fact in holding that appellant gave an undertaking through a consent entered into on July 15, 2016 and that it assumed control of the 3<sup>rd</sup> respondent through Kenya Deposit Insurance Corporation.
    - d. The learned judge erred in law and misapprehended the meaning and tenure of section 43 (1) and (2), 45 and 61 of the Kenya Deposit Insurance Corporation.



- e. The learned judge erred in law and in fact by going against a well- established principal of law, that was laid by this honourable court in National Bank of Kenya Limited v Pipelast limited that courts of law should not rewrite or interfere with parties agreements/ contract unless, undue influence or coercion was applied at the time of making the agreement
  - f. The learned judge erred in law in failing to appreciate the import of section 50 (2) and section 54 of the [Kenya Deposit Insurance Act](#) by making orders that purports to extinguish the powers of the 3<sup>rd</sup> respondents and the applicant respectively as bestowed by the aforesaid provisions of the statute.
  - g. The learned judge erred in law and in fact in failing to appreciate the submissions of the appellant and the authorities cited in support thereof.
  - h. The learned judge erred in law and misapprehended the express import and meaning of section 56 (2) of the [Kenya Deposit Insurance Act](#) and continued with the suit and subsequent application only to grant leave on November 25, 2022
5. The applicant further asserts that unless the ruling and orders given by the High Court on November 25, 2022 are stayed, the applicant’s appeal shall be rendered nugatory in that compliance was required within thirty (30) days from November 25, 2022 and the suit in the High Court was coming up directions on its hearing on March 1, 2023 , by which time the applicant was required to have given a binding undertaking to pay the sums that may be adjudged due and payable to the 1<sup>st</sup> and 2<sup>nd</sup> respondents which sums has been stated as USD 7,277,314.91. Further, that the status of the 3<sup>rd</sup> respondent remains in limbo having seemingly been reversed by the High Court from liquidation back to receivership and therefore making it impossible for the 3<sup>rd</sup> respondent to pay thousands of depositors who have been waiting for their deposits since the institution was placed under liquidation on December 8, 2021, causing unnecessary anxiety in the entire banking sector.
  6. The 3<sup>rd</sup> respondent filed an affidavit in support of the applicant’s application sworn on January 16, 2023 by Andrew Rutto, its liquidation agent who detailed the proceedings in the High Court that gave rise to the application, and contended that the said court *suo moto* granted the 1<sup>st</sup> and 2<sup>nd</sup> respondents sanction to bring proceedings against an institution in liquidation, and that its ruling and orders amounted to preferential treatment to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, who were under statutory obligations to lodge and prove their claim with the liquidator as provided in section 33 of the [KDIC Act](#). Further, the order for the discharge of the exparte orders on condition that a binding undertaking was given by the applicant and the 3<sup>rd</sup> respondent in 30 days was irregular as the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not seek any such orders in their application and were not challenging the liquidation. The 3<sup>rd</sup> respondent urged that if the orders made by the High Court are not stayed, the liquidator would not be able to perform its statutory mandate of collecting and realizing the assets of the 3<sup>rd</sup> respondent, which in effect paralyzed the liquidation process.
  7. The 1<sup>st</sup> and 2<sup>nd</sup> respondents on their part opposed the application in a replying affidavit and further affidavit sworn on January 18, 2023 and January 20, 2023 respectively by the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent deponed that the applicant will not suffer any loss or prejudice if the orders of stay are not granted because the trial judge did not order the applicant to pay money, and only ordered the applicant and the 3<sup>rd</sup> respondent to give an undertaking that they will pay any sums adjudged due and payable to the 1<sup>st</sup> and 2<sup>nd</sup> respondents after full adjudication of the suit. It is the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ case that the issue as to whether they obtained leave to continue with the case was raised by the applicant through a preliminary objection dated December 29, 2021 which was dismissed by the High Court in



a ruling delivered on May 6, 2022 and was not appealed, and cannot therefore be used as a basis to seek stay of execution of the impugned ruling.

8. It was also the 1<sup>st</sup> and 2<sup>nd</sup> respondents contention that the 3<sup>rd</sup> respondent voluntarily gave an undertaking to pay any sum adjudged payable by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the consent recorded on July 15, 2016, and that although applicant was not party to that consent, it was legally in charge of all the activities concerning the 3<sup>rd</sup> respondent and there was nothing wrong with making the applicant part of the consent in its capacity as the 3<sup>rd</sup> respondent's regulator. Further, the applicant was a defendant in the suit in the High Court and there was nothing wrong with asking it to commit that it will pay any money awarded to the plaintiffs by the court. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further contended that the only reason the applicant did not want to give an undertaking in the High Court was to enable the liquidation of the 3<sup>rd</sup> respondent to proceed such that by the time the judgment was obtained in the High Court, the 3<sup>rd</sup> respondent would have been wound up completely leaving it a mere shell or non-existent and therefore not capable of honouring any decree that may be passed in their favour.
9. We heard the application for stay on the court's virtual platform on March 22, 2023, and learned counsel Mr Chege appeared for the applicant; learned counsel Mr Oluga appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents; while learned counsel Mr Issa Mansur, together with learned counsel Mr Mbatai appeared for the 3<sup>rd</sup> respondent. Mr Chege relied on written submissions dated January 17, 2023 and its grounds of appeal to reiterate that the applicant had an arguable appeal and submit that the consent entered on July 15, 2016 did not take away the power conferred to the applicant by section 54 of the [Kenya Deposit Insurance Corporation Act](#) to place the 3<sup>rd</sup> respondent under liquidation. The counsel faulted the learned trial judge for misapprehending the meaning and tenor of sections 50 (2) (a) and 56 of the [Kenya Deposit Insurance Act](#) No 10 of 2012 that require all depositors to be treated as equal once a declaration of the moratorium was made, and the requirement of the court's sanction to continue with suits against institutions under liquidation.
10. On whether the appeal would be rendered nugatory should the stay of execution not be granted, the counsel reiterated the consequence of the orders sought to be stayed including the undertaking to pay USD 7,277,314.91, the effects on the 3<sup>rd</sup> respondent's role as liquidator and on depositors accessing their funds, and on the law of receivership and/or liquidation as provided by the [Kenya Deposit Insurance Act](#), No 10 of 2012. In their conclusion the applicant submitted that the High Court outrightly ignored the Court of Appeal decision in the case of [Kenya Deposit Insurance Corporation v Richardson & David Limited & another](#) [2017] eKLR where the court reiterated that specialized institutions such as the 3<sup>rd</sup> respondent and the appellant should be left on matters receivership and liquidation in that courts had no specialized knowledge on when to place an institution under liquidation and/or even process to revert an institution in liquidation to a receivership.
11. Mr Mansur highlighted written submissions dated January 16, 2023, and placed reliance on the cases of [Joseph Gitahi Gachau & another v Pioneer Holdings \(A\) Ltd & 2 others](#) [2009] eKLR, [Chris Mungu N. Bichage v Richard Nyagaka Tongi & 2 others](#) [2013] eKLR and [Cooperative Bank of Kenya v Banking Insurance and Finance Union, Kenya](#) [2014] eKLR to submit that the applicant produced a draft memorandum of appeal raising eight (8) grounds of appeal thereby confirming that the appeal was not only arguable but had a high chance of success at the hearing. The counsel submitted that the learned trial judge purported to usurp the statutory power vested on the Kenya Deposit Insurance Corporation and the applicant contrary to the binding decision in [Kenya Deposit Insurance Corporation v Richardson & David Limited & another](#) [supra] , and failed to appreciate the consent order recorded on July 15, 2016 was no longer enforceable as the 3<sup>rd</sup> respondent had been placed



under liquidation and the consent would be contrary to the law in giving the 1<sup>st</sup> and 2<sup>nd</sup> respondent preferential treatment as depositors. Lastly, that section 56 (2) of the [Kenya Deposit Insurance Act](#) and makes it mandatory for the 1<sup>st</sup> and 2<sup>nd</sup> respondent to seek the court's sanctions before commencing or continuing civil proceeding against the 3<sup>rd</sup> respondent when in liquidation, and reference was made to the case of [Otieno Ragot & Company advocates v National Bank of Kenya Limited](#) [2020] eKLR in this regard.

12. On the nugatory aspect, the 3<sup>rd</sup> respondent submitted that unless an order is granted to preserve the integrity and substratum of the appeal, the Kenya Deposit Insurance Corporation will not be able to discharge, its statutory mandate of collecting the monies due and owing to the 3<sup>rd</sup> respondent Ltd (IL) and to also pay the bank depositors in accordance with section 33 (6) of the [Kenya Deposit Insurance Act](#). Secondly, the 3<sup>rd</sup> respondent's legal status would remain in limbo as the orders of December 22, 2021 have the effect of indefinitely suspending the liquidation of the 3<sup>rd</sup> respondent despite the banking licenses having been revoked. Therefore, the High Court frustrated and delayed the liquidation of Imperial bank while making orders in favour of two depositors to the prejudice of thousands of depositors and this was contrary to public interest and an order staying the High Court orders should be granted.
13. Mr Oluga highlighted the 1<sup>st</sup> and 2<sup>nd</sup> respondents' written submissions dated January 24, 2023, wherein he contended that the draft grounds of appeal were stated in a general manner and incapable of determination as to their arguability, and that the appeal would not be rendered nugatory for the reason that the order required compliance in 30 days which had passed, and was therefore overtaken by events. Additionally, that if the appeal succeeded the undertaking would naturally be set aside without the appeal being rendered nugatory in any way. The 1<sup>st</sup> and 2<sup>nd</sup> respondent's counsel further submitted that the High Court did not order the applicant to pay the amount of USD 7,277,314.91/- or any money at all, but to only give an undertaking. That it was therefore premature for the applicant to complain that if it gave an undertaking as ordered by the High Court, the appeal would be rendered nugatory.
14. It was the counsel's position that the order requiring the applicant and the 3<sup>rd</sup> respondent to give an undertaking was not being made for the first time, and that the applicant and the 3<sup>rd</sup> respondent were part of the negotiations leading to the consent on July 15, 2016, and this was shown by the proceedings in the High Court, which showed that the applicant was part of the negotiations that yielded the said consent and was represented by its counsel, Mr Chege. Therefore, that the order of November 25, 2022, requiring the applicant and 3<sup>rd</sup> respondent to give the undertaking was not a new order but a reiteration of the order given earlier by P.J.O Otieno J. following the consent by all the parties.
15. Lastly, the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents urged that the learned trial judge did not reverse or set aside the appointment of the liquidator but allowed liquidation to go on after the applicant and 3<sup>rd</sup> respondent gave an undertaking to pay any amount that may be adjudged payable by the court, which was similar to the consent signed on July 15, 2016. In addition, that the undertaking was easily reversible and would naturally and automatically be set aside if the appeal succeeds.
16. It is evident that the legal effect of the consent entered into on July 15, 2016 on the applicant, and the legal implications of the ruling and orders granted by the High Court on November 25, 2022 on the powers and duties of the applicant and the Kenya Deposit Insurance Corporation, as well as on the status of the 3<sup>rd</sup> respondent in light of the provisions of the Kenya Deposit Insurance Corporation Act are arguable issues raised in the application. To this extent we find that the intended appeal is arguable.
17. On the nugatory aspect, it was stated by this court in [Reliance Bank Limited v Norlake Investments Ltd](#) [2002] 1 EA 227, that "the term 'nugatory' has to be given its full meaning. It does not only mean



worthless, futile or invalid. It also means trifling.” Likewise, it was held in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [supra] that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or injuncted, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. The continuation of activities in relation to the 3<sup>rd</sup> respondent’s liquidation are pegged on the undertaking of USD 7,277,314.91/- required by the High Court in the impugned ruling and orders, which is to be given by the applicant and 3<sup>rd</sup> respondent. In effect, unless a stay of this order is granted, the 3<sup>rd</sup> respondent’s activities will grind to a halt, and its legal status will be uncertain. The resultant economic prejudice on the applicant, 3<sup>rd</sup> respondent and third-party depositors is one which will be irreversible, and the 1<sup>st</sup> and 2<sup>nd</sup> respondents have not in this respect demonstrated that they will be able to compensate the 3<sup>rd</sup> respondent and affected third parties by way of damages.

18. We therefore find that the applicant has met the threshold for the grant of a stay, and its application dated December 20, 2022 is merited. We accordingly grant a stay of execution of the ruling delivered and orders given on November 25, 2022 in Mombasa HC Comm Case No 36 of 2016- Ashok L. Doshi and another v Central Bank of Kenya and Imperial Bank Limited pending the hearing and determination of the applicant’s intended appeal herein. The costs of the application shall abide the outcome of the appeal.

19. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> DAY OF MAY, 2023.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

