



I & M Bank Limited v Ufanisi Freighters Limited & 3 others (Civil Appeal (Application) E059 of 2023) [2023] KECA 976 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KECA 976 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E059 OF 2023
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

I & M BANK LIMITED APPELLANT

AND

UFANISI FREIGHTERS LIMITED 1ST RESPONDENT

PREMIER FLOUR MILLS LIMITED 2ND RESPONDENT

ATTA [KENYA] LIMITED 3RD RESPONDENT

MILLING CORPORATION KENYA [2009] LTD 4TH RESPONDENT

(An application for Stay of Execution of the Judgment and Decree of the High Court of Kenya at Mombasa (F. Wangari J.) dated and delivered on 2nd March 2023 in Mombasa High Court Civil Appeal No. E144 of 2021 arising from the original Ruling in Mombasa Chief Magistrate Court (Hon. E. K. Makori) dated 22nd September 2021 in Mombasa CMCC No. 1477 of 2017)

RULING

1. The Applicant's application dated 20th April 2023 seeks inter alia, an order of stay of execution of the judgment made and delivered by the High Court (F. Wangari J.) on 2nd March 2023 in Civil Appeal No. E144 of 2021. The 1st Respondent opposed the application by a Replying affidavit sworn on 28th April 2023 by Lawrence Mutethia King'ora, its General Manager. We heard the application on this Court's virtual platform on 5th June 2023, and learned counsel Mr. Frankline Otieno appeared for the Applicant, while learned counsel, Ms. Pauline Osino appeared for the 1st Respondent. There was no appearance for the 2nd, 3rd and 4th Respondents, despite their advocates having been duly served with the hearing notice, nor did they file any pleadings on the application. Mr. Otieno and Ms. Osino on their part highlighted the respective written submissions they had filed dated 26th April 2023 and 28th April 2023.



2. By way of a brief background and to provide the context of the application, the Applicant had lodged the appeal in the High Court against a ruling delivered on 22nd September 2021 by the Chief Magistrate's Court at Mombasa (Hon. E.K. Makori (as he then was)) in Mombasa CM Civil Case No. 1477 of 2017 (hereinafter the trial Court). The said ruling dismissed objection proceedings brought by the Applicant with respect to the execution proceedings by the 1st Respondent against the 2nd 3rd and 4th Respondents of a decree issued in the 1st Respondent's favour by the trial Court. The Applicant claimed to have a legal interest in the properties attached by the 1st Respondent in the said execution proceedings by virtue of a fixed and floating debenture dated 3rd March 2015 which created a charge over the said properties. The High Court, in dismissing the Applicant's appeal found that there was no evidence tendered of the appointment of a receiver and that the floating charge had thereby crystallized. This holding is the subject of the instant application.
3. The applicable principles in the exercise of the Court's unfettered discretion under Rule 5(2) (b) of the Court of Appeal Rules of 2022 to grant an order of stay are well settled. Firstly, an applicant has to satisfy that he or she has an arguable appeal. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in Stanley Kangeche Kinyanjui v Tony Ketter & 5 others [2013] eKLR.
4. The Applicants in this respect have averred in their application and the supporting affidavit sworn on 20th April 2023 by Andrew Muchina, Senior Manager of the Applicant in the Legal Department, that the High Court dismissed their appeal in the judgment delivered on 2nd March 2023 and aggrieved by the said decision, they filed a Notice of Appeal dated 3rd March 2023. It is their assertion that the intended Appeal raises substantive issues that require determination by this Court with regards to who, as between the Appellant and the 1st Respondent, has first priority over the attached assets belonging to the 3rd Respondent.
5. The Applicant urged that the appeal stood chances of success and relied on the grounds in its Memorandum of Appeal dated 20th April 2023 namely, that:
 - a. The Learned Judge erred in law by finding that the floating charge could only crystallize upon the appointment of the receiver.
 - b. The Learned Judge erred in law by failing to appreciate that the Appellant had indeed discharged the said burden of proving crystallization as the said assets had been proclaimed and attached pursuant to the decree passed on 18th May 2021
 - c. That the Learned Judge erred in law by misinterpreting and misdirecting himself on the law pertaining to the question of crystallisation and appointment of a receiver thereby reaching wrong conclusion of law
 - d. The Learned Judge misapprehended and misapplied the binding Court of Appeal authority of Lochab Brothers v Kenya Furfural Co. Ltd [1983] eKLR when she held that a floating charge can only crystallize upon the appointment of a receiver.
6. Mr. Otieno in his submissions made reference to the decision in County Secretary of Kajiado & 47 others v Salaries & Remuneration Commission & another (2021) eKLR, that an applicant only needs to demonstrate one arguable ground and not a multiplicity of them, and further that an arguable appeal is not necessarily one that will succeed.



7. The 1st Respondent on its part averred that that the Applicant's appeal against the trial Magistrate's decision was dismissed by the learned Judge of the High Court on 2nd March 2023 and was a negative decision, therefore the prayer for stay of execution would have no effect of stopping execution of the suit in the trial Court. In addition, that the application was sub judice and contrary to Rule 43 of the *Court of Appeal Rules, 2022* as there was a similar application filed by the Applicant on 3rd April 2023 pending before the High Court. Furthermore, that the Notice of Appeal and letter requesting for proceedings was served out of time upon the Respondent on 13th April 2023, and contrary to Rule 79 and Rule 84 of the *Court of Appeal Rules, 2022* respectively, since the time lapsed on 10th March 2023.
8. It was further averred that the Applicant had failed to prove ownership of the goods that were attached or that the debenture had crystallized as correctly found by the High Court. Consequently, the objection proceedings in the trial Court and subsequent appeal in the High Court were baseless, and made in bad faith to delay the execution of the judgment granted in the primary suit. Other issues raised by the Respondent on the intended appeal were that there was no nexus between the 2nd, 3rd and 4th Respondent's attached good and the Applicant; the attached goods were not listed in any schedule attached to the debenture documents and no evidence was placed before the Court on the recovery process so far undertaken by the Appellant against the 2nd, 3rd and 4th Respondent on any of the properties under the debenture which was not under attachment in this suit; there was no proof that the charges and debentures were currently in force; and there was no proof that a receiver manager had been appointed to date or legally appointed by law. Ms. Osino relied on the decision in *Charles Kipkoech Leting v Express (K) Ltd & another* [2018] eKLR to also submit that the Memorandum of Appeal filed by the Applicant disclosed issues of fact couched in a manner to appear as matters of law, which had been dealt with by the trial Magistrate and the Judge of the High Court.
9. We need to point out that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous and merits to be argued fully. Further, that it is sufficient if the appeal raises only one triable issue. The Applicant in this regards raises the issue of the legality of the findings made by the High Court as regards the circumstances when a floating charge can crystalize and when receivers can be appointed, which are not frivolous issues and merit consideration. To this extent we find that the intended appeal is arguable.
10. On the nugatory aspect, the Applicant averred that the appeal, if successful, will be rendered nugatory if stay of execution is not granted and irreparable loss caused to it for the reasons that the attachable assets, the subject of the said judgment may be sold at any time; the outstanding loan owed by the 2nd Respondent to the Applicant was over Kshs 1 billion and if this Court declines to grant a stay, the 1st Respondent would sell the said properties and the bank would be unable to recover the debt; and lastly that the debt owed by the 2nd Respondent outstripped the charged assets due to the accrued interest.
11. Mr. Otieno placed reliance on the cases of *Sicpa Securities Sol. Sa v Okiya Omtatab Okoiti & 2 others* [2018] eKLR, *Githunguri v Jimba Credit Corporation* (No. 2) (1988) KLR 838 and *Kenya Pipeline Company Limited v Stanley Munga Githunguri* [2011] eKLR to submit that the sale was irreversible and the Respondent are unable to refund the colossal amount involved, and it was in the interest of justice and proportionality to grant the orders sought considering the likelihood of loss to the Applicant.
12. The 1st Respondent asserted that the Applicant had not shown how the intended appeal would be rendered nugatory and had not alleged that the 1st Respondent was incapable of refunding any sums should the appeal be successful, and averred that it is a financially stable company capable of refunding any sums should the appeal be successful. Additionally, that the Applicant had not tendered any



security nor produced any evidence to show that they were financial stable. Further, that there was no documentary evidence placed by the Applicant before the Court to show the bank accounts held by the 2nd, 3rd and 4th Respondents; any outstanding loan/ debt currently owed to it by the 2nd to 4th Respondents; and the statement of accounts from the date of attachment to date and the details of the alleged debt of Kshs 1 billion. According to the 1st Respondent, the trial Court's decree currently outstanding was in the sum of Kshs 19,151,904.83 exclusive of the objection costs in the trial Court and this appeal. Lastly, that the Applicant was granted a temporary stay in the High Court which lapsed on 16th March 2023 and execution process was ongoing as at the time of filing the objections proceedings, the attached goods were waiting removal. The 1st Respondent had since applied for the reissue of warrants in the primary suit on 12th April 2023.

13. Reference was made to the decision in *Jetbwa v Shah T/A Supreme Styles* [1989] eKLR to submit that the right to appeal must be balanced against an equally weighty right of the 1st Respondent to enjoy the fruits of their judgment. Therefore, that if any stay of execution is to be granted, the same should be conditional upon the 1st Respondent being allowed to sell the attached properties and 90% of the decretal sum out of the sale be released to it, while 10 % of the decretal sum deposited in an interest earning joint account in the joint names of the parties' advocates within 30 days from date of the order. Reference was made to a similar holding in the case of *Sehmi General Building & Civil Contractor Limited v CJ Securities limited* [2021] eKLR.
14. It was held in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (*supra*) that whether or not an appeal will be rendered nugatory depends on whether or not what is ought 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. When it comes to stay of negative orders such as the dismissal of the appeal by the High Court that is the subject of the present application, this Court (Okwengu, Kiage & Sichale JJA) further observed in the case of *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2021] eKLR

“The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR where the Learned Judges stated thus:

“What is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”
15. The judgment of the High Court appealed from is therefore incapable of being stayed, irrespective of the merits or otherwise of the Applicant's appeal, as it does not order or require any actions to be taken by any of the parties to the appeal, and to this extent the appeal by the Applicant will not be rendered nugatory. It is also notable that the execution sought to be stayed is with respect to the orders of the trial Court, and which are not the subject of this application.
16. We accordingly find that the Applicant has not met the threshold for grant of stay of execution orders, and its Notice of Motion application dated 20th April 2023 is hereby dismissed with costs to the 1st Respondent.
17. Orders accordingly.



DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 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

