



**City Chemist (Nairobi) Limited v M. Oriental Bank Limited
(Formerly Delphis Bank Limited) & another (Civil Application
E280 of 2023) [2023] KECA 1137 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1137 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E280 OF 2023
DK MUSINGA, HA OMONDI & PM GACHOKA, JJA
SEPTEMBER 22, 2023**

BETWEEN

CITY CHEMIST (NAIROBI) LIMITED APPLICANT

AND

**M. ORIENTAL BANK LIMITED (FORMERLY DELPHIS BANK
LIMITED) 1ST RESPONDENT**

**JULIUS AGUNJA ONYANGO T/A AGUNJA AUCTIONEERS 2ND
RESPONDENT**

*(An application for stay of execution from the ruling of the High Court of Kenya at Nairobi
(F. Mugambi, J.) delivered on 19th June 2023 in High Court Civil Case No. E096 OF 2023)*

RULING

1. Before us is a Notice of Motion dated June 22, 2023 under rules 5(2) (b) and 42 of the [Court of Appeal Rules](#), 2010 (now 2022), seeking the following prayers:
 - a. Spent
 - b. That this Honourable Court, pending the hearing and determination of the intended appeal, be pleased to stay the entire ruling of the High Court (Commercial & Admiralty Division) at Nairobi delivered on June 16, 2023(sic) by the Honourable Justice Dr F Mugambi in HCCOMM No E096 of 2023; City Chemist (Nairobi) Limited vs M Oriental Bank Limited (Formerly Delphis Bank Limited & Julius Agunja Onyango T/A Agunja Auctioneers in which the court ordered that the entire suit was “res judicata” effectively dismissing the application and the entire suit with costs to the respondents.



2. The background of the application is that by a ruling dated June 19, 2023, the High Court, Commercial Admiralty Division (F Mugambi, J) struck out, High Court Civil Suit No E096 of 2023 that had been instituted by the applicant against the respondents on the basis that it was *res judicata*. The relevant part of the ruling is as follows:
 - “(18) I have perused the evidence presented before the court. The plaintiff does not dispute having filed a suit in HCCC 646 of 2007, HCCC 3609 of 1995 and HCCC 370 of 2003 but maintains that the suits were not *res judicata* as they were dismissed before the court could delve into the merits of the case. I do note from the record that the substantive prayers sought in these suits are similar. The suits were dismissed for the plaintiff’s failure to prosecute its’ claim.
 20. My understanding of the pronouncement by the Court of Appeal is that HCCC 3609 of 1995 and HCCC 646 of 2007 having been dismissed for want of prosecution are considered to have been determined on merit, and rightly so because litigation must come to an end.
 21. In the premises, if the suit cannot be sustained, it follows that the application dated March 13, 2023 cannot also succeed. In any case, there is on record a similar application filed on October 27, 2015, in HCCC 646 of 2007 seeking to restrain the defendants from disposing the property known as LR No 2/280 Kilimani. The court on June 25, 2008 dismissed the application. Going by the same pronouncement of the Court of Appeal, this litigation too is deemed as having been heard and determined.”
3. Aggrieved by the ruling, the applicant now seeks stay of execution of the order of the High Court. In an affidavit sworn by Mohamed Kisabuli, the applicant’s position is that the appeal is arguable and has cited various grounds, among others being: that the ruling of the High Court contains numerous incidences of misinterpretation of the law and facts; that the suit is not *res judicata* as held by the Court; that the applicant is willing to deposit security; and that the appeal will be rendered nugatory if the stay orders are not granted as there is a likelihood that the suit property may be sold before the appeal is heard and determined.
4. The applicant has also filed written submissions dated July 7, 2023 which reiterate the grounds that it has an arguable appeal and that the appeal will be rendered nugatory unless the order for stay is granted. The applicant relies on the ruling of this Court in *Stanley Kangethe Kinyanjui vs Tony Keter & 5 others* [2013] eKLR. The applicant also cites *Mulla’s Code of Civil Procedure* 16th Edition, Vol 1, on the meaning of the expression “heard and determined” to buttress its’ argument that the previous cases that it had filed, did not meet the threshold of “hearing and determination.”
5. In opposition, the respondents have filed a replying affidavit sworn by Wilfred K Machini on July 4, 2023. The replying affidavit gives a background to the suit and we take the liberty to summarize its’ contents as follows: that the applicant and Mohamed Kisabuli had previously instituted three other suits against the 1st respondent namely; HCCC No 646 of 2007, HCCC No 3609 of 1995 and HCCC No 370 of 2003, all of which were dismissed; that on June 25, 2008 the High Court (Kimaru, J ,as he then was) dismissed an application for injunction on the basis that it was *res judicata*; that the applicant is not the registered proprietor of the suit property; that the registered proprietor of the property, Mohamed Kisabuli is not a plaintiff in the suit that was struck out; that the applicant had made several offers to settle the outstanding debt and that the last offer for settlement was a sum of Kshs 17.5 Million; that the 1st respondent is a sound financial institution which is in a position to meet any damages in the



- event that the intended appeal succeeds; and that therefore the intended appeal will not be rendered nugatory.
6. In addition, the respondents have filed written submissions and a case digest dated July 11, 2023 in support of their arguments; that the applicant has not met the threshold for grant of the order for stay of execution as the intended appeal is not arguable and, in any event, will not be rendered nugatory even if the intended sale takes place.
 7. The principles that apply in applications under rule 5(2) (b) of this *Court's Rules* for stay of execution pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal, or appeal (if any) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory, if execution or further proceedings arising from a judgment, decree or order are not stayed. These principles have been enunciated in various judicial pronouncements of this Court, including those cited by the parties.
 8. On the first limb of the twin principles, in *Anne Wanjiku Kibe vs Clement Kungu Waibara & IEBC* [2020] eKLR this Court held that for stay orders to issue, the applicant must demonstrate that the appeal or intended appeal would, in the absence of stay be rendered nugatory. This brings us to the question: is the intended appeal arguable? To answer that question, it is important to note that the facts outlined in the replying affidavit sworn by Wilfred K Machini are not in dispute.
 9. From our reading of the grounds on which the application is founded, together with the draft memorandum of appeal, the rival affidavits, the respective written and oral submissions of the learned counsels for the parties, we are not persuaded that the applicants have an arguable appeal. We will say no more on the merits or otherwise of those grounds, we leave that question to the bench that will hear and determine the appeal.
 10. That brings us to the second limb of the twin principle, which is whether the appeal, if successful will be rendered nugatory. The term nugatory was defined in *Reliance Bank Ltd vs Norlake Investments Ltd*, [2002] 1 EA 227.
 11. We note that the core issue in dispute is whether the suit property should be sold to repay the debt. It is trite that once a property is offered as a security, it becomes a commodity for sale and a chargor can only redeem it upon paying the debt. It is not disputed that the 1st respondent is a reputable bank in Kenya which is capable of paying damages in the event the intended appeal is successful. This Court in *Elizabeth Jerono Yator vs Consolidated Bank of Kenya Ltd & Another*. [2019] eKLR held as follows:

“The 1st respondent is a reputable bank. It has not been suggested that should the intended sale found to be wanting, it may not be able to pay the applicant damages they be awarded. We reiterate that once a property has been given as security for financial accommodation, it becomes a commodity for sale and therefore the sentimental attachment to the same becomes inconsequential and must be sold in accordance with the law.”
 12. Accordingly, we note that the applicant has failed to meet the twin principles for the grant of an order for stay of execution. Before we pen off, we wish to say that the application also fails on another ground; the ruling of the High Court held that the suit by the applicant was res judicata and therefore the Court could not entertain the application for injunction dated March 13, 2023. The Court dismissed that application with costs to the respondents. This Court has held severally that there is nothing to stay in a negative order. See *Western College of Arts and Applied Sciences vs EP Oranga & 3 others* [1976] eKLR.



13. In view of the foregoing, we find that this application has no merit and we dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

D. K. MUSINGA, (P.)

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

