



**Mbotaz v NIC Bank Ltd (Civil Application E018 of 2020)  
[2022] KECA 1180 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1180 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E018 OF 2020  
K M'NOTI, F SICHALE & S OLE KANTAI, JJA  
OCTOBER 21, 2022**

**BETWEEN**

**BALUME LAURENJT MBOTAZ ..... APPLICANT**

**AND**

**NIC BANK LTD ..... RESPONDENT**

*(Application for stay of execution pending the hearing and determination of appeal against the Judgment and Decree of the High of Court of Kenya at Nairobi (Kasango, J.) dated 1st July, 2020 in HC CA No. E012 of 2019)*

**RULING**

1. The applicant's Motion on Notice before us is dated 3<sup>rd</sup> August 2020 and prays for an order of stay of execution of the Judgment and Decree of the High Court of Kenya at Nairobi (Kasango, J.) dated 1<sup>st</sup> July 2020. The short background to the motion is as follows.
2. In 2014, the respondent financed the applicant to purchase Lorry Registration No. KCA 854Z, Mercedes Benz Actros, for Kshs 5,258,000 and trailer registration No. ZE 8341 for Kshs 1,944,000. For convenience we shall refer to both the lorry and the trailer as "motor vehicles". The parties entered into two agreements, a hire purchase and a chattels mortgage agreement, upon which the motor vehicles were registered in their joint names. The applicant was to repay the purchase price by agreed monthly instalments.
3. On or about 28<sup>th</sup> March 2017, the respondent repossessed the motor vehicles on the grounds that the applicant had defaulted on the agreed instalments. On 7<sup>th</sup> April 2017 the applicant filed a suit against the respondent in the Chief Magistrate's Court at Nairobi seeking, among others, a declaration that the repossession of the motor vehicles was illegal, null and void, loss of earnings from 29<sup>th</sup> March 2017 until the date of judgment, and costs and interest. The applicant averred that the repossession was unlawful because he was up to date with his instalments and that in any event repossession was not available to



- the respondent because the applicant had already paid more than two-thirds of the purchase price. The respondent filed a defence and a counter-claim, seeking, inter alia, judgment for Kshs. 4, 752,683.89, being the outstanding balance owed by the applicant.
4. After hearing the suit, the trial court found in favour of the applicant, issued the declaration, ordered unconditional release of the motor vehicles and awarded the applicant Kshs 6,047,316.11 as damages for loss of user, costs and interest. The respondent was aggrieved and lodged an appeal in the High Court, contending, inter alia that the trial court erred by holding that the repossession was illegal, by awarding special damages that were neither specially pleaded nor strictly proved, and by applying the Hire Purchase Act, which did not apply in the case because of the amounts involved.
  5. In the judgment that the applicant is appealing, the High Court found that the repossession of the motor vehicles was not illegal because the applicant had indeed defaulted on the instalments, that the trial court erred by applying the Hire Purchase Act to this case where the hire purchase sum was 7,544,560 whilst the Act is limited to cases of up to Kshs 4,000,000, and that the award of special damages had no basis as they were neither pleaded nor proved. Accordingly, the High Court allowed the appeal but did not award costs. The applicant was aggrieved and has already filed a notice of appeal.
  6. In support of his application for stay of execution pending the hearing and determination of his intended appeal, the applicant contends, both in the affidavit in support of the motion and written submissions dated 24<sup>th</sup> August 2020, that his appeal is arguable because, in reaching its determination that the repossession of the motor vehicles was not illegal, the High Court considered matters it ought not to have considered and failed to consider relevant matters. He also faults the first appellate court for failing to find that the applicant had paid more than two-thirds of the hire purchase sum, for holding that the applicant had admitted default, for failure to apply section 20(1) of the [Consumer Protection Act](#), and for ignoring the applicant's legitimate expectation. As regards whether and how the appeal risked being rendered nugatory, the applicant simply submitted that he was asserting his constitutional and statutory right to property under Article 40 of [the Constitution](#) and Section 20 of the [Consumer Protection Act](#), which cannot be adequately compensated by damages.
  7. The respondent resisted the motion vide a replying affidavit sworn by its senior legal counsel, Mr. Stephen Atenya and written submissions dated 1<sup>st</sup> September 2020. It was the respondent's contention that the applicant's appeal is not arguable because the evidence on record shows that the applicant was in default and in arrears; that he had not paid two-thirds of the hire purchase price as alleged, that the award of special damages was not justified, and that the alleged violation of [the Constitution](#) and the [Consumer Protection Act](#) were an afterthought because the applicant was raising those issues for the first time in the second appeal. As regards whether the appeal would be rendered nugatory if stay of execution is not granted, the respondent contended that it was a reputable bank capable of compensating the applicant should the appeal succeed and that the motor vehicles were fast depreciating assets which were also accumulating storage charges.
  8. We have carefully considered the application. To be entitled the applicant to an order of stay of execution, it is common ground that he must satisfy us that the intended appeal is arguable, or is not frivolous, and that unless we grant an order of stay of execution, the appeals will be rendered nugatory. (See [Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others](#) [2013] eKLR). As has been stated time and again, an arguable appeal is not necessarily one that must ultimately succeed. In addition, an applicant does not have to establish a multiplicity of grounds to make out an arguable appeal. Even one bona fide ground deserving further consideration by the Court will suffice. Looking generally at the grounds of appeal, we are satisfied that the applicant's intended appeal is arguable.



9. As regards whether the appeal will be rendered nugatory or not, that depends on the peculiar circumstances of each case. The purpose of this consideration is to ensure that if the appeal succeeds, the applicant is not left only with a pyrrhic victory. In *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* (supra) the Court explained thus:

“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”. (Emphasis added).

10. The applicant has deposed that it is a reputable financial institution with a presence virtually throughout the country and is able and capable of easily competing the applicant the value of the motor vehicle. This averment is not contested or challenged by the applicant. Accordingly, we are not satisfied, in the circumstances of this application, that the applicant’s appeal will be rendered nugatory.

11. Having failed to satisfy the second consideration under rule 5(2) (b) of the Court of Appeal Rules, we find that this application has no merit. The same is hereby dismissed with costs to the respondent. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER, 2022**

**K. M’INOTI**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

