



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Ladopharma Company Limited & 2 others v National Bank of Kenya (Civil Appeal (Application) E530 of 2022) [2022] KECA 1076 (KLR) (7 October 2022) (Ruling)

Neutral citation: [2022] KECA 1076 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E530 OF 2022
W KARANJA, LK KIMARU & PM GACHOKA, JJA
OCTOBER 7, 2022**

BETWEEN

LADOPHARMA COMPANY LIMITED 1ST APPELLANT

LADISLAUS ADUDWO 2ND APPELLANT

SILFANUS ADUDWO MIYAGA 3RD APPELLANT

AND

NATIONAL BANK OF KENYA RESPONDENT

(Being an Application for injunction pending the hearing and determination of an intended Appeal from the Judgement and Decree of the High Court of Kenya at Nairobi (Fred A. Ochieng, J.) delivered on 23rd September 2019 in Milimani Commercial & Admiralty High Court Case No. 1031 of 2001)

RULING

1. The applicants come before us by way of a notice of motion expressed to be brought under rules 5(2) (b), 42, 43(i), 47 and 49 of the [Court of Appeal Rules, 2010](#) for the following orders:
 - a. (spent)
 - b. (spent)
 - c. That pending hearing and determination of the appeal or until further orders, conservatory orders and/or an interim injunction be and are hereby issued against the respondent restraining them from selling by public auction, alienating and/or disposing in any other manner dealing whatsoever with the applicants' properties known as Suna West/Wasweta-ii/1453-1497, Suna East/Wasweta-i/7193, Suna East/Wasweta-i/4251
 - d. That costs of this application be in the cause.



2. The case in the High Court arose from a bank/customer relationship. The applicant herein sought financial facilities on various dates in 1991. The good relationship only lasted for a few years and a dispute arose between the parties leading to the filing of the case at the High Court. After what is certainly a very long time, the matter was finally heard, and the learned judge delivered his judgement on September 23, 2021. For the purpose of this ruling the relevant paragraph of the said judgement is paragraph 94 and 107 of the judgement which states as follows;
 - i. Therefore, although Ladopharma wrote letters indicating that the contract with BDH had been cancelled and that the consignment had been rejected, I find that Ladopharma's conduct spoke a contrary language.
 - ii. Ladopharma received the consignment and retained the same.
 - iii. Once Ladopharma had made the decision to retain the goods, it had an obligation to pay for the same.
 - iv. And as the bank had placed itself in a situation in which the Central Bank of India could compel it to remit payment, I find that although the bank had flouted the [ICC-URC Rules](#), Ladopharma did not suffer losses attributable to the bank's actions.
 - v. As regards the securities, in the nature of charges registered against the various particularized earlier herein, the plaintiffs have failed to demonstrate any sound reason that would warrant the issuance of a permanent injunction to restrain the defendant from realizing the same.
 - vi. Provided that the account Ladopharma had legitimate debit balance, and if the account was secured by a charge registered over any title, the defendant would be entitled to exercise its statutory powers of sale, after giving the requisite notices.
 - vii. In order to arrive at the correct outstanding balances, the defendant is directed to provide a fresh statement of accounts, which is to be founded upon the remittance of Kshs 11,639,748.05(as opposed to Kshs 15,604,660.65)
 - viii. In the event, apart from an order of the recalculation of the sums payable by the plaintiffs (to the defendant) the suit is dismissed.
3. The applicants aggrieved by this judgement intend to challenge it in this court and have filed an appeal. In the meantime, they have brought this application seeking the orders which are set out herein. The application is premised on the now well known principles of rule 5(2)(b) of the [Court of Appeal Rules](#). It is a well trodden path and an applicant approaching this court under rules 5 (2) (b) has to satisfy the two principles namely;
 - i. That the applicant has an arguable appeal.
 - ii. That the appeal will be rendered nugatory if the injunction or stay of the proceedings are not granted.
4. There is a long line of authorities outlining these and they are well summarised. This court in the case of [Stanley Kangethe Kinyanjui v Tony Keter and others](#) Civil Appeal No 31 of 2012 summarised the two principles 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 consideration 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 bonafide arguable grounds of appeal is raised. *Damji Pragji Mandavia v Sara Lee Households & 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 and 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 the 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 with less, futile or invalid. It also means trifling. *Reliance Bank Limited v Norlake Investment Limited [2002] 1EA 227* at page 232.
 - X. Whether or not an appeal will be rendered nugatory depends on whether 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 evidence by the claim. *International Laboratory for Research on Animal Diseases v Kinyua, (1990) KLR 403.*”
5. Bearing those principles in mind, we now turn to this case and the submissions that were made by the parties’ advocates.
 6. Mr Gichuru Learned Counsel for the applicant filed written submissions dated March 14, 2022. On his part he highlighted the submissions and stated that;
 - i. The applicants have an arguable appeal as set out in the memorandum of appeal. It stated that the letters of offer dated April 12, 1999 were forged and therefore the statutory power of sale is based on forged documents thus tainted with fraud.
 - ii. That the respondent operated the accounts of the applicants unilaterally. This was in breach of the express and mandatory banking rules and regulations and specifically ICC-UBC522.



- iii. That there was no drawdown of the funds and therefore the charging of the properties was fraudulent.
7. On the nugatory aspect Mr Gichuru submitted as follows;
 - i. That 37 properties have been advertised for sale and they may be disposed before the hearing of the appeal.
 - ii. That the properties were in unique locations, and they were painstakingly acquired by the applicants over the years. He stated that if the sale takes place the damage will be irreparable and thus the intended appeal will be reduced to an academic exercise.
 8. On its part, the respondent through learned counsel Mr Chacha Odera filed written submissions dated July 19, 2022. They highlighted the submissions and submitted as follows;
 - i. That the applicants memorandum of appeal lacks merit and does not raise any arguable points; The bank was lawfully exercising its rights under the securities following the default by the applicants to service the financial facilities that were advanced.
 - ii. That the applicants acknowledged the debt and are currently not servicing the loan.
 - iii. That as ordered by the judge they had recalculated the interest and shared the recalculated balance with the applicants but no payment has been made.
 9. On whether the appeal would be rendered nugatory they submitted that;
 - i. Once the properties were offered as securities, they became commodities for sale upon default by the applicants of the payment and other obligations under the securities.
 - ii. The respondent is a bank and is capable of paying damages to the applicants in the event they are successful. They relied on the case of *Elizabeth Jerono v Consolidated Bank of Kenya Limited & another* [2019] eKLR which held as follows;

“The 1st respondent is a reputable bank it has not be suggested that should the intended sale found to be wanting, it may not be able to pay the applicant the damages they be awarded. We reiterated that once a property has been given as security for financial accommodation it becomes a commodity for sale and therefore sentimental attachment to the same becomes inconsequential and must be sold in accordance with the law.”
 10. We have carefully considered the application, the rival affidavits, the annexures, the written submissions and the authorities cited to us by learned counsel.
 11. As already stated, the law and the principles apply to an application under rule 5 (2) (b) is settled and crystal clear. At the risk of repetition, any applicant approaching this court must demonstrate that it has an arguable appeal. A single ground which is arguable and does not necessarily have to be successful at the conclusion of the appeal will suffice.
 12. Secondly, that the appeal will be rendered nugatory if the order for stay is not granted. This means that if what is sought to be stayed is allowed, it will be irreversible, and damages will not reasonably compensate the aggrieved party.
 13. Taking the above principles into account and having perused the memorandum of appeal we note that some of the issues raised in the grounds of appeal are:



- a. Whether the learned judge failed to appreciate and understand the nature and form of the financial facility extended to the applicants by the respondent;
 - b. Whether there were illegal debits and credits in the applicants' account by the Respondent (taking into account the learned judge found the respondent in breach of the mandatory banking regulations and specifically ICC-UBC522)
 - c. Whether the 2nd applicant's signature in the letter of offer dated April 12, 1999 was forged.
14. In our view it cannot be denied at this stage that the applicants have arguable points, whether those grounds will succeed is left to the bench hearing the substantive appeal.
15. On the nugatory aspect, it is beyond argument that the applicants offered the properties as securities and that the charges were registered against the properties. In their submissions, the applicants state that the properties are in unique locations. It is not in doubt that once a property is offered as a security its uniqueness or sentimental value is subordinated to the interest of the financier. The uniqueness or emotional attachment can only be redeemed or saved by payment of the financial obligations.

Further, the value of the said properties is known or can be established. Indeed, in their written submissions, the applicants state as follows: -

“..... As regards LR No 8534/115 (LR 5396), the market value of the property was settled at Kshs 100,000,000 (Kenya Shillings one hundred million) in 2017 and the same is unique property in the middle of Migori Town.”

16. This averment confirms that the value of the properties can be ascertained. It has not been alleged or demonstrated that the respondent, a well-known banking institution in Kenya is incapable of refunding or compensating the applicant in damages in the event the appeal succeeds. As correctly submitted by the respondent, this court in the case of Elizabeth Jerono v Consolidated Bank of Kenya Limited & another [2019] eKLR held as follows;

“The 1st respondent is a reputable bank it has not be suggested that should the intended sale found to be wanting, it may not be able to pay the applicant the damages they be awarded. We reiterated that once a property has been given as security for financial accommodation it becomes a commodity for sale and therefore sentimental attachment to the same becomes inconsequential and must be sold in accordance with the law.”

17. In view of the foregoing and noting that the applicant has failed to satisfy the two principles for granting an order for stay under rule 5 (2) (b) of the Rules, this application fails and is hereby dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 7th day of October, 2022.

W. KARANJA

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

L. GACHOKA, CIArb, FCIArb



.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

