



REPUBLIC OF KENYA



**KENYA LAW**  
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**Patel & another v Shah & 2 others (Civil Application E036 of 2022)  
[2022] KECA 1268 (KLR) (18 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1268 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E036 OF 2022  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
NOVEMBER 18, 2022**

**BETWEEN**

**MEHUL PATEL ..... 1<sup>ST</sup> APPLICANT**

**PRAKSHA PATEL ..... 2<sup>ND</sup> APPLICANT**

**AND**

**CHAMPAKLAL RAMJI RAISHI SHAH ..... 1<sup>ST</sup> RESPONDENT**

**I & M BANK KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**NDETO MUTUA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application under Rule 5(2)(b), 42 and 47 of the Court of Appeal  
Rules for stay of proceedings pending hearing and determination of the  
intended appeal against the ruling of the Mombasa High Court D. delivered by  
Chepkwony, J. on the 27th September 2021 in Commercial Case No. 25 of 2020)*

**RULING**

1. What is before us is the applicant's amended notice of motion application dated July 1, 2022 which has been brought pursuant to Rule 5 (2) (b), 42 (now 44) and 47 (now 49) of the [Court of Appeal Rules](#) (the Rules). Prayer for Orders 1 and 2 of the application is moot. Prayer for Order 3 seeks that pending the hearing and determination of the intended appeal the proceedings in Mombasa High Court Civil Case No 25 of 2015, Champaklal Ramji Raishi Shah v Mehul Patel & 2 others, be stayed.
2. The application is supported by grounds on the face of the Motion and the affidavit sworn by the 1<sup>st</sup> applicant dated June 10, 2022 and a supplementary affidavit sworn by the 1<sup>st</sup> applicant dated July 1, 2022, in response to the 1<sup>st</sup> respondent's replying affidavit dated June 28, 2022. There are 18 grounds on the face of the application, which are rehashed in the affidavit. The background to the application is that the 1<sup>st</sup> respondent guaranteed loan facilities advanced by the 2<sup>nd</sup> respondent to the applicants. The



1<sup>st</sup> respondent filed High Court Civil Case No. 25 of 2020 where he sued the applicants, in which suit the 1<sup>st</sup> respondent sought to compel the applicants to pay Kshs. 137,807,083.14. It is the applicants' position that the 1<sup>st</sup> respondent was equally liable to pay the amount as a guarantor, and that it was the 2<sup>nd</sup> respondent who had locus standi to sue the applicants for the alleged debt. The 1<sup>st</sup> applicant deposed that indeed while the 1<sup>st</sup> respondent's suit was still pending, the 2<sup>nd</sup> respondent filed its own suit against the applicants, being HCCC No. 37 of 2021 in which it sought to recover the loan arrears owed to the 2<sup>nd</sup> respondent, the sum amount claimed by the 1<sup>st</sup> respondent in his suit. The applicants contend that the two suits are proceeding before the High Court, with HCCC No 25 of 2020 at the Notice to Show Cause stage.

3. The applicants filed an application in HCCC No. 25 of 2020 dated May 27, 2022, seeking to move the High Court firstly, to stay the show cause proceedings against the applicants, secondly, to review or vary the ruling of PJ Otieno dated July 20, 2020 by setting aside the order directing the applicants to attend court and show cause why they cannot be compelled to provide security for the sum by the 1<sup>st</sup> respondent, and thirdly, prayer (c) of the applicants' plaint in the suit for an injunction to compel the applicants to liquidate and pay the 1<sup>st</sup> respondent the sum claimed of Kshs. 137,807,083.14 be struck out.
4. That application was dismissed in a ruling delivered by D. Chepwony, J. delivered on the September 27, 2021. The applicants then filed a Notice of Appeal in respect of the said ruling which was lodged with the Deputy Registrar on the October 22, 2021. It is the subject of this application.
5. The application came up for virtual hearing on the July 5, 2022.

At the hearing learned counsel Mr. Oluga for the applicants, learned counsel Mr. Sanjeev Khagram for the 1<sup>st</sup> respondent and learned counsel Ms. Wamuyu Mathenge for the 2<sup>nd</sup> respondent were present for their respective clients. Mr. Wameyo Onyango, the learned counsel for the 3<sup>rd</sup> respondent was absent despite the firm having been served with the hearing notice on the June 16, 2022. Mr. Oluga relied on his written submissions dated July 1, 2022 which he highlighted. Mr. Khagram for the 1<sup>st</sup> respondent relied on the replying affidavit dated June 29, 2022, the written submissions dated July 1, 2022 together with the 1<sup>st</sup> respondent's case and digest of authorities of even date. He too highlighted his written submissions. Ms. Mathenge for the 2<sup>nd</sup> respondent relied on the replying affidavit sworn by Andrew Muchina, the Senior Manager of the 2<sup>nd</sup> respondent, dated June 22, 2022. Counsel also relied on her written submissions which she highlighted, and the list of authorities dated June 29, 2022. The respondents opposed the application.

6. We have considered the application, the affidavits sworn by the parties on both sides and the submissions, both written and oral by counsel to the parties. In so far as applications filed under rule 5 (2) (b) of this *Court Rules* are concerned, there are twin principles which an applicant must satisfy in order to succeed in their application. The threshold requirements to be satisfied are amplified in the case of *Republic v Kenya Anticorruption Commission and 2 others* [2009] eKLR thus;

“The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory”.

7. In regard to the first principle, this court held as follows in *Somak Travels Ltd v Gladys Aganyo* [2016] eKLR



It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this court.

8. In regard to the arguability of the intended appeal Mr. Oluga for the applicants urged that what is being challenged is the existence of 2 different suits over the same claim and between similar parties. Counsel urged that the 2<sup>nd</sup> respondent advanced credit facility to the applicants guaranteed by the 1<sup>st</sup> respondent. Counsel referred to the replying affidavit of the 2<sup>nd</sup> respondent, where it annexed the Letter of Indemnity which shows that the 1<sup>st</sup> respondent committed himself to meet the liability of the applicants in the event they were unable to pay for the facility. Counsel urged that the applicants were unable to pay back the credit facility, that the 1<sup>st</sup> respondent, instead of meeting their obligation, filed the suit against the applicants. Counsel urged that part of the prayers sought includes a claim for Kshs. 134million and grant of security in the sum of Kshs. 200m. That the 2<sup>nd</sup> respondent sued to recover same loan arrears in the sum of Kshs. 158million. The applicants urge that they have an arguable appeal in that the 1<sup>st</sup> respondent had no locus standi to sue the applicants for the debt, as they were equally liable for the debt, and further that the said debt was not owed to them.
9. Mr. Khagram for the 1<sup>st</sup> respondent urged that the application is opposed. While quoting *Kenya Wildlife Service v James Mathenge* [2019] eKLR and *Halsbury's Laws of England* 4th Edition Vol 37 page 330 and 332 counsel urged that as stay of proceedings was a very serious, grave and fundamental interruption of the right a party has to conduct his litigation, a stay should not be imposed unless the proceedings beyond any reasonable doubt ought not to be allowed to continue; and thus it is a power that ought to be used sparingly. Counsel urged that the applicants had admitted the debt owed and promised to pay as per the letter annexed to the 1<sup>st</sup> respondent's affidavit, as an annexure at page 8, and that therefore the appeal was not arguable.
10. Mr. Khagram for the 1<sup>st</sup> respondent submitted that his client's case against the applicants was not just a mandatory injunction to compel the applicants to pay the amount they owe the 2<sup>nd</sup> respondent, but included a claim for British Pounds 200, 000, together with interest thereon lent to the applicants by way of loan, and the sum of Kshs. 10, 390, 118 which the 1<sup>st</sup> respondent had guaranteed the payment to Bank of India, and paid on borrowing made by the applicants. The 1<sup>st</sup> respondent's position is that the appeal is not arguable as the applicants have no defence to the 1<sup>st</sup> respondent's suit.
11. Ms. Mathenge for the 2<sup>nd</sup> respondent submitted that the application is opposed. While relying on the affidavit of Andrew Muchina, the Legal officer of the 2<sup>nd</sup> respondent counsel maintained that the appeal is frivolous as the HCCC No. 25 of 2020 filed by the 1<sup>st</sup> respondent arose from a guarantee and indemnity whereas the HCCC No. 37 of 2021 filed by the 2<sup>nd</sup> respondent arose from a charge over the suit property. It was therefore averred that the stay of proceedings is not warranted on the mere basis that the subject matter of both suits is a loan advanced to the applicants by the bank and guaranteed by the 2<sup>nd</sup> respondent. Counsel urged that the 2<sup>nd</sup> respondent will suffer prejudice because the debt owing by the applicants will remain unpaid and that the more time is spent, the more commercial interest continues to accrue.
12. The applicants main contention is that they are facing two cases arising from the same transaction whereby the 2<sup>nd</sup> respondent advanced them a credit facility that was guaranteed by the 1<sup>st</sup> respondent, and that each of these respondents have sued them. The 1<sup>st</sup> respondent contended that his suit concerns more that his indemnity to the 2<sup>nd</sup> respondent over the applicants debt to it; that it concerned other loans he lent to the applicants involving foreign banks. The 2<sup>nd</sup> respondent on the other hand maintains that it had a right to recover debt owed to it by the applicants, and that the applicants appeal is frivolous.



13. We are aware that at this stage, as held in *Stanley Kangethe Kinyanjui v Tony Keter & others* [2103] eKLR:
- xi. 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 that stage as doing so may embarrass the ultimate hearing of the main appeal.
14. Having considered the submissions by counsel on the first principle of arguability of the appeal, we are not, at this stage, persuaded that the applicants have an arguable appeal based on their argument that they were being forced to defend two cases instead of one arising from a similar claim, one of which is incompetent. There is clear divergence between the two cases, and prima facie they do appear to be two different causes of action.
15. Turning to the issue of whether the intended appeal will be rendered nugatory if the order sought is not granted and the appeal succeeds we are guided by the decision in *Stanley Kangethe Kinyanjui v Tonny Keter & others* [2013] eKLR where the court summarized what should guide the court as follows:
- xii. “The term ‘nugatory’ has to be given its full meaning. It does only mean worthless, futile or invalid. It also means trifling.
- xiii. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.
- ix. Where it is alleged by the applicant that the appeal will be rendered nugatory on account of the respondent’s impecuniosity, the onus shifts to the latter to rebut by evidence the claim.”
16. Mr. Oluga urged that if proceedings are not stayed as sought in the application, then the appeal will be rendered nugatory because the two different cases and the show cause hearing will proceed against the applicants to their detriment; as both suits are on course and proceeding that the applicants will suffer prejudice as they may be faced with demands to pay exponential amounts of money.
17. Mr. Khagram on his part urged that the appeal will not be rendered nugatory if stay was not granted as the Superior Court will continue with the suits on merit; and that in any event the debt is not denied. Ms. Mathenge on her part urged that the bank had a right to sue both the borrower and guarantor, and further that there was no law which barred a guarantor from filing suit against the borrower. Counsel urged that the appeal would not be rendered nugatory if stay was not granted but that if stay was ordered it is the respondents who stand to loss as the debt will remain outstanding.
18. On the nugatory aspect, what we need to ask ourselves is what is it that the applicants are trying to prevent, and whether if it happened, and the applicants appeal succeeds, it could be undone or alternatively if the damage can be compensated by an award of damages. Having considered the submissions of counsel we are satisfied that the applicants appeal will not be rendered nugatory if stay is not granted and their appeal succeeded. The reason being that the damage if any they may suffer in that eventuality is capable of being adequately compensated by an award of costs.
19. We find no merit in the applicants’ application. The result is that the application dated June 19, 2022 is declined and the same dismissed in its entirety with costs to the respondents.

Those are our orders.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF NOVEMBER ,2022.**

**S. GATEMBU KAIRU (FCI Arb)**



.....  
**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....  
**JUDGE OF APPEAL**

**J. LESIIT**

.....  
**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

