



KCB Bank Kenya Limited & another v Pearl Beach Hotel Limited (Civil Application E261 of 2022) [2022] KECA 1229 (KLR) (4 November 2022) (Reasons)

Neutral citation: [2022] KECA 1229 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E261 OF 2022
HM OKWENGU, HA OMONDI & JM MATIVO, JJA
NOVEMBER 4, 2022**

BETWEEN

KCB BANK KENYA LIMITED 1ST APPLICANT

KAMAL ANANTROY BHATT 2ND APPLICANT

AND

PEARL BEACH HOTEL LIMITED RESPONDENT

(Being an application for stay of the Ruling and stay of further proceedings pending the filing, hearing and determination of an intended appeal against the Ruling of the High Court of Kenya at Nairobi (Dorah Chepkwony, J) delivered on 12th July, 2022 in H.C.C.C. No. E201 of 2022)

REASONS

1. The applicants KCB Bank Limited (the bank) and Kamal Anantroy Bhatt (receiver) are aggrieved by a ruling delivered by the High Court at Nairobi (Chepkwony, J), on July 12, 2022 dismissing their notice of motion dated June 9, 2022, filed in HCCC No E201 of 2022 in which they had sought orders to set aside and/or vacate the ex-parte orders issued by the High Court on June 7, 2022. They have moved this court through a notice of motion dated July 22, 2022, brought under *inter alia* under rule 5(2)(b) of the [Court of Appeal Rules](#), for orders of stay of execution in regard to the ruling and orders of July 12, 2022 and stay of further proceedings in HCCC No E201 of 2022.
2. The dispute leading to the bank's motion stems from an agreement for financial facilities issued by the bank to Pearl Beach Hotel Limited (the respondent). The facilities were secured through debentures dated March 1, 2011, December 26, 2012 and April 30, 2014. On May 31, 2022, the bank appointed the receiver as Receiver Manager under the debentures, of all the respondent's assets, maintaining that the respondent was in default and there was an amount of Kshs 518,861,672,350.35 owing.



3. The respondent filed a suit in the High Court challenging the appointment of the Receiver Manager, and also filed contemporaneously, an interlocutory application dated June 6, 2022. On June 7, 2022 the learned judge heard the respondents *ex parte* and issued two sets of *ex parte* interim orders.

4. The first set of *ex parte* orders issued on June 7, 2022 at 1.17 pm were in the following terms:

“In view of the prayers being sought, the following do issue -

- a. That the application is certified as urgent.
- b. That pending the hearing and determination of this application, a temporary order of injunction be and is hereby issued restraining the 1st respondent from appointing a receiver or receiver managers, administrators or exercising its power under the debenture dated March 1, 2021, the supplemental debenture dated September 26, 2012 and the second supplemental debenture dated April 30, 2014.
- c. That pending the hearing and determination of this application, a temporary order of injunction holding in abeyance the actions and appointment of the 2nd respondent as receiver of the applicant pursuant to the debenture dated 1st March, 2011, the supplemental debenture dated September 26, 2012 and the second supplemental debenture dated April 30, 2014, be and is hereby issued.”

5. The second set of *ex parte* orders issued on the same day at 4.30. pm were varying the earlier order as follows:

“In view of the prayers being sought, the following do issue –

- a. That the application is certified as urgent.
- b. That pending the hearing and determination of this application, a temporary order of injunction be and is hereby issued restraining the 1st Respondent from appointing a receiver or receiver managers, administrators or exercising its power under the debenture dated March 1, 2021, the supplemental debenture dated September 26, 2012 and the second supplemental debenture dated April 30, 2014.
- c. That pending the hearing and determination of this application, a temporary order of injunction holding in abeyance the actions and appointment of the 2nd respondent as a receiver of the applicant pursuant to the debenture dated March 1, 2011, the supplemental debenture dated September 26, 2012 and the second supplemental debenture dated April 30, 2014, be and is hereby issued.
- d. That pending the hearing and determination of this application herein the existing "*status quo*" between the parties as at the date immediately prior to the appointment of the 2nd respondent be maintained in order to preserve the assets of the applicant/plaintiff until the application is heard and determined.
- e. That pending the hearing and determination of this application herein an order be and is hereby issued directed at the defendants/respondents



mandating them to allow unfettered access by the directors of the applicant to penthouses D1 and D2 in which they permanently reside.

- f. That a temporary injunction be and is hereby issued restraining the defendants/respondents by themselves, agents, servants, auctioneers, receiver agents, advocates or anybody acting on its behalf from trespassing onto, advertising for public auction, or offering for sale by private treaty or purporting to sell in any way divesting suit property known as subdivision No 6228/1/MN English Point - Mombasa or any part or building or development thereon or the assets of the applicant pending the hearing and determination of the application herein.
 - g. That a temporary injunction be and is hereby issued restraining the defendant by itself, agents, auctioneers, receiver agents, advocates or anybody acting on its behalf from trespassing onto, advertising for public auction, or offering for sale by public auction or purporting to sell in any way divesting suit property known as subdivision No 6228/1/MN English Point - Mombasa or any part thereof or building or development or improvement thereon or the assets of the Applicant pending the hearing and determination of the application herein.
 - h. Mention on June 13, 2022 for further directions."
6. The interim orders issued on June 7, 2022 were the subject of the applicants' motion dated June 9, 2022 in which the applicants sought the setting aside of the interim orders. Having heard the application inter partes the learned judge (Chepkwony, J) delivered a Ruling on July 12, 2022, in which she issued orders as follows:
- "a) That order No (2) of the *ex parte* orders issued on June 7, 2022 is hereby varied but only to the extent (*sic*) of staying and restraining the 2nd defendant from assuming his duties under the debenture dated March 1, 2021 and the supplementary debentures thereof, but maintain his appointment. The other orders to remain in subsistence pending the hearing and determination of the application dated June 6, 2022.
 - b. The consent order adopted on June 14, 2022 to remain in subsistence until the determination of the application dated June 6, 2022.
 - c. The 1st defendant be and is at liberty to file and serve a response to the application dated June 6, 2022 or adopt the supporting affidavit to the application dated June 9, 2022 or such response.
 - d. The parties herein be and are at liberty to file and serve each other with supplementary affidavits, if need be, to the application dated June 6, 2022 within five (4) (*sic*) days of the ruling.
 - e. The application dated June 6, 2022 to be canvassed by way of written submissions.
 - f. The applicant to file and serve written submissions upon the expiry of 5 days as directed in order (c) above.



- g. The respondents are equally granted 7 days corresponding leave to file and serve written submission upon being served with the applicant's submissions.
 - h. Mention on September 20, 2022 for parties to confirm compliance and take further direction or highlight their respective submissions.”
- 7. The bank is aggrieved by the ruling and orders of July 12, 2022, contending that the learned judge ought to have allowed their application and set aside the orders of 7th June as they were obtained through misrepresentation and non-disclosure of material facts. The bank and the receiver have filed a notice of appeal against the ruling together with the motion for stay of execution and stay of proceeding under rule 5(2)(b) as afore stated.
- 8. Osca Ombuna, the Head of the Bank's Head of Credit Support Unit has sworn an affidavit in support of the motion. The applicants have also filed written submissions. In brief in the applicants relying on the background that we have already highlighted, urge that they have an arguable appeal with good chances of success.
- 9. The applicants have identified 6 grounds upon which they intend to challenge the ruling of the High Court. These include the learned judge: applying wrong principles due to non-disclosure and misrepresentation of material facts; declining to consider any of the grounds that the applicants had advanced in support of the applications to set aside *ex parte* orders; failing to make a determination whether the *ex parte* orders obtained by the respondent were procured through misrepresentation and non-disclosure of material facts; purporting to undertake a merit review of the issues in dispute between the parties, when this was not required; failing to appreciate that the *ex parte* orders were irregular, illegal and fraudulent as they purported to prevent actions that had already taken place; and failing to appreciate that by conceding that the receiver's appointment ought to remain in place and varying her orders to this effect, there was no basis for her to restrain the receiver from carrying out his receivership functions.
- 10. As regards the appeal being rendered nugatory, the applicants argued that the value of the security held by the bank is being diminished by factors such as: the respondent's failure to pay the principal amounts due to the bank, while interest then standing at an astronomical amount of Kshs 5.2 billion continue to accrue; extortionist legal charges from the firm representing the respondent in which a director in the respondent's firm has a direct interest; conflict between the directors of the respondent; and the respondent's possession of two pent houses within the secured premises, thereby denying the bank income.
- 11. The applicants argue that the respondent is intent on abusing and circumventing the consent orders which have been confirmed in the varied orders, by using them as a means to siphon and divert funds from the respondent's bank accounts for the primary benefit of a director of the respondent who is presently in conflict with other shareholders, rather than utilize the funds for the agreed purpose of funding the operations and normal course of business of the respondent.
- 12. The bank further urges that the balance of convenience falls in its favour because the debt is growing and the security is being depleted, and if the appeal is successful, the respondent will not be able to compensate the bank for the shortfall.
- 13. In response to the applicants' motion the respondent relies on a replying affidavit sworn by Nazir Jinnah, a director of the respondent, and written submissions which have been duly filed.
- 14. The respondent opposed the motion on several grounds including: the orders made by the learned judge on June 12, 2022 being proper as the judge balanced the interest of the parties by merging the



- orders issued on June 7, 2022, with the terms of a consent order adopted by the court on June 14, 2022, pending the hearing of the application dated June 6, 2022; the applicants not having satisfied the threshold for setting aside the consent order; the orders issued by the learned judge being properly designed to protect the interest of both parties; the applicants have acted in bad faith by illegally denying the respondent the equitable right of redemption and freezing the respondent's accounts contrary to court orders; and the applicants seeking an equitable relief but coming to the court with unclean hands.
15. The respondent argued that the learned judge had unfettered discretion and dealt satisfactorily with the applicant's motion; that the bank has security in the form of a debenture and has control of the respondent's bank account and has oversight over all the respondent's transactions; that the applicant has misconstrued and misrepresented the terms of the orders issued by the High Court; that the parties entered into the terms of the consent order by mutual consent; that the applicants' averments are intended to mislead the court; that the applicants have not established that the execution of the orders will irreparably affect the bank or negate the very core of the appeal as the bank has security in the form of a debenture on the respondent's.
 16. In its written submissions, the respondent contended that the appeal is not arguable as the learned judge exercised her inherent powers and her discretion judiciously and correctly; and that if the court issues the orders sought, the substratum of the substantive suit that is still pending in the High Court, will be prematurely determined, and this will deny the parties an opportunity of a fair hearing.
 17. On the nugatory aspect, the respondent argued that the applicants' motion does not meet the threshold required under rule 5(2)(b) of the *Court Rules*, as the applicants have not demonstrated that the appeal will be rendered nugatory if the respondent is permitted to access the limited funds held by the Bank, for purposes of financing its core business. In addition, the value of the respondent is approximately 12 billion against a disputed loan amount of 5.6 billion and the bank has not produced any valuation report or document to substantiate their allegation that the debenture and the personal guarantee if realized, will not be sufficient to settle the loan facilities. Finally, the respondent urged that the balance of convenience does not tilt in the applicants' favour.
 18. We have carefully considered the motion before us, the affidavit in support and in reply, the contending submissions, and the authorities cited. The motion being one under rule 5(2)(b) of the *Court Rules*, the issue is whether the applicant has met the threshold provided under that rule. Rule 5(2)(b) states:
 - “(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—
 - (a)
 - (b) In any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”
 19. The rule gives the court discretion to grant orders of stay of execution, injunction or further proceedings. The threshold to be met before an order can be granted under this rule, has been laid down in several decisions of this court the sum total of which is, that an applicant must establish the twin principle of arguability and the nugatory aspect, by demonstrating that he has an arguable appeal, and that if the orders sought are not granted, the appeal/intended appeal will be rendered worthless. (see *Ruben & 9 others v Nderito & another* [1989] KLR 459; *Kenya Tea Growers Association & another v Kenya Plantation and Agricultural Workers Union* [2012] eKLR; and *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR).



20. It is not disputed that the bank granted the respondent financial facilities which were secured by debentures. The dispute arose from the appointment of the receiver ostensibly under the terms of the debenture. This is what gave rise to the respondent's application in the High Court, pursuant to which he obtained the *ex parte* orders dated June 7, 2022, ostensibly restraining the bank from appointing a receiver manager and restoring the status quo prior to the appointment of the receiver.
21. The bank being aggrieved by the interim order of June 7, 2022, sought to have the same set aside maintaining that the orders were obtained irregularly through false and misleading information; that the debentures were not registered and that the bank's right to appoint a Receiver Manager had not crystallized. It was also the bank's contention that the conduct of the respondent was demonstrable of bad faith, and unclean hands, as despite the appointment of the Receiver Manager, the respondent has blocked the bank from accessing certain funds held by it at Diamond Trust Bank. Thus the applicants urge that there is sufficient reason for the orders of 7th June to be stayed.
22. In her ruling the learned judge found that there was conflicting interests between the parties, and that it was the duty of the court to ensure a balance is reached and justice obtained for both parties. In arriving at that balance the learned judge found that there was a dispute concerning the appointment of the Receiver Manager, the validity and terms of the debenture, and amounts owed thereunder. The learned judge found no mistake or error in the orders issued on June 7, 2022, and ruled that the applicant will not suffer unnecessary hardship or prejudice if the orders of June 7, 2022 are not set aside, and that it was in the interest of justice to merge the orders of June 7, 2022, with the terms of the consent order adopted on June 14, 2022. It was on that basis that she dismissed the applicant's motion.
23. We have deliberately set out the background to the applicants' motion as it brings to perspective several issues that call for further interrogation. For instance, whether the learned judge properly exercised her discretion in issuing the impugned orders, whether the *ex parte* orders issued by the learned judge on June 7, 2022, and varied on July 12, 2022, were obtained through misrepresentation and material non-disclosure, and whether the learned judge properly exercised her discretion in refusing to set aside the orders of June 7, 2022 are issues that will be pertinent in the appeal lodged by the applicant. Needless to state that the applicant has an arguable appeal and has satisfied the first limb of arguability.
24. As regards the nugatory aspect, the financial facility granted by the bank involved a substantial amount of money and interest continue to accrue at a substantial rate. The respondent maintains that it is worth 12 billion but this is a bare assertion that has not been substantiated as no documents have been exhibited in support of that contention. We have weighed the competing rights of the parties, and do find that if the orders of stay are not issued, the bank is likely to suffer monumental losses that may adversely affect its business. On the other hand, the respondent, will not suffer prejudice be of that magnitude.
25. It is for the above reasons that on October 4, 2022, we found that the applicants had satisfied the requirement of rule 5(2)(b) of the *Court of Appeal Rules*, and issued the orders of stay of execution and orders of stay of proceedings as prayed in the applicants' motion. We affirm these orders. Costs shall be in the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH OF NOVEMBER, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL



H. A. OMONDI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

