



REPUBLIC OF KENYA



KENYA LAW
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**Family Bank Limited v Step-Up Holdings (K) Ltd (Civil Application
E012 of 2022) [2022] KECA 1430 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1430 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E012 OF 2022
F SICHALE, FA OCHIENG & LA ACHODE, JJA
DECEMBER 15, 2022**

BETWEEN

FAMILY BANK LIMITED APPLICANT

AND

STEP-UP HOLDINGS (K) LTD RESPONDENT

*(An Application for Stay of Proceedings in Nakuru Civil
Suit No. 306 of 2011 IN Nakuru HCCC No. 306 of 2011)*

RULING

1. Family Bank Limited (the applicant herein), has vide a motion dated February 21, 2022, brought pursuant to the provisions of Rule 5 (2) of the *Court of Appeal Rules* and all other enabling provisions of the Law, sought the following orders:
 1. Spent
 2. That the proceedings in Nakuru Civil Suit No 306 of 2011 be stayed pending the hearing and determination of the appeal.
 3. That this Honourable Court be pleased to issue any other orders and or directions as it may deem fit for the expeditious disposal of this application.
 4. That costs of this application be provided for.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Jackie Oyuyo Githinji an officer working with the applicant who deposed *inter alia* that the applicant was sued by the respondent arising from a purported claim of breach of fiduciary relationship; that on May 25, 2019, the respondent filed an application seeking to amend its plaint which the applicant objected to on the grounds, inter alia, that it sought to introduce new causes action; that on November



18, 2021, the High Court (Chemitei J), allowed the said application and that being aggrieved with the aforesaid ruling, the applicant instructed its advocates to file an appeal challenging the said ruling. She further deposed that if the proceedings in Nakuru HCCC No 306 of 2011, were not stayed or halted, the applicant would suffer irreparable loss as it will be subjected to a prejudicial process marred with blatant irregularities.

3. When the matter came up before us for plenary hearing on September 28, 2022, Mr. Kahiga Waitindi, learned counsel appeared for the applicant. There was no appearance for the respondent in spite of service of a hearing notice upon the parties on September 19, 2022 at 5:07 pm.
4. It was submitted for the applicant that if the hearing in the High Court was allowed to proceed, then it would mean that the appeal herein will have been rendered nugatory and that the applicant's right under Section 4 of the *Limitation of Actions Act* which it is seeking to preserve under the filed appeal shall be trampled upon and remain a mirage and a façade. It was against this backdrop that the applicant seeks for an order of stay so that the substratum of the appeal is preserved.
5. As we had alluded to earlier, the respondent did not file any response despite having been served with the hearing notice on September 19, 2022.
6. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicant's submissions and the law.
7. The applicant's motion is brought under Rule (5)(2) of this Court's *Rules*. Rule 5(2) of the *Rules* guides the Court in applications of this nature and it provides:
 - 5(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 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just."
8. The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) to grant an order of stay of execution, injunctions or stay of further proceedings are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle.
9. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles were summarized by this Court (differently constituted), in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & others* [2013] eKLR 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.
 - v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.



- vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
 - vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
 - viii. An applicant must satisfy the Court on both the twin principles.
 - ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
 - x. 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.
 - 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.
 - xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - xiii. Whether or not an appeal will be rendered nugatory depends on whether or not 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.”
10. In our view, it has not been demonstrated to the satisfaction of this Court that the intended appeal would be rendered nugatory if the orders being sought are not issued for two reasons; firstly, the applicant will have an opportunity to amend its pleadings in response to any issue that the respondent may raise in its amended plaint. Secondly and as regards the issue of limitation, the applicant can raise this issue at any stage of the trial and there is nothing that is preventing the applicant from raising the issue in the High Court. Ultimately therefore, we are not satisfied that the applicant has demonstrated that the appeal will be rendered nugatory if an order of stay of proceedings is not granted.
 11. Additionally, stay of proceedings is a drastic judicial action that should be sparingly and rarely invoked as it may impede the right to access to justice and should only be issued in the clearest of cases and from the circumstances of this case we are not satisfied that the applicant’s case is one such case.
 12. In view of the above, and the applicant having failed to establish that the appeal will be rendered nugatory absent stay, we do not consider it necessary to delve into the issue as to whether the applicant has established the arguability of the appeal as it is a prerequisite under Rule 5(2)(b) to establish both limbs.
 13. The upshot of the foregoing is that the applicant’s motion dated February 21, 2022 is without merit and the same is hereby dismissed.
 14. The costs of this motion shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2022.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

