



**Intex Construction Limited v African Banking Corporation Limited & another (Civil Application E266 of 2020) [2021] KECA 13 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 13 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E266 OF 2020  
W KARANJA, HM OKWENGU & MA WARSAME, JJA  
SEPTEMBER 23, 2021**

**BETWEEN**

**INTEX CONSTRUCTION LIMITED ..... APPLICANT**

**AND**

**AFRICAN BANKING CORPORATION LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KENYA RURAL ROADS AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of execution pending the hearing and determination of an intended appeal against the Ruling and Order of the High Court of Kenya at Nairobi (Maureen Odero, J) delivered on July, 2020 in Commercial and Tax Division HCCC No. 282 of 2017)*

**RULING**

1. By a Notice of Motion dated 1st September 2020 brought under section 3 of the [Appellate Jurisdiction Act](#), Cap 9 of the Laws of Kenya, Rule 2, Rule 5(2) (b) and Rule 42 of the Rules of this Court applicant herein is seeking orders of stay of execution against the ruling issued by the High Court (Maureen Odero, J.) in HCCC No. 282 of 2018. In the alternative the applicant prays that orders do issue staying enforcement of all orders ensuing from the impugned ruling dated 28th July 2020, pending the hearing and determination of the applicant's intended appeal.
2. The impugned ruling arises out of a suit filed by the 1st respondent for a refund of receivables in default due from the applicant and the 2nd respondent. The facts briefly are that between the year 2014 to 2016, the applicant sought and obtained various banking facilities from the 1st respondent amounting to KShs.753,419,937.00 on various headings.
3. In consideration, the applicant undertook to provide the 1st respondent with securities including an assignment of contract of receivables to finance its road construction projects. The applicant thereafter defaulted in servicing the facilities. It was then that the applicant requested the 1st respondent to



- partially take over the facilities by Kenya Commercial Bank Limited and that the balance due to be capitalized and converted into long terms loans and overdrafts to the tune of KShs.700 million.
4. On the strength of the applicant's proposals, the 1st respondent gave a letter of offer dated 25th December, 2015 which was subsequently amended on 25th July, 2016 and 6th July, 2016. The said agreements subsumed all prior agreements and liabilities between the parties herein. As a result, Kenya Commercial Bank took over KShs.400,000.00 of the outstanding dues leaving behind a balance of KShs.330,000,000.00 and an overdraft facility of KShs.30,000,000.00 due to the 1st respondent.
  5. The applicant and the 1st respondent executed an Assignment of Contract Receivables on 9th June 2016 with regard to the 2nd respondent's road construction projects and where the parties agreed to have all the proceeds assigned to the 1st respondent and requisite payments made in the applicant's account held with the 1st respondent bank. The applicant contravened the said contract by diverting funds and securities to other banks which necessitated a suit in the High Court. The 1st respondent was granted orders on 12th July 2017 restraining the applicant from making payments to banks other than the 1st respondent. Pursuant to further orders issued on 8th November 2017, the applicant and the 1st respondent opened an escrow account where the 2nd respondent deposited receivables worth KShs.233,200,623.40. By a consent, the parties thereafter agreed to have Ernst & Young to conduct audits to determine the amount along with interest owed to the applicant which sum was tallied to the tune of KShs.483,174,509.00.
  6. Again, the applicant continued to default in payments resulting to the filing of the suit followed by three applications filed by the 1st respondent. The said applications were consolidated and after consideration, the trial court held that the amount of the escrow account being KShs.233,200,623.40 at Stanbic Bank released to the applicant to settle partially the outstanding amount. The court further directed that any further payments made by the 2nd respondent to be released to the 1st respondent.
  7. Dissatisfied with the ruling of the trial court, the applicant filed a Notice of Appeal to this Court along with the instant application hinged on the grounds which faulted the trial court for; failing to make a finding on a multiplicity of contradicting interlocutory applications, granting orders that were neither pleaded or sought hence denying the applicant the right to be heard on the principal amount due and the lawfulness of the interest. In addition, the trial court was faulted for permitting the release of funds to the escrow account at an interlocutory stage with the effect of crippling the applicant's current and future financial and contractual obligations.
  8. The submissions in support of the application are that the applicant's draft memorandum of appeal demonstrates that the intended appeal is arguable with a chance of success from the foregoing arguments raised and will be rendered nugatory if the stay orders sought are not granted.
  9. In urging the dismissal of the application, the 1st respondent maintained the position held in *Intex Construction Limited v Credit Bank Limited* that a dispute on interest or amounts due falls outside the purview of grounds for granting an injunction. It was further submitted that the 1st respondent's business continues to suffer and to lose significantly due to the applicant's default in payment. On the argument on balance of convenience between the parties, the 1st respondent stated that it is a well-established bank capable of refunding any sums that may, in the unlikely event, be found due to the applicant. The ongoing default by the applicant on the other hand, with an admission of near insolvency, exposes the 1st respondent to breach of regulatory requirements regarding nonperforming loan and other losses.
  10. We have carefully considered the application, the affidavit in support, and the law. As has been stated by this Court, we must be satisfied of the guiding principles required for granting orders under Rule 5(2) (b) of the Rules of this Court. Firstly, as restated by the Court in *Stanley Kengethe Kinyanjui vs.*



*Tony Ketter & 5 Others*, the requirement for grant of relief under Rule 5(2) (b) of the Court of Appeal Rules is demonstration, that the intended appeal is arguable and that it will be rendered nugatory if the order of stay sought is not granted. In law 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. (See *Joseph Gitabi Gachau & Another vs. Pioneer Holdings (A) Ltd & 2 Others*, Civil Application No. 124 of 2008. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. (See *Winnie Mukolwe vs. Lucy Wanjiku Muchai*).

11. We are satisfied that the applicant has raised arguable points namely; on the amount payable to settle the debt, granting the orders that were not pleaded and determining the applicant's liability to the 1st respondent at an interlocutory stage among others. On determining whether the intended appeal will be rendered nugatory, we are bound to consider the rival positions taken by the parties herein. The factors which may render an appeal nugatory are to be considered within the circumstances of each particular case and in so doing we are bound to consider the conflicting claims of both sides. (See *Alfred Mincha Ndubi vs. Standard Limited* .) The term nugatory has been given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. In considering whether an appeal would be rendered nugatory in the event that orders for stay or injunctive orders are denied, the Court in *Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd* highlighted instances involving huge sums of money where the applicant was required to pay under a decree and where the anticipated damage entailed in the immediate payment of the money might be so severe that the applicant might never recover from even if the money were to be refunded to it in the event of its appeal succeeding.
12. In the words of Githinji , JA (as he was then),when addressing the issue of decrees involving huge sums of money whose payment would render an intended appeal nugatory, this Court in *Mbaraki Bulk Terminal Limited v. East African Bulking Services Limited & 2 others* noted thus;

“The circumstances which may render an appeal nugatory, if successful, varies from case to case. In money decrees, this Court has recognized that requiring an applicant to pay a huge sum of money before the appeal is heard may render an appeal nugatory. In *The Reliance Bank Ltd vs. Norlake Investment Ltd*. [2002] 1 EA 218, this Court said at page 231 paragraph e, f:

“..... the issue of the “balance of convenience” or “the claims of both sides” is one of the elements to be considered when dealing with the question of whether the success of an appeal would be rendered nugatory if stay of execution or an injunction is not granted. We do not understand the position to be that in a decree for the payment, of money, for example, the only thing that would render the success of an appeal nugatory is the inability of the other side to refund the decretal sum if it has been paid over to it. In the *Oraro and Rachier* case [1999] LLR 1118) the court took into account the fact that if the law firm was ordered forthwith to deposit the decretal sum, the firm itself might well be forced to go out of business and such an eventuality may itself be sufficient to render the success of their appeal nugatory”.

And in *Kenya Breweries Limited vs. Kiambu General Transport Agency Limited* – , (unreported) this Court said in part:

“The sum involved amounting to Kshs.241,586,711/58 is certainly very large and there is an uneasiness pervading a refusal to grant a stay of execution where such large amount of money is involved owing to the damage such a refusal may occasion to the applicant. Indeed the futility of success of the applicant's appeal to this Court may result from such a refusal for



the damage to the applicant may be irremediable even if the decretal sum was subsequently repaid to it if its appeal to this Court was to be successful”.

13. That said, there is no dispute that the 1st respondent advanced huge sums to the applicant. However, the amount payable to the 1st respondent exists in an escrow account to settle the colossal debt of KShs.330,000,000.00 in part. We think that the payment from the escrow account as was directed by the trial court in the impugned ruling would not be trifling in any way to the applicant’s business nor to the appeal since the amount claimed stands independently in the escrow account at KShs.233,200,623.40. As a result, we are convinced that the failure to grant the orders sought would not render the intended appeal nugatory as we are satisfied that 1st respondent is capable of compensating the applicant, bearing in mind that the matter is pending before the trial court for determination.
14. Consequently we find that the applicant has not laid any basis upon which the orders of interlocutory injunction can be anchored hence it is accordingly dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**H. OKWENGU**

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**JUDGE OF APPEAL**

**M. WARSAME**

.....

**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**

