



Zeitun Holdings Ltd & 4 others v African Banking Corporation & another (Civil Application E116 of 2021) [2021] KECA 68 (KLR) (8 October 2021) (Ruling)

Neutral citation: [2021] KECA 68 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E116 OF 2021
AK MURGOR, S OLE KANTAI & JW LESSIT, JJA
OCTOBER 8, 2021**

BETWEEN

**ZEITUN HOLDINGS LTD 1ST APPLICANT
ABDIRAZAK MAALIM AHMED 2ND APPLICANT
JABRI ABDULNASSIR SEIF 3RD APPLICANT
SONIA WANJIRU 4TH APPLICANT
ANITA NYAMBURA 5TH APPLICANT**

AND

**AFRICAN BANKING CORPORATION 1ST RESPONDENT
CHIEF LANDS REGISTRAR 2ND RESPONDENT**

(Being an application for stay of execution pending the hearing and determination of an intended appeal against the judgment of the High Court of Kenya (Majanja, J.) dated 9th April 2021 in High Court Commercial Case No. 312 of 2018)

RULING

- 1 The applicant by Notice of Motion dated 15th April 2021 brought under Rule 5 (2) (b) of this Court's rules seeks a stay of execution of the judgment of Majanja, J in High Court Commercial Case No. 312 of 2018 pending the hearing and determination of the applicant's intended appeal. The applicant also applies to be at liberty to apply for further orders/or directions as this court may deem just and fit.
- 2 The application is supported by grounds on the face of the application and the supporting affidavit sworn by the 2nd applicant. The application is opposed through the replying affidavit of the 1st respondent. It was canvassed through rival pleadings and written submissions by the applicants and the 1st respondent.



- 3 In summary the 1st applicant requested for and obtained various facilities for its business and commercial purposes from the 1st respondent, through various letters of offer and performance bonds. The securities were secured by legal charges registered over two properties, and personal deeds of guarantee and indemnity from the 2nd to 5th applicants. The applicants defaulted in payments, but the attempt by the 1st respondent to exercise its statutory power of sale failed. It therefore filed suit against the applicants and obtained judgment in its favour against them.
- 4 The applicants' averments and submissions are that they were aggrieved by the judgment and orders of the High Court dated 9th April 2021 in which the court entered judgment for the 1st respondent in the sum of Kshs. 227, 626, 588.49 together with interest thereon. The applicants' main argument is that the judge failed to consider Section 44 and 44A of the Banking Act and its import to the case as well as the weight of the evidence adduced in the case.
- 5 The applicants' submitted that the judge failed to accept that the interest charged on the loan was exorbitant contrary to the in duplum rule. The applicants contend that the appeal will be rendered nugatory if the stay sought is not granted. The applicants' submitted that what was at stake was a significant sum of money, being Kshs. 227, 626, 588.49, and that if no stay is granted the applicants will be exposed to incalculable suffering between the present time and the time the appeal will be heard and determined. They urged the court to grant the orders sought in order to preserve the subject matter and to do justice to the parties.
- 6 In regard to whether the applicants are deserving of the orders sought, it was the submission of the applicants that of paramount importance and consideration in an application under Rule 5 (2) (b) is the preservation of the subject matter of an appeal, and that failure to do so would greatly compromise the effectiveness of the appellate court in exercising its main judicial function of hearing and determining the appeal. They urged further that the court's jurisdiction to grant interim orders in order to prevent injustice to a party is entrenched in its operations applied over a long period of time and is of fundamental importance.
- 7 The 1st respondent opposed the application urging that the applicants had no arguable appeal. The 1st respondent submitted that the issue raised in the draft memorandum of appeal whether the judge appreciated the doctrine of in duplum rule was not raised in the pleadings before the trial court, and that it was being raised at the appellate stage.
- 8 In regard to whether the appeal will be rendered nugatory if no stay is granted, the 1st respondent relied on *Stanley Kinyanjui Vs Tony Keter & others* [2013] eKLR and urged that the applicants had not demonstrated whether what was sought to be stayed was reversible, or if not reversible whether damages would reasonably compensate the party aggrieved.
- 9 The 1st respondent urged that the suffering the applicants alleged they would be subjected to if the stay sought is not granted was not demonstrated. It was argued that what the applicants needed to show was that the 1st respondent would be unable to refund the decretal amount in the event the appeal is successful. It contended that it was capable of refunding the sum.
- 10 The 1st respondent urged that the factors which would render an appeal nugatory should be considered within the circumstances of each particular case and in so doing, the court is bound to consider the conflicting claims of both sides. For that proposition it relied on *Captain Motorcycles Manufacturing Company LTD Vs Jona Muthoni Mberere & another* [2020] eKLR.



- 11 The 1st respondent urged this court to consider that the suffering that would continue to be visited on it is enormous, which is support of that proposition cited in the case of *Reliance Bank Ltd Vs Norlake Investments Ltd* [2002]1 EA 227 where it was held that
- ‘to refuse to grant the order of stay to the applicants would be out of proportion to any suffering the respondent might undergo while waiting for the applicant’s appeal to be heard and determined.’
- 12 We have carefully considered the application before us and the rival pleadings and submissions by both sides to this application. Being an application under Rule 5 (2) (b) of this Court’s rules, the applicants have to demonstrate two conjunctive grounds, one that their appeal or intended appeal is arguable, and two that if the stay orders sought are not granted and the appeal succeeds, it will be rendered nugatory. See *Chris Mungga M. Bichage Vs Richard Nyagaka Tongi & 2 others* [2013] eKLR.
- 13 In support of the agreeability of the appeal, the applicants rely on their draft memorandum of appeal annexed to the supporting affidavit and the supporting affidavit. The main issue raised is the in duplum rule which it is claimed was not taken into consideration, or applied by the superior court, neither was the import of sections 44 and 44A of the *Banking Act* appreciated. The 1st respondent on its part urged that the applicants had no arguable appeal, and that the central issue raised in the draft memorandum of appeal and the grounds in support of the application is the doctrine of in duplum rule, which they urge is idle as the same was never pleaded nor raised before the superior court.
- 14 What the applicants needed to demonstrate is that it has an arguable appeal. We have considered the applicants’ grounds and find that what they contend is arguable is not stated anywhere in the application and supporting affidavit nor in the annexed draft memorandum of appeal. Without having specified any grounds, we are not able to ascertain one way or the other whether the appeal is arguable.
- 15 At paragraphs 11 and 12 of the supporting affidavit the applicants aver that the execution would irreparably devastate them, would grievously wound them and that it will be against public interest and the interest of justice to deny the orders sought. Apart from using those terms, none of them are substantiated.
- 16 In regard to the issue whether the appeal will be rendered nugatory, the applicants have relied on the fact that what is at stake in the matter was a significant sum of money, and that if stay is not granted and the 1st respondent executes the orders against them, they stand to suffer incalculable loss. The 1st respondent opposes that argument and submits that there has been no demonstration by the applicants of the way in which they will suffer. It urged that it nevertheless has the capacity to refund any money paid if the appeal were to succeed.
- 17 We have given consideration of the pleadings and submissions on record. We find no demonstration of the suffering the applicants stand to undergo if the order sought is not granted. We agree that the sum involved is colossal and the applicants may argue that that may lead to the appeal being rendered nugatory in case the appeal succeeds. However, that ground alone without any demonstration of an arguable appeal cannot on its own justify the granting of the orders sought. On the other hand, the 1st respondent’s contention that it has capacity to refund any money paid out if the appeal succeeds has not been controverted., Being a banking institution of repute, we are satisfied that the 1st respondent has the capacity to refund any money paid. We find that in the circumstances the applicants have not been able to prove this second ground either.
- 18 Having come to the conclusion we have of this application, we find that the same is for disallowing, which we hereby do, with costs to the 1st respondent.



Dated and Delivered at Nairobi this 8th Day of October, 2021

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

JESSIE LESIIT

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

