



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, MUSINGA & GATEMBU, J.J.A.)**

**CIVIL APPLICATION NO. E341 OF 2020**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED.....APPELLANT**

**AND**

**ECOBANK KENYA LIMITED.....1<sup>ST</sup> RESPONDENT**

**PESA PRINT LIMITED.....2<sup>ND</sup> RESPONDENT**

(Being an application for stay of execution of the Judgment and Decree of the Commercial and Admiralty Division (G.L. Nzioka, J.) dated 2nd September 2020 *in Civil Suit No. E335 of 2019.*)

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**RULING OF THE COURT**

1. The applicant's Notice of Motion dated 24th September 2020 seeks stay of execution of the judgment delivered on 2nd September 2020 by **G. Nzioka, J.** in **Nairobi Commercial and Admiralty Division, High Court E335 of 2019** and the ensuing decree pending hearing and determination of an intended appeal.
2. In the impugned judgment, the learned judge allowed the 1st respondent's claim for **USD3,681,924.64** plus costs, based on a Deed of Assignment of Receivables between the applicant and the 1st respondent. The applicant, being aggrieved by that decision, has filed a notice of appeal, and applied for typed proceedings.
3. The applicant's affidavit in support of the application reveals that on 6th December 2017 the 2nd respondent procured a credit facility from the 1st respondent in the sum of **USD 3,500,000** to provide working capital to the 2nd respondent against invoice No.00229 to the applicant under a contract between the applicant and the National Transport and Safety Authority (**NTSA**) to supply, install and maintain 202,100 second hand generation smart card driving licences. That by a Deed of Assignment of Receivables between the 1st and 2nd respondent, the 2nd respondent assigned to the 1st respondent the Assigned Assets, which include all monies that were to become due and payable to the Assignor out of the Assigned Agreement; that there was a delay in the applicant receiving payment from NTSA which led to a delay in paying the receivables to the 1st respondent; that as a result the 1st respondent filed suit against the applicant and obtained the impugned judgment.
4. The applicant contends that its intended appeal is arguable. It faults the learned judge for: misconstruing the import and meaning of "Receivables"; for failing to hold that the applicant's obligation to pay the receivables only arose once the applicant received the receivables under Invoice No.00229, and therefore since NTSA had not yet made the anticipated payment, the applicant's obligation to pay the 1st respondent under the Deed of Assignment of Receivables had not crystallized.
5. Lastly, the applicant argues that unless this Court grants the orders sought, the intended appeal will be rendered nugatory because it will be constrained to make a double payment to the 1st respondent in excess of USD 2,000,000 on account of monies that the 1st respondent has either expressly admitted to have received from the applicant or which the Court has held is not payable. That the payment of the said monies will cause the applicant to take the position of primary obligor for the credit facility; that the decretal sum is a substantial amount of money and if the applicant is compelled to pay at this stage, its services will be severely hampered.
6. In opposition to the said application, the 1st respondent argues that the intended appeal is not arguable, is frivolous and an abuse of this Court's process because the learned judge correctly found that the applicant had failed, neglected and/or refused to make payments on the 2nd respondent's receivables as per the Deed of Assignment, having admitted its obligation to make payments of all the 2nd respondent's

receivables to it.

7. Secondly, the respondent submitted that the intended appeal will not be rendered nugatory if stay is not allowed. In the event that it is successful, the 1st respondent, being a reputable financial institution, it will be able to refund the decretal amount, it stated. For those reasons, we were urged to dismiss the application.

8. We have considered the application, the parties' affidavits, written submissions and digest of cases. We are guided by the established principles that guide this Court in determining applications made under **rule 5(2)(b)** of this **Court's Rules** as summarized in a plethora of the Court's decisions, among them **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR**.

9. We are persuaded that the intended appeal is arguable. We need not say more on that limb, bearing in mind that an arguable appeal is not necessarily one that is likely to succeed, it is one that is not frivolous and contains at least one issue upon which the Court should pronounce itself.

10. On the nugatory aspect, we remind ourselves of this Court's holding in **Reliance Bank Ltd v Norlake Investments Ltd [2002] 1EA 227** that:

**“... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”**

11. In the same decision, the Court stated: -

**“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined.”**

We adopt that position in this application. The decretal amount is quite substantial and its payment before determination of the appeal is likely to occasion considerable hardship to the applicant especially in the event that the appeal succeeds. On the other hand, as both the applicant and respondent are reputable banking institutions, it is in the interest of justice that the intended appeal be filed and determined on the basis of priority and we so direct.

12. For those reasons we are satisfied that the applicant has demonstrated that its intended appeal is arguable and the same shall be rendered nugatory unless the order sought is granted. Consequently, we allow the applicant's application dated 24th September 2020. The costs of the application shall be in the appeal.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of October, 2020.**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**