



**Fuga Stock Feeds Limited v Absa Bank Plc (Civil Appeal
E076 of 2024) [2025] KEHC 5359 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5359 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E076 OF 2024
EM MURIITHI, J
APRIL 30, 2025**

BETWEEN

FUGA STOCK FEEDS LIMITED APPELLANT

AND

ABSA BANK PLC RESPONDENT

RULING

1. The applicant filed a notice of motion dated 10th July, 2024 seeking the following orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. Spent.
 5. Spent.
 6. That this Honourable Court be and is hereby pleased to grant an order of stay of execution of the Ruling and decree given on 9th July, 2024 in the Chief Magistrate's Court, at Kerugoya MCCC No. E002 of 2024 - Fuga Stock Limited vs ABSA Bank Kenya Limited by the Honourable Mutuku (C.M) pending the hearing and determination of the appeal herein and/or further directions of this Honourable court.
 7. That the costs of this application be provided for.
2. The application is based on the grounds on the face of the application and the supporting affidavit of Joyce Wangerwe setting out the facts relied on. The applicant being dissatisfied with the ruling delivered by this court on 9th July, 2024 preferred an appeal before the superior court. Her counsel on record has



commenced the appellate process and has requested for the certified copy of the impugned ruling, the proceeding thereto and all the pleadings filed.

3. Further, there exists eminent danger in the event that if stay of execution is not granted that the entire appeal will be rendered nugatory as the Auctioneer have already moved in and proclaimed and issued notification of sale of the subject suit property. That the respondent unless restrained is likely to actualise the Notification of Sale of the suit property that the Auctioneer issued to the Applicant an intended sale being on 7th February 2024.
4. The respondent on 24th July, 2024 made a Replying Affidavit principally contending that there was no merit in the appeal. They aver that given the clear and undisputed facts leading to the striking out of the suit by the lower Court, the intended appeal is clearly not arguable and is indeed frivolous.
5. Further, the Appellant/Applicant cannot purport to suffer any loss or prejudice if the orders are not granted for the simple reason that the Applicant voluntarily agreed to offer the property as security for the repayment of the loan and expressly consented to the sale of the property upon default, which is not disputed. Lastly, they aver that an injunction pending appeal will not be granted if there is a loan amount that is outstanding.

Appellant/applicant submissions

Establishment of a sufficient cause

6. It is the Applicant's humble submission that his intended appeal as evidenced by the memorandum of appeal is most definitely not frivolous, the same is arguable and deserves further interrogation by this Honourable Court.

Satisfaction of substantial loss

7. The Applicant has demonstrated, that as soon as the lower court rendered its Ruling the Respondent herein commenced realization of the charge and exposing the Appellant to the risk of losing his property.

Respondent submissions

8. The respondent submits that principles of grant of a temporary injunction pending appeal are set out in Patricia Njeri & 3 Others vs. National Museum of Kenya [2004] eKLR, where the High Court gave the following principles as governing grant of temporary injunction pending appeal;
 - a. An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal! is frivolous,
 - b. The discretion should be refused where it would inflict great hardship than it would avoid.
 - c. The applicant must show that to refuse the injunction would render the appeal nugatory.
 - d. The court should also be guided by the principles in Giella vs. Cassman Brown [1973] EA 358.
9. The respondent submits that the Appellant's appeal is not arguable, and thus the Application should fail. The property that is subject of sale was offered as security with clear understanding that it would be sold in the event of default, which has occurred even after recording of a consent in Court which the Borrower and Chargor have breached. In any event, the Bank is capable of paying damages for the commercial property which has a known value, in the event the Appellant was to eventually succeed.



Issue

10. Whether stay of execution pending hearing of the appeal should be granted.

Analysis

11. The Appellant has brought this Application under Order 42 rule 6 of the civil procedure rules seeking in prayer no 3 that this Honourable Court be and is hereby pleased to grant an order of stay of execution of the Ruling pending the hearing and determination of the appeal herein and/or further directions of this Honourable court.
12. The lower court matter is about the interpretation of a Loan agreement between the Appellant and the respondent bank.
13. The Court of Appeal in *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365, outlined the requirements for granting stay of execution pending appeal. It held that, whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 (as it then was) of the Civil Procedure Rules is fettered by three conditions namely establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

Establishment of a sufficient cause

14. In *Nyaboke v NCBA Bank Kenya PLC & Another* (Civil Application No. E038 — OF 2021) [2021] this Court held that in determining whether an appeal is arguable, a single bona fide ground of appeal raised is sufficient and that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court or in other words, an appeal which is not frivolous.
15. The respondent submits that the Appellant's appeal is not arguable, and thus the Application should fail.
16. It is the Applicant's submission that his intended appeal as evidenced by the memorandum of appeal is most definitely not frivolous, the same is arguable and deserves further interrogation by this Honourable Court.

ii) Satisfaction o substantial loss

17. The Applicant has demonstrated, that as soon as the lower court rendered its Ruling the Respondent herein commenced realization of the charge and exposing the Appellant to the risk of losing his property.
18. In *Sicpa Securities Sol. Sa v Okiya Omtatah Okoiti & 2 others* [2018] eKLR, the court affirmed its determination in *Githunguri v Jumba Credit Corporation (No.2)* (1988) KLR 838 that, "Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if not reversible whether damages will reasonably compensate the aggrieved party."
19. With the Respondent haste in realizing its charge there is nothing to prevent them from disposing the charged property
20. The respondent submits that the Bank is capable of paying damages for the commercial property which has a known value, in the event the Appellant was to eventually succeed.



Whether the Applicant has offered security

21. Order 42 Rule 6 requires that there be security for the decretal sum and there is no provision or requirement for payment of any portion of the decretal sum to the Judgment Creditor.
22. The applicant has not offered security for the due performance of the decree.
23. It is the discretion of the court to determine the security for costs.

Orders

24. Accordingly, for the reasons set out above, the Court finds that the applicant has satisfied the conditions for stay of execution pending the hearing and determination of the appeal.
25. The Court grants an order for stay of execution on condition that the appellant deposits the sum of ksh.3,000,000/- into Court or into an interest earning account in the joint names of the counsel for the parties within thirty (30) days from the date of this ruling.
26. The Record of Appeal shall be filed within sixty (60) days.
27. In default, the stay of execution will lapse and be of no effect.
28. The costs of the application shall abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF APRIL 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mwangi for the appellant.

Mr. Kimani for the Respondent.

