



Nyaga v Faulu Micro-Finance Bank Limited (Miscellaneous Civil Application E009 of 2021) [2022] KEELC 13335 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13335 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E009 OF 2021
A KANIARU, J
SEPTEMBER 27, 2022**

BETWEEN

CYRUS NJOKA NYAGA APPLICANT

AND

FAULU MICRO-FINANCE BANK LIMITED RESPONDENT

RULING

1. I am called upon to make a determination on the notice of motion dated June 15, 2021 and filed on June 21, 2021 under certificate of urgency. The applicant is Cyrus Njoka Nyaga, who is the plaintiff in the lower court suit while the respondent is Faulu Micro-Finance Bank Limited, the 2nd defendant in the lower court suit. The lower court matter has four defendants but only the respondent has been made a party to this application. It is not clear why they are omitted given that they are not lesser parties in the suit and are entitled to know how the suit is going on.
2. The notice of motion is expressed to be brought under order 42 rule 6 of the *Civil Procedure Rules 2010*, sections 3A, 1B, 63 and 79G of the *Civil Procedure Act* and all other enabling provisions of the law.

Application

3. The application came with seven (7) prayers. It seems like all the prayers are spent save for prayer 2, which seeks for leave to appeal out of time against the ruling delivered on May 11, 2021 in Embu CMCC ELC E015 of 2020, and prayer 7, which seeks for costs of the application. The rest of the prayers are sought pending the hearing and determination of the application. I will say more about the suitability of some prayers later. For this reason, and for ease of reference, I now set out the prayers here *ipsisima verba*:
 1. That this application be certified urgent and heard *ex parte* in the first instance.



2. That this honourable court be pleased to grant the applicant leave to appeal out of time against the ruling delivered on May 11, 2021 in Embu CMCC ELC E015 of 2020.
 3. That pending hearing of this application interpartes, this honourable court be pleased to grant stay of execution of the ruling delivered on May 11, 2021 and all consequential orders.
 4. That pending hearing of this application interpartes a temporary injunction be issued against the respondent, their agents, servants, employees, their officers or anybody claiming through the respondent from auctioning, selling alienating, or in any way dealing with land parcel No Gaturi/Nembure/14611 and 14612.
 5. That pending the hearing and determination of this application, this honourable court be pleased to grant a stay of execution of the ruling delivered on May 11, 2021 and all consequential orders.
 6. That pending hearing and determination of this application herein, a temporary injunction be issued against the respondent, their agents, servants, employees, their officers or anybody claiming through the respondent from auctioning, selling alienating or in anyway dealing with land parcels No Gaturi/Nembure/14611 and 14612.
 7. That costs of this application be provided for.
4. The application is founded on the grounds that the applicant intended to file an appeal against the respondent herein but he was late in filing the same as his advocate on record prepared the documents in time but erroneously forgot to file them. It was deposed that the applicant would suffer irreparable loss if the suit properties, being LR Gaturi/ Nembure/ 14611 and 14612, are auctioned or disposed off by the respondent and further that the sale or disposal of the parcels would render the appeal nugatory.
 5. The applicant's case was that the suit properties were fraudulently transferred by his son, one Moses Mucira Njoka, who proceeded and charged the said suit properties to the respondent so as to secure a loan of Kshs 2,500,000/- without his knowledge or consent. That he only became aware of this in the year 2018 when the respondent's agents visited him enquiring his son's whereabouts during which they disclosed that his son had taken a loan with them. It was averred that the applicant had been served with notifications of sale and it was decried that if the sale is conducted, he will be left a destitute as he has no other land. It was further deposed, that the application which is subject of this appeal had been dismissed by the court leaving the applicant on the verge of being auctioned. Finally, the delay in filing the appeal was said to be caused by human errors on the part of the applicant's advocate.
 6. The application is accompanied by two supporting affidavits. The first one is sworn by the applicant and he reiterated the grounds in the application. The second affidavit is sworn by Muthoni Ndeke, the advocate on record for the applicant. She deposed that she had prepared the memorandum of appeal and the application for stay of execution of the trial court's ruling and the said documents were ready for filing by June 8, 2021. That she then gave her clerk instructions to file the said documents but on June 14, 2021, she discovered that the same had not been filed and when she asked the said clerk, she got the response that the clerk had forgotten to file the said pleadings. As such, the mistake to file the appeal within time was occasioned by her office. She stated that she had been informed that the applicant's land was to be auctioned on June 25, 2021 and a notification of sale had been issued to that effect. This had prompted her to approach the court speedily to file the appeal and application for stay of execution.
 7. The respondent opposed the application by way of a replying affidavit sworn on October 28, 2021 by Maurine Kahiro, it's legal officer. She deposed that the instant application does not satisfy the



conditions for grant of the reliefs sought, to wit, appeal out of time, stay of execution, and orders of injunctions against the suit properties. As for leave to appeal out of time, it was deposed that the applicant did not proffer sufficient reasons since despite the applicant's advocates on record having blamed her clerk for the late filing, the said clerk did not swear an affidavit so as to confirm the delay. Further that the applicant did not prove that the intended appeal is meritorious and not frivolous and according to the respondent, a perusal of the draft memorandum of appeal showed that the appeal is frivolous and an abuse of the court process. That the applicant does not have locus to institute the appeal or the suit as he is not the registered owner of the suit properties. It was contended that there was no privity of contract between the bank and the applicant.

8. According to the respondent, once the property has been provided as a security to a charge, it becomes a commodity for sale the moment there is a default and the sale can only be stopped upon evidence that the bank failed to issue statutory notices of sale, a fact which was never proved in the trial court. The respondent urged the court to be hesitant in granting leave to appeal out of time as it was already prejudiced since interest on the principal continued to accrue. Further delay in realizing the security meant further loss to the bank.
9. On the order of stay of execution pending appeal and the interim injunctions, it was deposed that there was no appeal which has already been filed and as such the court lacked jurisdiction to issue the said orders. Further that no orders were issued by the trial court capable of being stayed and as a rule a negative order is incapable of being stayed. Further also that in the event the court was inclined to issue the orders of stay of execution, the applicant ought to be ordered to deposit security for the amount outstanding as required by order 42 rule 6 of the Civil Procedure Rules 2010.
10. The application was canvassed by way of written submissions. The applicant filed his submissions on March 24, 2022 which were dated March 22, 2022 and where he outlined the orders sought in the application. He relied on the case of *Nicholas Kiptoo Arap Korir Salat -vs- The Independent Electoral & Boundaries Commission and 7 others (2014) eKLR* which set out the principles that a court ought to consider in exercising its discretion in granting an application seeking leave to file an appeal out of time. The applicant submitted that the reasons for delay were as a result of the mistake by his advocate on record who had even sworn an affidavit holding herself vicariously liable for the omission of her clerk in failing to file the appeal on time. It was argued that the mistake by the advocate should not be visited upon an innocent litigant. In support of this, reliance was made on the case of *Xplico Insurance Co Ltd v Elias Maina Mwangi [2019]eKLR*. Ultimately, it was said that the mistake was not deliberate and the applicant ought not to suffer injustice due to mistake of counsel. Further, it was stated that the length of the delay was reasonable as the time for filing the appeal lapsed on June 11, 2021 while the instant application was filed on June 15, 2021.
11. On whether the appeal was arguable, it was submitted that the intended appeal was arguable as was evidenced by the draft memorandum of appeal. The appellant submitted that the merits of the appeal ought not be considered at this stage as it would amount to condemning him unheard. In support of this he relied on the case of *Xplico Insurance Co Limited vs Elias Maina Mwangi [2019]eKLR*. He further relied on the cases of *Kenya Commercial Bank Limited -vs- Nicholas Ombija (2009) eKLR* and *Stanley Kang'ethe Kinyanjui -vs- Tony Keter & 5 others (2013) eKLR* on the definition of an arguable appeal'. The applicant invited this court to find that the appeal is arguable.
12. On the orders of temporary injunctions, the applicant relied on order 42 rule 6 of the Civil Procedure Rules 2010 and the case of *Giella -vs- Cassman Brown (1973) EA 358* and submitted that he had satisfied the conditions as were laid down in the said case. In support of issuance of orders of injunction, he argued that he had been the owner of the suit parcel of land which his son had fraudulently transferred to himself and secured it as collateral for a loan with the respondent. He had thus filed a



suit against his son and that he had been issued with a notification for sale by the respondent. He said he risked being evicted from the land where he had lived his entire life, hence being rendered homeless, which is loss that cannot be compensated by way of damages. Finally, he said that he had demonstrated that he would suffer substantial loss and stay of execution order ought to issue. He urged the court to grant the orders sought pending the determination of the intended appeal and relied on the case of *Oliver Collins Wanyama v Engineers Board of Kenya [2019] eKLR* where he stated that the court of appeal had granted an order of injunction pending an intended appeal.

13. The respondent on the other hand filed its submissions on May 31, 2022. It gave brief facts of the case and submitted that the application herein is not merited. On whether leave to appeal out of time ought to be granted, it was submitted that grant of leave to file appeal out of time is discretionary and reliance was made on the cases of Nicholas Kiptoo Arap Korir Salat -vs- The Independent Electoral & Boundaries Commission and 7 Others (supra) and the case of *Thuita Mwangi -vs- Kenya Airways Limited (2003) eKLR*. These cases laid out the principles to be considered in exercise of such discretion. It was submitted that the instant application fell short of the said principles. It was reiterated that no tangible evidence was proffered to the court's satisfaction on why the appeal was filed outside the legal timelines. Further that no reasons were explained for the delay in filing the appeal as the applicant was only blaming his advocates on record without cogent explanation. It was said that it was not sufficient for a party to blame its advocates for omissions and in support of this relied on the case of *Andrew Kiplagat Chemarigo vs Paul Kipkorir Kibet [2019] eKLR*.
14. Further it was also submitted that the applicant did not prove that the intended appeal was meritorious and not frivolous. That a perusal of the draft memorandum of appeal indicates that the same is frivolous and an abuse of the court process as it sought to challenge the exercise of chargee's statutory power of sale whereas the applicant is not registered owner of the property and thus has no privity to contract with the respondent. On this, they relied on the cases of *Agricultural Finance Corporation v Lengetia (1982-88) 1KAR 772* and the case of *Savings & Loan (K) Limited vs Kanyenje Karangaita Gakombe & Another (2015) eKLR*
15. It was further said that a bank can only be prevented from selling a commodity provided as security for loans only when it can be proved by way of evidence that the statutory notices were never issued as required by law, which issue was never proved in the trial court. As such, it was submitted that the applicant had failed to satisfy the conditions for grant of leave to appeal out of time.
16. On the stay of execution pending appeal and for orders of injunctions, it was submitted that there was no appeal already filed and in the absence this, the court cannot grant stay orders pending appeal. Further that there were no orders which were issued by the trial court and which are capable of stay of execution (negative orders are not capable of stay of execution). Further too that the applicant did not satisfy the conditions for stay of execution pending appeal as provided for under order 42 rule 6(2) of the Civil Procedure Rules 2010. As such the orders of stay of execution ought not to be granted. It was further submitted that the applicant had not proved that he stands to suffer substantial loss or that the applicant was guilty of delay which had not been explained and/or still further that the applicant had failed to demonstrate his willingness to deposit security for due performance of the decree.
17. On the injunctive orders, the respondent relied on the case of *Naresb Darbarbar vs Thara Orchards Ltd and 2 others* which lay down the principles to be considered for issuance of an order for temporary injunction pending appeal. It was said that the applicant having failed to establish the three limbs for grant of an injunction then this relief ought not to be considered. In conclusion, the court was urged to dismiss the application with costs to the respondent.



Analysis and determination

18. I have considered the application, the response made, rival submissions from both sides, and the other material on record. When I set out the prayers sought earlier in this ruling, I pointed out that I would say more about them later. There is an obvious problem with the manner some of the prayers are formulated. A look at prayers 3, 4, 5, and 6 show that they are supposed to be granted to be in force during the period before determination of the application. The operative words used in all of them run thus: 'pending hearing and determination of this application' or 'pending the hearing of this application'
19. It is normal to formulate prayers like that when the application is meant to be handled by the court *Exparte* in the first instance. When words like that are used, it becomes plain or obvious to the court that the prayers are meant to be in force during the pendency of the application. If and when granted, the duration of such prayers only relate to the period before the application is determined. This is so because that is the period during which the application is pending.
20. When I entertained this application *exparte* and decided to grant prayer 4, I remember facing some difficulty trying to make out the difference between the prayer (prayer 4), which I granted, and prayer 6 which, like prayer 4, is also for a temporary restraining order. The difficulty arose from the fact that the two prayers are substantially similar in terms of the lexicon used and are meant to apply during the same period. I decided to have another look at the other prayers and realized that prayers 3 and 5 have the same problem. I hoped then that some amendments would be made later. They were not.
21. The submissions brought by both sides do not show that counsel on both sides were alive to the problem. Both proceeded on the assumption that the prayers were valid and could therefore be considered at this stage. The obvious question to ask is this: Since the prayers are sought pending hearing and determination or simply pending hearing of the application, will the application under consideration be pending after this ruling? The obvious position is that the pending of this application ceases after the determination of the application via this ruling. In my humble view some of the prayers should have been sought pending hearing and determination of the intended appeal. These are the only prayers that would be relevant for consideration at this stage. Needless to say, there are no such prayers.
22. In any pleading, the language used should be clear, precise and to the point. Such language makes the intention of the pleader clear without any doubt or ambiguity. It helps to get across the desired purpose of the pleading and is useful in achieving the intended result.
23. Language is the essential tool of the law. Cases turn on the meaning that judges ascribe to the words used. It is therefore always important for counsel on record to use the right words to effectuate the wishes of the persons they represent. In this regard, a heightened respect for linguistic precision is necessary. Imprecise use of language leads to serious errors or misunderstanding. This is exactly what has happened in this application.
24. The position I take is that prayers 3, 4, 5 and 6 are spent. They are not for consideration at this stage. As worded and/or formulated they were for consideration at the *exparte* stage. The only prayer for consideration therefore is prayer No 2, which relates to filing appeal out of time. I now proceed to consider that prayer.
25. This application was filed on June 21, 2022 and the ruling that arose from it was delivered on May 11, 2021. It is that ruling that the applicant at hand wants to appeal against. The period within which an appeal should be filed is 30 days from the date of the decree or order being appealed against. The



position expressed here is to be found at section 79 G of the [Civil Procedure Act](#) (Cap 21) which provides as follows:

' Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days form the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellatant of a copy of the decree or order.'

26. But the same provision also allows appeals to be filed out of time by providing as follows:

' Provided that an appeal may be admitted out of time if the appellatant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.'

27. Section 79(G) of the [Civil Procedure Act](#) is also augmented by section 95 of the same act which provides as follows:

' Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this act, the court may, in its discretion, from time to time, enlarge such period, even though the period fixed or granted may have expired.'

28. It is clear therefore that time for filing appeal can be extended. Put differently, an appeal can be filed out of time with leave of the court. Courts of law have pronounced themselves on this issue in numerous cases. In [Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 others \[2013\] eKLR](#), the Supreme Court of Kenya expressed itself as follows:

' Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.'

29. In [Muringa Company Ltd vs Archdiocese of Nairobi Registered Trustees: Civil Application No 190 of 2019 \[2020\] eKLR](#), the Court of Appeal stated some of the considerations necessary in making a decision as to whether or not to allow filing of an appeal out of time. It expressed itself thus:

' Some of the considerations which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interests of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.'

More about the principles applicable can also be found in the much earlier case of [Seventh Day Adventist Church East Africa Ltd & 2 others vs Masosa Construction Company: Civil Application No 349 of 2005 \[2006\] eKLR](#).

30. Having regard to the applicable statutory law and judicial pronouncement from the superior courts, it is now necessary to consider whether the application before this court has merits. As pointed out earlier, the ruling intends to be appealed against was delivered on May 11, 2021. The 30 days within which an appeal should be filed therefore lapsed on or about June 11, 2021. The application at hand



was filed on June 21, 2021. The applicants was therefore only ten (10) days late. This is only a small delay. In my considered view, it is excusable.

31. The reason for the delay was attributed to failure by the intended appellant's counsel to file the appeal within time. The counsel explained vide a sworn affidavit that the delay arose due to forgetfulness of a clerk in her office to file the necessary papers relating to the appeal timeously. Counsel owned up to the mistake of her office. To me, the reason for the delay is justifiable and I also bear in mind that the appellant should not be made to suffer for the mistake of others.
32. As to whether the appeal is arguable, a memorandum of appeal was made available. There are also other documents relating to the case in the lower court. I have read them. My view is that the appeal is arguable; it is not frivolous or hopeless. One pertinent issue raised is whether the applicant has interest in the suit property. That issue is definitely arguable.
33. I now turn to the issue of the possible prejudice that the parties may suffer. On this, the crucial consideration is the balancing of the right of the applicant to be heard on appeal and the right of the respondent to timeous resolution of the dispute. The respondent is worried that interests on loan continue to accrue. The applicant on the other hand is apprehensive that his land stands to be sold. In my view, the applicant stands to suffer more if the land is sold before the available legal processes are exhausted.
34. I think it is now clear that I am the view that the applicant should be allowed to appeal out of time. I therefore allow the application in terms of prayer 2 – which relates to appealing out of time. I further make an order that each side should bear its own costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 27TH DAY OF SEPTEMBER, 2022.

In the presence of Kimani for M/S Muthoni Ndeke for applicant and in the absence of Nyausi for respondent.

Court Assistant: Leadys

AK KANIARU

JUDGE

27.09.2022

