



REPUBLIC OF KENYA



**Sanga & another v Faulu Micro Finance Bank Limited & another (Miscellaneous Civil Application E001 of 2025) [2025] KEHC 3409 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3409 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CIVIL APPLICATION E001 OF 2025  
RN NYAKUNDI, J  
MARCH 21, 2025**

**BETWEEN**

**EDWIN KIPKURGAT SANGA ..... 1<sup>ST</sup> APPLICANT**

**LAWRENCE KIPLAGAT RUTO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**FAULU MICRO FINANCE BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JK WANDERI AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me for determination is a notice of motion dated 8<sup>th</sup> January, 2025 expressed to be brought under the provisions of section 1, 1B, 3A & 63(e) of the *Civil Procedure Act*, Order 43 & 50 Rule 6 of the Civil Procedure Rules, 2010 and Art. 159 of *the Constitution*. The applicant seeks orders as follows:
  - a. Spent
  - b. Spent
  - c. That there be temporary stay of execution and sale of the Plaintiff's parcel of land known as LR No. Kapsaret/Kapsaret block 5 (Kapteldon) 197 pending the hearing and determination of this application inter parties.
  - d. That this honourable court be pleased to allow the applicant herein to file an appeal out of time against the Ruling of the trial court delivered on 17<sup>th</sup> October, 2024 by Hon. P.N. Areri in Eldoret CMCC No. E592 of 2024.
  - e. That costs be in the cause.
2. The application is anchored on grounds as follows:



- a. That a ruling of stay of execution was delivered on 17<sup>th</sup> October, 2024 and the 30 days' period for appealing the same has lapsed.
  - b. The Applicants' erstwhile advocate failed to lodge the same in time.
  - c. There is need to appeal against the Ruling since the Respondents are on intent on executing the judgment of court delivered, and that they have already issued notice of attachment and are on top gear to dispose of and/or sale the suit property being land parcel LR NO. Kapsaret/ Kapsaret block 5 (Kapteldon) 197.
  - d. The applicant stand to suffer irreparable damage and great unless the reliefs hereby sought are granted.
3. The 1<sup>st</sup> Applicant also swore a supporting affidavit on his behalf and that of the 2<sup>nd</sup> Applicant in which he stated as follows:
- a. That I am the absolute registered owner of the parcel of land known as LR NO. Kapsaret/ Kapsaret block 5 (Kapteldon)/197 measuring approximately 2.44 Acres
  - b. That the 2<sup>nd</sup> applicant used my said land as a loan security for the sum of Kshs. One Million (Kshs. 1,000,000/=) in the year 2022.
  - c. That so far the 2<sup>nd</sup> Applicant has paid Kshs. 851,644/= towards clearing the said loan leaving a balance of less than Kshs. 150,000/= on the principal sum exclusive of the Bank interests and penalties.
  - d. That we moved to this Honourable court for intervention when the Respondents intended to sell the said suit land and the court granted us temporary stay of execution until 17<sup>th</sup> October, 2024 when our application was dismissed with costs thus the orders lapsed before hearing of the main case in the lower court.
  - e. That we have moved to this Honourable superior court in order to be allowed to file an appeal out of time to challenge the entire ruling orders of 17<sup>th</sup> October, 2024.
  - f. That the appeal has high chances of success if granted leave to file the same out of time
4. In response to the application, the 1<sup>st</sup> Respondent through Fredrick Nyabuti deposed as follows:
- a. That from the onset, the Plaintiffs' Application is devoid of merit, vexatious, brought in bad faith and ought to be dismissed with costs for being a waste of this Honourable Court's time.
  - b. That the Plaintiff has not come to this Honourable Court with clean hands and is therefore undeserving of the reliefs sought on the following grounds:
    - i. The Plaintiffs herein had initially filed an Application under Urgency dated 22<sup>nd</sup> August 2024 in MCCC No. E592 of 2024 Eldoret- Edwin Kipkurgat Sanga & Another versus Faulu Microfinance Bank Limited & Another seeking injunctive orders against the Defendants.
    - ii. The said Application was certified urgent by the Lower Court vide its Order issued on 23<sup>rd</sup> August 2024.
    - iii. Thereafter, the same was heard and determined and the Lower Court delivered its Ruling dismissing the Plaintiffs' Application with costs to the 1<sup>st</sup> Defendant.



- iv. Being dissatisfied with the Court's Ruling, the Plaintiffs proceeded to file another Application in the Lower Court dated 16<sup>th</sup> October 2024 seeking an extension of the temporary injunctive orders issued on 23<sup>rd</sup> August 2024 against the Defendants.
- v. However, the Plaintiffs failed to attend Court to prosecute the above Application which left the Lower Court with no choice but to dismiss the Plaintiffs' Application for non-attendance and want of prosecution.
- vi. The Plaintiffs herein have filed the present Application dated 8<sup>th</sup> January 2025 seeking stay of execution and leave to file an Appeal against the Ruling of the Lower Court delivered on 17<sup>th</sup> October 2024 out of time.
- vii. However, the 1st Defendant avers that the present Application only seeks to waste this Honourable Court's time and further prevent the 1st Defendant from enjoying the fruits of the said Ruling.
- viii. This is due to the fact that the Plaintiffs have not established the substantial loss they will suffer if the present Application is denied.
- ix. The 1<sup>st</sup> Plaintiff herein has only averred that the suit property is family land which he holds in trust for other members of his family.
- x. However, the 1<sup>st</sup> Defendant avers that the 1<sup>st</sup> Plaintiff was well aware of the consequences of default when offering the suit property as security for the loan advanced to the 2<sup>nd</sup> Plaintiff hence the threat of execution cannot by and of itself amount to substantial loss.
- xi. In light of the above, the 1<sup>st</sup> Defendant avers that the Plaintiffs have failed to provide this Honourable Court with sufficient cause to warrant the granting of status quo orders pending Appeal.
- xii. The 1<sup>st</sup> Defendant avers that it is the party that stands to be greatly prejudiced if the present Application is granted as prayed since it has already advanced the 2<sup>nd</sup> Plaintiff with the loan amount which is currently outstanding to the tune of Kshs. 689,043.66/- as at 7<sup>th</sup> February 2025.
- xiii. Further, the Plaintiffs have successfully managed to curtail the 1<sup>st</sup> Defendant's right to recover its outlay through the filing of numerous Applications in Court.
- xiv. The 1<sup>st</sup> Defendant avers that the filing of the present Application is yet another way of preventing the 1<sup>st</sup> Defendant from exercising its statutory power of sale mandated in law.
- xv. That notwithstanding, the 1<sup>st</sup> Defendant avers that if this Honourable Court is inclined to indulge the Plaintiffs, the Plaintiffs' Application should be granted on condition that they deposit the entire decretal sum to the Court pending the hearing and determination of the Appeal.
- xvi. That the 1<sup>st</sup> Defendant denies all allegations of fact contained in the Supporting Affidavit save and except those expressly admitted herein.



### **Analysis and determination.**

5. The application before this Court raises two critical issues for determination: first, whether the Applicants should be granted leave to file an appeal out of time against the ruling delivered on 17<sup>th</sup> October, 2024; and second, whether a temporary stay of execution and sale of the suit property should be granted pending the hearing and determination of the intended appeal.
6. The principles governing the extension of time for filing an appeal are well established. This Court has discretion to extend time where sufficient cause is shown. In considering what constitutes sufficient cause, the Court must weigh various factors including the length of the delay, the reason for the delay, the chances of success of the intended appeal, and the degree of prejudice that would be suffered by the respondent if the extension were granted.
7. As regards the prayer for stay of execution pending appeal, Order 42 Rule 6 of the Civil Procedure Rules sets out the conditions that must be satisfied. The Applicant must demonstrate that substantial loss would result unless the order is made, that the application has been made without unreasonable delay, and that security has been given by the applicant for the due performance of such decree as may ultimately be binding upon the applicant.

### **Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;**

8. Section 79G of the *Civil Procedure Act* states: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from 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 of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
9. The law governing extension of time as explicitly outlined in Section 79G of the *Civil Procedure Act*, which requires that applicants demonstrate good and sufficient cause before the Court may favorably consider their request. This provision places a definitive obligation on the applicants to justify why the Court should exercise its discretion in their favor despite the statutory timelines having lapsed. In *Diplack Kenya Limited vs William Muthama Kitonyi* [2018] eKLR, the Court established that an applicant seeking enlargement of time must present compelling reasons that satisfy judicial scrutiny. This standard ensures that extensions are not granted as a matter of course but rather upon thoughtful consideration of the particular circumstances that prevented timely compliance with procedural requirements. The Court must balance the interests of justice against the importance of finality in litigation and the orderly administration of judicial proceedings.
10. In the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding



whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

11. Applying these principles to the present application, I note that the Ruling sought to be appealed was delivered on 17<sup>th</sup> October, 2024, while the present application was filed on 8<sup>th</sup> January, 2025, approximately two and a half months after the expiry of the statutory period for filing an appeal. The Applicants attribute this delay to the failure of their erstwhile advocate to lodge the appeal in time. While the Court acknowledges that mistakes by counsel should not necessarily be visited upon litigants, the Applicants have not provided any supporting evidence such as correspondence with their former advocate or any attempt to follow up on the matter during this period. Furthermore, the Applicants have not demonstrated any reasonable prospects of success in the intended appeal. Their assertion that “the appeal has high chances of success” remains a bare statement unsupported by any analysis of the lower court’s decision or identification of specific errors of law or fact. The Respondent, on the other hand, has provided a detailed chronology of the proceedings, illustrating that the Applicants have consistently failed to prosecute their applications diligently, including failing to attend court for the hearing of their application dated 16<sup>th</sup> October, 2024. This pattern of conduct suggests a deliberate strategy to delay the Respondent’s exercise of its statutory power of sale rather than a genuine pursuit of justice. Additionally, the Respondent stands to suffer significant prejudice if extension is granted, as the loan amount remains outstanding to the tune of Kshs. 689,043.66/- as at 7<sup>th</sup> February, 2025, which continues to accrue interest.

12. As to the question of stay of execution, it is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -

“ 1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.

2. No order for stay of execution shall be made under sub rule 1 unless:-

- a. The Court is satisfied that substantial loss may result to the 1<sup>st</sup> Applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

31. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:



1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

32. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

13. Turning to the second limb of the Applicants' prayer regarding stay of execution, I find that the Applicants have failed to satisfy the three-pronged test established under Order 42 Rule 6(2) of the Civil Procedure Rules.
14. First, while the Applicants contend that they would suffer irreparable damage if the property is sold, they have not demonstrated with specificity how this constitutes substantial loss beyond the ordinary consequences of execution. The 1<sup>st</sup> Applicant's assertion that the property measures approximately 2.44 acres and that only Kshs. 150,000/= remains outstanding on the principal sum is not, in itself, sufficient to establish substantial loss within the meaning articulated in James Wangalwa & Another vs Agnes Naliaka Cheseto (supra). The potential sale of property offered voluntarily as security for a loan does not constitute the kind of loss that would render an appeal nugatory, particularly where no special attachment or unique qualities of the land have been demonstrated.
15. Second, the application has been made with unreasonable delay, having been filed in January 2025, approximately three months after the impugned ruling of October 2024. Third, and perhaps most significantly, the Applicants have not offered any security for the due performance of the decree. They have neither deposited the outstanding loan amount in court nor proposed any alternative security arrangements despite the 1<sup>st</sup> Respondent's outstanding claim of Kshs. 689,043.66/-. The 1<sup>st</sup> Respondent's suggestion that any stay should be conditional upon deposit of the full decretal sum appears reasonable in the circumstances. The fact that substantial payment of Kshs. 851,644/= has already been made towards the loan does not absolve the Applicants from their continued obligation to service the outstanding balance, which includes accrued interest and penalties as per the loan agreement.
16. For the reasons stated hereinabove, I find that the Applicants have failed to establish good and sufficient cause for filing the appeal out of time as required under Section 79G of the [Civil Procedure Act](#).



Similarly, they have not satisfied the three-pronged test for the grant of stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules.

17. Accordingly, I make the following orders:

- a. The Notice of Motion dated 8th January, 2025 is hereby dismissed.
- b. The costs of this application shall be borne by the Applicants.

18. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 21ST DAY OF MARCH 2025.**

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**R. NYAKUNDI**

**JUDGE**

