



REPUBLIC OF KENYA



**KENYA LAW**  
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**Faulu Microfinance Bank Limited v Nganga (Civil Appeal  
59 of 2022) [2023] KEHC 24646 (KLR) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 24646 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 59 OF 2022**

**MN MWANGI, J**

**MAY 5, 2023**

**BETWEEN**

**FAULU MICROFINANCE BANK LIMITED ..... APPELLANT**

**AND**

**JOSEPHINE NDINDA NGANGA ..... RESPONDENT**

**RULING**

1. The application before this Court is a Notice of Motion dated 14<sup>th</sup> July, 2022 brought under the provisions of Article 159 of the Constitution of Kenya, Sections 1A, 1B & 3A of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The appellant seeks the following orders-
  - i. Spent;
  - ii. Spent;
  - iii. That this Honourable Court be pleased to grant an order for stay of further proceedings in Mombasa Civil Suit No 578 of 2021 *Josephine Ndinda Nganga v Faulu Microfinance Bank Limited* pending the hearing and determination of the appeal;
  - iv. That the appeal be set down for directions on priority basis; and
  - v. That costs of this application be in the cause.
2. The application has been brought on the grounds on the face of it and is supported by an affidavit sworn on 14<sup>th</sup> July, 2022, by Ashely Kimathi, learned Counsel for the appellant. In opposition thereto, the respondent filed grounds of opposition dated 3<sup>rd</sup> August, 2022.
3. The application was canvassed by way of written submissions. The appellant's submissions were filed on 26<sup>th</sup> September, 2022 by the law firm of Maina & Onsare Partners Advocates LLP, while the



respondent's submissions were filed by the law firm of Njoroge & Katisya Advocates on 4<sup>th</sup> October, 2022. The respondent's Counsel filed supplementary submissions on 17<sup>th</sup> October, 2022.

4. Ms. Kimathi, learned Counsel for the appellant submitted that the respondent filed a defamation suit in the lower Court against the appellant and that the latter raised a Preliminary Objection on the ground that the suit was time barred. She stated that the Trial Court vide a ruling dated 12<sup>th</sup> April, 2022 dismissed the appellant's Preliminary Objection with costs. She indicated that the appellant was dissatisfied with the said ruling and lodged an appeal against it. She relied on the case of *Re Global Tours and Travel Ltd* HCWC No. 43 of 2000 and submitted that the Trial Court failed to appreciate the provisions of Section 4(2) of the [Limitation of Actions Act](#) which provides that the time limit for filing a claim for defamation is twelve (12) months and not three (3) years, a position that was affirmed by Judge Nyagah in *Royal Media Services Ltd v Valentine Mugure Maina & another* [2019] eKLR. Ms Kimathi contended that the Trial Court erred in dismissing the Preliminary Objection on grounds that time had not lapsed.
5. She stated that the plaint which was filed before the Trial Court and the demand letter that was served on the appellant prior to the institution of the suit make reference to defamation and the attendant damage allegedly suffered by the respondent, and at no point did the respondent deviate from defamation as a cause of action. Ms Kimathi maintained that the appeal has prima facie merit. She cited the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR and submitted that the issue of Section 4(2) of the [Limitation of Actions Act](#) is a substantial one that goes to the root of the claim before the Trial Court. She stated that the demand letter referring to the appellant's defamatory acts is dated 15<sup>th</sup> August, 2018 whereas the suit before the Trial Court was filed on 16<sup>th</sup> April, 2021, and that the appeal is arguable with reasonable chances of success.
6. She submitted that the substance of the appeal goes to the root of the suit before the Trial Court and if the proceedings before the Trial Court are allowed to proceed simultaneously with this appeal and the appeal succeeds, the Trial Court will have wasted precious judicial time and resources adjudicating the matter. She referred to Article 159 of the [Constitution](#) of Kenya and urged that the application herein has been filed in a timely manner and seeks to save on precious judicial time.
7. Ms. Katisya, learned Counsel for the respondent submitted that the application herein threatens to deny the respondent her constitutional right of access to justice, the fundamental right to be heard, and for equal treatment under the law. She further submitted that the suit before the Trial Court seeks redress for the respondent having been unfairly and wrongly listed with the Credit Reference Bureau on the appellant's false information even before she had taken a loan from the appellant with the objective of locking her in and restraining her from seeking facilities from other banks. She stated that since the respondent's suit is on the appellant's breach of duty and negligence, and it was filed within the three years' limitation period and it is not time barred. She contended that the appellant's defence before the Trial Court does not contain defences of defamation such as fair comment, justification or privilege.
8. She relied on the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR, and the Halsbury's Law of England, 4<sup>th</sup> Edition Volume 37 page 330 and 332 on the principles to be considered in an application for stay of proceedings pending appeal. Ms. Katisya referred to the case of *Lucy Waitthera Kimanga & 2 others v John Waiganjo Gichuri* [2015] eKLR and to Article 159 of the [Constitution](#) and urged this Court to find that the interest of justice will be best served by the controversy between the parties being heard in a trial on merits.
9. Ms Katisya submitted that the appellant does not have an arguable appeal due to the fact that the Memorandum of Appeal dated 20<sup>th</sup> April, 2022 was filed without leave of the Court hence it



contravenes Section 75 of the *Civil Procedure Act* and Order 43 Rule 1(2) of the *Civil Procedure Rules*. She stated that the appeal herein is on a single issue of Section 4(2) of the *Limitation of Actions Act* and the statute does not confer a right of appeal. Ms. Katisya referred to the Court of Appeal decision in *Kenya Commercial Bank Limited v Manaseh Esipeya* [1999] eKLR and submitted that this Court does not have jurisdiction to hear the appeal for want of leave, and as such, the appeal is not arguable.

10. In submitting that the respondent's right to access to justice overrides the appellant's fear of inconvenience which can be addressed with an appropriate order for costs, Ms Katisya referred to the case of *David Morton Silverstein v Atsango Chesoni* [2002] eKLR where the Court of Appeal cited the decision in *Kenya Commercial Bank Limited v Benjob Amalgamated Ltd & another* Civil Application No. Nai 50 of 2001 (Unreported). She further submitted that the Court should not deny a party the fruits of any decision unless an applicant stands to suffer substantial loss. She stated that no tangible evidence of the loss or the prejudice that the appellant would suffer if the suit before the Trial Court proceeds, has been placed before this Court.
11. In a rejoinder, Ms. Kimathi submitted that what is before this Court is an application for stay of proceedings and not the striking out or dismissal of the appeal and at this point there is no challenge as to the appeal and the Court cannot grant a relief which has not been sought. She stated that no orders can issue to the effect that the appeal is not properly before the Court. She further submitted that no prejudice would be suffered by the respondent in the event that the orders sought herein are granted. She contended that if the orders sought herein are not granted, the appeal will be rendered nugatory as the suit before the Trial Court will proceed to its logical conclusion.

#### **Analysis and Determination.**

12. I have considered the present application, the grounds on the face of it and the affidavit filed in support of the said application. I have also considered the grounds of opposition filed by the respondent and the written submissions by Counsel for the parties. The issues that arise for determination are-
  - i. Whether the intended appeal is incompetent for want of leave to appeal; and
  - ii. Whether the plaintiff has satisfied the conditions to warrant grant of an order for stay of proceedings.
13. In the affidavit filed by the appellant, it deposed that the appeal herein raises substantial issues of law and has a very good chance of success since the Trial Court failed to appreciate the statute of limitation for defamation suits is twelve (12) months from the date the cause of action arose. It further deposed that the order granted constitutes a negative order and the only recourse available to the appellant is to stay the proceedings before the Trial Court.
14. The appellant averred that if the orders sought are not granted, the appellant would suffer prejudice in terms of costs and time spent litigating before the Trial Court. It also averred that if the appeal herein was to succeed, the proceedings and outcome of the Trial Court would be rendered void ab initio. It deposed that the respondent stands to suffer no prejudice which cannot be compensated by an award of damages. The appellant stated that it is ready and willing to comply with any directions given by this Court to ensure the expeditious disposal of the main appeal.
15. In opposition to the application herein, the respondent filed grounds of opposition dated 3<sup>rd</sup> August, 2022 raising the following grounds-
  - i. The appeal is not arguable as it was filed without leave of the Trial Court in contravention of Section 75 of the *Civil Procedure Act* (Cap 21) Laws of Kenya and Order 43 Rule 1(2) of the *Civil Procedure Rules*;



- ii. The Preliminary Objection was founded on the *Limitation of Actions Act* (Cap 22) Laws of Kenya which does not confer a right of appeal;
- iii. The appellant based their Preliminary Objection dated 30<sup>th</sup> August, 2021, on the ground that the suit was filed more than three (3) years ago contrary to the first limb of Section 4(2) of the *Limitation of Actions Act* (Cap 22) Laws of Kenya, and they cannot raise a new objection based on the proviso to Section 4(2) of the said Act through an appeal;
- iv. The appellant based their Preliminary Objection dated 30<sup>th</sup> August, 2021 on Regulation 35(5) of the Credit Reference Bureau Regulations, 2013 enacted under the *Banking Act* (Cap 488) Laws of Kenya which governs the banker-customer relationship between the appellant and the respondent and on which basis the cause of action before the Trial Court is founded, not defamation;
- v. The respondent did not raise the issue of limitation of time in the defence which is a fatal omission and in fact expressly admitted the Honourable Trial Court's jurisdiction;
- vi. The respondent's application is a travesty of justice denying the respondent her fundamental right to access to justice and the right to be heard;
- vii. The appellant's reason for applying for stay of proceedings is that the impugned orders are negative, which does not justify the limitation and interference of the of the respondent's fundamental rights;
- viii. As stated in the impugned ruling, the cause of action arose in 2018 and any further delay of the suit will gravely prejudice the respondent;
- ix. The appellant's supporting affidavit is defective as the deponent is an Advocate who has sworn to hearsay;
- x. The respondent has failed to demonstrate what loss, if any, they stand to suffer if the trial proceeds; and
- xi. The appellant's application is bad in law, misconceived and an abuse of the Court process.

**Whether the inTended Appeal is incompetent for Want of Leave to Appeal.**

16. The respondent contended that the appellant does not have an arguable appeal since the Memorandum of Appeal dated 20<sup>th</sup> April, 2022 was filed without leave of the Trial Court which is in contravention of Section 75 of the *Civil Procedure Act* and Order 43 Rule 1(2) of the *Civil Procedure Rules*. In addition, she stated that the appeal herein is on a single issue of Section 4(2) of the *Limitation of Actions Act* and the statute does not confer a right of appeal. The appellant on the other hand contended that at this point in time, there is no challenge as to the appeal and the Court cannot grant a relief which has not been sought and no orders can issue to the effect that the appeal is not properly before the Court.
17. Section 75(1) of the *Civil Procedure Act* provides for the orders against which an appeal would lie as of right and/or with leave of the Court. It states that-
  - “An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-
    - a. An order superseding arbitration where the award has not been completed within the period allowed by the court;



- b. An order on an award stated in the form of a special case;
- c. An order modifying or correcting an award;
- d. An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- e. An order filing or refusing to file an award in an arbitration without the intervention of the court;
- f. An order under section 64;
- g. An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- h. Any order made under rules from which an appeal is expressly allowed by rules.”

18. Order 43(1) of the *Civil Procedure Rules* on the other hand provides for orders from which an appeal shall lie from as of right. It provides as follows-

“An appeal shall lie as of right from the following orders and rules under the provisions of section 75(1)(h) of the *Act*:

- a. Order 1 (parties to suits);
- b. Order 2 (pleadings generally);
- c. Order 3 (frame and institution of suit);
- d. Order 4, rule 9 (return of plaint);
- e. Order 7, rule 12 (exclusion of counterclaim);
- f. Order 8 (amendment of pleadings);
- g. Order 10, rule 11 (setting aside judgment in default of appearance).
- h. Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
- i. Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
- j. Order 19 (affidavits);
- k. Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
- l. Order 23, rule 7 (trial of claim of third person in attachment of debts);
- m. Order 24, rules 5, 6 and 7 (legal representatives);
- n. Order 25, rule 5 (compromise of a suit);
- o. Order 26, rules 1 and 5(2) (security for costs);
- p. Order 27, rules 3 and 10 (payment into court and tender);
- q. Order 28, rule 4 (orders in proceedings against the Government);



- r. Order 34 (interpleader);
- s. Order 36, rules 5, 7 and 10 (summary procedure);
- t. Order 39, rules 2, 4 and 6 (furnishing security);
- u. Order 40, rules 1, 2, 3, 7 and 11 (temporary injunctions);
- v. Order 41, rules 1 and 4 (receivers);
- w. Order 42, rules 3, 14, 21, 23 and 35 (appeals);
- x. Order 45, rule 3 (application for review);
- y. Order 50, rule 6 (enlargement of time);
- z. Order 52, rules 4, 5, 6 and 7 (advocates);
- aa. Order 53 (judicial review orders).”

19. Order 43 Rule 1(2) of the *Civil Procedure Rules* provides that an appeal shall lie with the leave of the Court from any other order made under the said Rules. It is evident therefore that unless the order sought to be appealed from falls under the orders provided for under Section 75(1) of the *Civil Procedure Act* and Order 43(1) of the *Civil Procedure Rules*, leave to appeal must be sought and obtained as envisaged under the said provisions of the law, from the Court that made the order. Such leave must be sought either by way of an oral application at the time the order was made or within 14 days from the date the order was made, before an appeal can be filed.
20. The appeal in issue is against an order dismissing a Preliminary Objection that had been raised before the Trial Court on the ground that suit therein offends the provisions of Section 4(2) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, since it is time barred. In view of the above, it is evident that the order dismissing the said Preliminary Objection is not listed as one which is appealable as a matter of right. Additionally, the *Limitation of Actions Act*, Cap 22 Laws of Kenya does not confer any right of appeal to the appellant, and as such, an appellant has to first seek leave of the Court before filing an appeal.
21. It is my finding that the applicant’s submissions that there is no challenge as to the appeal and that the Court cannot grant a relief which has not been sought are not relevant in light of the ground of opposition filed by the respondent. It is not disputed that the appellant herein did not seek leave of the Court prior to the filing of the appeal. I am bound by the Court of Appeal holding in the case of *Kenya Commercial Bank Limited v Manaseh Esipeya* [supra], where in striking out an appeal for being incompetent, the said Court cited with approval the decision of *G.R. Mandaria V Rattan Singh* [1965] EA 118 where it was held that-
- “ where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails and a suit is permitted to proceed, no preliminary decree arises but only an order, the unsuccessful party has a right of appeal with leave and accordingly the appeal was incompetent for want of leave”.
22. In the absence of leave to appeal against the ruling that was delivered by the Trial Court on 12<sup>th</sup> April, 2022, this Court finds that the appeal herein is incompetent for want of leave of Court hence there is no valid appeal.



**Whether the Plaintiff has satisfied the Conditions to Warrant Grant of an Order for Stay of Proceedings.**

23. This Court has the requisite jurisdiction to hear and determine an application for stay of proceedings pending appeal pursuant to the provisions of both Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 as well as the inherent jurisdiction reserved in Section 3A of the *Civil Procedure Act*. In the case of *Global Tours & Travels Limited*, Nairobi HC Winding Up Cause No 43 of 2000, the Court laid down the principles to be considered in determining whether or not to grant stay proceedings as hereunder-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

24. Bearing in mind the above decision, it is evident that an appellant seeking stay of proceedings pending appeal has a duty to first establish that it has an arguable appeal with chances of success. Having found that the appeal herein is incompetent for want of leave, it is my finding that in the absence of a competent appeal, there cannot be an arguable appeal.

25. It must also be noted that the appellant herein is seeking an order for stay of further proceedings before the Trial Court pending the hearing and determination of the appeal. It however follows that without a valid appeal as has already been held hereinabove, there would be no basis upon which to grant an order for stay of further proceedings.

26. The upshot is that the application dated 14<sup>th</sup> July, 2022 is devoid of merit and the same is dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF MAY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Kimathi for the Appellant

No appearance for the Respondent

Ms. B. Wokabi – Court Assistant.

