



REPUBLIC OF KENYA



KENYA LAW
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**Kihoi v Faulu Microfinance Bank Ltd (Civil Appeal E171 of 2023)
[2023] KEHC 25002 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 25002 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E171 OF 2023
DO CHEPKWONY, J
SEPTEMBER 20, 2023**

BETWEEN

MARY MUTHONI KIHOI APPELLANT

AND

FAULU MICROFINANCE BANK LTD RESPONDENT

RULING

1. Before the court for determination is the Appellant/Applicant's Notice of Motion application dated 31st May, 2023 filed pursuant to Order 42 Rule 6, Order 51 (1) of the [Civil Procedure Rules](#) which seeks the following orders:
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of this appeal, the court be pleased to grant an order that the status quo on the land parcel be maintained in that, the Respondent its employees, agents, servants be restrained from exercising its statutory power of sale by putting up for auction the land parcel Number LR No Ruiru/Ruiru East Block 2/6603, the security for the loan which was subject of the suit;
 - d. That the costs of the application be in the cause.
2. The Application is based on the grounds set out on its face and the Supporting Affidavit of Mary Muthoni Kihoi sworn on 31st May, 2023 wherein she avers that the subordinate court delivered a Judgment on 17th May, 2023 and dismissed her case which has prompted her to file the Memorandum of Appeal dated 31st May, 2023 seeking to have the Judgment set aside and her case in the subordinate court upheld.



3. The Applicant contends that her appeal has a high chance of success and that she would suffer substantial loss if status quo is not issued to restrain the Respondent from exercising its statutory power of sale.
4. The Applicant served the Application upon the Respondent and filed an Affidavit of Service sworn by Ann Nduta Maina on 21st June, 2023. On 21/06/2023 when the parties appeared before court, the Respondent was granted leave to file a response to the application. The court similarly directed the parties to file their written submissions in respect to the application.
5. As at the time of writing this Ruling, the Respondent had not filed any response neither had either party filed their submissions. Be that as it may, the court is still required to consider the merits of the application before granting any orders thereto.

Analysis and Determination

6. The court has considered the application and the affidavit sworn in support thereof and the main issue for determination is whether the Applicant's prayer has merit.
7. The Applicant has sought for an order that status quo be maintained on the Land Parcel LR Number Ruiru/Ruiru East Block 2/6603 pending hearing and determination of the appeal filed herein. Basically, this prayer is equivalent to one for stay of execution and so the law applicable is that enshrined under Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides:-

“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 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”
8. From these provision, the circumstances under which a court may order for stay of execution of an order or decree or order for status quo to be maintained pending an appeal and that an Applicant must demonstrate to the satisfaction of a court that the application has been filed timeously; that he/she stands to suffer substantial loss if stay is not granted and lastly, that the Applicant is willing to offer such security as may be ordered by the court. It is trite law that for the court to grant stay of execution three conditions must be met:-
 - a. The application has been made without unreasonable delay.
 - b. The Applicant will suffer Substantial loss
 - c. The Applicant has offered security for due performance of the decree.
 9. On the purpose of an application for stay of execution pending appeal the court in [RWW v EKW](#) [2019] eKLR, held:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who



should not be deprived of the fruits of his/her Judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

10. The first requirement for testing the application at hand is whether the same was filed timeously. The Judgment herein was delivered on 17th May, 2023 and the present application was filed on 6th June, 2023 which was timely and without unreasonable delay hence this condition had been substantially fulfilled.
11. On the second condition of whether the Applicant stands to suffer substantial loss if the orders for stay of execution are not granted, the Applicant has stated that she is likely to suffer substantial loss if the orders are not granted as the respondent may exercise its statutory power of sale by auctioning the said land parcels. The Respondent has not responded to the application to demonstrate any prejudice it is likely to suffer if the order for status quo is issued. It behoves this court to lay a basis on what amounts to substantial loss. In the persuasive case of *Sewankambo Dickson v Ziwa Abby* HCT-00-CC MA 0178 of 2015, substantial loss was described as a qualitative concept which connotes a loss with real value as opposed for a nominal loss. The court went on to state that substantial loss refers to any loss, great or small, that is real worth of value as distinguished from a loss without value. What is discerned from the Applicant's expression is the feat of their appeal being rendered nugatory if the Respondent is let to proceed with the exercise of its statutory power of sale; which this court finds is reasonable fear. Having not filed any response, the Respondent has failed to discharge the burden that had shifted to it to prove otherwise. This court is therefore persuaded that the Applicant has satisfied that she stands to suffer substantial loss if the order of status quo is not granted.
12. Lastly is the issue of security for the due performance, the court has not been shown the value of the loan the Respondent seeks to realise from selling the said land parcel which was used as security. In the case of *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR, the court held that:-

“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails...”

13. Be that as it may, it is not lost to this court that a successful party is entitled to the fruits of the Judgment, the court should not lose sight to the equally important right of a party to appeal against the finding of the trial court until the appeal goes through its due course upto Apex Court. The court is therefore under duty to balance the two competing rights and interests of both parties. This court then moves to the issue of whether the Applicant has an arguable appeal. Although the court is not required to dwell into the merits the appeal at this stage, a perusal of the Memorandum of Appeal, it finds that the grounds raised therein particularly that the Applicant/Appellant had paid the full loan amount which the subordinate court failed to consider is an arguable ground on appeal which warrants the protection of court before it is determined. The Court of Appeal in the case of *Joseph Gitabi Gachau And another v Pioneer Holdings (A) Limited & 2 others* [2009] eKLR the court held:-

“...On our part, after considering the rival submissions by the parties, the ruling of the learned Judge below together with pleadings we are satisfied that the appeal is indeed arguable. This,



in essence, does not mean an appeal which must necessarily succeed, but of course, one which ought to be argued fully before the Court.”

14. The court therefore finds that being an arguable one, in the event that the subject property is sold then the Appeal will be rendered nugatory. In the circumstances, the court hereby allows the Notice of Motion application dated 31st May, 2023 and make the following orders:-
- a. An order be and is hereby made that the status quo on the land parcel be maintained in that, the Respondent its employees, agents, servants be restrained from exercising its statutory power of sale by putting up for auction the Land Parcel Number LR No Ruiru/Ruiru East Block 2/6603, the security for the loan which was subject of the suit pending the determination of the Appeal.
 - b. Costs to abide the appeal.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 20TH DAY OF SEPTEMBER, 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

M/S Maina counsel for Appellant/Applicant

M/S Wakarimi counsel for Respondent

Court Assistant - Martin

