



**Kihoi v Faulu Microfinance Bank Limited (Civil Application
E269 of 2025) [2025] KECA 1581 (KLR) (3 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1581 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E269 OF 2025
DK MUSINGA, K M'INOTI & GV ODUNGA, JJA
OCTOBER 3, 2025**

BETWEEN

MARY MUTHONI KIHAI APPLICANT

AND

FAULU MICROFINANCE BANK LIMITED RESPONDENT

(Being an application for injunction pending appeal of the Judgment and Decree of the High Court at Thika (Muchemi, J.) delivered on 3rd April 2025 in HCCA NO. 9 OF 2024)

RULING

1. Before this Court is a Notice of Motion dated 28th April 2025 which is brought by the applicant under the provisions of section 3A and 3B of the [Appellate Jurisdiction Act](#) and rule 5 (2)(b) of the Rules of this Court. The applicant seeks stay of execution of the judgment and decree by Muchemi, J. delivered on 3rd April 2025 in HCCA No. 9 of 2024 and all consequential orders therein pending hearing and determination of an intended appeal.
2. The background to the application is that the applicant obtained a loan facility from the respondent which was secured by a registered charge over her property. That facility was later cleared, but the respondent advanced further sums to the applicant without registering a subsequent charge. Instead, the respondent relied on a clause in the letter of offer to the effect that the second advancement would continue to be secured by the original charge. When the applicant defaulted, the respondent moved to exercise its statutory power of sale against the property.
3. The applicant challenged the move in the Ruiru Magistrate's Court vide SPMCC No. E238 of 2021, contending that no valid charge secured the subsequent loan, and that the respondent could not rely on a discharged charge to dispose of her property. The trial court dismissed her case, holding that she had not proved repayment of the loan in full, or that the respondent's reliance on the earlier charge was unlawful.



4. She appealed to the High Court at Thika vide Civil Appeal No. 9 of 2024. The High Court (Muchemi J.) agreed with the trial court and dismissed the appeal, confirming the respondent's entitlement to enforce its security. It is against that judgment that the present application arises.
5. The applicant was dissatisfied with the decision of the High Court and lodged a notice of appeal dated 15th April 2025, evincing her intention to appeal.
6. In this application which is supported by the grounds on the face thereof and in the applicant's affidavit in support, the applicant contends that her intended appeal raises arguable points of law with high chances of success. In the memorandum of appeal which is annexed to her affidavit, the applicant contends, inter alia, that the learned judge erred in law and in fact by failing to apply section 107 of the *Evidence Act* by accepting the respondent's claim of additional loan disbursements without proof of the appellant's application for such loans, or evidence of actual disbursement, thereby misapplying the burden of proof; by failing to properly evaluate the appellant's evidence of full loan repayment and instead accepting the respondent's unproven claims of further indebtedness without requiring proof of disbursement; and in disregarding the statutory right of a borrower to full disclosure and proper loan statements, thereby occasioning procedural unfairness and violating the principles of natural justice.
7. On the foregoing grounds, the applicant submits that she has demonstrated that her intended appeal raises arguable issues worthy of consideration by this Court.
8. As regards the nugatory aspect, the applicant contends that there is a real and imminent risk that the respondent will proceed to execute the judgment and decree to her extreme detriment, and that such execution at this stage would not only cause her substantial loss but also render her intended appeal nugatory. She maintains that no prejudice would be suffered by the respondent which cannot adequately be compensated by an award of costs.
9. The application is opposed through a replying affidavit sworn by Frederick Nyabuti, the respondent's Legal Officer. The respondent contends that the applicant has failed to demonstrate that the intended appeal raises any arguable issue, or that she stands to suffer substantial loss if the orders sought are not granted. It is further averred that the applicant has engaged in protracted and vexatious litigation since 2021 with the sole aim of frustrating the respondent's lawful rights under the loan agreement between the parties. The respondent therefore urges that this application be dismissed with costs.
10. At the hearing hereof, only learned counsel Mr. Tambo was present for the respondent. There was no appearance by the applicant, despite service of a hearing notice. However, the applicant had filed her written submissions. Counsel for the respondent elected to rely entirely on his written submissions without any oral highlights.
11. In her written submissions, the applicant asserts that the intended appeal turns on whether a statutory power of sale can be exercised without a validly registered charge. She submitted that section 85(1) of the *Land Act* entitles a chargor to be discharged upon repayment, and subsection (2) voids any agreement purporting to deprive a chargor of that right. The applicant contends that the respondent's reliance on a letter of offer to extend the initial charge to cover a second loan was unlawful and contrary to Statute. The applicant draws support from the decision of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] KECA 79 (KLR) where this Court restrained a bank from exercising its statutory power of sale for want of compliance with the law.
12. On the nugatory aspect, the applicant contends that the property in question is family land and therefore unique and irreplaceable. Therefore, if the land were to be sold to a bona fide purchaser for value as contemplated in *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR, the applicant would permanently lose her home and no amount of damages



could adequately compensate her. She maintains that while she stands to suffer irreparable harm, the respondent will suffer no prejudice that cannot be compensated in costs if a stay is granted.

13. The respondent in its written submissions reiterates that the applicant must demonstrate both an arguable appeal and that the appeal would be rendered nugatory if stay is not granted. On arguability, it relies on *Pithon Waweru Maina v Thuka Muguria* (1983) KECA 75 KLR and *Kenya Medical Laboratory Technicians & Technologists v Attorney General; Commission of University Education & Another* (2020) eKLR, emphasizing that a second appeal lies only on matters of law under section 72 of the *Civil Procedure Act*. It is submitted that the applicant's intended appeal raises no arguable point of law but instead rehashes factual questions already determined by two courts, namely, whether she had repaid the loan, and whether the respondent could rely on the initial charge. Both the trial court and the High Court, after full evaluation, found against her, and it is not in the interests of justice for this Court to reopen factual disputes.
14. On the nugatory aspect, the respondent cites *Kenya Shell Limited v Benjamin Karuga Kibiru* [1986] eKLR, where this Court stressed that substantial loss is the cornerstone for the grant of stay pending appeal. It is argued that the applicant has provided no credible evidence of such loss, and that the loss she refers to is merely the lawful enforcement of a judgment and realization of the respondent's contractual rights. It is the respondent's position that no prejudice will be occasioned to the applicant beyond what the law contemplates and she has therefore failed to satisfy the threshold for the exercise of this Court's discretionary power. The respondent thus prays that the application be dismissed with costs.
15. We have considered the application, the affidavits, the rival submissions, and the law. It is trite law that in an application of this nature the applicant must demonstrate, first, that the intended appeal is arguable, and secondly, that unless the orders sought are granted, the appeal will be rendered nugatory. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.
16. However, before engaging with those two limbs, we must first be satisfied that there exists a positive order capable of being stayed. The position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed. We reiterate the sentiments of the predecessor of this Court in its decision in *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] KECA 15 (KLR) where the Court stated in respect of stay of execution as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered.”
17. The principle in *Western College of Arts and Applied Sciences v EP Oranga & 3 others* (supra) has been affirmed in numerous decisions of this Court including *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* [2008] KECA 346 (KLR), *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] KECA 353 (KLR), and *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR.



18. In the circumstances herein, although the application on the face it as worded as “an application for injunction under rule 5(2)(b)

..., the main orders sought in the motion itself relate to stay of execution of the judgment of the High Court. None of the said orders seek an injunction. The judgment of the High Court did no more than dismiss the applicant’s appeal. It did not direct her to do or refrain from doing anything, save for payment of costs. In those circumstances, the order under challenge is a negative one that cannot be stayed. While the applicant may very well pursue her intended appeal, the relief she seeks under rule 5(2)(b) does not lie in law.

19. For these reasons, the Notice of Motion dated 28th April 2025 is without merit. It is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

