



Makokha v Faulu Microfinance Bank & another (Environment and Land Miscellaneous Application E006 of 2025) [2025] KEELC 4552 (KLR) (12 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4552 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2025
EC CHERONO, J
JUNE 12, 2025**

BETWEEN

DORINE NEKESA MAKOKHA APPLICANT

AND

FAULU MICROFINANCE BANK 1ST RESPONDENT

JK WANDERI AUCTIONEERS 2ND RESPONDENT

RULING

1. The Applicant, vide a Notice of Motion filed under certificate of Urgency dated 5th March 2025 seeks the following orders;

1. (Spent)

That pending the hearing of this Application inter partes, this Honourable Court does issue an order of injunction restraining the 1st Respondent by themselves and/ or by their employees, servants, agents, auctioneers from selling the Applicant's home situate on all that parcel of land known as East Bukusu/North Sang'alo/5855, situated at Makatelo area Bukembe in Bungoma County Measuring 1.60 Ha. by way of Public auction and/or through any other means.

That pending the Hearing and determination of this Application inter parties this Honourable Court be pleased to order a stay of proceedings in the matter of Bungoma CMCC E163 of 2024 (Dorine Nekesa Makokha versus Faulu Microfinance Bank and J.K Wanderi Auctioneers).

That this Honourable Court be pleased to enlarge time for filing an Appeal against the Ruling delivered by Honourable Gichimu CM on 14.01.2025 in the matter of Bungoma CMCC E163 of 2024 (Dorine Nekesa Makokha versus Faulu Microfinance Bank and J.K Wanderi Auctioneers).



That pending the Hearing and determination of the intended Appeal, this Honourable Court does issue an order of injunction restraining the 1st Respondent by themselves and /or by their employees, servants, agents, auctioneers from selling the Applicant's home situate on all that parcel of land known as East Bukusu/North Sang'alo/5855, situated at Makatelo area Bukembe in Bungoma County Measuring 1.60 Ha. by way of public auction and/or through any other means.

That pending the Hearing and determination of the intended Appeal, this Honourable Court be pleased to order stay of proceedings in the matter of Dorine Nekesa Makokha v Microfinance Bank and J.K Wanderi Auctioneers.

That the costs of this Application abide the outcome of the intended Appeal.

2. The said Application is premised on eight grounds apparent on the face of the application supported by the affidavit of the Applicant sworn on even date. According to the Applicant, she filed a suit contemporaneously with an Application for stay of execution being Bungoma CM-ELC NO. E163 of 2024. She deposed that in a Ruling delivered on 14/01/2024, the Chief Magistrate dismissed the said Application for stay setting the matter for hearing of the main suit. She stated that upon delivery of the said Ruling, the 2nd Respondent moved to schedule another auction which scheduling was contrary to the express provisions of the *Auctioneers Act*
3. The Applicant further deposed that she was dissatisfied with the ruling by the trial Magistrate on grounds that the Respondents had failed to provide valuation reports for the suit land before purporting to exercise their statutory power of sale. While admitting that there was a loan advanced by the Respondents, the Applicant stated that she was willing to service the facility which had been substantially covered and that she offered her pay slip for purposes of discharging the security and having the pay slip cover the balance which was minimal. She stated that the Respondent called off the auction which had been scheduled for 14.02.2025 albeit to give negotiation a chance. She deposed that negotiations had just began when the Respondents served her with another notice for the auction of the suit land scheduled for 06.03/2025 which she stated was defective in substance and contrary to the legal requirements under the *Land Act* and the *Auctioneers Act*.
4. In her supplementary affidavit, the Applicant reiterated her position that the Respondents did not carry out nor produce a valuation report which is a grave violation of section 97 of the *Land Act*. She stated that there being no valuation report, it is baffling how the Auctioneers determined the forced sale value of the suit property which is calculated against its market value. She deposed that an appeal lodged out of time without seeking leave is defective ab initio and that it is ridiculous of the Respondents to require that the intended Appeal be filed without first seeking and obtaining leave. She argued that what is required is for her to demonstrate an arguable Appeal with high chances of success and that the draft Memorandum of Appeal has been annexed to her supporting affidavit and marked as "DNM 14". She stated that she took a loan of Kshs. 600,000/ and paid Kshs. 400,000/=leaving a balance of Kshs. 200,000/= She stated that she has a chance of getting a loan of Kshs. 200,000/ from both KCB and Equity Bank but unfortunately, the Respondent has listed her with CRB
5. The 1st Respondent filed a Replying affidavit sworn by its legal Officer, one Frerick Nyabuti in which she deposed that the application is misconceived and frivolous as the Applicant has not demonstrated any special circumstances to warrant the Honourable Court's intervention. The 1st Respondent further deposed that all the Applicant's allegations were substantively traversed in the Replying affidavit filed in reply to the Applicant's application in Bungoma CM-ELC



No. E163 of 2024 which the Applicant annexed to her supporting affidavit and marked as “DNM5”.

6. She stated that the Ruling on the Applicant’s application for injunction over the suit property No. E.bukusu/n.sang’alo/5855 delivered on the 14/01/2025 is a negative order incapable of being stayed. The 1st Respondent further contends that whereas both section 16A(2) of the *Environment and Land Court Act* and section 79G of the *Civil Procedure Act* gives this Honourable Court discretionary power to enlarge time for lodging an appeal to this Court against a judgment of the lower court, the intended appeal ought to have already been filed before or together with the application seeking leave to extend time for filing an appeal out of time and that the instant application is therefore defective and without merit. He stated that the Environment and land Court’s jurisdiction as a Superior Court to grant stay pending appeal is fettered by the three conditions namely, establishing sufficient cause, satisfaction of substantial loss and furnishing of security and that the application must be made without unreasonable delay. He stated that in view of the contents of the Replying affidavit filed in the former suit and his Replying affidavit to the present application, she sincerely believes that the Applicant has not met the threshold under order 42 Rule 6 of the Civil Procedure Rules nor has she demonstrated that she has an arguable appeal that will be rendered nugatory if stay orders are not granted and that the Applicant is likely to suffer irreparable loss which cannot be compensated by way of damages. He deposed that the Applicant is latching on the issue of valuation of the suit property which was neither pleaded nor evidence adduced by the Applicant on the same and that parties are bound by their own pleadings. He stated that the Applicant’s loss would be purely financial and the Applicant has not proved that the 1st Respondent is incapable of atoning the same. He deposed that the 1st Respondent has a registered charge over the suit property and the Applicant has defaulted on her obligations towards repayment of the loan and that the 1st Respondent has a statutory power of sale which it has exercised by making preliminary steps in selling the suit property to recover the Bank depositors’ funds. In conclusion, the deponent deposed that the Applicant has failed to demonstrate that the intended appeal would be rendered nugatory if the orders sought are not granted. To the contrary, the deponent stated that should the stay orders be granted, the Respondent would be prejudiced as interest on the loan sum would continue to accrue resulting in the increase of outstanding sum which does not benefit the Applicant.

LEgal Analysis and Decision

7. I have considered the application, the grounds on the face of the said application, both the supporting and supplementary affidavit as well as the Replying affidavit and the applicable law. The Applicant has brought the present application for stay of Execution under Order 42 Rule 6 CPR. Order 42 Rule 6(2) provides as follows;

“(2) No order for stay of execution shall be made under subrule (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”.



The superior courts in numerous decisions have held that before an application for stay pending appeal is granted, the following conditions must be satisfied;

- a. The applicant must demonstrate that he will suffer substantial loss.
 - b. That the application has been brought without undue delay;
 - c. The applicant must give an undertaking to give security as the court orders for the due performance of such decree or order as may ultimately be binding on him; and
 - d. The applicant must demonstrate that he has an arguable appeal which would be rendered nugatory unless the stay orders are granted.
2. The first requirement is that the intended appeal must be arguable. It is not in dispute that these proceedings have been commenced by way of a Miscellaneous application dated 5th March, 2025. The Applicant is seeking stay of an order dismissing an application for injunction in CM-ELC No. E163 of 2024 delivered on 14/01/2025. It is apparent that no Appeal has been filed. This Honourable Court cannot determine the arguability or triability of an Appeal that is yet to be filed. The essence of whether or not the intended appeal raises triable issues is to avoid the same be rendered nugatory should the decision of the Appellate Court overturn that of the trial Court. This first ground has not therefore been met.
3. The second issue is whether the application before court was filed without undue delay. From the supporting affidavit and the annexures thereto, it is not in dispute that the order sought to be stayed was issued on 14/01/2025 while the present application was filed on 05/03/2025. It took the Applicant about one and a half months to file the present application. The explanation given for the delay is that the Respondent called off the auction scheduled for 14/02/2025 albeit to give negotiations a chance. From the letters annexed to the supporting affidavit, there is no indication that the parties had a common intention to negotiate the matter out of court. The said letters were initiated by the Applicant and no corresponding communication from the Respondents or their advocates expressing any intention to settle the matter amicably. When the Applicant was not getting feedback, she should have filed the appeal without unreasonable delay. I find that a period of more than one and a half Months without sufficient explanation is unreasonable delay.
4. The third issue is whether failing to grant the stay orders would occasion the Applicant substantial loss. Substantial loss was explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR where F. Gikonyo J held as follows;

“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.”

5. Since no appeal has been filed upon which the application is anchored, I am of the respective view that that the Applicant has not established any substantial loss to be occasioned should the application be disallowed.
6. The fourth and last condition is that the Applicant has to give security or an undertaking to give such security as the court may order for the due performance of the decree/order as may ultimately be binding on her. There is no deposition in both the supporting and the supplementary affidavit that the Applicant undertakes to give such security as this Honourable Court may order for the due performance of the order as may ultimately be binding on her.
7. It is trite that the four conditions for stay must be met simultaneously before an order for stay of execution is granted. I find that the Applicant has miserably failed to establish any of the conditions for the grant of stay of execution pending appeal.
8. The upshot of my finding is that the Notice of Motion application dated 5th March, 2025 is devoid of merit and the same is hereby dismissed with costs to the Respondents.

Orders accordingly.

READ, DATED AND SIGNED AT BUNGOMA THIS 12TH DAY OF JUNE, 2025.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

M/S Ataka H/B for Alovi for the Appellant/Applicant.

Respondent/Advocate-absent.

Bett C/A.

