



**Faulu Microfinance Bank Limited v Nightigale Enterprises Limited &
another (Commercial Appeal E095 of 2025) [2025] KEHC 19062 (KLR)
(Commercial and Tax) (18 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 19062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E095 OF 2025
MN MWANGI, J
DECEMBER 18, 2025**

BETWEEN

FAULU MICROFINANCE BANK LIMITED APPELLANT

AND

NIGHTIGALE ENTERPRISES LIMITED 1ST RESPONDENT

METROPOL CREDIT REFERENCE BUREAU LIMITED 2ND RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 26th March 2025 filed by the appellant under the provisions of Articles 50 & 159(2) of *the Constitution* of Kenya, Sections 1A, 1B, 3A & 65 of the *Civil Procedure Act*, Order 42 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. The appellant seeks an order staying the execution of the Judgment and decree issued by the Hon. Principal Magistrate Becky Cheloti Muema at the Milimani Commercial Law Courts on 28th February 2025, pending the hearing and determination of the Appeal.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Frerick Nyabuti, an Advocate of the High Court of Kenya and the appellant's Legal Officer. Mr. Nyabuti averred that the 1st respondent filed Milimani Civil Suit No. E6943 of 2020 against the appellant and another, which proceeded to full hearing and culminated in a Judgment delivered on 28th February 2025 in favour of the 1st respondent, with costs of the suit to be borne by the appellant. He stated that thereafter, the 1st respondent obtained and served a decree demanding payment of Kshs.97,675.00 as costs. Counsel contended that the aforesaid Judgment is marred by material errors of law and fact, and has accordingly filed an appeal challenging the entire decision.



3. Mr. Nyabuti deposed that unless stay of execution is granted, the 1st respondent is likely to commence execution, thereby causing the appellant to suffer irreparable harm rendering this Appeal nugatory. He claimed that this Appeal is arguable as it raises substantial issues, including the Trial Court's failure to properly evaluate evidence regarding the loan transaction, erroneous dismissal of the counterclaim and the restraint against loan recovery despite a valid Loan Agreement. Counsel stated that the instant application was filed without undue delay and that the appellant is ready and willing to provide security as directed by this Court.
4. In opposition to the application, the 1st respondent filed Grounds of Opposition dated 29th April 2025, raising the following grounds –
 - i. That the Judgment in this matter was delivered on the 28th February 2025 in favour of the 1st respondent as against the appellant and the 2nd respondent, and the appellant/applicant was directed to pay costs to the 1st respondent;
 - ii. That the appellant/applicant has not satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010, in order to warrant stay the execution as the appellant/applicant has not demonstrated what substantial loss it will suffer if the order of stay is not granted as it is not enough to merely proffer assertions of substantial loss without any evidence to support such contention;
 - iii. That the Appeal herein as well as the application dated 26th March 2025 are devoid of merit and do not present an arguable case hence the same should not be allowed;
 - iv. That the 1st respondent has a right to enforce the Judgment delivered in its favour and granting this application will only delay the 1st respondent from enjoying fruits of the Judgment which will be akin to justice being delayed and hence being denied (sic);
 - v. That the 1st respondent will stand to suffer prejudice if the stay orders are granted as it will still be listed at the Credit Reference Bureau and hence will be unable to access any credit facility which will ultimately prevent the 1st respondent from carrying out its businesses;
 - vi. That on the other hand, if the stay orders are not granted, the appellant/applicant will not suffer any prejudice thereto; and
 - vii. That should the Honourable Court be inclined to grant the stay orders, then the appellant/applicant should proceed to deposit the security as directed by the Honourable Court on the 6th April 2025, failure to which, the stay orders to be denied (sic).
5. The 1st respondent seeks for orders that the appellant/applicant's Notice of Motion dated 26th April 2025 be dismissed with costs to the 1st respondent.
6. The instant application was canvassed by way of written submissions. The appellant's submissions were filed on 17th June 2025 by the law firm of Maina & Onsare Partners Advocates LLP, whereas the 1st respondent's submissions were filed by the law firm of Wanjiru Kairu & Company Advocates on 28th July 2025. On 30th July 2025, Ms Njeri, learned Counsel for the 2nd respondent indicated that the 2nd respondent would not participate in the application herein.
7. Ms Ngui, learned Counsel for the appellant cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 and submitted that the appellant has established a case to warrant being granted the orders being sought herein. On substantial loss, Counsel submitted that execution of the decree for costs before this Appeal is heard and determined would occasion irreparable financial harm to the



appellant and render this appeal nugatory. She argued that the appellant being a licensed financial institution, faces continued exposure from the non-performing facility at the heart of the dispute between the parties herein and that premature execution would adversely affect its liquidity and public confidence. In addition, she asserted that recovery of any sums paid may prove difficult should this Appeal succeed.

8. On the issue of delay, Ms Nguu stated that the impugned Judgment was delivered on 28th February 2025, and thereafter a Memorandum of Appeal was filed on 21st March 2025, followed by the instant application which was filed on 26th March 2025. Counsel asserted that the application herein was filed promptly and without any undue delay. Ms Nguu confirmed that the appellant complied with this Court's interim directions by depositing the decretal costs in Court, thereby satisfying the requirement under Order 42 Rule 6 of the Civil Procedures Rules, 2010, requiring provision of security for the due performance of the decree.
9. Mr. Kimani, learned Counsel for the 1st respondent submitted that the instant application fails to meet the requirements under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. He further submitted that the grant of an order for stay of execution is a discretionary remedy and the appellant has not demonstrated any substantial loss it stands to suffer should the application herein be disallowed. He relied on the cases of Kenya Shell Ltd v Kibiru & Another [1986] KLR 410 and Gakere & another v Kiromo [2024] KEHC 10930 (KLR), and argued that substantial loss must be more than the ordinary consequences of execution and must demonstrate that the Appeal would be rendered nugatory if stay of execution is not granted. He however contended that the appellant has not shown such exceptional circumstances.
10. Mr. Kimani noted that the impugned Judgment only restrained the appellant from recovering the disputed loan and from listing the 1st respondent with the Credit Reference Bureau, orders that have been in effect since 2016 when the dispute arose. He asserted that the appellant failed to demonstrate why the situation has suddenly become dire or how not being granted an order for stay of execution, would result in irreparable harm. Counsel submitted that granting the orders sought herein would cause the 1st respondent to suffer prejudice as it would risk being negatively listed with the Credit Reference Bureau, thereby hindering its ability to access credit facilities and conduct business. He stated that in the event that this Appeal succeeds, the appellant would still be able to pursue recovery or list the 1st respondent with the Credit Reference Bureau at that time.

Analysis And Determination.

11. I have considered the application herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the grounds of opposition by the 1st respondent and the written submissions by Counsel for the appellant and the 1st respondent. The issue that arises for determination is whether an order for stay of execution pending Appeal should be granted.
12. This Court's jurisdiction to issue an order for stay of execution pending Appeal is derived from the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, which states that –
 - 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.
13. When considering an application for stay of execution pending Appeal, Courts must strike a balance between the competing rights of the parties, recognizing on one hand the appellant's unquestionable right to Appeal, and on the other, the respondent's right to enjoy the fruits of a valid Judgment. In the case of *Vishram Ravji Halai v Thornton & Turpin* [1990] KLR 365, the Court of Appeal affirmed that while its own power to grant an order for stay pending Appeal is unrestricted, the High Court's authority to do so under Order 42 Rule 6 of the Civil Procedure Rules, 2010, is fettered by three conditions namely -
- i. establishment of a sufficient cause;
 - ii. satisfaction of substantial loss; and
 - iii. the furnishing of security.
14. The Trial Court delivered its Judgment on 28th February 2025 in favour of the 1st respondent, granting orders of injunction restraining the appellant and the 2nd respondent from listing the 1st respondent with the Credit Reference Bureau and from recovering the alleged loan amount from the 1st respondent. The Court further ordered that the costs of the suit be borne by the appellant. Subsequently, the 1st respondent extracted a decree and a certificate of costs requiring the appellant to pay the 1st respondent costs of the suit in the sum of Kshs.97,675.00 Aggrieved by both the Judgment and the resulting decree, the appellant lodged the present Appeal.
15. On perusal of the appellant's Memorandum of Appeal, it is evident that the appellant contests the Trial Court's findings that the loan was fraudulently obtained and its dismissal of the appellant's counterclaim, notwithstanding evidence suggesting that the 1st respondent benefited from the loan facility. Consequently, the key issues for determination in this Appeal will include whether the subject loan was indeed fraudulently obtained, whether the 1st respondent benefited from said loan and whether an obligation to repay the loan existed. In view of these questions, I am persuaded that the appellant has an arguable Appeal worthy of consideration by this Court.
16. Given that the impugned Judgment and decree have an order for payment of costs in the sum of Kshs.97,675.00, I am satisfied that the decree issued on 14th March 2025 constitutes a money decree. Where the decree appealed from is a money decree, Courts are generally reluctant to grant an order for stay of execution unless it is shown that the decree-holder lacks the financial capacity to refund the decretal sum should the Appeal ultimately succeed. In the case of *Kenya Hotel Properties Limited v Willesden Investments Limited* [2007] KECA 401 (KLR), the Court of Appeal affirmed this position in the following words-
- Courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.
17. It is now well settled that submissions do not constitute pleadings, rather they serve merely as persuasive tools or a marketing language employed by Counsel to advance and support their clients' respective positions. In this application, save for the appellant's submissions that recovery of any sums paid to the 1st respondent may prove difficult should this Appeal succeed, the appellant neither averred nor alluded to the 1st respondent's inability to refund the decretal sum in the event that the Appeal is successful.



Additionally, in as much as the appellant stated that it stands to suffer substantial loss that cannot be compensated by an award of damages, it did not put forth its current financial position to show how the same will be affected in the event that the application herein is not allowed.

18. In the case of *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] KEHC 4530 (KLR), the Court in allowing an application similar to the instant one made the following observation –

Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See *Caneland Ltd. & 2 Others vs. Delphis Bank Ltd.* Civil Application No. Nai. 344 of 1999.

The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum.

19. In this instance, the 1st respondent did not provide evidence of its financial capacity to this Court, nor did it file an affidavit of means to show its ability to refund the appellant the decretal sum should this Appeal succeed. I am however of the view that the 1st respondent was under no obligation to do so, as the appellant neither alleged nor demonstrated that the 1st respondent would be unable to repay the decretal sum if the Appeal will be successful.
20. In light of the foregoing, this Court finds that the appellant has not demonstrated that it stands to suffer substantial loss in the event that the application herein is not allowed.
21. As to whether there has been a delay in filing the instant application, this Court notes that the Trial Court's Judgment was delivered on 28th February 2025, whereas the instant application was filed on 3rd April 2025, approximately thirty-five days later. In the premise, this Court finds that the application herein was filed timeously.
22. The appellant in its affidavit in support of the application herein averred that it is ready and willing to provide security as directed by this Court. In the often cited case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] KEHC 8358 (KLR), it was as follows-

Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.

23. On 6th April 2025, this Court granted the appellant an order for stay of execution pending the hearing and determination of the application dated 26th March 2025, subject to the appellant depositing the full decretal sum in Court within thirty (30) days from 7th April 2025. Records from the Case Tracking



System (CTS) indicate that on 15th April 2025, the appellant deposited the entire decretal sum of Kshs.97,675.00 in Court in compliance with the said Order, thereby demonstrating its good faith and willingness to comply with Court Orders in regard to deposit of security for the due performance of the decree.

24. In the absence of evidence demonstrating substantial loss, Courts will rarely grant an order for stay of execution pending Appeal. In the case of Kenya Shell Limited v Kibiru (supra), the Court in considering the concept of substantial loss, held that -

It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money. (Emphasis added).

25. In view of the fact that the appellant has established that it has an arguable Appeal and demonstrated willingness to provide security as directed by this Court, I am satisfied that the instant application is merited.

26. As a result I make the following orders -

- i. Pending the hearing and determination of this Appeal, an order staying the execution of the Judgment and decree by the Hon. Principal Magistrate Becky Cheloti Muema at the Milimani Commercial Law Courts on 28th February 2025 in respect to the taxed costs is hereby granted;
- ii. The entire decretal sum of Kshs.97,675.00 deposited on 15th April 2025 by the appellant shall continue being held by the Court as security for the due performance of the subject decree; and
- iii. Costs of this application shall abide the outcome of the Appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF DECEMBER 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Ngugi for the appellant/applicant

Mr. Rukwaro h/b for Mr. Kimani for the 1st respondent

No appearance for the 2nd respondent

Ms B. Wokabi – Court Assistant.

