



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndiritu v Agricultural Finance Corporation (Miscellaneous Civil Application  
E023 of 2023) [2025] KEHC 7629 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7629 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
MISCELLANEOUS CIVIL APPLICATION E023 OF 2023**

**AK NDUNG’U, J**

**MAY 29, 2025**

**BETWEEN**

**GRACE WANJIKU NDIRITU ..... APPLICANT**

**AND**

**AGRICULTURAL FINANCE CORPORATION ..... RESPONDENT**

**RULING**

1. GRACE WANJIKU NDIRITU (hereinafter, the Applicant), moved this court vide the Notice of Motion application dated 18/08/2023 seeking for leave to file an appeal out of time and stay of execution pending the hearing of appeal. The application is brought under section 79G of the *Civil Procedure Act*, Order 50 Rule 6 and Order 42 Rule 6 of the Civil Procedure Rules.
2. The application is based on the grounds on the face thereof and is supported by an affidavit of the Applicant. She deponed that her claim seeking an order of injunction against the Respondent from evicting, alienating or interfering with her use, occupation or ownership of L.R No. Gakawa/Kahurura Block 1/Ichuga/1XX9 was dismissed with costs to the Respondent on 13/02/2019. Consequently, she instructed her advocates on record to appeal and she applied for typed proceedings on 18/02/2019. That she has been advised that a similar application to appeal out of time was filed in Nyeri Misc. Civil Application No. 84 of 2019 which was allowed by Hon. J Muya on 20/07/2022 but the advocates on record were informed that the matter had been transferred to Nanyuki law courts and they were advised to file the application afresh. That the delay was not intentional and if granted leave, she shall lodge the appeal without delay and that she believes that the appeal has high chances of success.
3. The Respondent did not oppose the application despite being served. There was no appearance by the Respondent.
4. The Applicant’s counsel filed written submissions and maintained that judgment was delivered on 13/02/2019 and an application seeking leave to appeal out of time was filed at Nyeri High Court being



Nyeri Misc Civil Application No. 84 of 2019 on 21/06/2019 which was allowed on 20/07/2022. The Applicant's then advocate was ailing and later passed on so he was unable to prosecute the appeal. That when the current advocate took conduct of the matter, the matter had been transferred to this court and required orders from this court to actualise the appeal.

5. That the delay is of 11 months which is excusable since it has been explained. That from record, she has an arguable case with chances of success and that the Respondent does not stand to suffer prejudice since it is not precluded from enjoying the fruits of the trial court's judgment. That the Applicant will be prejudiced given that she suffered loss as a consequence of her property getting auctioned without regard to its value and without due process. That she has demonstrated the willingness to furnish security for the due performance of the decree as may be directed by the court.
6. I have considered the application, the affidavit evidence and submissions made. The Applicant stated that a similar application seeking leave to appeal out of time was filed in Nyeri High Court vide Nyeri Misc. Civil Application No. 84 of 2019 dated 21/06/2019 and was allowed by Hon J Muya on 20/07/2022 and the file was transferred to this court. The said application is attached to her supporting affidavit and it shows that the same was filed before the Environment and Land Court at Nyeri.
7. So, having filed a similar application before the said court and the same being allowed, the Applicant is barred from filing a similar application before this court. This is per the principle of res judicata. The essence of this principle is that where a suit involving the same parties is decided by a court of competent jurisdiction, any other subsequent suit between the same parties and on similar facts offends the rule on res judicata and ought not to be entertained.
8. The relevant law is found in section 7 of the [Civil Procedure Act](#) which states that;

“No court shall, try, any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or issue in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
9. The test was summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, [2010] eKLR, under five distinct heads as follows;

“ (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”
10. In *Uhuru Highway Development Ltd – Vs – Central Bank of Kenya & 2 others*(1996)eKLR the Court of Appeal stated;

“ That is to say, there must be an end to Applications of similar nature, that is to further, under principles of Res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or [Civil Procedure Act](#) caters for.”
11. It follows then that the application before this court is res judicata. What the applicant seeks in this application was already granted by my brother Muya J and this court cannot revisit the issue.



12. Even assuming that the application could be properly entertained by the court, the prayer for a stay too stands on quick sand.
13. The principles guiding the grant of stay of execution pending appeal are provided under Order 42 rule 6(2) of the Civil Procedure Rules which states;
  - “(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.”
14. In *Halal & Another v Thornton & Turpin Ltd, (1963) Ltd [1990] eKLR* the Court of Appeal held that:

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay. In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted...”
15. The Applicant readily offers that the subject property is already sold. There is nothing to stay in those circumstances and any order of stay would serve no useful purpose.
16. Secondly, it was upon the Applicant to demonstrate that substantial loss would occur if stay is not granted. She has not done so. Musinga J in *Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001* put it succinctly thus;

“It is not enough for an applicant to merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur. Disruption of business and loss of reputation can only be suffered if stay of execution was refused and the applicant refused to pay or became unable to pay and auctioneers had to move in to carry out execution. “Substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum.”
17. On whether there was inordinate delay in filing the application, the Applicant stated that the judgment was delivered 13/02/2019 so the delay is of six years which delay is not explained.
18. On the whole, the application lacks merit. It is dismissed. As the same was not defended, I make no orders as to costs.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF MAY 2025.**

**A.K. NDUNG’U**

**JUDGE**

