



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Faulu Microfinance Bank Limited (Civil Appeal
E031 of 2023) [2024] KEHC 5975 (KLR) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5975 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E031 OF 2023
PN GICHOHI, J
MAY 27, 2024**

BETWEEN

PENNINA WAKIURU KAMAU APPELLANT

AND

FAULU MICROFINANCE BANK LIMITED RESPONDENT

RULING

1. Under a Certificate of Urgency, the Appellant moved this Court by way of a Notice of Motion dated 17/02/2023 invoking Order 50 Rule 1, 2, 3, of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 of the Constitution of Kenya 2020 seeking orders that:-
 1. Spent.
 2. Pending hearing and determination of Appeal No. 31 of 2023, the court does stay the proceedings in Nakuru Small Claims Court No. E614 of 2022 Faulu Microfinance Bank Limited v Peninnah Kamau coming for hearing 27/02/2023.
 3. Costs be in the cause.
2. The grounds are that the court delivered a ruling on 27/01/2023 declining the Appellant's application to join Egerton University as a defendant in this case. She states that the case in the Small Claims Court was coming for hearing on 27/02/2023 and that if it proceeds without her appeal being determined, she shall suffer irreparable harm as any decree will affect her yet the intended third party is the one who failed to pay the Respondent her full salary to enable her meet the check off agreement entered with her.
3. She states that no prejudice will be suffered by the Respondent as she (Appellant) will continue paying Kshs. 10,000/= in loan payment since she is on half salary by her employer. In support of the application *vide* Affidavit sworn on 17/0/2023, the Appellant depones that the Respondent advanced a loan of Kshs. 731,000/= and it was to be repaid in 84 months from 03/10/2019 at monthly



- instalments of Kshs. 16,870/= plus interest at 20.53 percent but due to covid- 19 that attacked the country including Egerton University where she worked, she was put on half salary like all the other staff in the institution . That meant the University did not pay the check-off amount of Kshs. 16,870 / = as agreed with between her and the Respondent .
4. She states that she has nevertheless be remitting Kshs. 6,000/= which she has since to Kshs. 10,000/= from January 2023. She claims that loan was to be cleared through check-off which the University had guaranteed her but the agreement was not practical as the guarantor was unable to pay her full salary and therefore deduct the monthly instalments.
 5. As a result, she wished to join the University as it was liable for putting her in this predicament where the Respondent has sued her for fault of her own.
 6. The Respondent filed grounds of opposition dated 14/06/2023 challenging the viability of the application and therefore seeking its dismissal with costs. The grounds thereof are that:-
 1. This Court lacks jurisdiction to determine both the application and the purported appeal.
 2. There is no competent application capable of determination by this Court. .
 3. Having admitted the indebtedness to the Respondent, the Applicant seeks to purport to pass on her obligation to a third party outside the doctrine of privity of contract.
 4. The Applicant has failed to avail evidence of payment of the outstanding arrears.
 5. There is no evidence of existence of a contract of guarantee between the Appellant and the , Egerton University and the Respondent as alleged by the Applicant.
 7. The application was canvassed by way of written submissions. In her submissions dated 29/06/2023, the Appellant Order 1 rule 15 *Civil Procedure Rules*, Overriding Objectives under *Civil Procedure Act* and Article 159 of the *Constitution* that the Appellant ought to have been granted leave to join the third party to enable the court to effectively determine the real issues in question and also to avoid multiplicity of suits in future.
 8. While further relying several cases including Court of Appeal decision in *Jessie Mwangi Gachago v Attorney General* [1981]eKLR, the Appellant urged the Court to find the existence of nexus between the Appellant and the intended third party who is her employer and who would deduct the money from the Appellants account but failed to remit it to the Respondent.
 9. She further urged this Court to unearth or discern from the application herein as to whether there is a triable issue between the Applicant and the proposed third party and therefore allow the Appellant to issue a third-party notice to Egerton University.
 10. On its part, the Respondent filed submissions dated 27/09/2023 highlighting four grounds of opposition. He submits that this Court lacks jurisdiction to hear and determine the application and the purported appeal as both are based on facts and not law as provided for under section 38 of the *Small Claims Act* as can be noted in all the six grounds of appeal.
 11. Further, he submits that there is no order or the impugned ruling annexed to so as to enable the Court exercise its discretion on this application where the Applicant seeks that the appeal be allowed and the Ruling set aside. He therefore submits that in the circumstances, this Court is precluded to determine that it has an appeal for determination in the first instance.
 12. As regards stay of proceedings, the Respondent submits that the Appellant has failed to prove she has an arguable appeal with high chances of success as held in the case of *Peter Kariuki Mburu & another*



v Neema Shah [2021]eKLR and the factors for consideration by Court as to whether to grant stay enunciated by Ringera J (as he then was) in the case of *Re Global Tours & Travel Ltd.* HCWC No. 43 of 2000 that is, the need for expeditious disposal of the case , the prima facie merits of the intended appeal , that is whether it is an arguable one, the sanctity and optimum utilisation of judicial time and whether the application has been brought expeditiously.

13. Further he submits that the application and the appeal are intended Appeal derail expeditious disposal of the matter under Section 34 of the *Small Claims Court* and to delay payment of a just and liquidated that continues to attract interest until full and final settlement.
14. Terming the application an abuse of court process, he submits that the claim between the Appellant and the intended proposed third party is separate and that the Respondent is not a party. Lastly, he urges the Court to dismiss the application and the Appeal with costs to the Respondent.

DETERMINATION

15. After considering the application response and submissions by the parties herein , this Court is alive to the fact that there is only one prayer before this Court and therefore, only one issue for determination being:-

Whether this Court should grant an order for stay of the proceedings in Nakuru Small Claims Court No. E614 of 2022 pending hearing and determination of Appel No. 31 of 2023.

16. To start with, it is clear that no stay orders were granted pending inter-partes hearing even though the case before the small Claims Court was scheduled for hearing on 27/02/2023.
17. That means that by now, the said case is still proceeding or finalised, bearing in mind the emphasis on expeditious disposal of cases as provided for under Section 34 (1) of the *Small Claims Act* that :-

“ All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day-to-day basis until final determination of the matter which shall be within sixty days from the date of filing the claim.”

18. It is also borne in mind that Section 3 (1) of *the Act* provides that while exercising its jurisdiction under this Act, the Court shall be guided by the principles of judicial authority prescribed under Article 159 (2) of the *Constitution*.
19. Further, the Small Court is mandated under Section 3 (3) of *the Act* to adopt such procedures as it may deem appropriate so as to ensure:- (a) the timely disposal of all proceedings before the Court using the least expensive method; (b) equal opportunity to access judicial services under this Act; (c) fairness of process; and (d) simplicity of procedure.
20. Further, Section 17 of *the Act* mandates the Court to have control of its own procedure in the determination of claims before it but having regard to the principles of natural justice.
21. With such provisions guiding the hearing and determination of the matter before the Small Claims Court , it was incumbent upon the Appellant to avail the copy the Ruling or the Order dismissing the alleged application for joinder of a third party to enable this Court discern what led to the dismissal of the said application but this was not done.



22. However, failure to annex the said copy of ruling or order would not call for striking out of the Appeal at this juncture. There is no record of appeal yet. Further, Order 42 Rule 2 of the [Civil Procedure Rules](#) provides as follows:-

“Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed.”

23. The issue is whether the Court should strike out the Memorandum of Appeal on allegation that it is based on facts and not law as provided for under section 38 of the [Small Claims Act](#).

24. A look at the Memorandum of Appeal dated 15th February 2023 is on six grounds that is:-

1. That the learned trial magistrate erred in law in finding the inability of Egerton University to pay the Appellant her full salary against a loan the University had guaranteed amounted to a labour dispute yet the plaintiff is sued for inability to pay the loan granted by the Respondent due to lack of payment of the monthly sum by Egerton University.
2. That the learned trial magistrate erred in law in failing to enjoin Egerton University as a third party yet is the University that has failed to pay the appellant her full salary to enable her meet her obligation to the respondent.
3. That the learned trial magistrate erred in law in failing to enjoin Egerton University which guaranteed the loan given to the appellant by the respondent leaving the plaintiff exposed to a court decree which she cannot service due to the University’s inability to pay her full salary.
4. That the learned trial magistrate erred in law in finding that the appellant by seeking to join Egerton University was seeking to confer the court with jurisdiction to hear and determine a labour and employment dispute.
5. That the learned trial magistrate erred in law in failing to enjoin Egerton University as an interested party yet it is the University’s inability to pay the appellant full salary that has led to default in servicing the check off loan guaranteed by the University.
6. That the plaintiff is sued for inability to pay the loan granted by the Respondent due to lack of payment of the monthly sum by Egerton University.

25. The grounds of appeal, the Supporting Affidavit together with the annexures thereto, are on the relationship between the Appellant and the intended third party; whether the intended third party guaranteed the Appellant and; how such relationship would affect the relationship between the Appellant and the Respondent in regard to the non- payment of the loan applied for by the Appellant.

26. Those issues may appear to be a mixture of facts and law whereas Section 38 (1) of the [Small Claims Act](#) provides that :-

“A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.”

27. From the averments and the annexures to the supporting affidavit, it is apparent that the Applicant was trying to use the facts as an explanation to reach a conclusion on a point of law. However, in an application for stay of proceedings pending appeal, one of the factors for consideration is whether the appeal is arguable. That does not necessarily mean that the appeal will succeed.



28. Indeed, the Court of Appeal in *Cabinet Secretary Ministry of Health v Aura & 13 others* (Civil Application E583 of 2023) [2024] KECA 2 (KLR) (19 January 2024) (Ruling) held:-

“An arguable appeal was not one that must succeed and an applicant need not proffer a multiplicity of arguable points. One was sufficient. For a point to be arguable it needed merely to raise a bona fide point of law or fact sufficient to call for an answer from the respondent and was worthy of the court’s consideration. Moreover, whereas such arguable points should ideally and conveniently be expressed in the form of a draft memorandum of appeal, there was no rule that it must be so. One could raise such grounds on the face of the motion and even in the supporting affidavit. The appeal was eminently arguable.”

29. Further, and as earlier stated in this ruling, this is not an appeal but application for stay of proceedings pending appeal. To strike out the Memorandum of Appeal at this juncture and in the circumstances would be too drastic. It is up to the Applicant/Appellant to pursue the appeal on merit if she so wishes.

30. Otherwise, and the circumstances, this Court finds that failure to avail the Order dismissing the Appellant’s application to join the third party makes the Application herein incompetent.

31. In conclusion, the application dated 17th February 2023 is struck out with costs to the Respondent.

DATED,SIGNED AND DELIVERED NAKURU THIS 27TH DAY OF MAY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Nancy Njoroge for the Appellant/ Applicant

N/A for Respondent

Ruto- Court Assistant

