



REPUBLIC OF KENYA



**Nduti v Rafiki Microfinance Bank Limited (Environment and Land Appeal  
E027 of 2021) [2023] KEELC 747 (KLR) (13 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 747 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E027 OF 2021  
MN GICHERU, J  
FEBRUARY 13, 2023**

**BETWEEN**

**JANE MWIHAKI NDUTI ..... APPELLANT**

**AND**

**RAFIKI MICROFINANCE BANK LIMITED ..... RESPONDENT**

*(An application for stay of execution of whole judgment and decree of  
the chief Magistrate's Court at Kajiado, Hon. I. Kabuya, PM dated and  
delivered on the 18th day of August, 2021 in ELC Case No. 112 of 2018)*

**RULING**

1. This ruling is on the notice of motion dated March 17, 2022. The said motion is by the appellant and the main prayer is as follows.
  - i. That this court be pleased to stay execution of the judgement and decree dated August 28, 2021 in Kajiado CMELC No 112 of 2018 pending the hearing and determination of this appeal.
2. The motion is under articles 48 and 159(2) (d) of the *Constitution of Kenya*, sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and orders 42, rule 6 and 51, rule 1 of the *Civil Procedure Rules* and is supported by twelve grounds, a supporting affidavit and five annexures.
3. In a nutshell, the appellant is saying that unless the motion is allowed, her appeal will be rendered nugatory yet the same has a reasonable chance of success. Her property which is LR Kajiado/ Kapatuei/22495 measuring 0.20 hectares is in danger of being sold by auction. The intended auction is highly irregular and improper for lack of statutory notice; the appellant has great sentimental attachment and value over the suit land because her parents are buried thereon, the appellant is willing and able to abide by any conditions that the court may set; no prejudice will be suffered by the respondents as they can adequately be compensated by way of costs and the trial magistrate acted in excess of her pecuniary jurisdiction by awarding the respondents Kshs 13, 948, 009.38.



4. The motion is opposed by the respondent and Jane Warau, the respondent's debt recovery manager has sworn a replying affidavit dated April 20, 2022 which has four annexures. In summary, the respondents deny that the decree is for Kshs 13, 948, 009.38 and instead say that it is for Kshs 9, 453, 10898. Secondly, it is deposed in reply that all the requisite statutory notices were issued as per the annexed copies. Thirdly, the appellant should not be heard to talk about the sentimental value of the land because she charged it well knowing about such value. Fourthly, the respondents are saying that they will suffer great prejudice if the application is allowed because the unserved loan will continue to accumulate interest and thereby diminish the value of the security held by the respondents. Finally, it is the respondent's contention that in the event the appellant's appeal succeeds, the respondent will be in a position to meet the award.
5. Counsel for the parties filed written submissions on October 4, 2022 and January 9, 2023 and raised the following issues.
  - a. Whether the appellant is likely to suffer substantial loss if the order for stay is not granted?
  - b. Whether the appellant has offered any security as a condition for stay?
  - c. Whether the application has been made without unreasonable delay?
  - d. Whether the appellant is entitled to the orders sought?
6. I have carefully considered the application in its entirety including the affidavits, the annexures, the grounds, the submissions and the law cited therein. I agree that the issues identified above are the right ones applicable to this motion. I find as follows on the four issues.
7. On the first issue, I find that substantial loss may result to the applicant if the order for stay of execution is not made. She has stated, without evidence of pictures that her parents' graves are in the land in danger of sale. The only question that comes to mind is why she used this land as security well knowing that one of the risks inherent in this was sale of the suit land in the event of failure to service the loan. This is a risk that she took deliberately and now the time has come to face the consequences of the risk. A look at order 42, rule 6(2) (a) and (b) of the [Civil Procedure Rules](#) will show that both (a) and (b) are conjunctive and not disjunctive. This means that it is not enough to show that the applicant will suffer substantial loss. It is also a requirement that security for the due performance of the decree be given by the applicant. The word "and" at the end of order 42, rule 6(2) (a) [Civil Procedure Rules](#) means that the two conditions in (a) and (b) must be present together and not separately for an order of stay of execution to issue.
8. On the second issue, I find that the appellant has not offered any security as a condition for stay. In paragraph 15 of the supporting affidavit, she has stated as follows.

“That the respondent is in possession of sufficient security being Kajiado/Kaputiei North/22495 however I am willing to abide by any conditions the court may set as a condition for grant of orders of stay pending the hearing and determination of this appeal”.

This deposition raises many questions such as, why has the applicant not offered LR 22495 as an alternative to the respondent? What is its value? Is it really in her name? Why did she not offer it as security in the first place instead of the suit land? Why has she not sold it to save the suit land which she says she attaches great sentimental value to? In short, this deposition is not convincing because she has had all the time to sell the alternative land to save the suit land. She has not offered any security for the due performance of the decree that has been passed against her in case her appeal fails.



9. I need not consider whether the current application has been made without unreasonable delay because that aspect is covered in rule (2) (a) which I have found in favour of the applicant.
10. Finally, I find that the applicant is not entitled to the orders sought because she has not proved the crucial aspect of security for the due performance of the decree which is a prerequisite for the grant of the order that she seeks. The notice of motion dated March 17, 2022 has therefore no merit and is dismissed with costs to the respondents.

It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**M.N. GICHERU**

**JUDGE**

