REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPLICATION NO E003 OF 2025

ALEXANDER MULI NZUNGI……1ST APPLICANT

MIRIUM MEIKALI MULI……2ND APPLICANT

VERSUS

FAULU MICROFINANCE BANK LIMITED……RESPONDENT

RULING

1. The Applicants' Notice of motion dated 19th February 2025 seeks an order for stay of execution of the decree and judgment herein pending appeal.

2. The application is supported by the affidavit of Alexander Muli sworn on 5th December 2024. The gist of the application, as can be discerned from the grounds on its face thereof and in the affidavit, is that being aggrieved by the judgment of the lower court filed an appeal. That the claimant was in the process of extracting warrants of execution for the decretal sum and that the claimant being a financial institution stands to suffer no prejudice or loss. He also deposed that he was willing to abide with any reasonable conditions which the court may impose as a condition for grant of stay.

3. The application was opposed through a replying affidavit sworn by the Respondent's Legal Officer sworn on 13th March 2025 where he deposes that the entire appeal and this application are misconceived, scandalous, vexatious and amount to an abuse of the court process; that the Respondent has suffered prejudice due to continued default by the Applicant. The Respondent also avers that it is doubtful of the Appellants' ability to abide by whatever conditions the court may impose based on the Appellant's past conduct which has not inspired confidence in the Respondent.

4. Learned Counsel for the parties agreed to canvass the application by way of written submissions. For the Applicant it was submitted that it is not disputed that there is default on the loan. That however, the Appellant is willing to service the loan and if stay is not granted the appeal will be rendered nugatory. Further, that the draft memorandum of appeal raises arguable issues and they stand to suffer substantial loss as they would be committed to civil jail and also rendered bankrupt**.**

5. Relying on the case of **Owade & another v Njoroge [2022] KEHC 10715 (KLR),** Learned Counsel for the Respondent submitted that the Appellants had not sufficiently demonstrated the manner in which they would suffer irreparable and substantial loss should the court deny them stay; that no evidence of the alleged economic ruin has been availed; that there has been inordinate delay in bringing this

application; that the Appellants have not filed an application for leave to appeal out of time and lastly the Appellants have not met the conditions necessary for the grant of stay of execution orders and thus not deserving of the orders they are seeking.

Analysis and **determination**

6. I have carefully considered the application, the rival submissions, the cases cited and the law.

7. **Order 42 Rule 6(1)** states that an appeal does not automatically operate as a stay of execution; Rule 6(2) outlines the following conditions for the granting of stay: (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.

8. On substantial loss the applicant contended that they stand the risk of being committed to civil jail or otherwise being subjected to economic ruin should the Respondent proceed to execute the judgment which was entered in its favour. A judgment debtor is committed to civil jail if there is nothing to attach and they refuse to settle the decree. In my considered

view civil jail is a consequence which the Appellants can avoid if they satisfy the decree which they readily admit they have not satisfied. It cannot be a ground to grant a stay of execution as that would be tantamount to assisting the Applicants to avoid a debt for which there is no dispute that they owe. It is a doctrine that he who seeks equity must do equity and clearly the discretion of this court must not be exercised to aid a party to throw another from enjoying the fruits of their judgment merely because that party is not willing to perform his part of the bargain.

9. On the application being made without undue delay, the impugned judgment was delivered on 11th September 2024 and the appeal should have been filed within thirty days. However, this application was filed on 19th February 2025, 150 days after the right of appeal accrued. The delay is inordinate and the Applicants did not give any plausible explanation as would excuse the delay.

10. On the issue of security, the applicants averred that they are willing to abide by any conditions imposed upon them by this court. However, that condition cannot stand on its own. The other two conditions must be fulfilled for the application to stand. As the Applicants have not fulfilled the first two conditions they are not deserving of the exercise of the discretion in their favour.

11. The upshot is that the application has no merit and it is dismissed with costs to the Respondent.

Orders accordingly.

Ruling signed, dated and delivered virtually on this 14th day of November 2025.

E. N. MAINA

JUDGE

IN PRESENCE OF:

Ms Okinyi for the Applicant

Ms Kimathi for the Respondent

C/A: Geoffrey