REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. 16 OF 2017

BOLEYN MAGIC WALL PANEL LTD.....PLAINTIFF/RESPONDENT

VERSUS

NESCO SERVICES LIMITED.....DEFENDANT/APPLICANT

AND

THE PRINCIPAL SECRETARY OF STATE DEPARTMENT

FOR HOUSING AND URBAN DEVELOPMENT.....1ST GARNISHEE

CREDIT BANK PLC.....2ND GARNISHEE

RULING

1. This ruling is the subject of two applications. The first application brought by way of Notice of Motion is dated 10th September, 2021 brought by the decree holder herein seeking the following orders:

a) THAT, the application be certified urgent,

b) THAT, a restraining order be placed against all and/or any part of monies owing to the Judgment-debtor from the Ministry of Housing and Urban Development the 1st Garnishee barring it from paying the said monies to the judgment-debtor and/or its agents pending the hearing and determination of this application.

c) THAT, a restraining order be placed on account No. Kes 0061007000108 held and operated by the 2nd Garnishee, Credit Bank PLC, Westlands Branch Nairobi on behalf of the Judgment-debtor herein barring him from carrying out any transaction on the said account pending the hearing and determination of this application.

d) THAT, the Honourable Court be pleased to order that all and/or any part of monies owing from the Ministry of Housing and Urban Development the 1st Garnishee to the judgment-Debtor be attached to answer the decree together with the costs of the garnishee proceedings.

e) THAT, the monies held on account No. Kes 006xxxxxxxxx by the 2nd Garnishee, Credit Bank PLC, Westlands Branch Nairobi on behalf of the Judgment-debtor herein be and is hereby attached to answer the decree herein of Kshs. 25, 255,998/=.

f) THAT, the Honourable court do fix the date when the garnishees shall appear before the court to show cause why they should not pay the decree-holder the debt due to the judgment debtor or so much thereof as may be sufficient to satisfy the decree together with costs.

g) THAT, the Garnishee order be made absolute at the *inter partes hearing* and the 1st and 2nd Garnishees, Ministry of Housing and Urban Development and Credit Bank PLC, Westlands Branch Nairobi be directed to release funds owed to the judgment-debtor to a total tune of Kshs. 25,255,998/= to satisfy the decree herein.

h) THAT costs of these proceedings be provided for.

2. The said application was supported by an affidavit sworn by **Manyara Mainye Michael** an advocate of the High Court of Kenya practising in the firm of **M/S Oyugi & Company Advocates** having the conduct of this suit herein on behalf of the Decree holder/Applicant.

3. According to the deponent, on 9th October 2019, the Arbitrator **Mr. Nyagah Boore Kithinji**, awarded as a final judgment Kshs. 20,477,916.06 with interests and costs to the Decree-holder which award was recognised by this Court on 18th November 2020 as binding the final arbitration award made on 9th October 2019 and entered judgment. However, the judgment-debtor has failed, neglected and/or refused to satisfy the said decree despite several demands and the said amounts still remain outstanding since 2019 in the sum of Kshs. 25,255,998/=.

4. The Decree-holder was apprehensive that if the orders sought herein are not granted the judgment-debtor would continue defeating the judgment of the court to the detriment of the decree-holder.

5. The Motion was opposed by the 1st garnishee who raised preliminary objections based on the following grounds:

1) That the Application dated 10th September 2021 of the Government Proceeding Act, Cap 40.

2) That the Application dated 10th September 2021 offends the provisions of Order 29 Rule 2 & 4 of the Civil Procedure Rules, 2010.

3) ***That the suit offends the provisions of Order 23 of the Civil Procedure Rules, 2010.***

6. The said Garnishee also filed an affidavit sworn by **Arch. Duncan Imbamba**, a Deputy Director Housing and Coordinator, Police and Prisons Housing Project in the State Department for Housing and Urban Development. According to him, the State Department for Housing and Urban Development engaged M/S Boleyn Magic Wall Panel Limited as the contractor to undertake the construction of 130 housing units for GSU Presidential Escort unit at State House site, Nairobi which project started on the 18th November 2019 and is still ongoing with the project being 30% complete. It was averred that the project involves the construction of 3 blocks and a mess for the officers using prefabricated wall and floor panels. The prefabrication happens off site and is further transported to the site for fixing.

7. It was deposed that as of 16th September 2021, the State Department for Housing and Urban Development had already paid all interim payment certificates owed to Boleyn Magic Wall Panel Limited and that it had no other pending payment obligations as per the last valuation submitted which was in accordance with the terms and conditions of the contract which stipulates how payments for the works are to be made once certificates are presented for payment. It was disclosed that on 7th May 2020 the State Department paid the Contractor a gross amount of KES. 85,855,355.70 of which KES. 73,213,894.75 directly to M/S Boleyn Magic Wall paper Panel Limited after deductions of taxes and retention while on 25th September 2020 the State Department paid the Contractor a gross amount of KES. 11,995,594.00 of which KES. 10,229,346.18 was paid directly to M/S Boleyn Magic Wall paper Panel Limited after deductions of taxes and retention. It was further disclosed that on 10th September 2021 the State Department paid the Contractor a gross amount of KES. 10,097,139.45 of which KES. 8,610,422.70 was paid directly to M/S Boleyn Magic Wall paper Panel Limited after deductions of taxes and retention and on 8th September 2021 the State Department paid the Contractor a gross amount of KES. 19,303,022.82 of which KES. 16,460,819.05 was paid directly to M/S Boleyn Magic Wall paper Panel Limited after deductions of taxes and retention.

8. Therefore, according to the deponent, the total amount paid to the Contractor, herein the Judgment Debtor, is KES. 127,251,111.97. It was averred that the proposed project is critical to provide decent accommodation for GSU Presidential Escort Officers who provide security to the Head of State and that the project may stall if the funds payable for the works done are utilized to pay the award as the Contractor may not put in new resources into the project going forward. The deponent lamented that the Contractor's performance has not been at optimum level as evidenced by the issuance of default notice by the Project Manager.

9. It was however contended that there are currently no pending payment obligations owed to the Contractor by the State Department that can satisfy the order. Consequently, there is no reason for the Principal Secretary who is the accounting officer for the State Department for Housing and Urban Development to be party to these garnishee proceedings.

10. According to the deponent, the Applicants/ Decree Holders Application dated 10th September 2021 has been overtaken by events and thus been rendered moot. Further to that any order issued against the 1st Garnishee would be in vain since there is no pending payment obligations owed to the Judgement Debtor by the State Department. It was therefore urged that in the interest of justice, the Principal Secretary for the State Department of Housing and Urban Development who is also the accounting officer should be struck off from these garnishee proceedings and in the Applicant's Notice of Motion Application dated 10th September 2021.

11. The 2nd application dated 15th September, 2021 was made by the Judgement Debtor herein seeking an order staying execution of the judgement and decree of this Court delivered on 18th November, 2020 pending the hearing and determination of Nairobi Court of Appeal Civil Application No. E322 of 2020.

12. The said application was supported by an affidavit sworn by **Liu Weijun**, who did not disclose his capacity in swearing the supporting affidavit. He however deposed that the Judgement Debtor being dissatisfied with the said decision intimated that it was proceeding to appeal against the same and di file a substantive appeal on 16th September, 2020 vide Appeal No. E322 of 2020. Notwithstanding the pendency of the appeal, this Court adopted the award as an order of this Court.

13. It was deposed that the Judgement Debtor would be greatly prejudiced of the execution were to proceed as that would render the appeal nugatory, yet the said appeal has likelihood of success. According to the Judgement Debtor, unless the application is granted, the success of

the appeal would be extinguished if the Court of Appeal were to set aside the award.

14. It was disclosed that the delay in filing the application was occasioned by the fact that all the applicant's assets were wholly charged to Standard Chartered Bank via a floating charge for USD 7,500,000/- and the Judgement Debtor was seeking a suitable security to be deposited in Court. It was however disclosed that the Judgement Debtor had now secured a deed of guarantee from its sister company, Boleyn International Limited, which had offered its crane as security, the value of the same being in excess of Kshs 40,000,000/-. However, the said crane was not available earlier as it was charged to African Banking Corporation and had only been discharged recently.

15. By a further affidavit the Judgement Debtor sought to refute the allegations by the Decree Holder that the Judgement Debtor was obstructing the realisation of the decretal sum by making several applications and instituting objection proceedings. According to the Judgement Debtor the said objection proceedings were commenced by parties whose interests were adversely affected by the execution proceedings.

16. It was averred that the Judgement Debtor was in fact struggling under a heavy burden of debt as its core business of construction was severely frustrated by the ongoing Covid 19 pandemic. According to the Judgement Debtor, the execution is likely to render the Judgement Debtor insolvent and cause irreparable damage to the Judgement Debtor.

17. In response to the application dated 10th September, the Judgement Debtor averred that it has no significant sums in the account held with the 2nd Garnishee that is capable of satisfying the decretal sum herein as the same has been attached by Kenya Revenue Authority vis agency notice dated 29th September, 2021.

18. As regards the 1st Garnishee, it was deposed that any sums owed are on account of ongoing works being undertaken on its behalf for the erection of 130 additional housing for the General Service Unit. However, the said works haven been stopped due to financial strain and risks not being finished due to lack of resources if the aid account is attached. It was averred that it is only from interim payments that the judgement debtor gets money to carry out the works on the project. It was averred that unless the attachment is lifted the judgment debtor will not be able to fulfil its contractual obligations and will end up being in breach and incur hefty penalties.

19. The Court was urged to be lenient to the judgement debtor and to protect its business continuity so as to enable it fulfil its financial obligations.

20. In response to the application dated 15th September, 2021, the Decree Holder, vide an affidavit sworn by **Harun Osoro Nyamboki**, one of its directors deposed that the said application does not satisfy the tripartite conditions as provided under Order 42 Rule 6 of the ***Civil Procedure Code***, 2010. According to him, the said application is not only an afterthought, but plainly incompetent, devoid of any merit, frivolous and a complete abuse of the court process intended only to scuttle the Garnishee proceedings initiated herein.

21. It was averred that the said Application was inordinately late and that there was no evidence of substantial loss. The deponent averred that **j**judgment was entered against Plaintiff/Applicant on 18th November 2020 by this Court for a monetary decree of Kshs. 20,477,917.06/= plus interest and costs since 9th October 2019 and that the Plaintiff/Applicant has deliberately and consciously frustrated the settlement and/or execution of the decree herein for more than one year after execution began.

22. It was contended that the right of Appeal has to be balanced with the right of the Decree-holder to enjoy the fruits of its judgment; which the Plaintiff's/Applicant wants the Court to disregard. It was his view that the only reason the Plaintiff/Applicant has rushed to court now is after the initiation of Garnishee proceedings against debts it is to be paid. It was deposed that since December 2020 execution proceedings have proceeded without the Plaintiff/Applicant seeking stay of execution, on account that it was aware that the Defendant/Respondent will be frustrated with its agents, emissaries and trustees but things have changed once its debts owed to it that can satisfy the decretal sum in full have been discovered and are being sought to be attached.

23. In the deponent's view, the Appeal has no chances of success in view of the Supreme Court's decision in **Nyutu Agrovet Limited Versus Airtel Network Kenya Limited and Chartered Institute of Arbitrators-Kenya Branch [2019] eKLR** and that being a monetary decree there in no reason advanced to support the assertion that substantial loss will be occasioned if the decretal sum is settled. It was contended that the Respondent's company is a going concern and with means to refund the decretal sum if and when the Plaintiff's/Applicant's Appeal succeeds; nevertheless, the Plaintiff/Applicant have not raised any apprehension that the Defendant/Respondent will have a difficulty in refunding the same.

24. It was however proposed that should the Court be inclined to grant a stay then it should direct that half of the decretal sum be paid to the Respondent and the other half be deposited in an interest earning account in the joint names of the advocates on record acting for the parties herein in view of the averment that all the assets of the Plaintiff/Applicant are wholly charged. As regards the security offered, it was averred that the same is inadequate in view of the wear and tear associated with continuous use and the Respondent is apprehensive that its value will inevitably depreciate and will unable to satisfy the decretal amount which keeps on increasing in view of the interest granted.

25. It was the Decree Holder's position that the Plaintiff/Applicant is not interested in settling the decretal amount at all, unless through execution, as even costs of arbitration paid by the Defendant/Respondent for purposes of receiving the Arbitral Award have never been refunded to the Defendant/Respondent. In its view, the Applicant's Application dated 15th September 2021 is just but a waste of judicial time and is a delaying tactic to frustrate the Respondent's Application dated 10th September 2021 and it is in the interest of justice and fairness for the same to be dismissed with costs.

Decree Holder's Submissions

26. On behalf of the Decree Holder, it was submitted that the grounds upon which its Application is based are straight forward to wit: there is

a decree for payment to the Decree Holder Kshs. 25,255,998/- dated 18th November 2021; the decree is unsatisfied and the Garnishees herein are indebted to the Judgment Debtor and debts due to the Judgment debtor should be attached to answer to the decree. According to the Decree Holder these grounds fit the conditions under Order 23 Rule 1 (1) of ***Civil Procedure Rules 2010.***

27. It was submitted that the replying affidavit sworn by the judgement debtor is superfluous and immaterial save for the confirmation therein that they hold an account with the 2nd Garnishee and there are sums owed from the 1st Garnishee to it. According to the Decree Holder, the Judgment debtor has no role in garnishee proceedings as it is only the garnishees as are cited, who are to respond and show cause why they should not pay to the decree holder the debt due from them to the judgment. This position, it was submitted is fortified by the holding of ***Kemei J****, in* ***Ngaywa Ngigi & Kibet Advocates vs. Invesco Assuarance Co Ltd; Diamond Trust Bank (Garnishee) [2020] eKLR.***

28. With respect to the 1st Garnishee's Preliminary Objection dated 25th October 2021 the same is misconceived, far-fetched and a completely devoid of merit and it should be dismissed with costs. According to the Decree Holder, the provisions quoted of the ***Government Proceedings Act*** are not only irrelevant but plainly unrelated to what is before Court. It was submitted that the provisions of the ***Government Proceedings Act*** as relied upon by the 1st Garnishee speak to suing the government or executing against the Government after successfully suing it. In this case, there is no suit nor is there a decree against the Government for the provisions to be applicable. Secondly, garnishee proceeding cannot be equated to a suit and that this was the holding of the Court in ***Mengich T/A Mangich & Co Advocates & Anor -vs-joseph Mabwai & 10 Others [2018] eKLR***.

29. In the Decree Holder's view, the provisions of the ***Government Proceedings Act*** and Order 29 Rules 2 & 4 of the ***Civil Procedure Rules, 2020*** were only to apply if, either the Government was sued as a Defendant or Respondent or execution proceedings were brought against the Government as a Judgment Debtor. However, this is not the case before the Court as the government department is not sued but is being asked to answer for a debt of a private company, the judgment debtor herein.

30. It was submitted that from the replying affidavit sworn by the ***Arch. Duncan Imbamba*** three issues stand out: one they do not dispute liability or their indebtedness to the Judgment debtor - which fact is confirmed by the Judgment Debtor- two that they worry if they divert payment to settle the Decree herein the works may stall and third that payment was made on the same day the Court gave directions for the matter to be heard on 10th September 2021. There are no reasonable explanations given why the decree of the Decree Holder cannot be satisfied with what is due to the Judgment Debtor even if available in the future.

31. Accordingly, the Court was urged not to lift the Order nisi but instead make it absolute so that the 1st garnishee can settle the decree from the debt owed to the judgment debtor. At any rate, the speculative apprehensions raised by the 1st Garnishee can be addressed through breach of contract clauses in the contract between the 1st Garnishee and the Judgment Debtor.

32. As regards the 2nd Garnishee who despite service did not appear or file any response to the garnishee proceedings, the Court was urged to order execution against the 2nd Garnishee guided by the provisions of Order 23 Rule 4 and the holding of ***Kemei, J*** in the ***Ngaywa Ngigi & Kibet Advocates vs. Invesco Assurance Co. Ltd & Another [2020] eKLR.***

33. In the present case, it was submitted that the Garnishee Bank did not appear or file a response and in the absence of evidence to the contrary, it follows that they acknowledged that they held accounts with them and it was not necessary for court to question them and cross-examine them as they did not have any objection in relation to attachment. Consequently, the Court was urged to make the Order Nisi, absolute and order the 2nd Garnishee to release the amounts held in its accounts on behalf of the Judgment Debtor to the extent of the available funds or in settlement of the decree herein.

34. *With regard to the A*pplication by the Judgment Debtor for stay of execution of the decree of the Court dated 18th November 2021, it was submitted that the Plaintiff Applicant has not surmounted the threshold as set in Order 42 Rule 6(2) for the Court to exercise its discretion in its favour. According to the Decree Holder, there is inordinate delay in filing the Application by the Plaintiff/Applicant; further that the Applicant is an unable to demonstrate any likelihood of substantial loss if the decretal amount is paid to the Defendant/Respondent and the security given is not only insufficient but prone to depreciate or deliberate damage as it will be in the hands of a third party.

35. In this case it was submitted that judgment was delivered on 18th November 2020 and the application for stay of execution was filed on 15th September 2021, 10 months later. The delay, according to the Decree Holder, is not only inexplicable and unreasonable but inexcusable, as it is prejudicial on the Defendant/Respondent who has spent so much time and resources in trying to execute the decree. Furthermore, the reason proffered by the Plaintiff/Applicant is implausible and ludicrous in view of the proceedings herein.

36. It was submitted that first, the only reason the Application has been brought is to try to scuttle the Garnishee Proceedings which are to guarantee settlement of the decretal sum, as the Garnishees are indebted to the Plaintiff/Applicant. In the Decree Holder's view, these are all the legal somersaults the Plaintiff/Applicant is intent in engaging to defeat, delay or deny the Defendant/Respondent its fruits of judgment that are long overdue. Secondly, execution proceedings of the decree of 18th November 2020 have been ongoing since December 2020 when the first proclamation was done. However, the Judgement Debtor has been in collusion with other objectors to frustrate those execution processes, including the guarantor. In urging the Court to finds that the application is caught up by inordinate delay, reliance was placed on **Thomas K'Bahati T/a K'Bahati & Co Advocates vs. Janendra Raichand Shah [2021] eKLR**.

37. As to what constitutes inordinate delay, the Decree Holder cited the case of **Utalii Transport Company Ltd & 3 Others -vs- NIC Bank Ltd & Another 2014 eKLR** and **Dickson Miriti Kamonde vs. Kenya Commercial Bank Limited [2006] eKLR**.

38. As regards the second limb, it was submitted that the Judgement Debtor has equally not satisfied even on the bare minimum, that this being a monetary decree, the Decree Holder will be unable to refund the decretal sum in the event the appeal is successful. In this respect reliance was placed on **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR**.

39. According to the Decree Holder, in monetary decrees like the one herein substantial loss and the appeal being rendered nugatory will only be demonstrated if it is indicated the Defendant/Respondent will be unable to refund the decretal sum if and when the appeal succeeds. The Judgement Debtor in its supporting affidavit and further affidavit does not claim, show or even indicate that the Defendant/Respondent will be unable to refund the decretal amount for the aspect of substantial loss to manifest, hence there is no reason to keep the Respondent out of their money. In this regard the Decree Holder relied on **Indus Trading Limited & Another vs. Charles Aricha [2021] eKLR** where the decision in **Shell Limited vs. Kibiru [1981] KLR** was cited.

40. Instead of the Plaintiff/Applicant showing substantial loss that is connected to the appeal being render nugatory, it was submitted that the Judgement Debtor elected to aver that it is struggling financially under a heavy burden of debt, its core business being construction having been severely frustrated by the ongoing Covid 19. In the scale of balancing to ensure the appeal is not rendered nugatory, while at the same time ensuring that a successful party is not impeded from enjoyment of the fruits of his judgment, that reason does not swing the scales in favour of the Plaintiff/Applicant. In the Decree Holder's view, there is clearly no substantial loss demonstrated but what is clearly coming out is that the Plaintiff/Applicant is not ready to settle the decretal sum now or in the future, as it appears that the Defendant/Respondent even if stay was to be granted and eventually it becomes unsuccessful in its appeal it will be impossible to realize the decree as they would have been declared insolvent.

41. As regards the issue of security the Defendant/Respondent referred to the holding of **Musyoka, J** in **Simba Coach Limited vs. Kikuyu Mechants Auctioneers [2019] eKLR** where the cited the decision in ***Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates;*** **Lochab Brothers Ltd vs. Lilian Munabi Nganga & 2 Others [2007] eKLR** and ***Esri Star Ltd & Another vs. Sila Oweshiwani*** **[2018] eKLR**.

42. From the foretasted authorities, it was submitted that it is clear that a logbook is not and cannot be the ideal security in the circumstances owing to the circumstances and the uncertainties that it possesses in terms of how the respondent will recover the decretal sum.

43. The Court was therefore urged not to exercise its discretion in favour of the Judgement Debtor on account that they have failed not only satisfy the conditions precedent under Order 42 Rule 6 (2) but also failed to comply with the overriding objective of ensuring just, expeditious, proportionate and affordable resolution of disputes.

1st Garnishee's Submissions

44. On behalf of the 1st Garnishee, it was submitted based on Order 23 Rule 1(1) of the ***Civil Procedure Rules*** before the orders sought against the 1st garnishee are issued, the applicant must first satisfy the court on; the existence of a decree issued that is still unsatisfied and the existence a garnishee who is holding money due to a judgement debtor in its hands and reliance was placed on **Mengich T/A Mengich & Co Advocates & Another vs. Joseph Mbwai & 10 Others {2018} eKLR**

45. In this case, it was submitted that the 1st Garnishee specifically denies being indebted to the Judgement debtor and there is no evidence to contradict the said denial. In garnishee proceeding such as these, the judgment creditor has a duty to prove the Garnishee's indebtedness based on sound evidence as the Court of Appeal held in **James G.K Njoroge t/a Baraka Tools and Hardware vs. APA Insurance Company Limited & 3 Others (2018) eKLR.**

46. In this case it was submitted that the Decree Holder has not demonstrated or established that the 1st garnishee owes any debt upon which the order of Garnishee could be pegged. Based on the record, it was submitted that there are no pending payment obligations owed to the contractor (the judgement debtor) by the State Department that can satisfy the order as alleged in the decree holder's application hence there is no justification for the Principal Secretary who is the, Accounting officer for the State Department for Housing and Urban Development (the 1st Garnishee) to be party to these Garnishee proceedings. Reliance for this proposition was placed on **Ngaywa Ngigi & Kibet Advocates vs. Invesco Assurance Company Limited & Diamond Trust Bank (2020) eKLR** where it was held that the onus is on the judgment creditor to establish that there is a debt due and unrecoverable from the Garnishee which the applicant has failed to prove.

47. It was argued that this court should lift the Garnishee order nisi in the absence of sufficient proof of indebtedness by 1st garnishee to the judgement debtor.

48. It was further submitted that the 1st garnishee's expenditure like every Government expenditure is budgeted for and must be appropriated by law hence it is unlikely the department will readily have funds to settle unfounded decrees without affecting the program that is budgeted for in its financial cycle.

Determination

49. I have considered the foregoing.

50. Since the 1st garnishee has raised preliminary objections to the Decree Holder's Application, I wish to deal with the same first.

51. According to the 1st Garnishee:

> ***1) That the Application dated 10th September 2021 of the Government Proceeding Act, Cap 40.***
>
> ***2) That the Application dated 10th September 2021 offends the provisions of Order 29 Rule 2 & 4 of the Civil Procedure Rules, 2010.***

3) ***That the suit offends the provisions of Order 23 of the Civil Procedure Rules, 2010.***

52. The 1st garnishee in its submissions did not however elaborate on these grounds. Suffice it to say that the matter before me are garnishee proceedings as opposed to a civil suit. Accordingly, I do not understand how the said objections become relevant. I agree with the opinion expressed in ***Mengich T/A Mangich & Co Advocates & Anor -vs- joseph Mabwai & 10 Others [2018] eKLR*** *that:*

> ***"The primary object of a garnishee order is to make the debt due by the debtor of the judgment debtor available to the decree holder in execution without driving him to the suit."***

53. *As regards the merits of the Judgement Debtor's application,* Order 42 rule 6(1) and (2) of the ***Civil Procedure Rules*** provides as follows:

> ***"(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***
>
> ***(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."***

54. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is nolonger limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the ***Civil Procedure Act*** or in the interpretation of any of its provisions.

55. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.** This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

> **"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court…The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant…For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss… Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation…At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."**

56. On the first principle, **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

> **"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".**

57. On the part of **Gachuhi, Ag. JA** (as he then was) at 417 held:

> **"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."**

58. Dealing with the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, **Hancox, JA** (as he then was) in the above cited case when he expressed himself as follows:

> **"I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age."**

59. In this case, it is not alleged that the Decree Holder will be unable to refund the decretal sum. Rather it is argued that should the execution proceeds against the Judgement Debtor, it is likely to render the Judgement Debtor insolvent and cause irreparable damage to the Judgement Debtor. In other words, it is the impecuniosity of the Judgement Debtor that is being relied upon as a ground for seeking stay of execution.

60. In an application for stay the Court must consider the overriding objective and balance the interest of the parties to the suit since the court is enjoined place the parties on equal footing. Since the overriding objective aims, *inter alia*, to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, the balancing of the parties' interest is paramount in an application for stay of execution pending appeal. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100.**

61. Still on the issue of the overriding objective, the principle of proportionality requires the Court to take into account the amount of money involved; the importance of the case; the complexity of the issues; and the financial position of each party. See **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63.**

62. It is with this in mind that the Court of Appeal in **Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005** while citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. Therefore, where there is a large sum of money involved the Court may take that in consideration in an application for stay of execution. Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes a central issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words, the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of his judgement. **See Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410; Mukuma vs. Abuoga [1988] KLR 645.** In the latter case the amount in question was Kshs. 4,000,000.00. Therefore, if the applicant were to prove that if compelled to settle the decretal sum it may well fold up hence be disabled in pursuing his otherwise merited appeal, the Court may, while also taking into account the prospects of the Respondent being able to be paid if the appeal were to fail, grant the stay sought.

63. With respect to the issue whether or not the applicant stands to suffer substantial loss in **Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005** the Court of Appeal citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. In the said case the amount in question was Kshs. 4,000,000.00. However, in this case it is not contended that the applicant is not in a position to pay the said sum or that if made to pay the same it is likely to find itself in some financial embarrassment. To the contrary it is contended that it is the respondent's financial position that is disturbing since there is evidence that the respondent has been unable to meet its financial obligations. That the amount involved is by no means smallish is not in doubt.

64. The law however is not that in monetary decrees a stay of execution is not to be granted. What the Court stated in ***Kenya Shell Case*** was that **normally** in such decrees the appeal is unlikely to be rendered nugatory. However, Order 42 rule 6 recognises that there may exist **sufficient cause** even in such decrees. Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes a crucial issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal to ensure that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words, the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of his judgement. See **Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Kenya Shell Ltd vs. Kibiru & Another** (supra) **; Mukuma vs. Abuoga [1988] KLR 645.**

65. As was stated by **Kuloba, J** in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:**

> **"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".**

66. It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be the case if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another** (supra).

67. The Judgement Debtor paints a picture of a legal person who is in financial distress. It is not only the Decree Holder that is pursuing it, but is also being pursued by the Kenya Revenue Authority.

68. The next issue for consideration is the issue of security. The Judgement has offered, as security a crane that belongs to its sister company. Though it is indicated that the value of the same, as at now, is over Kshs 40,000,000.00 there is no guarantee that by the time the appeal is heard and determined, the value will remain the same since it has not been contended that the said crane will not be in use. **Musyoka, J** in **Simba Coach Limited vs. Kikuyu Mechants Auctioneers [2019] eKLR** cited the decision in ***Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates***, where the court stated that*:*

> ***"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.'***

69. In ***Lochab Brothers Ltd vs. Lilian Munabi Nganga & 2 Others*** **[2007] eKLR,** the court expressed itself as follows:

> ***'there is no guarantee that by the time the appeal will be heard and determined the vehicle will be worth the same money or it be there at all. The vehicle is still under the control and use of the applicant. Many things can happen to it before the appeal is heard. It can be wasted and its value diminished or it can even be involved in an accident and be completely damaged. I am not saying that this is going to happen but it can happen. If that happens then there will be no security for the respondent to fall back on if the appeal is not successful. Deposit of motor vehicle log book is therefore not a satisfactory security.'***

70. Similarly, in the case of ***Esri Star Ltd & Another vs. Sila Oweshiwani*** **[2018] eKLR** the court held *that:*

> **"a motor vehicle or a trailer, as in this matter, is the worst form of security that an applicant can offer with the aim of obtaining orders for stay of execution in a case involving a money decree."**

71. It is true that under Order 42 rule 6 aforesaid, the applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. However, as already stated above the Court must similarly consider the overriding objective and balance the interest of the parties to the suit. The law is that where the applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. The issue of adequacy of security was dealt with by the Court of Appeal in **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100** where the Court of Appeal expressed itself as follows:

> **"The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where**

judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so…The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it."

72. On its part, the Decree Holder has proposed, should the Court be inclined to grant a stay, that half of the decretal sum be paid to the Respondent and the other half be deposited in an interest earning account in the joint names of the advocates on record for the parties herein in view of the averment that all the assets of the Plaintiff/Applicant are wholly charged.

73. Having considered the issues placed before me herein, I find that this is case in which the stay ought to be granted but on a condition. I grant stay of execution pending the said appeal on condition that the Judgement Debtor furnishes a Bank Guarantee from a reputable financial institution for payment of Kshs 25,000,000.00 during the pendency of the said appeal. The said guarantee to be given within 30 days.

74. I now proceed to the application by the Judgement debtor. Order 23 Rule 1(1) of ***Civil Procedure Rules 2010*** provides as hereunder:

A court may, upon the ex parte application of a decree-holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42) owing from such third person (hereinafter called the "garnishee") to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.

75. Therefore, in order for the Decree Holder to succeed, it must show that it has a decree against the Judgement Debtor herein and that the said decree remains *unsatisfied and to what amount. It must then prove that the Garnishee is indebted to the judgment-debtor who is within the jurisdiction. Once the conditions under the aforesaid provisions are satisfied the Court must then proceed to make the garnishee nisi absolute, the sentiments of the judgement debtor notwithstanding since as appreciated by* ***Kemei J****, in* ***Ngaywa Ngigi & Kibet Advocates vs. Invesco Assuarance Co Ltd; Diamond Trust Bank (Garnishee) [2020] eKLR****:*

"The Judgment debtor has no locus to apply to seek to dismiss the garnishee order in the instant proceedings as the judgment debtor is not a party to the Garnishee Proceedings. Garnishee Proceedings are separate proceedings between the judgment creditor and the Garnishee…"

76. In this case, it is clear that there is a decree by the Decree Holder against the Judgement Debtor and the said decree remains unsatisfied. The issue in contention however, is whether the two garnishees are indebted to the Judgement Debtor. As was held in **National Industrial Credit Bank Ltd. vs. Mindi Estates Ltd. & 2 Others [2002] 1 KLR 447,** the onus is upon the attaching creditor to show that the garnishee is indebted to the Judgement debtor. However, where a person is holding a certain sum, not in his capacity as a debtor for the Judgement Debtor but subject, for example, to orders of the Court which orders are yet to be issued, that person cannot be said to be a debtor for the purposes of garnishee proceedings. It was therefore held in the above case that:

"The Deputy Registrar of the Court of Appeal cannot be a garnishee. For one to be a garnishee, he must be indebted to the Judgement debtor and the deputy registrar who is holding money deposited in court cannot be regarded as a debtor to the Judgement debtors the deposit is not an amount due and owing to the Judgement debtor by the Deputy Registrar: it is a deposit lying with the Registrar subject to the jurisdiction of the Court and cannot be released until the Judgement debtor has complied with the terms of the order of the Court."

77. In other words, where money is held contingent upon an occurrence of an event which is yet to happen, the money cannot be subject of such proceedings. It was therefore held in **Petro Sonko & Another vs. H A D B Patel & Another [1953] 1 EACA 99** that**:**

"A garnishee cannot accelerate the time for payment of a debt. Where the debt is not due there is nothing to be attached…A judgement creditor cannot by means of attachment stand in a better position as regards the garnishee than the judgement debtor did, 'he can only obtain what the judgement debtor could honestly give him.'

78. In this case, the Decree Holder avers that the 1st Garnishee is owing the Judgement Debtor a sum in excess of Kshs 26,000,000/- as at 21st July, 2021 based on the annexed statement of payment of account and payment vouchers. It is also contended that the Judgement Debtor operates an account with Credit Bank PLC, Westlands Branch Nairobi. While the 2nd Garnishee has not disputed the allegations made by the Decree Holder, the 1st Garnishee's position is that there are currently no pending payment obligations owed to the Judgement Debtor by the 1st Garnishee that can satisfy the order. It was further contended that the continuation of the adverse orders against the Judgement Debtor are impacting negatively on the proposed project which is critical to provide decent accommodation for GSU Presidential Escort Officers who provide security to the Head of State and that the project may stall if the funds payable for the works done are utilized to pay the award as the Contractor may not put in new resources into the project going forward.

79. With due respect the relationship between the 1st Garnishee and the Judgement Debtor being contractual, the 1st Garnishee has no business protecting the Judgement Debtor from its liabilities. If the Judgement Debtor is unable to meet its contractual obligations, the 1st Garnishee has a remedy in contract against the Judgement Debtor. It should not be seen to be propping up a contractor whose performance, in its own view, has not been at optimum level. Since the 1st Garnishee is utilising public funds, one of the principles of public finance under Article 201(d) of the Constitution is that public money shall be used in a prudent and responsible way. One cannot be said to be utilising public finance in a prudent and responsible way when it acknowledges that the contractor contracted to undertake its projects is not operating at an optimum level due to financial constraints and yet no legal action has been taken. I will say no more on that.

80. I however associate myself with the holding of **Kemei, J** in **Ngaywa Ngigi & Kibet Advocates vs. Invesco Assurance Company Limited & Diamond Trust Bank (2020) eKLR** *where he expressed himself as follows:*

> ***"I agree with the contentions of Counsel for the Applicant that the term of Order 23 Rule 4 of the Civil Procedure Rules, if he does not appear upon the day of hearing named in the Order Nisi, then the Court may Order execution against the person and goods of the garnishee to levy the amount due from him, so much thereof as may be sufficient to satisfy the decree, together with the costs of the Garnishee Proceedings. It is the position in law that garnishee proceedings the Garnishee Banks are only required to appear before Court to acknowledge or dispute the debts."***

81. In this case, the burden is upon the Decree Holder to show that money is owed. According to **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001**, pursuant to section 3 of the ***Evidence Act*** a fact is not proved if it is neither proved nor disproved. It is therefore not proved. In this case, in light of the denial by the 1st Garnishee that it is presently holding sums in favour of the Judgement Debtor, having made payments to the Judgement Debtor, the fact of its indebtedness to the Judgement Debtor has not been proved.

82. In the premises, the orders that commend themselves to me and which I hereby grant are as follows:

> **a) An order is hereby granted staying execution of the judgement and decree of this Court delivered on 18th November, 2020 pending the hearing and determination of Nairobi Court of Appeal Civil Appeal No. E322 of 2020 on condition on condition that the Judgement Debtor furnishes a Bank Guarantee from a reputable financial institution for payment of Kshs 25,000,000.00 during the pendency of the said appeal. The said condition to be complied with within 30 days from the date of this ruling.**
>
> **b) Subject to the foregoing, the garnishee order nisi issued against the 2nd garnishee is hereby made absolute. Consequently, the monies held on account No. Kes 006xxxxxxxxx by the 2nd Garnishee, Credit Bank PLC, Westlands Branch Nairobi on behalf of the Judgment-debtor herein be and is hereby attached to answer the decree herein of Kshs. 25, 255,998/= and unless (a) is complied with, the 2nd Garnishee is hereby directed to release funds owed to the judgement debtor to a total tune of Kshs 25,255,998/-. This order will however be vacated upon compliance with (a) above.**
>
> **c) The decree order nisi issued against the 1st garnishee herein is hereby vacated and the garnishee proceedings against it dismissed.**

83. As none of the parties can be said to have been wholly successful save for the 1st Garnishee, the costs of the 1st garnishee shall be borne by the Judgment Debtor otherwise each party will bear own costs of the garnishee proceedings.

84. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 24TH DAY OF MARCH, 2022.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Manyara for the Decree Holder

Miss Musyoki for the 1st Garnishee

CA Susan