REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

MISC. APPLICATION NO.E44 OF 2020

R.K. SANGHANI.....APPLICANT

VERSUS

EMMACULATE MUENI NZUVE.....1ST RESPONDENT

OMURUNGA EVALYNE.....2ND RESPONDENT

FRANCIS MBOYA WAMBUA.....3RD RESPONDENT

RULING

1. By a Motion on Notice dated 14th December, 2020, the applicant herein seeks the following orders:

> **1) Spent.**
>
> **2) THAT leave be and is hereby granted to the Applicant to appeal out of time against the ruling of the Honourable B. Bartoo (SRM), in Machakos CMCC No. 360 of 2013; Emmaculate Mueni Nzuve vs Omurunga Evalyne, Francis Mboya Wambua and R.K. Sanghani delivered on the 13th February, 2020.**
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> **3) Spent.**
>
> **4) Spent.**
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> **5) THAT pending the hearing and determination of the intended appeal there be a stay of execution of the judgment and decree in Machakos CMCC No. 360 of 2013; Emmaculate Mueni Nzuve vs Omurunga Evalyne, Francis Mboya Wambua and R.K. Sanghani**
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> **6) THAT the costs of this Application abide the outcome of the intended Appeal.**

2. In support of the application, the applicant relied on the supporting affidavit sworn by **Mogire Hezron**, the applicant's advocate on 14th December, 2020.

3. According to the deponent, on 18th April 2013, 1st Respondent sued the Applicant in the lower court for damages following a road traffic accident that occurred on or about 11th February, 2011. It was averred that this matter fell in a series in which **Machakos CMCC No. 856 of 2011; Bernard Nzioka Nzalu vs Nyingi Peter, Francis Mboya, R.K. Sanghani and Njoroge Zipporah** being 1st, 2nd, 3rd and 4th defendants respectively had been selected as the test suit for purposes of determining the issue of liability which test suit was heard, concluded and on 29th August 2017 by **Hon. A.G. Kibiru** who found as follows on the issue of liability against the defendants:

> i) **Nyingi Peter** and **Francis Mboya** i.e. 1st & 2nd defendants=85% liable;
>
> ii) **R.K. Sanghani**, the 3rd party (now the Applicant herein) =15% liable;

iii) The case against **Njoroge Zipporah**, the 4th defendant (who is not a party to the suit herein) was dismissed with costs.

4. It was contended that all the Plaintiffs and Defendants in all suits that arose from the said accident were bound by the said determination of the test suit on the issue of liability. However, the lower court (the **Honourable B. Bartoo**) (SRM) delivered judgment in the matter on 17th day of July, 2019 and found the defendants 100% liable and awarded the plaintiff (now 1st respondent herein) Kshs. 2,511,440.00 plus costs and interest.

5. It is the Applicant's position that there was an error apparent on the face of the record in the lower court judgment since the lower court ignored the findings on apportionment of liability amongst the defendants which, had been found in the test suit despite the fact that the test suit judgment had been brought to its attention. Accordingly, the Applicant herein moved the lower court through an application dated 11th November, 2019 for review of its judgment and upon hearing the said application, the lower court directed that a ruling thereon would be delivered on 16th January, 2020. However, on that date the ruling was not delivered and the Court directed that the same would be delivered on 6th February, 2020 on which date once more the ruling was not delivered.

6. It was deposed that thereafter efforts by the Applicant's Advocates through numerous visits to the court registry to find out when the ruling was to be delivered were not successful as they were informed by the registry staff that the file could not be traced. Numerous letters to the Executive Officer by the Applicant's Advocates inquiring on the status of the ruling were not successful since none of the letters were responded to.

7. It was deposed that the Applicant came to establish that the Ruling was delivered on 13th February, 2020 yet neither itself nor its Advocates on record received a Notice of Delivery of the Ruling from the lower court. By then the period of 30 days within which an appeal ought to have been preferred to this Court had since lapsed.

8. According to the Applicant, it is aggrieved by the entire Ruling of the **Honourable B. Bartoo** (SRM) delivered on 13th day of February, 2020 and seeks leave to appeal out of time against the said Ruling. In the meantime, the 1st Respondent has obtained Warrants of Attachment and Proclaimed against the Applicant and unless a stay order is granted, the Applicant contended that it would suffer irreparable loss and damage rendering the intended Appeal nugatory. In the applicant's view, the intended appeal is meritorious with a high probability of success as the lower court ignored the findings on liability that had been established in the test suit.

9. The applicant lamented that the amount awarded by the lower court to the 1st Respondent and which the 1st Respondent has already obtained warrants of attachment is colossal. The Applicant disclosed that it had on 20th September, 2019 remitted its share of contribution (15%) as per the test suit to the 1st Respondent's Advocates and expressed its willingness to furnish this Court with reasonable security in the event it is so directed as a condition for grant of the stay of execution orders. It was deposed that this application is meritorious and timely made and the Respondents shall not suffer any prejudice if the orders sought are granted.

10. In a rejoinder to the replying affidavit, the Applicant averred that the 1st Respondent has not demonstrated that she has the capacity to refund to the Applicant the colossal sum of Kshs. 1,638,152/= that she claims ought to be directly released to her. Further, the 1st Respondent has not demonstrated that she is not impecunious and that she is in a position to refund the amount in question if the same is paid out to her. The result is that the intended appeal shall be rendered nugatory if successful.

11. The application was however, opposed by the 1st Respondents vide a replying affidavit sworn by **Philip M. Mulwa**, the 1st Respondent's advocate on 22nd December, 2020. According to him, there is no plausible explanation as to why the Applicant had to wait for over ten (10) months to launch the application and only did so after the Respondent proceeded to instruct auctioneers and after proclamation. Indeed, it was deposed, since the ruling was given on 13th February 2020, no action was taken by the applicant or their advocates until the auctioneers proclaimed on the applicant's movables on 10th December 2020.

12. It was averred that prior to the proclamation of 10th December 2020, the applicant had sought and obtained stay of execution orders in Machakos CMCC 360 of 2013 vide the application of 11th November 2019 which was later dismissed in February 2020. The 1st Respondent lamented that the applicant has continuously stopped the 1st Respondent and continues to do so with court orders always citing liability on non-parties to the proceedings. It was deposed that the application of 11th November 2020 sought to review the judgment of 17th July 2019 by introducing the concept of the test suit touching on the matter and which test suit was never brought to the attention of the trial court and in which liability was purportedly apportioned to parties not part of the proceedings in Machakos CMCC 360 of 2013.

13. In the 1st Respondent's view, it is outright a delaying tactic which ought not be condoned by the court and the delay in making the application for leave to file out of time has not been explained. Since the ruling was delivered, there was more than thirty (30) days to file an appeal before the Covid-19 lock-downs began. Further, the lock-downs were lifted in June when courts resumed activities and a further delay of over two (2) months is noted when a letter was done to the registry. There is no further effort made to demonstrate any action from August until December when the 1st Respondent applied for decree and commenced execution proceedings.

14. It was therefore the 1st Respondent's position that the intended appeal has no merits at all since the court cannot hold liable a person who was never involved in the proceedings at all. In her view, the defendant/applicant ought to have initiated third party proceedings to bring in the party they claim to have been liable for the accident.

15. While acknowledging that the applicant paid the sum of Kshs. 414,346/= in part payment, he sought to set it's on terms of payment by purporting to be liable to pay 15% of the judgment sum which was not in the terms of the judgment in which the trial court found the applicant 100% liable for the accident and the application for review, having provided no new evidence, was rightly dismissed thus binding the applicant herein to satisfy the decree in full.

16. While the 1st Respondent's view was that there was no reason why stay orders should be granted or why the applicant should be allowed to appeal out of time, they proposed that in the event that the court be inclined to allow the application, the applicant should offer sufficient security by paying half of the decretal sum (Kshs. 1,638,152/=) to the judgment creditor and having the balance of Kshs (1,638,152/=) deposited in a joint interest earning account in the name of the advocates for the parties.

17. The 1st Respondent however urged the Court to dismiss the application with costs.

18. In its submissions, the Applicant relied on **Leo Sila Mutiso vs. Rose Hellen Wangai Mwangi,** Civil application No. 255 of 1997, and averred that while the impugned ruling was delivered on 13th February, 2020, immediately the Applicant got wind of the fact that a ruling had been made, it moved the court on 14th December, 2020 for leave to appeal out of time. It was submitted that this period is not inordinate owing to the fact that the Covid-19 pandemic wrecked and continues to wreak havoc both in Kenya and the rest of the world. In an unprecedented situation, the Courts in this country were closed for a significant period of time before the situation normalized. In fact, until this time, most court stations in the country together with their respective registries are serving court users through virtual platforms so as to contain the spread of the virus. Such virtual platforms have come with their fair share of challenges.

19. As to what amounts to inordinate delay, the Applicant cited the case of **Utalii Transport Company Limited & 3 Others vs. NIC Bank Limited & Anor [2014] eKLR**.

20. On the prospects of success of the intended appeal, it was submitted that the intended appeal is meritorious with a high probability of success as it raises pertinent points of law. Looking at the draft memorandum of appeal, it raises arguable grounds on whether the lower court was right in ignoring the comprehensive findings of a test suit on liability and substituting it with its own findings. The draft memorandum of appeal further raises the question on whether the lower court was right in its refusal to review its judgment when it was apparent the judgment had an error apparent on the face of the record.

21. Regarding stay of execution, the Applicant relied on **Kapa Oil Refineries Limited vs. Festus Mutuku and Anor (2018) eKLR** and submitted that without an order of stay of execution, the Applicant stands to suffer substantial, irreparable loss and damage if the 1st Respondent executes the decree of the lower court. It is evident that the 1st Respondent has already extracted warrants of attachment and proclaimed upon the Applicant's goods. This means that the threat of execution is imminent. Whereas the Applicant is willing to furnish this Court with reasonable security in the event it is so directed as a condition for the grant of stay of execution orders, the Applicant is apprehensive on release of any portion of the said monies to the 1st Respondent, reason being that the 1st Respondent has not demonstrated that she is not impecunious and that she is in a position to refund the amount in question if the same is paid out to her. In the Applicant's view, it would amount to substantial loss if the Applicant faces difficulties in recovering the said money were the appeal herein be successful. Reliance was placed on **Zillion Farm Limited & Anor vs. Josephine Mukai & Another**, Misc. App. No. 687 of 2019 and **The County Government of Meru vs. Isaya Mugambi M'Muketha** Civil Application No. 109 of 2019 (UR 75/2019) and it was contended that the Applicant had sufficiently demonstrated that it is entitled to grant of the orders prayed for in the application dated 14th December, 2020 which ought to be granted.

22. On behalf of the 1st Respondent it was submitted that the general rule is that all Appeals emanating from the subordinate court to High Court be filed within 30 days from the date of the decree or order appealed against as stipulated under Section 79G of the ***Civil Procedure Act, 2010.*** The Act however vests Courts with discretionary power to extend time provided there is cause for not filing the appeal in time. In the instant case, it was submitted that there is no plausible explanation as to why the Applicant had to wait for over ten (10) months to launch the Application and only did so after the 1st Respondent proceeded to instruct auctioneers and after proclamation on the Applicant's movables on 10th December 2020.

23. It was submitted that there was more than 30 days to file an Appeal before the Covid-19 lockdown began and further that the lock-downs were lifted in June when courts resumed activities and a further delay of over two (2) months is noted when a letter was done to the registry. There is no further effort made to demonstrate any action from August until December when we applied for decree and commenced execution proceedings. Even though the Act allows for extension of time, it was submitted that the Applicant herein has proved to be reluctant since delivery of the Ruling in February 2020 and an Application made after 10 months is a tactic to delay the execution process already initiated by the 1st Respondent which should highly be condemned.

24. In support of her submissions the 1st Respondent relied on Section 1B (d) of the ***Civil Procedure Act*** and contended that the said section obliges Courts to ensure timely disposal of Court proceedings for the purpose of furthering the overriding objective specified in section 1A. Allowing the subject Application, it was averred, will only cause more delays thereby defeating the overriding Objective set out in Section 1A of the Act. She also relied on the case of **County Government of Mombasa vs. Kooba Kenya Limited (2019) eKLR** where reference was made to **Abdul Azizi Ngoma vs. Mungai Mathayo [1976] Kenya LR 61, 62,** on the basis of which it was submitted that there are no sufficient grounds to allow the subject Application, thus the same should be dismissed.

25. On the issue of prejudice, it was submitted that the Application is a mere sham to deny the 1st Respondent, her rightful enjoyment of the proceeds of the judgment. The Applicant failing to act for 10 months after delivery of the Ruling is a mere tactic to delay the process which is an abuse of the court process and relied on **Dilpack Kenya Limited -v- William Muthama Kitonyi (2018) eKLR.**

26. It was reiterated that the intended appeal has no merits at all since the court cannot hold liable a person who was never involved in the proceedings at all. It was therefore asserted that the Applicant has failed to adequately explain the prolonged delay in filing the subject Application as required under section 79G of the ***Civil Procedure Act***, as a result, the Application lacks merits and ought to be dismissed with costs.

Determination

27. I have considered the application, the affidavits in support of and in opposition to both applications, the submissions filed as well as the authorities relied upon.

28. Section 79G of the ***Civil Procedure Act*** provides that:

> ***Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***
>
> > ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.***

29. It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words "sufficient cause" and "good cause". It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides,* is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

30. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant. This was the position reiterated in **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR**, where the Court of Appeal set out the principles undergirding an Application for leave to file an appeal out of as follows:

> **"Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others..."**

31. Similarly, in **Leo Sila Mutiso vs. Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231** the Court of Appeal set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant. However, in the case of **Thuita Mwangi vs. Kenya Airways Ltd [2003] eKLR,** the Court explained that follows:

> **"The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered."**

32. However, as was held in **Kenya Commercial Bank Limited vs. Nicholas Ombija [2009] eKLR:**

"An "arguable" appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court."

33. That was the position in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR** where the court held that:

> **"...On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous..."**

34. I also associate myself with the decision of the Supreme Court in **Civil Application No. 3 of 2016 - County Executive of Kisumu –vs- County Government of Kisumu & 7 Others** at page 5 where the said Court said:-

> **"... 23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the NICHOLAS SALAT case to which all the parties herein have relied upon. The court delineated the following as:-**

"the underlying principles that a court should consider in exercise of such discretion:

> **1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
>
> **2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
>
> **3) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
>
> **4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**
>
> **5) …"**

35. In this case the Applicant contended, a contention which the Respondents have not disputed that the decision intended to be appealed against was delivered without notice. Order 21 rule 1 of the ***Civil Procedure Rules*** provides that:

> ***In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.***
>
> ***Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment.***

36. It therefore follows that parties are entitled to a notice of the date of delivery of judgement and where such notice is not given, that omission may well amount to a sufficient reason for the purposes of enlargement of time to appeal if the applicant moves the Court for regularisation of his position expeditiously. See **Kwach, JA** in **Zacky Hinga vs. Lawrence Nthiani Nzioki & Another Civil Application No. Nai. 359 of 1996**. In fact, the Court of Appeal held in **Ngoso General Contractors Ltd. vs. Jacob Gichunge Civil Appeal No. 248 of 2001 [2005] 1 KLR 737** that:

> **"The failure by the Superior Court Judge in an application for extension of time to file an appeal, to consider, as a matter of law, whether the Appellant, who was admittedly absent when the Judgement was delivered, was served with notice of delivery of the Judgement was a misdirection…The law under Order 20 r 1 is explicit in terms and mandatory in tone that a Judgement which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates and where only the successful party in the Judgement had prior knowledge of the delivery of the Judgement and no apparent reason was advanced for the failure to serve or to attempt to serve the Appellant or his advocate, the Appellant's right of appeal was grossly compromised…An order was made by the Magistrate granting a right of appeal within 28 days and directing the party in attendance to inform the other side does not cure the flagrant breach of the mandatory procedural rule which accords with fundamental rules of natural justice and the right to be heard which the Constitution safeguards."**

37. Though the Respondent has taken issue with the delay in filing the application, the applicants have deposed that the failure to notify it of the date of the delivery of the judgement coupled with the intervening COVID 19 pandemic which led to the scaling down of the court operations militated against the filing of the appeal within the prescribed timelines. However, as rightly pointed out by the 1st Respondent the entire period of the delay was not sufficiently explained. However, as appreciated in the case of **Utalii Transport Company Limited & 3 Others vs. NIC Bank Limited & Anor [2014] eKLR**:

> **"Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."**

38. The broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See **Philip Chemwolo & Another vs. Augustine Kubende [1986] KLR 492; (1982-88) KAR 103.**

39. Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure. In this case, though the 1st Respondent urged the Court to read *mala fides* in the actions of the Applicant, it is admitted that the Applicant has paid to the Respondent what, in its view, it is liable to pay based on the alleged test suit. I did not hear the Respondents contend that if the application is allowed they will suffer such prejudice that cannot be compensated by an award of costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See **Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**

40. As regards the prospects of the appeal succeeding, the question that this court will be called upon is to decide whether in light of the decision on liability in the test case, it was open to the learned trial magistrate to arrive at a different finding on liability. That, in my view, is

an arguable issue which deserves a day in court and cannot be said to be a frivolous one which would only result in the delay of the course of justice.

41. As regards stay, the principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the ***Civil Procedure Rules*** which provides as follows:

> ***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.***

42. 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. According to section 1A(2) of the ***Civil Procedure Act*** "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

43. 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 in **Jason Ngumba Kagu & 2 Others vs. Intra Africa Assurance Co. Limited [2014] eKLR** where it was held that:

> **"The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of ''the appeal will be rendered nugatory'', the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process."**

44. I therefore agree with the decision in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where the court observed that:

> "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…"**

45. It was therefore appreciated by **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** that:

"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."

46. 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."

47. On his 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."

48. Dealing with the contention that the fact that the respondent is in need of finances is an indication that he would not be in position to refund the decretal sum, **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."

49. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co. Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

"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".

50. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the Applicants to prove that the Respondent will not be able to refund to the Applicants any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

51. The law, however appreciates that it may not be possible for the Applicants to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, *upon reasonable grounds*, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank

accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum. **See Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

52. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success. Suffice to say as was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991,** financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.

53. In the case of **Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation) (2004) E.A. LR 331**, the Court defined substantial loss in the sense of Order 42 rule 6 as follows:

> **"…Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal…"**

54. Substantial loss may be equated to the principle of negation of the success of the intended appeal. Dealing with the latter, it was held in the case of **Kenya Airports Authority vs. Mitu-Bell Welfare Society & Another (2014) eKLR**, that:

> **"The nugatory limb is meant to obviate the spectre of a meritorious appeal, when successful, being rendered academic the apprehended harm, loss or prejudice having come to pass in the intervening period. Our stay of execution jurisdiction is meant to avoid such defeatist eventualities in deserving cases."**

55. It was therefore held in the case of **Tabro Transporters Ltd. vs. Absalom Dova Lumbasi [2012] eKLR**, thus:

> **"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination."**

56. I agree with the position adopted in Bungoma High Court Misc Application No 42 of 2011 - **James Wangalwa & Another vs. Agnes Naliaka Cheseto** that:

> **"The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.''**

57. I therefore appreciate the sentiments expressed by the High Court in **John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another [2016] eKLR** that:

> **"There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief."**

58. In this application the applicants have not alleged that the Respondent will be unable to refund the decretal sum if paid over to her. The Applicant has simply contented itself by averring that the Respondent has not indicated that she is in a position to refund the decretal sum if paid over to her. It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant's business. I agree with the position in ***HCCA* NO. 161 of 2019; Awale Transporters Ltd vs. Kelvin Perminus Kimanzi** where the court observed that:

> **"In this case it was the applicant's case that unless the stay is granted, the appeal will be rendered nugatory. It was not explained in what manner the said appeal would be rendered nugatory. The Applicant has not explained what loss, if any, it stands to suffer if the stay is not granted. That the Respondent intends to proceed with execution is not reason enough to grant stay since being the successful litigant, he is lawfully entitled to enjoy the fruits of his judgement. Therefore, in proceeding with the execution process the Respondent is simply exercising a right which has been bestowed upon him by the law and such an exercise cannot be stayed unless good reasons are given by the Applicant."**

59. However, the Respondent has not, on her part deposed that she is in a position to refund the said sum. The intended appeal raises an important legal point whether a decision on liability in a test suit can be deviated from in matters covered by the test suit.

60. In the premises, I find this application merited. Time is hereby extended to the applicants to lodge their appeal. Let the memorandum of appeal be filed and served within 10 days from the date of delivery of this ruling. In default, the whole application shall stand dismissed with costs.

61. As for the prayer for stay pending the intended appeal, it is my view that this a case where a stay ought to be granted but on conditions. Accordingly, the order which commends itself to me and which I hereby grant is that there will be stay of execution pending the hearing and determination of the intended appeal on condition that the Applicants deposits Kshs. 1,638,152/= in a joint interest earning account in the names of the advocates for the respective parties in Kenya Commercial Bank, Machakos within 30 days from the date of this ruling and in default the prayer for stay shall be deemed to have been dismissed with costs to the 1st Respondent. For avoidance of doubt the amount already paid to the 1st Respondent is not to be deemed as part of the aforesaid deposit.

62. The costs of this application are awarded to the 1st Respondent in the intended appeal, **Emmaculate Mueni Nzuve**.

63. It is so ordered.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 20TH APRIL, 2021.

G V ODUNGA

JUDGE

DELIVERED IN THE PRESENCE OF:

MISS OPIYO FOR THE APPLICANT

MR MUTINDA FOR THE RESPONDENT

CA GEOFFREY