Makata Savings and Credit Cooperative Society Limited v Kioko (Miscellaneous Application E001 of 2022) [2022] KEHC 10114 (KLR) (20 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10114 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS APPLICATION E001 OF 2022

GV ODUNGA, J

MAY 20, 2022

BETWEEN

MAKATA SAVINGS AND CREDIT COOPERATIVE SOCIETY LIMITED ..... APPLICANT

AND

PHILIP KIILU KIOKO ..... RESPONDENT

RULING

1. By a Motion on Notice dated 11th January, 2022, the applicant herein seeks the following orders:
    1. That this matter be certified urgent and heard ex parte in the first instance and service thereof be dispensed with.
    2. Thatthis Honourable Court be pleased to order a stay of execution of the ex-parte judgment delivered on 16th June, 2021 by Hon. A.G Kibiru in Machakos PMCC No.147 of 2020 pending the hearing and determination of the application.
    3. That this Honourable Court be pleased to grant the Applicant leave to appeal out of time against the Ruling delivered on 13th day of December,2021 by Hon. A.G Kibiru (CM) in Machakos PMCC No.147 of 2020.
    4. That the costs of this application be provided for.
2. The application was supported by an affidavit sworn by Kelvin Ngure, a Legal Officer at Directline Assurance Company Limited, the insurers of the suit motor vehicle registration number KCJV 029J and at whose instance this claim is being defended. According to him, he swore the said affidavit by virtue of the rights of subrogation under the relevant policy of insurance and at common law and the right to defend, settle or prosecute any claims in the insured's name.

3. It was averred that judgment in Machakos PMCC No 47 of 2020 was delivered on 16/06/2021 as follows; Liability 100%, General damages Kshs 900,000/=, special damages Kshs 20,445 /= plus costs and interest. It was averred that the afore-stated judgment was entered ex-parte as the applicant did not defend himself in the said matter despite the fact that she had filed the requisite claim supporting documents.

4. It was deposed that the applicant filed an application dated 9th July, 2021 seeking to set aside the ex-parte judgment delivered on 16th June,2021 which application was dismissed on 13th December, 2021. However, the delay in lodging the Appeal within the requisite statutory timeline was occasioned by the fact that the ruling was dated 13th December ,2021 was delivered without notice to the parties' advocates. The applicant is however aggrieved by the said decision and has instructed M/S Kimondo Gachoka to appeal against the said Ruling, an appeal which the Applicant believes has a strong case on defence.

5. It was however contended that since there are no orders of stay of execution in force and the respondents have commenced execution, the Applicant herein stand to suffer irreparable loss and damage if the orders sought in the application herein are not granted.

6. This Court was urged to adhere to natural justice, doctrines of equity and the *constitution* in this matter as the Applicant will be condemned unheard if it is not granted an opportunity to lodge an Appeal against the Ruling of Hon. A.G Kibiru delivered on 13th December,2021 and to defend the suit. On the other hand, it was deposed that the application will not occasion any prejudice to the respondent.

7. It was submitted on behalf of the Applicant that the intended Appeal was not filed within the required statutory timeline and the reason for the delay was occasioned by the fact that the ruling was delivered in the absence of both parties hence the delay was not inadvertent. Accordingly, the Applicant filed the Application herein 28 days after expiry of the time prescribed for filing Appeal due to the explained circumstances

8. It was the applicant's submission that the delay was not very inordinate to warrant this court to fail to exercise its discretion in favour of the Applicant and admit the Appeal.

9. It was submitted that the Respondent has not established that he has been prejudiced in any manner by the said delay and in this regard the Applicant relied on the decision of the Court of Appeal in *Nicholas Kinto Arap Korir Salat vs. Independent Electoral and Boundaries Commissions & others* (2013) eKLR.

10. In the applicant's view, no prejudice will be suffered by the Respondent that cannot be ameliorated by an award of costs. Moreover, the Applicant's right to access justice and fair hearing under Articles 48, 50 and 159 of the *Constitution* should be protected and not to be watered down by a mere technicality of failure to file the Memorandum of Appeal with the prescribed timeline.

11. Based on the foregoing, the Court was urged to exercise its discretion in favour of the Applicant and grant leave to file the Memorandum of Appeal out of time.

12. It was submitted that since the Applicant is seeking leave to appeal the ruling of the trial court based on the fact that though it filed all the requisite documents, it was never accorded audience, its intended appeal is arguable and raises serious issues to warrant this Court's intervention on appeal. In this regard, the Applicant relied on *Kenya Revenue Authority vs. Sidney Keitany Changole & 3 Others* (2015) eKLR.

13. It was submitted that since the Applicant's intended Appeal herein is merited and is not frivolous, it is paramount that the Applicant is given an opportunity to ventilate his intended Appeal on merits.

14. On the issue of substantial loss, it was submitted that there was no evidence to prove the Respondent's capability. Accordingly, the Respondent's means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the intended Applicant's Appeal succeeds. According to the Applicant, the Respondent herein is the only one who can specifically show that he has means to repay the decretal amount if the court grants stay pending appeal and the said appeal succeeds. In this regard reliance was placed on the decision of Aburili, J in *Edward Kamau & Another vs. Hannah Mukui Gichuki & Anor*. [2015] eKLR where it was held that:

> "I am in agreement with the applicants that in the absence of an affidavit of means, it may be construed that the respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed."

15. It was submitted that since the Respondent has failed to prove that he is a man of means or has financial resources to pay the decretal amount in the event the intended Appeal is filed and in turn succeeds, the court should allow the Application for stay of execution.

16. On the issue of security, it was submitted that the Applicant has already deposed in the Supporting Affidavit to the Application that he is willing to furnish reasonable security in form of a bank guarantee. The Court was urged to carefully weigh the prejudice, if any, to be suffered by Respondent in the event that the Appeal is admitted out of time vis-à-vis the hardship and/or injustice to be suffered by the Applicant in the event leave is not granted to file the Appeal out of time.

17. In view of all the foregoing, the Applicant submitted that he has demonstrated sufficient grounds for this Court to exercise discretion and enlarge time to file the intended Appeal.

18. In opposing the application, the Respondents relied on the replying affidavit sworn by Philip Kiilu Kioko the Respondent herein whose view was that application is frivolous, a non-starter and a clear waste of the court process and the Applicants are yet to demonstrate any substantial grounds for the setting aside of the Judgment delivered on 16th June 20221 in Machakos PMCC NO 147 of 2020. According to him, the Judgment delivered on 16th June 2021 was delivered in his favour with liability at 100%, General Damages Kshs.900, 000/-, special damages Kshs 20,445/- plus costs and interest and that the Applicant's subsequent application dated 9th July, 2021 seeking to set aside the proceedings and ex-parte Judgment entered on 16th June 2021 on the ground that they were not aware of the proceedings and Judgment entered was dismissed for lack of merit on 13th December, 2021.

19. According to the Respondent, in its ruling the Court noted that the reason for setting aside the Judgment were appalling and casual since the Applicant's Counsel conveniently forgot that on 27th April 2021 they were present when a mention date for filing submissions was set, both parties having filed the same and Judgment Date entered by consent of both parties. According to the deponent, a Ms. Mwaura Holding Brief for Ms. Waitaka for the Applicant and a Ms. Kamene appeared Holding brief for Ms. Kui appeared on behalf of the Respondent appeared on 27th April, 2021 and that on the disputed 16th June, 2021 Judgment was delivered in absence of the Applicant despite taking the date by consent and a notice was further forwarded by the Plaintiff informing the Applicant herein of the Judgment Delivery and attaching to it a decree for their approval within seven days which was received by the Applicant on 30th June 2021. Having been aware of the judgement date, it was deposed that the Applicant should have secured their attendance in court on the material date.

20. It was further deposed that the Applicant has actively participated in the subject suit proceedings and all notices served upon its advocate's representative hence the absence of the Defendant/Applicant on

the date of delivery of judgment is immaterial and the Plaintiff has a right to enjoy the fruits of his judgment.

21. In the Respondent's view, the Applicant's Draft Memorandum of Appeal does not demonstrate any tangible grievance and that further the only ground of appeal was dealt with exhaustively and evidence adduced demonstrating that the Applicant, fully participated in the proceedings and closed its case and thereafter fixed a Judgment date by consent.

22. It was averred that the Applicant is yet to demonstrate any sufficient cause as to the stay, any substantial loss rendering the Application for stay of execution with no legal basis and should be dismissed with costs to the Respondents. To the Respondent, it is not sufficient for the Applicant to state that the decretal sum from the default judgment is hefty without substantiating it. Based on legal advice, it was deposed that granting an order for stay would mean that the status quo should remain as it were before the Judgment and that would be denying a successful litigant the fruits of his judgment which should not be done if the Applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay.

23. It was averred that it is trite that the court in considering the Application does not necessarily make orders that would deprive a successful party to a litigation of the fruits of his or her litigation and that this Application is an outright abuse of court process, that it is whimsical, jocose and time-wasting and the same should be dismissed with costs to the Respondents.

24. In his submissions, the Respondent reiterated the foregoing and retraced the history of the litigation disclosing that The Applicant entered appearance and filed their statement of defence on the 20thJuly, 2020 denying the allegations of the facts stated on the Plaint. The matter was then fixed for pre-trial on 8th October 2020 and 3rd November, 2020 and notices served upon the Applicant. On 12th December, 2020, when the same matter was fixed to confirm compliance with order 11, the Defendant/Applicant was absent despite having been duly served with the Mention Notice. By then the Applicant had equally not complied with pre-trial directions and a hearing was fixed on 24th March, 2021 for which a hearing notice was duly served upon the Applicant's advocates where they acknowledged receipt of the same on 7th December 2020.

25. It was submitted that despite due service, the Defendant never appeared on the set hearing date and the Respondent's/Plaintiff advocate proceeded and closed his case and while the Applicant's/Defendant's case was subsequently closed for non-attendance. The parties were then directed to file submissions and a mention date for compliance was slated on 13th April, 2021 on which date both parties attended court with the Applicant represented by a Ms. Wanjiku and Ms. Kui appeared on behalf of the Respondent. As none of the parties had filed submissions, another mention date was slated for 27th April 2021 by consent of both parties. Come the said 27th April 2021, a Ms. Mwaura appeared Holding Brief for Ms. Waitaka for the Applicant and a Ms. Kamene appeared Holding Brief for Ms. Kui and while the Respondent, then Plaintiff, confirmed that they had complied, the Applicants herein stated that they were yet to comply and requested for more Fourteen (14) days to comply and Judgment was thus set for delivery on 16th June 2021 by consent of all parties.

26. It was submitted that on the said 16th June, 2021 Judgment was delivered in the absence of the Defendant despite taking the date by consent and notice was thus forwarded by the Respondent informing the Applicant of the Judgment delivery and attaching to it a decree for their approval within Seven (7) days which was received by the Applicant on 30th June, 2021.

27. It was submitted that it was upon receipt of the Judgment Notice and decree for their approval that necessitated the Applicants herein to file an application seeking for orders of stay of Judgment for

reasons that they were not served with a Judgment notice. The said application dated 9th July, 2021 was canvassed and was dismissed for lack of merit vide the trial court's Ruling delivered on 13th December, 2021. It was that ruling that provoked the present appeal.

28. It was submitted that the Applicant should fully demonstrate from its supporting affidavit what loss they would incur in the event the decree is executed and also balance the interest of the successful litigant. In this case, it was contended that the Applicant failed to demonstrate the actual loss that he would suffer if decree proceedings were instituted that are yet to be instituted till date, and that the issues ventilated at the trial court were exhaustively dealt with at the trial court.

29. It was submitted that the law states that a successful litigant can only be deprived of the fruits of success in exceptional circumstances. Therefore, the legal burden is on the applicant to adduce evidence on the basis of which he forms its belief that it stands to suffer loss. Thereafter the evidential burden shifts to the successful party to show that that is not the case. In this case there is no evidence upon which the Applicant has discharged the legal burden in order to call upon the Respondent to discharge the evidential burden. Reference was made to *Public vs. Retirement Benefits Appeals Tribunal Ex-parte Heritage A.I.I. Insurance Company Limited Retirement Benefits Scheme* [2017] where it was held that the issue of substantial loss is such a crucial issue in such applications that it ought to come out clearly in the supporting affidavit rather than to be dealt with in the submissions.

30. According to the Respondent, the importance of complying with the conditions precedent to the grant of stay pending appeal was emphasised in *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63.

31. This Court was therefore urged to dismiss the application on grounds that the same has not been sufficiently substantiated with orders of cost to the Respondent.

32. As regards the leave to appeal out of time, it was submitted that an Applicant must now show, in descending scale of importance, the following factors: a) That there is merit in his appeal b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and c) That the delay has not been inordinate. In the Respondent's view, the Applicant has not demonstrated the above criteria. The grounds in the Draft Memorandum of Appeal hold no water, as it's not in the court position to correct the Applicant's mistake. That further the extension of the time will cause undue prejudice to the Respondent by maintaining the status quo of the suit thus denying him the fruits of his Judgment and that the delay is inordinate as the Applicant is seeking to file an Appeal after Seven (7) months.

33. In this case it was submitted that from the foregoing it is thus clear from the Applicant conduct wherein they never appeared in court despite service is not denied and the reasons submitted for not coming to court on the day fixed for hearing despite knowledge of the hearing date which also is not denied is not merited. The Applicant is therefore not entitled to the orders sought as the Respondent shall suffer prejudice in the forebode that it's Applicant tactic to delay execution and payment of decretal sums as ordered by court.

34. The Respondent therefore prayed that the Application be dismissed with costs as the threshold to stay execution has not been met and the Respondent is apprehensive that the Defendant intents to delay execution of the Judgment rendered on 16th June 2021.

Determination

35. 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.

36. 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.

37. 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.

38. 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..."

39. 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."

40. 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."

41. 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..."

42. 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. ..."

43. In this case the Applicant contended, that the decision intended to be appealed against was delivered without notice. Instead of dealing with this issue, the Respondent instead defended the decision by the learned trial magistrate dismissing the application to set aside the judgement. That the Applicant has a right to appeal against the order dismissing his application is not in doubt. However, the Respondent

is of the view that the intended appeal has no chances of success as the Applicant was notified of every stage the main suit was coming up but the Applicant chose not to attend. The law is however clear that the Court ought not to deny a person a hearing simply because his case is considered by the other side as hopeless. As was held by Madan, J (as he then was) in *Official Receiver vs. Sukhdev* Nairobi HCCC No. 423 of 1966 [1970] EA 243:

> "In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties."

44. In *Yaya Towers Limited vs. Trade Bank Limited (In Liquidation)* Civil Appeal No. 35 of 2000the same court expressed itself thus:

> "A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved."

45. The intended appeal is against a decision dismissing an application to set aside a judgement. Such an application is not to be equated with an appeal. Therefore, the Court should not approach such an application as if it is an appeal. Platt, JA in *Bouchard International (Services) Ltd vs. M'mwereria* [1987] KLR 193 expressed himself as follows:

> "The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits

> or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure...It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail... Indeed there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgement would be set aside in the exercise of the court's inherent jurisdiction."

46. It follows that in an application seeking for extension of time to lodge an appeal against the decision dismissing the application for setting aside, this Court ought not to deal with the matter as if the trial Court was considering an appeal against its own decision. Therefore, by concentrating on the merits of the decision declining to set aside the judgement, the Respondent herein misdirected his submissions and addressed the Court on a matter that is irrelevant to the application before this Court.

47. 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.

48. 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."

49. In this case, the Applicant's contention that the ruling intended to be appealed against was delivered in the absence of the parties is not contested. Accordingly, I have no hesitation that the applicant's reason for not lodging the appeal within the prescribed time is sound.

50. As regards the delay it was appreciated in the case of *Utalii Transport Company Limited & 3 Others vs. NIC Bank Limited & Anor* [2014] eKLR that:

> " 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."

51. 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.

52. 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, I did not hear the Respondent contend that if the application for leave to appeal out of time is allowed he 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.

53. 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.

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. 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.

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 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."

56. 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..."

57. 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."

58. 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."

59. 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."

60. 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."

61. 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".

62. 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.

63. 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.

64. 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.

65. 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..."

66. 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."

67. 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."

68. 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."

69. 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."

70. In this application the applicants have alleged that since the Respondent's means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the intended Applicant's Appeal succeeds. According to the Applicant, the Respondent herein is the only one who can specifically show that he has means to repay the decretal amount if the court grants stay pending appeal and the said appeal succeeds. It was submitted that since the Respondent has failed to prove that he is a man of means or has financial resources to pay the decretal amount in the event the intended Appeal is filed and in turn succeeds, the court should allow the Application for stay of execution.

71. In this regard reliance was placed on the decision of Aburili, J in *Edward Kamau & Another vs. Hannah Mukui Gichuki & Anor.* [2015] eKLR where it was held that:

> " I am in agreement with the applicants that in the absence of an affidavit of means, it may be construed that the respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed."

72. The law as I understand it is that that a successful litigant can only be deprived of the fruits of success in exceptional circumstances. Therefore, the legal burden is on the applicant to adduce evidence on the basis of which he forms its belief that it stands to suffer loss. Thereafter the evidential burden shifts to the successful party to show that that is not the case. Accordingly, the burden lies on a party seeking to deny or delay the successful litigant from enjoying the fruits of judgement to place before the Court material upon which such a decision is to be based. That burden cannot be said to have been satisfied based on mere allegations. Therefore, an affidavit of means is only called upon where some material is placed by the Applicant forming his grounds of belief that the Respondent is unlikely to refund the decretal sum if paid over to him and the intended appeal succeeds. It cannot be that because the Respondent has not disclosed his means of income, then it must follow that he will not be able to refund the same. The Respondent does not bear the initial burden unless some material adverse to him is presented.

73. 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."

74. In this case, however, the Applicant is contending denial of the opportunity to present his case. In other words, the appeal revolves around a right to be heard which is a fundamental right. To my mind, the intended appeal raises an important legal point and in the absence of a positive averment by the Respondent that he is in a position to refund the decretal sum in the eventuality that the intended appeal succeeds, 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.

75. 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.

76. 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 the decretal sum 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.

77. However, as was appreciated by Platt, JSC in *Henry Bukomeko & 2 Others vs. Statewide Insurance Co. Ltd* Uganda Supreme Court Civil Appeal No. 13 of 1989:

> "Whereas on the authorities, if the delay is caused by the court registry, and the applicant has taken every step possible to prosecute the appeal, further time will be allowed to a blameless intending appellant, there is an overriding factor in this case, and that is that where an interlocutory appeal is taken great care must be exercised in getting the appeal on as quickly as possible, in order that the trial may proceed with the minimum of delay. It is obvious that the longer an interlocutory appeal intervenes in the trial, the greater is the risk that the trial may be prejudiced. Therefore, rule 4 of the Court of Appeal Rules would be read as requiring an intending appellant to show sufficient cause in the light of the fact that the appeal is an interlocutory appeal which must be brought forward as soon as possible. Indeed, the court itself has a duty to see that such appeals are disposed of with special urgency."

78. In the premises I direct the appellant to ensure that the record of appeal is prepared and directions on the appeal taken within 45 days from the date of this ruling. In default, the orders of stay issued herein shall stand vacated.

79. The costs of the application are awarded to the respondent.

80. It is so ordered.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 20TH DAY OF MAY, 2022.

G V ODUNGA

JUDGE

In the presence of:

Miss Kamene for the Respondent

CA Susan