Muendo v Muia (Miscellaneous Civil Application E62 of 2022)
[2022] KEHC 13230 (KLR) (26 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13230 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION E62 OF 2022

GV ODUNGA, J

SEPTEMBER 26, 2022

BETWEEN

FREDRICK MUTHAMA MUENDO ..... APPLICANT

AND

WINFRED MULONDU MUIA & MARY MUTINDI KIILU (SUING AS ADMINISTRATORS OF THE LATE JACKSON MUTUNGA KIILU-DECEASED) ..... RESPONDENT

(An Appeal from the Judgment and Decree of the Principal Magistrate's Court of Kenya at Kithimani (Hon. Wambugu) delivered on the 24th day of February, 2022 in Kithimani PMCC No. 83 of 2020 – Winfred Mulondu Muia & Another vs. Fredrick Muthama Muendo)

RULING

1. By a Motion on Notice dated April 4, 2022, the applicant herein seeks inter alia, orders that the following orders:

    1. Spent

    2 Spent

    3. Thatleave be granted to the applicant to appeal out of time against the whole judgement and decree in Kithimani PMCC No. 83 of 2020 – *Winfred Mulondu Muia & Another v Fredrick Muthama Muendo*.

    4. Thatthere be a stay of execution of the said judgment in Kithimani PMCC No. 83 of 2020 – Winfred Mulondu Muia & Another v Fredrick Muthama Muendo pending the hearing and determination of the intended appeal.

    5. That the costs of this application be in the cause.

2. The application was supported by an affidavit sworn by Kiendi L. Wavinya, the Applicant's Advocate. According to the deponent, judgement in the said Kithimani PMCC No. 83 of 2020 – Winfred Mulondu Muia & Another v Fredrick Muthama Muendo, was delivered on February 24, 2022in the sum of Kshs 4,908,976.00.

3. It was however averred that though the Applicant is aggrieved by the said judgement, he did not appeal within the prescribed time. The failure to do so was explained on the ground that the Applicant was not aware of the said judgement as counsel who had the conduct of the matter left the Applicant's Advocate's office without updating the firm and that the Applicant only became aware of the judgement on March 26, 2022.

4. It was averred that the intended appeal has overwhelming chances of success, is arguable and has merit and that unless the stay sought is granted, the applicant stands to suffer substantial loss and hence render the intended appeal nugatory since the process of execution had already been put into place by the Respondent.

5. It was deposed that the Applicant's insurers were willing to abide by any conditions the Court may impose. The Applicant was apprehensive that should the decretal sum be paid out, it would be out of reach of the Applicant should the appeal succeed. On the other hand, the grant of the orders sought would not occasion any prejudice to the Respondents which may not be compensated by way of costs if the application is allowed hence it is in the interest of justice that the application be allowed.

6. In opposing the application, the Respondents relied on the replying affidavit sworn by Winfred Mulondu Muia who took the view that the Application was an abuse of the Court process and would unduly delay the payment of the decretal sum. Based on legal advice, he stated that the Applicant had not discharged the duty imposed under Order 42 Rule 6.

7. It was further averred that there were no sufficient grounds in the Memorandum of Appeal as the contemplated Appeal is illusory and only meant to delay the execution process hence deny him from enjoying the fruits of legally obtained judgment.

8. In the alternative, the deponent proposed that should the Court grant the stay, the same should be conditional on the Applicant deposits the full decretal sum in an interest earning account or paying half of the decretal amount to him and the balance be deposited in an interest earning account since the applicant herein can always recover the same in the event the appeal is allowed and no irreparable loss would be occasioned to the applicant.

9. It was submitted on behalf of the applicant that the intended appeal is arguable and it is merited for the reasons inter alia that the Trial Magistrate erred in law and fact and misdirected herself by adopting an unjustified, inordinately high multiplicand unsupported by the pleadings and evidence provided at the hearing of the suit and that the Trial Magistrate erred in law by giving an inordinately high and manifestly excessive award as loss of dependency which award is unsupported by law so as to amount to an erroneous award in the circumstances of the case. The applicant relied on the sentiments of the Court of Appeal in *Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another* [2015] eKLR where the court in restating its own decision in *Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union* Civil Application Nai. No. 72 of 2001 in which it was held that the applicant need not show that such an appeal is likely to succeed as long as she is able to show that there is at least one issue upon which the Court should pronounce its decision and that demonstration of the existence of even one arguable point will suffice in favour of the Applicant. Reliance was also placed on *Kenya Railways Corporation v. Edermann Properties Ltd*., Civil Appeal No. Nai 176 of 2012, *Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 Others*, Civil Appeal

No.Nai.256 of 2013) and *Salaries Remuneration Commission v Parliamentary Service Commission & 4 Others* [2019] eKLR for the same proposition.

10. Bearing the foregoing in mind, it was the Appellant's/Applicant's submission that the intended appeal has issues on which this Court should pronounce its decision as enumerated herein above and the draft Memorandum of Appeal.

11. According to the Applicant, leave to file the intended appeal out of time is in the interest of justice and in good faith and that the delay of 10 days in filing an appeal is not inordinate as to warrant this application to be expunged. In this regard reliance was placed on the case of *Agip (Kenya) Limited v Highlands Tyres Ltd* [2001] eKLR.

12. According to the Applicant, Section 79G of the *Civil Procedure Act* provides that an appeal from the subordinate Court to the High Court may be admitted out of time provided that the Appellant satisfies the Court that there are good and sufficient cause for not filing the appeal in time. In this case it was submitted that there were sufficient reasons and that the intended appeal will not occasion any prejudice to the Respondent which may not be compensated by way of costs.

13. Therefore, it was submitted, it is in the interest of justice that this application be allowed and the Appellant/Applicant be granted leave to file appeal out of time.

14. On the other hand, it was submitted by the Respondents that no substantial loss will be occasioned to the applicant in the event the orders being sought are not granted because the said judgment is monetary and it's has not been alleged or proved that in the event execution is done and goods sold, the respondent will be unable to refund the same. The respondent relied on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* in Misc Appl No. 42 of 2011 [2002] eKLR and *Timsales Limited v Hiram Gichohi Mwangi* (2013) eKLR and submitted 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. In this case, it was contended that the Applicant totally failed to show or prove such loss is likely to occur.

15. According to the Respondent, it is trite law that if an order for stay of execution pending the hearing and determination of an appeal the Applicant has to deposit such security as is required. It's submitted that there is no valid appeal to warrant deposit of security and therefore there being a judgment the respondent is entitled to enjoy his full fruits of judgment and not vice versa. The said willingness to deposit security would have only worked well had there been an appeal which is not illusory.

16. From the foregoing, it was submitted that the applicant has failed to prove its case on balance of probability to warrant the court exercise its discretion in its favour thus application should be dismissed with costs to the Respondent.

17. It was further submitted that there are no sufficient grounds in the Memorandum of Appeal as the contemplated Appeal is illusory and only meant to delay the execution process hence denies the respondent the fruits of his judgment. The Applicant, it was submitted, has done the memorandum of Appeal only hoping to overturn the judgment but has not really stated any issues which are really triable. According to the Respondents, the applicant/appellant did not call any witness in lower court and hence their contemplated appeal has no basis and hence a waste of court precious time. According to the Respondents, the applicant's application is only meant to deny the respondent herein from enjoying the fruits of a legally obtained judgement.

18. It was however submitted that should the Court grant a stay it should be conditional on the Applicant depositing the full decretal sum in an interest earning account or paying half of the decretal amount to the applicant and the balance to be deposited in an interest earning account since the respondent never

recovered fully and still undergoing treatment. In this regard reliance was placed on the holding in the case of *Samwel Kimutai Korir (Suing as Personal and Legal Representative of Estate) of Chelangat Silevia v Nyanchwa Adventist Secondary School & Nyanchwa Adventist College* [2017] eKLR.

Determination

19. I have considered the application, the respective affidavits and the submissions filed as well as the authorities relied upon.

20. 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.

21. Under the proviso to section 79G of the *Civil Procedure Act*, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so. This must be so since it was held in *Feroz Begum Qureshi and Another v Maganbhai Patel and Others* [1964] EA 633 that there is no difference between the words "sufficient cause" and "good cause". It was therefore held in *Daphne Parry v 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.

22. As to the principles to be considered in exercising the discretion whether or not to enlarge time in *First American Bank of Kenya Ltd v 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.

23. In this case the Applicants contended that the delay in filing the appeal was due to the fact that the counsel who was handling the mater left the firm without handing over and the judgement was only discovered after the time limited for filing the appeal had lapsed. This averment was never controverted by the Respondent and in my view, that reason justifies the extension of time to file the appeal. Accordingly, I grant leave to the applicants to file the appeal out of time.

24. 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.

25. In *Vishram Ravji Halai v 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 no longer restricted 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.

26. This was the position adopted in *John Gachanja Mundia v Francis Muriira Alias Francis Muthika & Another* [2016] eKLR where the Court stated 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."

27. 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 v Amboseli Resort Limited* [2004] 2

KLR 589. This was the position of Warsame, J (as he then was) in *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

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

28. On the first principle, Platt, Ag.JA (as he then was) in *Kenya Shell Limited v 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."

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

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

30. 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."

31. 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 v 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."

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

33. The law, however appreciates that it may not be possible for the applicant 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 v Paul*

Gachanga Ndarua Civil Application No. Nai. 367 of 2001; *ABN Amro Bank, N.K. v Le Monde Foods Limited* Civil Application No. 15 of 2002.

34. 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 v 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.

35. In this case, the applicant has have not disclosed their grounds for believing that the Respondent would not be able to refund the decretal sum herein. In my view it is not sufficient to simply tell the Court that the applicant is apprehensive that the Respondent is unlikely to refund the decretal sum if paid over to him. As far as the Court is concerned the Respondents are the successful parties and has a right to enjoy the fruits of his judgement and brakes ought not to be applied to that right unless the circumstances dictate otherwise. It is upon the party seeking to deprive the successful party from enjoying his fruits of judgement that ought to prove that those circumstances do exist.

36. In the case of *Tropical Commodities Suppliers Ltd and Others v 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..."

37. Therefore, the mere fact that the Respondent has put into motion the execution process does not, without more, justify the grant of the orders of stay. I agree with the position adopted in Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & Another v Agnes Naliaka Cheseto* in Misc Appl No. 42 of 2011 [2002] eKLR where Gikonyo J. stated 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."

38. In the same case it was held that:

> " No doubt, in law the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *Civil Procedure Rule* . This is so because execution is a lawful process."

39. That was the position in the case of *Timsales Limited v Hiram Gichohi Mwangi* (2013) eKLR where the court held that;

> " The mere fact that the process of execution has commenced is likely or is to commence or has been completed by itself, does not amount to substantial loss for the reason that execution is

a lawful process. The Appellant must establish other factors which show that the execution will irreparably negative his right as the successful party in the appeal."

40. 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 v 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."

41. What has troubled me however, is the fact that the Respondents are suing in their capacity as the administrators of the estate of a deceased person. Whereas, the Respondents in their individual capacities may well be able to refund the decretal sum, when it comes to their representative capacities, it is another issue altogether. In this case however, the decree sum is about Kshs 5 million. While the general rule is that poverty of the judgement creditor is not necessarily a ground for granting stay of execution, where the award is on the face of it high, that is a factor which this Court may take into account. With respect to the issue whether or not the applicant stands to suffer substantial loss in *Job Kilach v Nation Media Group & 2 Others* Civil Application No. Nai. 168 of 2005 the Court of Appeal citing *Oraro & Rachier Advocates v Co-operative Bank of Kenya Limited* Civil Application No. Nai. 358 of 1999 held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. In the said case the amount in question was Kshs. 4,000,000.00. Therefore, if the applicant were to prove that if compelled to settle the decretal sum it may well fold up hence be disabled in pursuing his otherwise merited appeal, the Court may, while also taking into account the prospects of the Respondent being able to be paid if the appeal were to fail, grant the stay sought.

42. While in this case, it is not contended that the applicant's insurers are likely to fold up, the amount herein was awarded to an estate of the deceased.

43. Accordingly, the order which commends itself to me and which I hereby grant is that time is hereby extended to the Applicant within which the memorandum of appeal is to be filed with a further period of 10 days.

44. As regards stay, I find that this is a case where a conditional stay ought to granted. The Respondents have taken issue with the nature of the security proposed by the Applicant. In the case of *Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa* [2016] eKLR, the court pronounced itself as follows:

> "It is noted that though the Respondent alleges that he is willing to deposit a bank guarantee for the decretal sum, he has not attached any evidence by way of bank statements or other documents as proof that he indeed has the money. It is not enough for him to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my

view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge."

45. It was held in the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR that:

> " Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."

46. The issue of adequacy of security was dealt with by the Court of Appeal in *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

> " The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it."

47. It is contended, which contention is not controverted that the Applicant did not offer any evidence at the trial. While that does not necessarily mean that the Applicant cannot successfully challenge the finding on liability, at the stag of stay pending the appeal, where the interests of both parties have to be taken into account, it may be a factor to be considered when it comes to the nature of stay to be ordered.

48. In the premises, I direct that there will be a stay of execution on condition that the whole of the decretal sum be deposited 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 this application shall be deemed to have been dismissed with costs to the Respondents.

49. The costs of this application are awarded to the Respondents in any event.

50. It is so ordered.

G V ODUNGA

JUDGE

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 26TH DAY OF SEPTEMBER, 2022.

M W MUIGAI

JUDGE

Delivered the presence of: