



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 100 OF 2020

REBECCA ASWA MWIRISHA.....PLAINTIFF/RESPONDENT

-VERSUS-

MOSES NDUMIA.....DEFENDANT/APPLICANT

RULING

[1] The Notice of Motion dated **21 September 2020** was filed herein by the applicant, **Moses Ndumia**, pursuant to **Sections 1A, 1B, 3A, 3B & 79** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**. The orders sought thereby are that:

[a] Spent

[b] Spent

[c] That the Court be pleased to grant leave to the applicant to file an appeal out of time from the judgment and decree issued on **26 June 2020**, pending the hearing and determination of the application;

[d] That the Court be pleased to grant a stay of execution of the decree of this Court issued herein on **26 June 2020** pending the lodgement, hearing and determination of the appeal to be filed in the High Court of Kenya at Eldoret.

[e] That the costs of the application be provided for.

[2] The application was predicated on the grounds that the applicant only got to know of the judgment when he was served with the Certificate of Costs dated **10 July 2020**; and that, even then, it took some time for him to be given a copy of the judgment. He further contended that the respondent is a person of straw; and that it will be well-nigh impossible to recover the decretal sum from her should payment be made in execution of the decree.

[3] In support of the application, the applicant relied on two Supporting Affidavits, sworn on **16 September 2020** by his counsel, **Ms. Sonia Aguko**, Advocate, and by **Isabella Nyambura**, the legal counsel at **Directline Assurance Company Ltd** (hereinafter "**Directline Assurance**"). In the first affidavit, **Ms. Aguko** averred that she had the conduct of this matter on behalf of the applicant; and that it is within her knowledge that Judgment was delivered in the lower court suit without notice to the applicant. It was further her assertion that they were only made aware of the said Judgment when the respondent's counsel served their firm with a letter dated **13 July 2020** forwarding the Certificate of Costs dated **10 July 2020**. She annexed copies of the Judgment as well as the Certificate of Costs to her affidavit as **Annexures "SA-1" and "SA-2"**.

[4] **Ms. Aguko** further averred that it took a bit of time to obtain a copy of the Judgment from the court and to forward the same to the applicant's insurers, **Directline Assurance**, for settlement; which delay she attributed to the slow pace of things occasioned by the ongoing COVID-19 pandemic. She added that ultimately, **Directline Assurance** issued instructions to appeal the Judgment; by which time, the appeal period had already lapsed. Counsel further deposed that the instant application was filed without any delay, upon receipt of instructions to file an appeal; and that the appeal has very good chances of success. A copy of the draft Memorandum of Appeal was also annexed to **Ms. Aguko's** affidavit and marked **Annexure "SA-3"**.

[5] At paragraph 10 of her affidavit, **Ms. Aguko** deposed that the respondent is likely to proceed to execute the decree by way of attachment and sale of the applicant's movable property since the order of stay granted by the lower court had already lapsed. It was her postulation that both the applicant, and by extension **Directline Assurance**, stand to suffer substantial and irrecoverable loss unless an order of stay of execution is made; and that it would be impossible to retrieve the decretal sum from the respondent, who has not really revealed her financial status. She added that the applicant, through **Directline Assurance**, is willing to furnish such security as the Court may deem fit, including depositing half of the decretal amount in an interest bearing account in the names of both counsel. In her estimation, the respondent stands to

suffer no prejudice in the event of a stay order being given.

[6] In the second affidavit, **Ms. Isabella Nyambura** deposed that it was within her knowledge that **Directline Assurance** instructed the firm of **M/s Kimondo Gachoka & Company Advocates** to enter appearance for the applicant in **Eldoret CMCC No. 858 of 2019**; and that Judgment was delivered in the matter on **26 June 2020** without notice to the applicant's advocate. She also reiterated the assertion that the said judgment was not received by the said advocates in good time, likely due to the COVID-19 pandemic, since most of the court registries were closed.

[7] At paragraph 8 of her affidavit, **Ms. Nyambura** deposed that she is reasonably apprehensive that, if the decretal amount is paid over to the respondent, she will not be in a position whatsoever to refund the same in the event of a successful appeal, as her financial status is unknown. For that reason, she averred that, unless the orders sought are granted, the appeal will be rendered nugatory. **Ms. Nyambura** also indicated that, to ameliorate any prejudice that might be visited on the respondent, **Directline Assurance** is ready, willing and able to furnish security by depositing 50% of the decretal sum in court pending the hearing and determination of the appeal.

[8] In response to the application, the respondent relied on her Replying Affidavit sworn on **25 September 2020**. She asserted that, upon delivery of judgment in the primary suit, his Advocate duly notified the firm of **Kairu & McCourt Advocates** of the same vide a letter dated **1 July 2020**. She exhibited a copy thereof as **Annexure RM1**; and therefore that, as of the time the Certificate of Costs was sent to the applicant's counsel, the applicant was already aware of the Judgment. It was thus her contention that the applicant is to blame for his own negligence and indolence in failing to file his appeal within the period stipulated by the law.

[9] Further to the foregoing, it was contention of the respondent that the application is itself incompetent in so far as neither of the Supporting Affidavits was sworn by the applicant. According to her, neither **Sonia Aguko** nor **Isabella Nyambura** is competent to depose to the matters in issue herein.

[10] The application was canvassed by way of written submissions, pursuant to paragraph 6 of the **Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from the Risks associated with the Global Corona Virus Pandemic, Gazette Notice No. 3137 dated 20 March 2020**. In her written submissions dated **5 February 2021**, **Ms. Aguko** relied on **Annah Mwihaki Wairuru vs. Hannah Wanja Wairuru** [2017] eKLR to underscore her submission that it is within the discretion of the Court to grant the prayers sought; and that the principles guiding the discretion are now settled. She pointed out that, at this stage, the applicant need only demonstrate that the proposed appeal is arguable. She further submitted that the applicant has met the requirements of **Order 42 Rule 6** of the **Civil Procedure Rules** and shown that he will be unduly prejudiced; and that the appeal shall undoubtedly be rendered nugatory unless stay of execution is granted.

[11] Counsel relied on **Ishmael Kagunyi Tande vs. Housing Finance Company of Kenya Ltd** [2005] eKLR, **Kenya Kazi Security Services Ltd vs. Kenya National Private Security Workers Union** [2013] eKLR and **Housing Finance Company of Kenya vs. Sharok Kher Mohamed Ali Hirji and Another** [2015] eKLR to buttress her posturing that the applicant stands to suffer substantial loss, notwithstanding that this application involves a money decree. She also urged the Court to find that the application was brought without undue delay, given that judgment was delivered without notice on **26 June 2020** and was not brought to the applicant's attention until **7 August 2020** when the Certificate of Costs was served.

[12] Lastly, counsel submitted that the applicant's proposed appeal is arguable and has high chances of success. She relied on **Kenya Tea Growers Association & Another vs. Kenya Planters & Agricultural Workers Union**, Civil Appeal (Nai) No. 72 of 2001 and **David Omwenga & John Teleyio Ole Sawoyo** [2010] eKLR in which it was held that it is enough for an applicant to show that there is at least one issue on which the Court shall pronounce itself and that stay ought to be granted so that the appeal is not rendered nugatory should it succeed. Thus, **Ms. Aguko** urged the Court to allow the application dated **21 September 2020** and to grant the orders sought therein.

[13] **Mr. Mwinamo** for the respondent opposed the application *vide* his written submissions dated **6 October 2020**. He reiterated the respondent's assertion that notice of delivery of judgment was served on the applicant; and that the delay in lodging an appeal within time is inexcusable. In his view, the COVID-19 pandemic should not be used as an excuse for the applicant to get sympathy from the Court. He added that, in any event, no evidence has been presented herein to prove that the court file went missing from the registry. Counsel further pointed out that, even assuming that the applicant only became aware of the judgment on **7 August 2020**, he thereafter took no step to file the instant application until **21 September 2020**; which delay has also not been explained.

[14] In response to the submission that the proposed appeal is arguable, **Mr. Mwinamo** took the view that it is not the duty of the Court to look at the merits of the appeal at this stage. According to him, the primary concern of the Court is to consider whether an explanation has been given for the failure to file the appeal within time; which burden the applicant failed to discharge. He also took issue with the two affidavits filed in support of the application, contending that they have been sworn by strangers to the proceedings before the lower court; and therefore offend the provisions of the **Oaths and Statutory Declarations Act** and the **Civil Procedure Rules**. He accordingly urged the Court to dismiss the application with costs.

[15] It is manifest from the foregoing that counsel for the respondent raised two pertinent issues that have the potential of disposing of the application on technicalities. The first is the question whether the firm of **Kimondo Gachoka & Company Advocates** is properly on record in this matter; and in this regard, **Mr. Mwinamo** alluded to **Order 9 Rule 9** of the **Civil Procedure Rules**, which provides that:

"Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court--

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

[16] Accordingly, the application would be for striking out for having been improperly filed in disregard of **Rule 9** aforementioned, granted that in **Rule 5 of Order 9** it is provided that:

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”
(emphasis supplied)

[17] It is noteworthy however that, in both the affidavits of **Ms. Aguko** and **Ms. Nyambura**, it was deposed that the firm of **Kimondo Gachoka & Company Advocates** was indeed instructed to act for the applicant herein in the lower court suit. Indeed, the Certificate of Costs dated **10 July 2020** was evidently served on the firm of **Kimondo Gachoka & Company Advocates** on **7 August 2020**. Similarly, the forwarding letter dated **13 July 2020**, though addressed to **Kairu and McCourt Advocates**, was also passed over to the firm of **Kimondo Gachoka & Company Advocates**; an indication that the said firm had taken over the conduct of the matter on behalf of the defendant/applicant. Indeed, at paragraph 12(b) of the Replying Affidavit, it is acknowledged that a Notice of Change was filed before the lower court on **6 August 2020**.

[18] If indeed the Notice of Change was invalid then that is an issue that ought to have been taken before the lower court. As it is, the lower court file has not been availed before me and therefore it is impossible to tell, with certainty, which Advocate was on record prior to **6 August 2020**; or whether the change of advocates was done in strict compliance with **Rule 9 of Order 9, Civil Procedure Rules**. Consequently, I have no basis for making a definitive finding that the firm of **Kimondo Gachoka & Company Advocates** is improperly on record herein to warrant the striking out of the application dated **21 September 2020**. In the premises, I decline that invitation.

[19] The second technical point raised by **Mr. Mwinamo** is the fact that no affidavit was obtained from the applicant himself; and that he chose instead to rely on the affidavits sworn by third parties to the lower court suit; namely, **Ms. Aguko** and **Ms. Nyambura**. From the material placed before me, **Ms. Aguko** is no stranger to the lower court suit. She adverted to the fact that she has the conduct of this matter on behalf of the applicant. Hence, nothing bars her from making a deposition in the matter. Nevertheless, authorities abound to demonstrate that it is unseemly for counsel to enter into the arena of conflict; particularly in matters in which their services have been retained. **Hon. Ojwang, J.** (as he then was) went a step further to put it this way in **Oyugi vs. Law Society of Kenya & Another [2005] 1 KLR 463**:

“It is not competent for a party’s advocate to depone (sic) to evidentiary facts at any stage of the suit and by deponing (sic) to such matters the advocate courts an adversarial invitation to step down from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions and it is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case.”

[20] Similarly, in **Republic vs. Nairobi County Government & 6 others Ex-parte Mike Sonko Mbuvi [2015] eKLR Hon. Odunga, J.** took the view that:

"Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted."

[21] The foregoing notwithstanding, it is noteworthy that the issues deposed to by **Ms. Aguko** are those that fell within the scope of her functions; such as the need to explain why the proposed appeal was not filed within the period prescribed by the law; and whether she was served with Notice of Judgment. I accordingly find no justification for striking out her affidavit. The same goes for **Ms. Nyambura’s** affidavit. It is not in dispute that the instructions to appeal emanated from **Directline Assurance**, the party with the ultimate obligation to satisfy the decree on behalf of the applicant. No provision of the law was cited by **Mr. Mwinamo** to show that such a party cannot make a deposition as to matters within their knowledge. Hence, on both scores, I find no merit in the technical points raised by **Mr. Mwinamo**.

[22] Turning now to the merits of the application, I have given due consideration to the application and the written submissions filed herein by counsel for the parties. The application is two-pronged in that, it not only seeks leave to appeal out of time, but also prays for an order of stay of execution pending appeal. Its brief background is that the respondent sued the applicant before the lower court in **Eldoret Chief Magistrates Civil Case No. 858 of 2019** for general and special damages for negligence. The cause of action arose from a road traffic accident that occurred along Eldorer-Munyaka Road on **24 April 2017**, involving the applicant’s motor vehicle **Registration No. KAH 012V**. The lower court found in favour of the respondent and awarded her **Kshs. 500,000/=** in general damages as well as special damages in the sum of **Kshs. 6,000/=**; together with costs.

[23] The applicant now contends that he is aggrieved by that decision and wishes to file an appeal but cannot do so without leave, granted that the appeal window has been shut to him by operation of the law. Indeed, **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 30 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 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."

[24] I note that the authorities cited by counsel for the applicant all relate to applications that were filed before the Court of Appeal pursuant to **Rule 5(2)(b)** of the **Court of Appeal Rules**. Nevertheless, there are overarching prerequisites in both **Section 79G** of the **Civil Procedure Act** and **Rule 5(2)(b)** of the **Court of Appeal Rules**, that are pertinent herein, namely:

[a] whether there is a good and reasonable explanation for the delay;

[b] whether the application has been brought without undue delay;

[c] whether the proposed appeal is arguable, and

[d] whether any prejudice will be suffered by Respondent.

[25] Hence, in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi**, which was followed in **Annah Mwihaki Wairuru vs. Hannah Wanja Wairuru** (supra) which the applicant's counsel relied on herein, the Court of Appeal held that:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted."

[26] Accordingly, the first question to pose for determination is whether the applicant has satisfied the Court that he has good and sufficient cause for not filing his appeal within the period stipulated in **Section 79G** **above-mentioned**. The explanation offered herein by the applicant's counsel at paragraphs 3, 4, 5 and 6 of her affidavit is that the judgment was delivered without notice; and that the judgment was not brought to her attention until **7 August 2021**, when the Certificate of Costs was served on her. A copy thereof was exhibited to the Supporting Affidavit as **Annexure SA-2**; and it does bear a date stamp of **7 August 2020**.

[27] As counsel for the applicant denied having been served with a Notice of Judgment as alleged by counsel for the respondent, it was expected of the respondent to demonstrate proof of service thereof. No such proof was availed. Indeed, that the respondent purported to serve such notice is a confirmation of the fact that neither the applicant nor his counsel was in attendance on **26 June 2020** for delivery of the impugned judgment. In any case, what was annexed to the Replying Affidavit is a copy of an unsigned letter dated **1 July 2020** addressed to **M/s Kairu and McCourt Advocates**, indicating that judgment was delivered via *Skype* video conferencing platform and that there was stay of execution for 30 days. Hence, while the letter purports that copies of the judgment and the plaintiff's Bill of Costs were forwarded therewith, there is no proof of that it was indeed signed and dispatched to the addressee. More importantly, there is absolutely no proof that notice of delivery of judgment via *Skype* was given to the applicant's counsel.

[28] In the premises, I am satisfied that sufficient cause has been shown by the applicant as to why he did not file his appeal within 30 days of **26 June 2020**. As for the instant application, counsel for the applicant deposed that it took some time for the applicant to obtain a copy of the judgment and forward it to the insurers, **Directline Assurance**; who thereafter gave instructions for the filing of an appeal. She explained that this was likely attributable to the prevailing COVID-19 pandemic and the scaling down of services at the court registries. While counsel for the respondent dismissed this as a gimmick for the applicant to gain the Court's sympathy, the reality, of which this Court takes judicial notice, is that COVID-19 pandemic has posed challenges and impacted on service delivery at the court registries. Thus, the Supreme Court did not dismiss such an explanation as a ruse in **William Olotch vs. Pan Africa Insurance Co. Limited** [2020] eKLR, but held that:

[3] UPON considering the written submissions on record for the Applicant and the Respondent dated 29th June 2020 and 14th July 2020, respectively, wherein the Applicant contends that the delay in filing the application for review to this Court was inadvertent, and was caused by the adverse effects posed by the Covid 19 pandemic, including restrictions on travel imposed by the Government and coupled with the challenges in accessing reliable internet; and

The Respondent in opposing the application submits that the explanation advanced by the Applicant is not plausible; that the reasons for the delay are not satisfactory, and, that the application lacks merit, is an abuse of the processes of this Court and does not disclose any substantial grounds for the Court to exercise its discretion; and

[4] HAVING considered the application, the Grounds of Opposition and the submissions filed by the respective parties, by a unanimous decision of this Bench, we find that ... the Applicant has a reasonable and cogent explanation and adduced sufficient reasons for the inadvertent delay in filing his application for review of the Court of Appeal decision on certification in Civil Application No. SUPP 15 of 2019..." (emphasis supplied)

[29] I am therefore convinced that the delay in filing the instant application, between **7 August 2020** and **21 September 2020**, is neither inordinate nor inexcusable.

[30] As to whether the proposed appeal is arguable, I have looked at the draft Memorandum of Appeal annexed to the Supporting Affidavit in the light of the Judgment of the lower court. The applicant proposes to challenge both liability and quantum and contends that the lower court erred in not paying due regard to the decisions filed alongside his written submissions; and therefore that the lower court ended up with an award on quantum that was excessive in the circumstances.

[31] Plainly therefore, the appeal is arguable, bearing in mind that an arguable appeal is not necessarily an appeal that must ultimately succeed. In **Kenya Tea Growers Association & Another vs. Kenya Planters & Agricultural Workers Union** (supra), the Court of

Appeal made this clear when it held that:

“He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision.”

[32] On the question of prejudice, having weighed the competing interests and rights of the parties, I take the view that the party that would suffer the most prejudice would be the applicant, should he be denied a chance to pursue his proposed appeal. As matters stand, the respondent already has a decree in his favour; and the delay in its enjoyment, if any, will invariably be compensated for by costs as well as interest on the principal sum, should the appeal turn out to be frivolous. In the premises, I find instructive the position taken in Banco Arabe vs. Bank of Uganda [1999] 1 EA 22, that:

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."

[33] Thus, I am satisfied that the applicant has satisfied the conditions for leave to appeal out of time for purposes of **Section 79G** of the **Civil Procedure Act**; and I so find.

[34] Turning now to the second aspect of the application, which is the prayer for stay of execution pending appeal, the applicant relied on **Order 42 Rule 6** of the **Civil Procedure Rules**. It provides that:

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

[35] At this stage, it must be appreciated that the respondent, having been successful in her litigation, is entitled to the fruits of her judgment. Thus, it is useful to bear in mind the apt expressions made in Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63, that:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or 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."

[36] In the premises, an applicant for stay of execution of decree or order pending appeal is under obligation to satisfy the conditions set out in **Rule 6(2) of Order 42** aforementioned, namely:

[a] that substantial loss may result to the applicant unless the order is made;

[b] that the application has been made without unreasonable delay.

[c] that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

[37] Counsel for the applicant urged the position, with which I entirely agree, that although the application involves a money decree, the applicant nevertheless stands to suffer substantial loss in the event of a successful appeal because the respondent has not shown that she will be in a position to refund the decretal sum, if paid now. In Kenya Hotel Properties Ltd vs. Willesden Properties Ltd the Court of Appeal held that:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.”

[38] The onus of proving that the respondent is in a position to refund the decretal sum in the event of a successful appeal was on the respondent. This was well discussed by the Court of Appeal in National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another [2006] eKLR, thus:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an

applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

[39] With the foregoing in mind, I have perused the respondent’s Replying Affidavit but find no such indication. I therefore find the applicant’s assertion, that it stands to suffer substantial loss, un rebutted. And having ruled that the delay in filing the instant application is excusable, it follows that the applicant has indeed satisfied the Court that he is entitled to the grant of an order of stay pending appeal. It was indicated, at paragraph 12 of **Ms. Aguko’s** affidavit and paragraph 10 of the affidavit sworn by **Isabella Nyambura**, on behalf of **Directline Assurance**, that the applicant’s insurer is prepared to furnish such security as the Court may require; including depositing half of the decretal amount in an interest bearing account in the names of both counsel.

[40] In the result, I find merit in the application dated **21 September 2020**. The same is hereby allowed and orders granted in respect thereof as hereunder:

[a] That the applicant be and is hereby granted leave to appeal out of time from the Judgment delivered on **26 June 2020** in **Eldoret CMCC No. 858 of 2019: Rebecca Aswa Chepkemboi vs. Moses Ndumia**; and that the said Appeal be filed within 14 days from the date hereof;

[b] That execution of the judgment and the ensuing Decree in **Eldoret CMCC No. 858 of 2019: Rebecca Aswa Chepkemboi vs. Moses Ndumia** be and is hereby stayed pending the hearing and determination of the appeal on condition that 50% of the decretal sum be deposited by the applicant in an interest earning account in the joint names of counsel for the parties within 14 days of the date hereof;

[c] That the costs of the subject application shall abide the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF APRIL 2021

OLGA SEWE

JUDGE