



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

HIGH COURT CIVIL SUIT NO. 49 OF 2006

PETER ADAMS LUDAVAA.....PLAINTIFF

-VERSUS-

HOUSING FINANCE CO. OF KENYA LIMITED.....DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 2nd November, 2020 brought under the provisions of Section 7 of the Appellate Jurisdiction Act Cap 9, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21 and Order 42 Rule 6 of the Civil Procedure Rules, 2010. The plaintiff seeks the following orders –

(i) Spent;

(ii) Spent;

(iii) That there be a stay of execution of the Judgment dated 2nd April, 2019, the subsequent ruling dated 6th October, 2020 and the resultant decree or order pending the hearing and determination of the intended appeal to the Court of Appeal;

(iv) That the time for lodging a Notice of Appeal against the decisions of 2nd April, 2019 and 6th October, 2020 be extended for such period as the Court deems fit and the Notice of Appeal dated 2nd November, 2020 be deemed as validly filed within such extended time; and

(v) The costs of this application be in the cause.

2. The application is brought on the grounds on the face of it and is anchored on the supporting affidavit sworn on 2nd November, 2020 by Joseph Lule, the defendant's Legal Officer and a supplementary affidavit sworn on 17th November, 2020 by Christine Wahome, the defendant's Legal Manager.

3. In the said affidavits, the defendant has deposed that in a Judgment delivered on 2nd April, 2019, the Court found that it had varied interest without proper notice to the plaintiff and ordered that an audit be conducted to establish whether prayers 2 and 3 of the plaint should be granted. That upon conducting the audit, the Court delivered a ruling on 6th October, 2020 and granted prayers 2 and 3 of the plaint and a sum of Kshs. 629,583.00, together with interest at 12% p.a from 5th April, 2004 until payment in full. That the court also ordered for the said sum to be paid within 30 days of the said ruling.

4. The defendant deposed that the plaintiff thereafter extracted an order dated 9th October, 2020 demanding payment of Kshs. 4,104,783.86. The defendant stated that it was only notified of the above by its former Counsel on record through a letter dated 14th October, 2020, which was addressed to the plaintiff's Counsel. That the said letter prompted the defendant to seek an alternative legal view and it is then that it learnt that no Notice of Appeal had been filed against the Judgment delivered on 2nd April, 2019.

5. The defendant stated that it was informed by its former Counsel on record that the Court advised against the filing of a Notice of Appeal since the Judgment of 2nd April, 2019 was not conclusive and that a composite one ought to be filed after the final decision, thus the necessity to extend time to file a Notice of Appeal. The defendant further stated that the delay in filing a Notice of Appeal against the ruling of 6th October, 2020 was due to the time taken by its Counsel on record to peruse the pleadings and render a legal opinion and to get the defendant's management to approve the change of legal representation.

6. It was stated by the defendant that the said approval was given on 29th October, 2020 and immediately thereafter, it filed the present application and a Notice of Appeal dated 2nd November, 2020. The defendant further stated that the intended appeal is arguable and that the

instant application has been brought without unreasonable delay. The defendant also stated that it was ready to give such security as the Court may order, for the satisfaction of the decretal sum, should the intended appeal fail.

7. In its supplementary affidavit, the defendant averred that it was not blaming or accusing the Court or its former Counsel on record of any deliberate wrongdoing or incompetence, but was instead conveying the reason for the delay. It further stated that its intention was not to frustrate the plaintiff in a case that had taken almost 20 years to conclude.

8. While making reference to the plaintiff's affidavit, the defendant deposed that the plaintiff had mentioned having made a deposit of Kshs. 1,000,000/= as evidence of his financial ability, but it was unaware of whether it was ever made. The defendant stated that from a ruling delivered on 12th November, 2014, the court noted that the plaintiff had failed to deposit the Auctioneer's costs and Kshs. 1,000,000/= as ordered by the court in March, 2012. That since the ruling in issue was in regard to an application for review, it was indicative of the plaintiff's financial position, which fortified the defendant's fear that it may not recover the decretal sum, if it was to be paid out to the plaintiff.

9. The defendant averred that some of the title documents availed to prove the plaintiff's property portfolio were issued as far back as in the year 1975 and were not accompanied by current official search certificates to prove ownership. That some of the title documents were incomplete and did not disclose the encumbrance sections to ascertain that there were no other claims. That the plaintiff had not given any valuation reports for the properties.

10. The plaintiff filed a replying affidavit sworn by Peter Adams Ludavaa, the plaintiff herein, on 14th November, 2020 and filed in court on 16th November, 2020, to oppose the application.

11. The plaintiff stated that he was not aware of what transpired between the defendant and its former Counsel on record but it was not true that the Judgment delivered on 2nd April, 2019 and the ruling made on 6th October, 2020 were brought to the defendant's knowledge for the first time through a letter dated 14th October, 2020. He deposed that the defendant had known about the said Judgment since its delivery on 2nd April, 2019 and took steps in enforcement of the orders by the Court.

12. The plaintiff also stated that the defendant had no intention whatsoever to appeal against the Judgment and ruling of the Court delivered on 2nd April, 2019 and 6th October, 2020, respectively. The plaintiff avowed that what triggered the institution of the application herein was the amount of Kshs. 4,104,783.86 demanded in a letter dated 9th October, 2020 since vide a letter 14th October, 2020 the defendant was willing to pay Kshs. 1,838,321.76.

13. The plaintiff deposed that the present application was an afterthought and only meant to challenge the sum of Kshs. 4,104,783.86 thus an abuse of the court process. He stated that the Court never gave the advice alleged to have been given to the defendant. The plaintiff stated that the filing of a Notice of Appeal did not require a prior change of Advocates.

14. The plaintiff stated that the defendant is a well established large and reputable commercial bank and payment of Kshs. 4,104,783.86 cannot render it bankrupt. He further stated that he is a commercial farmer in Kitale and has the means and financial capacity to reimburse the defendant if the Court would eventually so order. He went further to list a number of properties valued at approximately Kshs. 200,000,000/= which means that he has the financial capacity to refund the sum of Kshs. 4,104,783.86. He also asserted to have paid a security deposit of Kshs. 1,000,000/= in the year 2015.

15. The plaintiff stated that the supporting affidavit by Joseph Lule was incompetent as the defendant had not authorized him under seal to swear the said affidavit and the same should be struck out. He also stated that the defendant would not suffer any irreparable loss by complying with the Court's Judgment.

16. The application was canvassed by way of written submissions. On 1st December, 2020, the law firm of Muriu Mungai & Co. Advocates LLP filed written submissions on behalf of the defendant. The plaintiff's submissions were filed on 7th December, 2020 by the law firm of Asige, Kiverenge & Anyanzwa Advocates.

17. In support of the application, the defendant's Counsel submitted that the High Court has jurisdiction to extend the time for filing a Notice of Appeal under the provisions of Section 7 of the Appellate Jurisdiction Act and the question of whether to grant the extension is an exercise of discretion. He submitted that the key point was to establish whether there was an explanation given for the delay. It was submitted that the defendant was informed that a composite appeal would be filed after the audit was complete. The defendant's Counsel relied on the case of **Muthike v Kenya Film Corporation Ltd** [1989] eKLR, where the Court held that where liability has been established by a preliminary decree, it is necessary to appeal within proper time against that preliminary decree.

18. The defendant's Counsel submitted that the said mistaken view led to the delay in filing a Notice of Appeal against the Judgment delivered on 2nd April, 2019 which constitutes a reasonable explanation for extension of time. In relying on the case of **Belinda Murai & 9 others v Amos Wainaina** [1979] eKLR, he explained that they had to wait for the ruling before filing a Notice of Appeal and that constitutes a reasonable explanation.

19. The defendant's Counsel relied on the case of **Njeri Njoroge v Joseph Maina Gichuhi & another** [2018] eKLR and submitted that the reason given for delay in filing a Notice of Appeal with respect to the ruling delivered on 6th October, 2020 was sufficient. It was further submitted that the said delay was not inordinate in light of the explanation given. The case of **Anthony Kaburi Kario & 2 others v Ragati Tea Factory Company Limited & 10 others** [2014] eKLR, was cited, where the Court held that where a reasonable explanation has been given for the delay, the Court ought to consider it and may look at the delay more leniently and excuse it.

20. On whether the order for the stay of execution sought should be granted, the defendant's counsel submitted that the applicant is required to demonstrate three things, namely, threat of substantial loss, that the application was made without undue delay and that the applicant is ready to offer such security as the Court may order.

21. On the issue of substantial loss, he submitted that the order whose execution is sought to be stayed is a money decree and in such cases, substantial loss occurs when there is difficulty or inability of recovering the money in the event of a successful appeal. He placed reliance on the case of **Kelvin Kinuya Macharia v Aisha Motors Dealers Limited & 3 others** [2019] eKLR. The defendant's Counsel submitted that the plaintiff's attempt to demonstrate his financial ability in his replying affidavit holds no water and that there was hardly any evidence to persuade the Court that the plaintiff is a man of means.

22. It was submitted for the defendant that when it comes to delay, reference should be made to the ruling delivered on 6th October, 2020 thus the present application has been made without unreasonable delay.

23. On the issue of security for costs, the defendant's Counsel submitted that Order 42 Rule 6 of the Civil Procedure Rules does not require the furnishing of security as a condition for stay of execution. He also stated that in the event the Court is minded to call for security, it ought to be guided by the dictum from the Court of Appeal in **Gitahi & another v Warugongo** [1988] eKLR, where the Court allowed the deposit of a bank guarantee rather than cash.

24. He further submitted that since the defendant's financial ability had not been questioned, it wouldn't be necessary to order it to deposit any money. He urged this Court to allow the application dated 2nd November, 2020.

25. On the issue of whether an order for stay of execution should be granted, the plaintiff's Counsel submitted that the instant application was filed over one and a half years after the Judgment was delivered on 2nd April, 2019. He also submitted that the defendant was not aggrieved or dissatisfied with the Judgment or order the Court had made and consequently, there was no stay of execution application made. He further submitted that with regard to the ruling delivered on 6th October, 2020, the defendant did not seek to appeal against it and only embarked on filing the application herein after it was asked to pay Kshs. 4,104,783.86, merely to frustrate the plaintiff from enjoying the fruits of his Judgment. Counsel for the plaintiff cited the case of **Victory Construction v BM (a minor suing through next friend one PMM)** [2019] eKLR to support his submission.

26. He contended that a challenge as to quantum which had resulted from the consent entered between the defendant and the plaintiff was not substantial loss as contemplated under Order 42 Rule 6 of the Civil Procedure Rules. He submitted that the defendant should have demonstrated the means and ability or lack of them on the plaintiff's part since the Court cannot exercise its discretion upon conjecture. He stated that on the other hand, the plaintiff in his replying affidavit had demonstrated that he was a man of means and was well endowed with properties in various parts of Kenya including Mombasa County, and that they are valued at approximately Kshs, 200,000,000/=. That he was also a commercial farmer. The plaintiff's Counsel submitted that the plaintiff had demonstrated his means and ability to pay back to the defendant, if the intended appeal was successful.

27. The plaintiff's Counsel further submitted that the defendant had not demonstrated what substantial loss it would suffer if the money decree was satisfied and it had also not demonstrated its financial ability. That the Court could not be left to imagine the extent of reputation and financial means and ability of the defendant, thus without such evidence, there was no basis whatsoever for the Court to exercise its discretion and grant stay of execution.

28. On the issue of extension of time, the plaintiff's Counsel submitted that under Order 42 Rule 6 of the Civil Procedure Rules, an application for stay of execution cannot be entertained unless there was a pending appeal duly filed. He indicated that there was no pending appeal filed against the Judgment and ruling which were delivered on 2nd April, 2019 and 6th October, 2020, respectively, thus this Court lacks jurisdiction to entertain the application herein. He relied on the case of **Trimborn Agricultural Engineering Limited v David Njoroge Kabaiko & another** [2000] eKLR, to bolster his submission.

29. He prayed for the orders issued on 5th November, 2020 to be discharged. The plaintiff's Counsel relied on the case of **DT Dobie & Co. (Kenya) Limited v Alfred Machayo** [2005] eKLR and **Trimborn Agricultural Engineering Limited v David Njoroge Kabaiko & Another** (supra). He submitted that the defendant was estopped from moving this Court and seeking the prayers sought.

30. He also submitted that the defendant's supporting and the supplementary affidavits had been sworn without authority under seal from the defendant which is a limited liability company and were thus in contravention of Order 9 Rule 2(c) of the Civil Procedure Rules. He prayed for the said affidavits to be struck out and for the application to be dismissed with costs. He submitted that the intended appeal would fail under the provisions of Section 67(2) of the Civil Procedure Act due to the existence of a consent order duly executed between the plaintiff and the defendant.

31. The plaintiff's Counsel further submitted that Judge P.J. Otieno did not advise the defendant not to file an appeal until final orders were made, thus such allegations should be disregarded. He further submitted that if the accusations leveled against the defendant's former Counsel contained any truth, then the said Counsel should have sworn an affidavit to substantiate the said allegations.

ANALYSIS AND DETERMINATION

32. I have carefully considered the application, the affidavits on record, the rival submissions made on behalf of the parties and all the authorities cited. The issues which arise for determination are:-

1) Whether the affidavits sworn by Joseph Lule and Christine Wahome offend the provisions of Order 9 Rule 2(c) of the Civil Procedure Rules;

2) Whether extension of time to file a Notice of Appeal should be granted; and

3) Whether the defendant has satisfied the requisite conditions to warrant grant of an order for stay of execution pending appeal.

Whether the affidavits sworn by Joseph Lule and Christine Wahome offend the Provisions of Order 9 Rule 2(c) of the Civil Procedure Rules.

33. Order 9 Rule 2 of the Civil Procedure Rules, 2010 provides as follows:-

“The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) Subject to approval by the court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;

(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal. (emphasis added).

34. The plaintiff’s Counsel’s contention was that since the defendant is a limited liability company but the supporting and the supplementary affidavits were sworn by persons who were not duly authorized to do so under the seal of the company, the said affidavits should be struck out and the application herein dismissed.

35. It is not contested that Joseph Lule is the defendant’s Legal Officer while Christine Wahome is the defendant’s Legal Manager and in their respective affidavits, they deposed to the fact that they are fully conversant with matters of fact giving rise to the application herein, hence they are duly authorized by the defendant to swear the affidavits on its behalf.

36. In **Ajiwa Shamji Limited v Kenya National Highways Authority & another** [2018] eKLR, the Court when dealing with the issue of whether an affidavit must be sworn by an officer of the company duly authorized under its seal to do so held as follows:-

“I am inclined to agree with the position taken by the Plaintiff which quoted the decision of D.K. Maraga (Ag. Judge as he then was, now Chief Justice) in the case of Mombasa HCCC No. 496 of 1995 Peter Onyango Onyiego vs. Kenya Ports Authority, Who stated as follows:

“... from these definitions, it is clear that an affidavit is a sworn statement usually given to be used as evidence. So anybody swearing an affidavit on behalf of a corporation can also give evidence for or on behalf of a corporation. To suggest, therefore, that everybody who testifies for or on behalf of a corporation has to have authority from the corporation given under seal as required by order 3 rule 2(c) is in my view not correct. In the circumstances, I hold that other than verifying affidavits, which as I have stated must be sworn by the plaintiffs themselves or authorised agents, all other affidavits filed and used in courts are not among the acts covered by order 3 rules 1 to 5. All other affidavits can be sworn on behalf of individuals or corporations by anybody as long as that person is possessed of the facts and/or information that he deposes on, that in the rules of evidence would be admissible. Mere failure to state that the deponent of such an affidavit has the authority of the corporation on whose behalf he swears it does not invalidate the affidavit. That is an irregularity courts can under Order 18 rule 7 of the Civil Procedure Rules ignore.”

The equivalent of Order 3 Rules 1 to 5 referred to in the above quotation is the current Order 9 Rules 1 to 4 of the Civil Procedure Rules, 2010.”

37. Bearing in mind the above decision and the positions occupied by the defendant’s 2 (two) deponents in their legal capacity, it cannot be said that they woke up one day, went to work and deposed to facts which they had no knowledge of. This court holds that the supporting and supplementary affidavits sworn by Joseph Lule and Christine Wahome, respectively are not in contravention of the provisions of Order 9 Rule 2(c) of the Civil Procedure Rules and are therefore properly on record.

Whether extension of time to file a Notice of Appeal should be granted.

38. Section 7 of the Appellate Jurisdiction Act provides as follows-

“The High Court may extend the time for giving notice of intention to appeal from a Judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

39. It is worth noting that by virtue of the provisions of Section 7 of the Appellate Jurisdiction Act, this Court has wide discretionary powers when it comes to applications seeking extension of time. In the present case, Judgment was delivered on 2nd April, 2019 where the Court held that the defendant had varied interest without proper notice to the plaintiff and ordered that an audit be conducted to establish whether prayers 2 & 3 of the plaint should be granted. Following an audit of payments that the plaintiff had paid to the bank in satisfaction of the loan which had been advanced to him, Judge P.J. Otieno delivered a ruling on 6th October, 2020 in respect to the outcome of the audit that was conducted in compliance with the orders of 2nd April, 2019.

40. In **Karny Zaharya & another v Shalom Levi, Civil Appl. No. 80 of 2018, Koome, JA** stated as follows with regard to extension of time-

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

41. In the present application, it was submitted that no Notice of Appeal was filed against the Judgment that was delivered on 2nd April, 2019 on advice of Judge P.J. Otieno who said that the defendant should await the delivery of the ruling and thereafter file a composite Notice of Appeal. Upon delivery of the said ruling, on 6th October 2020 the plaintiff extracted an order for payment of Kshs. 4,104,783.86 which necessitated the defendant to seek an alternative legal view. This was followed with a legal opinion which involved perusal of the Court file. The defendant had to await approval from its management to engage another firm of Advocates to pursue the appeal on its behalf. That the said approval was given on 29th October, 2020 and immediately thereafter the application herein was filed together with a draft Notice of Appeal dated 2nd November, 2020 which the defendant seeks to be deemed as duly filed, upon grant of an order for extension of time.

42. The defendant’s Counsel admitted that indeed the Notice of Appeal was not filed within the timelines required. In his view, the reasons given and/or explained should persuade this Court to exercise its discretion and extend the time within which to file a Notice of Appeal. It was also submitted that the said delay was not inordinate since the final award was made through a ruling delivered on 6th October, 2020 and the present application was brought within a month of the said ruling, which was excusable.

43. The plaintiff’s Counsel was categorical that the application was brought one and a half years after the Judgment was delivered on 2nd April, 2019. He was of the view that the defendant never showed and/or expressed any interest to appeal against the Judgment and/or the ruling until after it was served with the demand to pay Kshs. 4,104,783.86. That its actions and the application herein were meant only to frustrate the plaintiff and deny him the right to enjoy the fruits of his Judgment for a case that has been in Court for over twenty years. He took the position that since the defendant lodged a Notice of Appeal on 11th November, 2020, they were estopped from seeking extension of time to lodge one.

44. In the case of **Abdul Azizi Ngoma v Mungai Mathayo [1976] KLR**, the Court of Appeal held thus:

“We would like to state once again that this court’s discretion to extend time under rule 4 only comes into existence after ‘sufficient reason’ for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.” (emphasis added).

45. The record reveals that Judgment was scheduled to be delivered on 25th January, 2019. On that day, Mr. Asige appeared for the plaintiff and Lutta for the defendant. The Judgment was not ready and it was rescheduled to 15th March, 2019. On that day, Mr. Asige appeared for the plaintiff but there was no appearance for the defendant. The Judge indicated that the Judgment was not ready on the said date on account of the fact that the file was taken to the registry by mistake. The Judgment was then rescheduled to 1st April, 2019. On that day, Miss Nyaga held brief for Mr. Asige for the plaintiff but there was no appearance for the defendant. The Judge stood over delivery of the Judgment to 2nd April, 2019 and directed that the defendant should be notified. On the said date, Mr. Asige for the plaintiff attended court and but there was no appearance for the defendant. The defendant either lost interest in attending court to follow up on the delivery of the Judgment or it was not informed that the Judgment would be delivered on 2nd April, 2019. It is therefore not discernible when the Judge advised the defendant to await the delivery of the subsequent ruling before filing a Notice of Appeal.

46. This case was mentioned several times after the 2nd April, 2019 and at no point in time did the defendant’s Counsel address the court about an intention to appeal. The only issue that came up for mention several times was on the appointment of auditors by the parties and the outcome of the audit report. I therefore agree with Mr. Asige that the deposition made by the defendant that Judge P.J. Otieno advised them to wait for the ruling before they could file a Notice of Appeal is not backed by the proceedings. In any event, the defendant had an Advocate on record and it also had the advantage of in-house Legal Counsel such as the Legal Officer and the Legal Manager who swore the affidavits in support of the application herein.

47. The only explanation that the court can pay due regard to as being plausible is that the defendant instructed a new firm of Advocates to take over the conduct of this matter. It is understandable that they would need to first familiarize themselves with the matter before advising their client on whether there is need for lodging an appeal or not.

48. Instead of the plaintiff’s Counsel seeking leave of the court for the plaintiff to file a further affidavit to bring to this court’s attention the Notice of Appeal lodged in court by the defendant, he resorted to attach the said Notice of Appeal to his submissions filed on 7th December, 2020. The plaintiff’s Counsel also attached 2 other documents to his written submissions. This Court must outrightly state that evidence

cannot be introduced into a case through submissions of Counsel. It is apparent that his action is aimed at introducing evidence in a case through the back door. The purpose of submissions is to elucidate each party's case in the most persuasive manner. This court therefore declines to consider the documents attached to the plaintiff's written submissions.

49. This Court notes that despite the fact that Judgment was delivered on 2nd April, 2019 where the defendant was faulted for failure to issue a proper notice to the plaintiff before varying interest, the Court was yet to render its decision on prayers 2 and 3 of the plaint. As such, it is in the interest of justice that time to file an appeal should be computed from the date when the court rendered its decision on the two prayers, which was done on 6th October, 2020.

50. The plaintiff has not demonstrated what prejudice he will suffer if any, in the event the Court extends time within which the defendant can lodge a Notice of Appeal out of time. In light of the foregoing, it is my finding that the reasons adduced by the defendant for the delay are sufficient and justifiable to warrant an order for extension of time.

Whether the defendant has satisfied the requisite conditions to warrant grant of an order for stay of execution pending appeal.

51. The court's discretion in an application seeking stay of execution must be exercised judiciously. In **Absalom Dora vs Tarbo Transporters** [2013] eKLR, the court held 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.”

52. Order 42 Rule 6. (2) of the Civil Procedure Rules provides as follows; -

“No order for stay of execution shall be made under sub-rule (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;

(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.”

53. The Court of Appeal in **Vishram Ravji Halai vs. Thornton & Turpin** [1990] KLR 365 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.”

54. It is the duty of the defendant herein to demonstrate that it has met the threshold of the above three conditions. In considering whether or not to grant the order sought for stay of execution pending appeal, this court has to balance the interests of the parties taking into account the fact that defendant has a right of appeal whereas the plaintiff has a decree which he should not be obstructed from executing unless there is a good cause. Courts are enjoined to give effect to the overriding objective in exercise of its powers under Sections 1A and 1B of the Civil Procedure Act or in the interpretation of any of its provisions.

55. It is worth noting that when confronted with such circumstances, Courts should consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing. In applying the above principles to the present application, it is important first to establish whether substantial loss will be suffered if orders for stay of execution are not granted.

56. In **Sofinac Co. Ltd vs Nelphaat Kimotho Mutuu** [2013] eKLR, the court *intelia* held as follows-

“The appellant's belief that the respondent will be unable to repay the same is solely based on the appellant's lack of knowledge as to the respondents' financial capability and does not give rise to the presumption that the respondent will be unable to repay the sum. There must be factors that led to that presumption. The law of evidence places the onus of proof on the party making the allegation and a mere averment that due to the respondents' social and economic status she is unlikely to be able to refund the money is not tenable in Law”.

57. In the present case the defendant's Counsel was of the view that the intended appeal is arguable and that unless stay of execution is granted, execution shall issue. He also took the position that if the Kshs. 4,104,783.86 was to be paid out to the plaintiff, in the event the defendant succeeded in the intended appeal, it shall be unable to recover the decretal sum already paid out. The plaintiff however asserted that he is man of means and he is a commercial farmer in Kitale and has several properties including some in Mombasa County. He insisted that and in the event the intended appeal is successful, he shall have no difficulty in paying back the defendant the decretal sum.

58. In regard to the ruling that was delivered on 12th November, 2014 where the court noted that the plaintiff had neither deposited Kshs. 1,000,000/= nor paid the Auctioneer's fees as ordered by the court, the defendant's Counsel indicated that he was not aware whether that

deposit was ever made. This court notes that the order which required the plaintiff to pay Auctioneer's fees and deposit security of Kshs. 1,000,000/= was made on 29th May, 2012 in a ruling delivered by Judge J.W. Mwera.

59. The plaintiff referred to the year 2015 when he paid security of Kshs. 1,000,000/=. On 22nd September, 2020, Mr. Asige appeared for the plaintiff and Mr. Okoko appeared for the defendant. On that day, Mr. Asige applied for the release of the sum of Kshs. 1,000,000/= deposited by the plaintiff as security. Mr. Okoko said that the deposit was never paid. On 6th October, 2020, Mr. Asige brought up the issue of the deposit once again and explained that it was deposited in account No. 01000041822434 at CFC Bank, Digo Road, Mombasa, pursuant to a conditional injunction granted on 29th May, 2012. Mr. Okoko said that there was no evidence in his file about the said deposit. He said that Mr. Asige had written to the said bank to confirm the deposit and if it was confirmed that it existed, he had no objection to the money being released. Judge P.J. Otieno directed that the deposit of Kshs. 1,000,000/= and interest earned pursuant to a conditional injunction granted on 29th May, 2012 should be released by the bank, to the depositor.

60. From the above proceedings, it is clear that the deposition made by the defendant that the plaintiff never deposited the sum of Kshs. 1,000,000/= as directed by the Court was not correct. The plaintiff delayed in depositing the said amount and was only jolted to realize the seriousness of his default on 6th November, 2014 when Judge Kasango mentioned in her ruling that the plaintiff had not complied with court orders. The plaintiff later deposited the said amount in CFC Bank after the said ruling.

61. The Court in **Masisi Mwita V Damaris Wanjiku Njeri** [2016] eKLR, held that to show that the appellant stands to suffer substantial loss, it must be demonstrated that the respondent will not pay the money back if the appellant succeeds in his appeal.

62. In the case of **G. N. Muema p/a (sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & Another** [2018] eKLR, it was held as follows: -

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

63. In the present case, the plaintiff annexed some title deeds of some properties to demonstrate his financial capability. This court notes that firstly, the encumbrance sections of the said title deeds availed by the plaintiff have been omitted. One can therefore not establish if the plaintiff has used the title documents he availed in court as security for loans. Secondly, there are no search certificates to indicate whether the plaintiff is the current owner of the properties. Thirdly, he did not attach valuation reports to his affidavit to show the current value of the said properties. In the absence of the foregoing, it is difficult for this court to determine if the plaintiff would be able to refund the defendant the sum of Kshs. 4,104,753.86 he is claiming without any hardship, in the event that the appeal is successful. In the said circumstances, this court is satisfied that the defendant would suffer substantial loss if this court was to order for the entire amount of Kshs. 4,104,753.86 to be released to the plaintiff.

64. It was evident from the defendant's depositions that it was strongly opposed to the plaintiff being paid the full amount of Kshs. 4,104,753.86 but correspondence between the plaintiff's Advocate and Musinga & Co. Advocates which was previously representing the defendant shows that the defendant did not contest to the sum of Kshs. 1,838,221.76 being paid to the plaintiff. The annexure marked JL-4 attached to the defendant's supporting affidavit is illustrative of the said fact.

65. On the issue of whether the application has been brought without unreasonable delay, the Court in the case of **Jaber Mohsen Ali & another v Priscillah Boit & another** [2014] eKLR stated as follows:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay being dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.” (emphasis added).

66. In the present case, the Judgment was delivered on 2nd April, 2019 and subsequently a ruling was delivered on 6th October, 2020. The plaintiff thereafter extracted an order for payment of Kshs. 4,104,783.86. The application herein was filed on 4th November, 2020, which was a month after delivery of the ruling. It was explained by the defendant that the said delay came about because its current Advocates on record had to first peruse the court file and then render a legal opinion. The defendant also had to seek approval from its management to have a new firm of advocates take over the conduct of the matter. I find that the delay is not inordinate so as to render it inexcusable. I also find that the explanation given for the delay is plausible. In this court's view, the Judgment and Ruling made by Judge P.J Otieno were so inextricably intertwined, co-joined so to say, that it of necessity called for the said court to pronounce itself on its final award before the defendant could lodge an appeal to the Court of Appeal.

67. The defendant herein expressed its readiness and/or willingness to comply with any order and/or direction as regards security for the due performance of the decree. This court has discretion to impose any conditions on security as would be ultimately binding on the defendant for the due performance of decree and/or order.

68. The plaintiff submitted that he got into a consent with the defendant that was adopted as an order of the Court and therefore the defendant has no right of appeal. This court has looked at the contents of the consent dated 15th October, 2019 and found that it had no bearing with the final determination by Judge P.J. Otieno. The consent was only limited to the issue of appointment of Accountants, payment of their fees and filing of a joint report in Court which would eventually assist the Trial Judge in making his determination on the amount which the plaintiff had overpaid the defendant.

69. Reports of audited accounts were filed in court and the audit reports done by the professionals appointed by the plaintiff and the

defendant showed that they were unanimous that the plaintiff had overpaid the defendant by Kshs. 629,583.00. The said amount was to attract interest at 12% from 5th April, 2004 until payment in full. This court's finding is that the defendant has an arguable appeal when it contests the claim of Kshs. 4,104,753.86 that has been made by the plaintiff. According to its calculations, the amount of Kshs. 629,583.00 inclusive of 12% interest for 16 years works out as Kshs. 1,838,221.76. Whether that is the amount which the appellate court will settle for, will be determined by the said court.

70. From the analysis of each party's case, it is the finding of this court that the application dated 2nd November, 2020 has merit and the same is allowed in the following terms:

(i) That leave is granted to the defendant to file a Notice of Appeal out of time and that Notice appeal dated 2nd November, 2020 be and is hereby deemed as being properly filed upon payment of requisite fees;

(ii) That there be a stay of execution of the Judgment dated 2nd April, 2019, the subsequent ruling dated 6th October, 2020 and the resultant decree or order pending the hearing and determination of the appeal;

(iii) That the stay of execution is granted on condition that the defendant pays the plaintiff Kshs. 1,838,221.76 within 30 days from 19th April, 2021. The balance of Kshs 2,266,532.10 shall be deposited in an interest earning bank account in the joint names of the Advocates on record within 30 (Thirty) days from 19th April, 2021; and

(iv) Costs of the application shall abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 16TH DAY OF APRIL, 2021. Ruling delivered through Microsoft Teams Online Platform due to the outbreak of the Covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Asige for the applicant

Mr. Kongere for the respondent

Mr. Oliver Musundi - Court Assistant