REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL MISC. APPLICATION NO. E034 OF 2021

KENYA COMMERCIAL BANK LTD..APPLICANT

VERSUS

JONATHAN NDOLO MULWA...DEBTOR

AND

PAMELA JOY T/A SADIQUE ENTERPRISES AUCTIONEERS...RESPONDENT

RULING

1. By a Motion on Notice amended on 26th February, 2021, the Applicant herein seeks the following orders:

a. Spent

b. THAT pending hearing of the intended appeal, any further proceedings and/or consequential steps and/or execution of the subsequent certificates of costs as per and arising from the ruling of Taxing Master Hon. H. Onkwani delivered herein on 11th February, 2018 (sic) be and is hereby stayed.

c. THAT the time limited for lodging this appeal from the decision of the Taxing Master Hon. H. Onkwani herein dated 11/2/2021 and filin of the Memorandum of Appeal by way of Chamber Summons be and is hereby extended from 18/2/2021.

d. THAT the memorandum of appeal by way of Chamber Summ0ns attached herein be deemed as duly lodged within the prescribed time and upon payment of the requisite fees.

e. That costs of this application be provided for.

2. According to the Applicant, on 11thFebruary, 2021, **Hon. Omkwani, PM** delivered a ruling in Mavoko Misc. Application No. 17 of 2020 and upon such delivery the applicant's advocate on instructions of the applicant applied for the typed copy of the same on 12th February, 2020 and the same was available for collection on 19th February, 2020 in the afternoon.

3. It was deposed that the applicant's advocate immediately emailed copies of the said ruling to the applicants to review. However, since the ruling involved 6 matters that had to be discussed with different bank managers in various matters it was not until 23rd February, 2021 that instructions were received.

4. It was therefore averred that the delay in filing the appeal was due to challenges beyond the control of the applicant and that the application was filed with promptitude.

5. In the applicant's view, the intended appeal is arguable and has prima facie chances of success hence the application ought to be granted in order to afford the applicant an opportunity to prosecute the appeal to its logical conclusion.

6. It was averred that the Taxing Master in her determination was not cognizant and/or did not take into consideration material facts and that the Bill of Costs was premised on exaggerated valuations of the proclaimed movables and figures were inflated.

7. According to the applicant, the application is made in utmost good faith and in the interest of justice and that the respondent will not suffer

any prejudice should the application be allowed.

8. In opposing the said application, it was averred on behalf of the Respondent that the application is fatally and incurably defective as the same has been brought under the wrong provision of the law. It was further averred that the Applicant has not demonstrated that the intended appeal has any chances of success hence discloses no arguable grounds.

9. It was averred that the Applicant has not given any reasonable or sufficient reason for the failure to lodge the appeal within the prescribed time other than mere allegations of blame on the registry for the failure to supply typed proceedings and to obtain instructions. It was averred that had the applicant been keen and interested in the intended appeal, it ought to have filed a holding appeal as it awaited the other requirements.

10. The Respondent however averred that in the event that the Court is persuaded to grant the prayers sought the same ought to be granted on condition that half the taxed costs be released to the Respondent's advocates and the balance be deposited in a joint interest earning account in the name of both advocates pending the determination of the intended appeal. In the alternative the whole of the taxed costs be deposited till the finalization of the intended appeal.

11. On behalf of the applicant it was submitted that the respondent through an application dated 24th June, 2020 sought directions that the applicant is liable to pay the auctioneers charges and expenses arising from execution/repossession done by the auctioneer/ and that the auctioneers bill of costs attached be deemed as properly drawn and filed and the same be taxed/assessed by a taxing master and paid forthwith by the respondent after taxation. On 11th February, 2021, the court delivered its ruling in which it directed that the applicant herein ought to settle the auctioneer's charges and proceeded to tax the auctioneers bill of cost as drawn and the auctioneer was granted costs of the application.

12. Being dissatisfied with the decision, the applicant on 23rd February, 2021 instructed its advocates on record to appeal against the lower court's ruling. Accordingly, the said firm of advocates proceeded to prepare a memorandum of appeal stating the grounds of the appeal and having realized that the duration to appeal had expired, filed the present application, barely 8 days after the last day for filing the appeal.

13. The Applicant cited the provisions of Rule 55(5) of the ***Auctioneers Rules*** and urged the Court to be guided by the provisions of **Section 79G** of the ***Civil Procedure Act*** which gives the court general powers to extend time. The Court was further urged to invoke the inherent jurisdiction as provided for under **Section 3A** of the ***Civil Procedure Act.*** **It was submitted that** this Court is clothed with both the constitutional and legal mandate to grant the prayers sought by allowing the filing of the appeal out of time to ensure that the ends of justice are met since judicial discretion gives court flexibility to provide a definition according to the specifics of a case, for ends of justice and to prevent the abuse of the court process. In support of the submissions the Applicant relied on the case of **Rufus Murithi Nyaga vs. Juliet Wanja Ireri (2018) eKLR** where **Muchemi, J** while endorsing the dicta in **Nicholas Kiptoo Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** and **Leo Sila Mutiso –vs – Rose Hellen Wangari Mwangi CA Application No. Nairobi 25 of 1997.**

14. It was submitted that the current application has been brought with promptitude having been filed 8 days upon expiry of the statutory period. In the Applicant's view, it has an arguable appeal which raises serious points of law, which will be rendered nugatory if stay is not granted and if the appeal is not admitted out of time. In this regard the Court was referred to the attached draft memorandum of appeal and was urged to appreciate that the same raises several poignant points of law that deserve attention and determination by this Court. On that basis, it was submitted that the applicant need not establish a multiplicity of grounds and that it is sufficient if a single *bona fide* arguable ground of appeal is raised as was held in the case of **Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd,** Civil Application No. Nai 345 of 2004. Further, that an arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous as was held in **Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others,** Civil Application No. 124 of 2008.

15. It was further submitted that the applicant is willing to deposit with court security costs pending hearing and determination of the appeal as the court may deem fit.

16. The Court was therefore urged to find that the application is proper before this Court as provided under **Rule 55(4)** as the late filing was due to the fact that the typed ruling of the taxing master was availed on the 19th February, 2021 a day after expiry of the allowed statutory period and the same was presented to the client for review on the same day and due to the weekend in between, the instructions to appeal were only received on 23rd February, 2021. It was therefore submitted tat the inadvertent delay was beyond the time and control of the Applicant, and the same is nevertheless excusable.

17. The Court was urged in line with the provisions of *Article 159(2)(d)* of the Constitution as read with **Sections 1A and 1B** of the ***Civil Procedure Act***, as well as **Rule 55(5)** of the ***Auctioneers Rules*** to make a just determination on procedural technicalities in the interest of justice and the equitable, expedient and fair resolution of matters based on the decision in **Wasike vs. Khisia (2004) 1 KLR 197** and **Joseph Njau vs. Benson Mwai (2013) eKLR**.

18. The Court was urged to find that the inadvertence of the mistake has been adequately explained, and to take cognizance of the fact that mistakes do happen (**see Muria v Wainaina (No. 4) (1982) KLR 38.** As such, the Court ought to do whatever is necessary to rectify the mistake of the Applicant's counsel, in the interest of justice.

19. On behalf of the Respondent, it was submitted that Rule 55 [5] of the ***Auctioneers' Rules,*** is cogged in mandatory terms and therefore any prayers being granted under such must be done with lots of precaution since it employs the term "shall". Reliance was placed on the decision of the **High Court at Nyeri in Civil Suit 101 of 2011, Wachira Karani vs. Bildad Wachira** which quoted the Court of Appeal in Tanzania's decision in the case of the **Registered Trustess of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & Others** as well as the decision in **Daphene Parry vs. Murrray Alexander Carson,** and submitted that the applicant has not

shown sufficient cause as to why the appeal should be allowed out of time. As regards the need to comply with the rules of procedure, the Respondent relied on the case of **Onjula Enterprises Ltd vs. Sumuria [1986] KLR 651.** In this case it was submitted that the applicant herein was expected to lodge his said appeal within 7 days as provided and not to wait up to a later time of his own convenience to lodge the same and that there was a good time for limiting the said filing period to only seven days. In this regard reliance was placed on **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] e KLR** as well as the case of **Chelashaw vs. Attorney General & Another [2005] 1 EA 33**.

20. As regards the length the delay, it was submitted that the said appeal ought to have been filed on or before 18th February 2021 but was lodged on 2nd March 2021 meaning that the delay was for than 12 days from the stipulated time to file the same which was out time and should not be admitted. As for the reason for the delay, it was submitted that Section 79G of the ***Civil Procedure Act***, in its proviso provides that an Appeal may be admitted out of time if the Appellant satisfies the Court that he had a good and sufficient cause of not filing the appeal in time. In the instant case, it was submitted that the Applicant has not shown good or sufficient reasons to warrant the court exercise its discretion to extend time of filing the Appeal. According to the Applicant, the delay was inordinate and not satisfactory and that the applicant was not keen with the said appeal and hence should not be accorded any such opportunity as he sat on his rights. To the Respondent, the reasons given are casual, vague and mockery to the ends of justice as they are not supported in any way by either any documents or annextures. In her view, this Application is an afterthought and only intended to frustrate and delay payment of the Judgment.

21. As regards the possibility of success of intended appeal, it was submitted that the intended appeal has no slightest chances of success as the Learned Magistrate did not err in proceeding to assess the bill of costs as there was already an existing dispute. This submission was based on **Bungoma High Court Civil Misc. Appl. No 312 of 1999 Nzoia Sugar Company Ltd vs. Nzoia Outgrowers Co. Ltd and Manuel Otiangala T/A Kuronya Auctioneers [Auctioneer] Samson Itonde Tumbo T/A Dominion Yards Auctioneers And Paul Barasa Wamoto T/A Pawaba Auctioneers**, Nairobi, Milimani Commercial Courts, Civil Suit 1818 Of 2000, between **National Industrial Credit Bank Limited vs. Majanimingi Sisal Estate Ltd & 2 Others** and Mombasa Civic Misc Application No 172 of 2009 between **Trophy Enterprises vs San Gigio Limited.** According to the Respondent, the bill of costs dated 24th June 2020 was properly taxed by the taxing master as she was properly guided and alive to the provisions of Rule 55[3] of the ***Auctioneers Rules 1997*** which provides inter alia that in any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the board on the application of any party to the dispute assess the fees payable.

22. On the issue of prejudice, it was submitted that the Respondent having obtained the Judgment in the lower court in her favour should be allowed to enjoy the same without any further delay as this are costs which were clearly incurred and ought to be reimbursed on time.

23. According to the Respondent, as a sign of good faith and since the Respondent has succeeded in the 1st hurdle by having a Judgment in her favour, if the court is persuaded to enlarge time to file the Appeal out of time, then the same must be granted on some reasonable conditions as proposed in the replying affidavit, the Applicant having failed to demonstrate the irreparable loose they will suffer if their said Orders are not granted.

Determination

24. I have considered the application. Although the parties herein have submitted at length on the merits of the intended appeal, what is before me is a consideration whether or not this court should extend the time to the Applicant to lodge the Appeal and whether there ought to be a stay of execution during the pendency of the said appeal.

25. Rule 55(5) of the ***Auctioneers Rules***, which provides that:

> ***"5. The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate."***

26. The proviso to section 79G of the ***Civil Procedure Act*** provides that:

> ***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.***

27. 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 vs. 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 vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides,* is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

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

29. Regarding the reason for the delay, two reasons have been advanced. The first is the delay by the registry to furnish the applicant with a copy of the decision. In other words, the Applicant's case is that its inability to file the appeal was partly due to the delay in the registry

furnishing it with a copy of the decision. While the Respondent argues that the Applicant ought to have filed a holding appeal, in my view, it was not unreasonable for the applicant to first get sight of the decision before making up his mind to refer an appeal. As was appreciated by **Tunoi, JA** in **Margaret Apiyo vs. Jotham Chemwa Matayo Civil Application NO. NAI. 257 of 1996** where the blame for tardiness is placed squarely at the door of the court, discretion ought to be exercised in favour of the party suffering the consequences thereof.

30. The other reason is that there was delay in obtaining instructions from the client. The client herein is a corporation and it is contended that the reason for the delay was that the ruling involved 6 matters that had to be discussed with different bank managers in various matters it was not until 23rd February, 2021 that instructions were received. As was appreciated in **Sebei District Administration vs. Gasyali and Others [1968] EA 300** a distinction is to be drawn between an individual defendant and an incorporated body which is a defendant, with multifarious duties to perform. I find that the reason given for the delay is excusable.

31. As regards the merits of the intended appeal, it is arguable that the learned taxing master misapprehended the subject matter upon which the taxation of costs was based. Without deciding the matter, such an issue is clearly arguable in matters of taxation of costs.

32. I find that the period of delay of 9 days not inordinate. However, as appreciated in the case of **Utalii Transport Company Limited & 3 Others vs. NIC Bank Limited & Anor [2014] eKLR**:

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

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

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

35. **Waki, JA** in **Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005** held that:

> **"As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors…In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves…The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant's counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay… Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle."**

36. I associate myself with the position of **Aburili, J** in **Edward Kamau & Another vs. Hannah Mukui Gichuki & Another [2015] eKLR** that:

> **"The right of appeal, it has been held time and again, is a Constitutional right which is the cornerstone of the rule of law. To deny a party that right, would in essence be denying them access to justice which is guaranteed under Article 48 of the Constitution and also a denial of a right to a fair hearing guaranteed under Article 50 (1) of the Constitution which latter right cannot be limited under Article 25 of the said Constitution. In my view, it has not been shown that the intended appeal is frivolous or a sham and therefore it is only fair and just that the applicants be accorded an opportunity to ventilate their grievances where they are aggrieved by a decision of the lower court, to challenge it before a superior court."**

37. In the premises, I find merit in the limb for extension of time.

38. As regards the stay, have carefully considered the application, the affidavits filed, submissions made as well as authorities cited by counsel for both parties. **Order 42 rule 6(1) and (2)** of the ***Civil Procedure Rules*** provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.

(2) 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.”***

39. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is 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.

40. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA** on 20/11/09 held *inter alia* that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.

41. The same Judge in **Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** held that:

> **“where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case.”**

42. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.** This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. 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."

43. On the first principle, **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

> **"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money".**

44. 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."**

45. Dealing with the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, **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."**

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

> "**to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."**

47. 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 vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

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

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

50. In an application for stay the Court must consider the overriding objective and balance the interest of the parties to the suit since the court is enjoined place the parties on equal footing. Since the overriding objective aims, *inter alia*, to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, the balancing of the parties' interest is paramount in an application for stay of execution pending appeal. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal,

and in the event it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100.**

51. Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes a crucial issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal to ensure that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words, the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of her judgement. See **Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Kenya Shell Ltd vs. Kibiru & Another** (supra)**; Mukuma vs. Abuoga [1988] KLR 645.**

52. As was stated by **Kuloba, J** in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:**

> **"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."**

53. It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be the case if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another** (supra).

54. 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 defendants any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

55. The next issue for consideration is the issue of security. It is true that under Order 42 rule 6 aforesaid, the applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. However, as already stated above the Court must similarly consider the overriding objective and balance the interest of the parties to the suit. The law is that where the applicant intends to exercise its undoubted right of appeal, and in the event it was eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. The issue of adequacy of security was dealt with by the Court of Appeal in **Nduhiu Gitahi vs. 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".**

56. In this case, the Applicants have not disclosed the taxed amount. It is not even alleged that the Respondent will not be able to refund the same in the evet that the intended appeal succeeds. In fact, nothing has been said at all with respect to the loss, if any, that the applicant stands to suffer unless the stay is granted. Accordingly, there is no material on the basis of which this Court can find that the Applicant stands to suffer loss leave alone a substantial one. On the other hand, the Respondent has not stated that she is in a positon to make good the taxed amount if the same were to be paid over to her. That the applicant is a bank of repute may be taken judicial notice of.

57. Accordingly, I grant leave to the applicants to file the appeal out of time. Let the Appeal be filed and served within 10 days from the date hereof. In default the application shall stand dismissed.

58. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff I grant a stay of execution of the decree herein on condition that the Applicant pays to the Respondent half of the taxed sum and deposits the other half in joint interest earning account(s) in the names of the advocates for the parties herein in Kenya Commercial Bank, Machakos within 30 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.

59. The costs of the application are awarded to the Respondent.

60. This ruling applies to Machakos High Court Misc. Application Nos. E35, E036A, E036B, E037, E038 all of 2021.

61. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30TH DAY OF JUNE, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mwanzia for the Applicant

Mr Mochama for the Respondent

CA Geoffrey