REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

MISCELLANEOUS APPLICATION NO. 77 OF 2021

MBUKONI SERVICES LIMITED...1ST APPLICANT

ALFRED KYALO KIVUU...2ND APPLICANT

-VERSUS-

MUTINDA REUBEN NZILI, ROSE NDUNGE MUTINDA AND

MORRIS NDINDA MUTINDA (Suing as the Legal Reps of the Estate of

FLORENCE NDINDA MUTINDA- Deceased)..RESPONDENTS

RULING

1. By a Motion on Notice dated 3rd May, 2021, the applicants herein substantially seek that this court be pleased to extend time and grant leave to the Applicant to lodge their memorandum of appeal out of time against the judgement and/or decree entered against them by the **Hon. B. Bartoo** (S.R.M.) in Machakos Chief Magistrate's Court Civil Suit No. 354 of 2018 delivered on 11th March, 2021. Pending the hearing and determination of the intended appeal, the Applicants also seek an order staying the execution of the said judgement.

2. The Application was supported by an affidavit sworn by the 2nd Applicant, the insured and owner of motor vehicle reg. no. KCA 677U. According to him, judgement was delivered on 11th March, 2021 in which the Applicants were found liable in the ratio of 80:20 and the Respondents were awarded a total sum of Kshs 2,825.334.00 plus costs and interest. According to the Applicants this award is excessive in terms of liability apportioned to the Applicants hence the intended appeal has high chances of success.

3. It was explained that the delay in filing the appeal was due to the time taken by the advocate in obtaining a copy of the judgement and communication to him about the same due to the restrictions occasioned by the pandemic.

4. It was deposed by the Applicants that the Respondent is a person of unknown means hence his apprehension that if the decretal sum is paid out, the Appeal will be rendered nugatory and an academic exercise. It was deposed by him that his insurer is ready and willing to provide a Bank Guarantee as security for stay execution pending appeal.

5. The Applicants also relied on the affidavit sworn by **Kelvin Ngure**, a Legal Officer at Direct Assurance Company Limited who are the insurers of Motor Vehicle Registration No. KAU 025R at whose instance the above cited suit was defended. According to the deponent, he swore the supporting affidavit by virtue of their rights of subrogation under the relevant policy of insurance and the common law rights to defend, settle and prosecute any claims in the insured's name.

6. While reiterating the averments made by the 2nd Applicant, the deponent stated that he informed the Applicants of the outcome of the matter and later held discussions with the Applicants' advocates at which it was decided that an appeal be lodged as the award was too high in the circumstances of the evidence adduced. By the time the instructions to appeal were issued, the time for filing the appeal had lapsed due to the restrictions brought about by the pandemic. According to him the intended appeal is not an afterthought and that the same is merited, arguable and raises pertinent points of law and fact thus has overwhelming chance of success.

7. The deponent disclosed that the Applicants' insurer was ready and willing to provide Bank Guarantee as security for stay of execution pending the appeal.

8. The deponent deposed that the delay in extracting the judgement and receiving instruction from the Applicants which was regretted ought not to be visited on the Applicants. According to the Applicants the Respondents stand to suffer no prejudice or damage that cannot be compensated by way of costs.

9. In response to the application, the Respondents relied on the replying affidavit sworn by **Dominic Mulyungi**, the Respondents' advocate who deposed that the application failed to establish or meet the minimum threshold established by law to enable the court exercise its discretionary powers in favour of the applicants and grant them the orders they seek. It was averred that the applicants have not given a reasonable explanation for the delay in filing the appeal and the reason advanced is remote and not convincing, unbelievable and untrue. It was noted that the deponents of the supporting affidavits have not given the exact dates when the applicant was informed of the outcome of the trial and when they issued instructions to appeal but have rather made general statements. It was further averred that the applicants are evasive on the facts when the judgement was applied for and received. It was further noted that the two supporting affidavits are contradictory as to who informed the applicants of the outcome of the judgement.

10. In the deponent's view, the draft memorandum of appeal shows that the appeal has no chances of success as the award was within the current awards by the courts and the trial court properly directed itself on liability. As regards the belief that the Respondent is a person of unknown means, it was deposed that the source of such information was not disclosed. To the deponent, this application is an afterthought prompted by the application for the decree by the Respondents in readiness to enforce the judgement. According to the Respondent, to the extent that the application is filed at the behest of the applicants' insurers purportedly in exercise of their right of subrogation, the same is premature.

11. The deponent averred that the Applicants cannot dictate to the court what conditions to impose in the event it finds the application merited. It was noted that from the affidavits the applicants do not deny liability in its entirety but only the apportionment and that the appeal is only on quantum hence the grounds in the draft memorandum of appeal attacking liability are a fishing expedition and academic exploration by the applicants. Accordingly, the court was urged should it find merit in the application, the same should be allowed on condition that at least half of the decretal sum in the lower court and the uncontested cost in the lower court be released to the respondent and the balance be deposited in a joint interest earning account in the names of the parties. According to the deponent the said sum is Kshs 1,398,529.10.

12. It was deposed that the applicants had all the time to file the appeal within time and to seek stay expeditiously.

13. In their submissions, the Applicants stated that in the circumstances of this case where the Applicants have a genuine, viable, strong and merited appeal the ends of justice demand that the intend appeal be heard on its merit so that all the matters in controversy are finally determined. In this regard the Applicants relied on **Wachira Karani vs. Bildad Wachira [2016] eKLR**. Based on section 3A of the ***Civil Procedure Act*** and the case of **Patel vs. E A Cargo Handling Services Ltd [1974] EA 75**, it was submitted that the intended appeal should be admitted so as to ensure the ends of justice are met. According to the Applicant, an applicant should not be deni3d an opportunity to prosecute his appeal or driven from the judgement seat unless the appeal is unarguable. According to the Applicants their intended appeal is arguable and raises serious points of law and fact on liability. The applicant cited **Bake 'N' Bite (Nrb) Limited vs. Daniel Mutisya Mwalonzi [2015] eKLR**, it was submitted that it is not a condition precedent in application of this nature to prove that the intended appeal has high chances of success.

14. As regards the conditions for grant of leave to appeal out of time the Applicants relied on **Esther Wamaitha Njihia & 2 Others vs. Safaricom Limited [2014] eKLR** and submitted that since the delay was occasioned by restrictions imposed by the Government due to the pandemic, the same is excisable and the Applicants should not be punished for the same. In the Applicants' submissions, they have established a good and sufficient cause for not filing the appeal in time based on the decision in **Wachira Karani vs. Bildad Wachira** (supra).

15. As regards the stay, it was submitted that the Respondent has not disclosed or furnished the court with any documentary evidence to prove their financial standing hence their ability to refund the decretal sum in the event that the appeal succeeds. Based on **Edward Kamau & Another vs. Hannah Mukui Gichuki & Another [2015] eKLR**, it was contended that the Respondents are the only ones who can specifically show that they have the means to repay the decretal amount if the appeal succeeds. In the absence of the affidavit of means, it was submitted that the court should allow the application.

16. As for the delay, it was submitted that there was no inordinate delay in bringing the application since upon receipt of instructions the Applicants' advocates immediately took steps and filed the application. It was reiterated that the Applicants are ready and willing to provide a Bank Guarantee as security. In this regard the Applicants relied on **Empower Installations Limited vs. Eswari Electricals (Pvt) Limited [2016] KLR**.

17. It was therefore submitted that the Applicants have satisfied all the conditions for the grant of stay pending the hearing and determination of the appeal.

Determination

18. I have considered the application, the supporting and replying affidavits and the submissions filed as well as the authorities relied upon.

19. Section 79G of the ***Civil Procedure Act*** provides that:

> ***Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree***

or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

20. It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words "sufficient cause" and "good cause". It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

21. 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 length of the delay; (ii) the explanation if any for the delay; (iii). 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; (iv). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant. This was the position reiterated in **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR**, where the Court of Appeal set out the principles undergirding an Application for leave to file an appeal out of as follows:

"Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others..."

22. Similarly, in **Leo Sila Mutiso vs. Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231** the Court of Appeal set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant. However, in the case of **Thuita Mwangi vs. Kenya Airways Ltd [2003] eKLR,** the Court explained that follows:

"The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered."

23. However, as was held in **Kenya Commercial Bank Limited vs. Nicholas Ombija [2009] eKLR:**

"An "arguable" appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court."

24. That was the position in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR** where the court held that:

"...On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous..."

25. I also associate myself with the decision of the Supreme Court in **Civil Application No. 3 of 2016 - County Executive of Kisumu –vs- County Government of Kisumu & 7 Others** at page 5 where the said Court said:-

"… 23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the NICHOLAS SALAT case to which all the parties herein have relied upon. The court delineated the following as:-

"the underlying principles that a court should consider in exercise of such discretion:

1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

5) …"

26. In this case the Applicant contended that the delay in filing the appeal was due to inability to give instructions to lodge the appeal within the prescribed time occasioned partly by the restrictions posed by the COVID19 pandemic. That COVID19 Pandemic has given rise to circumstances which have turned the normal course of life upside down is not in dispute. In those circumstances, neither the Applicant nor the Respondent should be blamed for the inability to take necessary steps within the prescribed time limits.

27. 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.**

28. 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.**

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

30. As regards stay, the principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the ***Civil Procedure Rules*** which provides as follows:

No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

31. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is nolonger limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. According to section 1A(2) of the ***Civil Procedure Act*** "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

32. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.** This was the position in **Jason Ngumba Kagu & 2 Others vs. Intra Africa Assurance Co. Limited [2014] eKLR** where it was held that:

"The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his

appeal. Even though many say that the test in the High court is not that of ''the appeal will be rendered nugatory'', the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process."

33. It was therefore appreciated by **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** that:

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

34. 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".**

35. 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."**

36. Dealing with the contention that the fact that the respondent is in need of finances is an indication that he would not be in position to refund the decretal sum, **Hancox, JA** (as he then was) in the above cited case when he expressed himself as follows:

> **"I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age."**

37. 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".

38. 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.**

39. In my view, a mere averment that the Respondent's means are unknown is not enough to shift the burden to the Respondent to swear an affidavit of means. There must be grounds upon which it is believed that the Respondent will be unable to refund the decretal sum if paid over to him. He is the successful party as at that time and is entitled to the fruits of his judgement and ought not to be prevented from doing so on bare averments.

40. 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.**

41. The same sentiments were expressed in Civil Application No. 238 of 2005; **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike** in which the Court of Appeal expressed itself at Page 3 Paragraph 2 as follows:-

> **"This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the 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."**

42. I therefore appreciate the sentiments expressed by the High Court in **John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another [2016] eKLR** that:

> **"There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief."**

43. 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.

44. In the case of **Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation) (2004) E.A. LR 331**, the Court defined substantial loss in the sense of Order 42 rule 6 as follows:

> **"…Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal…"**

45. Substantial loss may be equated to the principle of negation of the success of the intended appeal. Dealing with the latter, it was held in the case of **Kenya Airports Authority vs. Mitu-Bell Welfare Society & Another (2014) eKLR**, that:

> **"The nugatory limb is meant to obviate the spectre of a meritorious appeal, when successful, being rendered academic the apprehended harm, loss or prejudice having come to pass in the intervening period. Our stay of execution jurisdiction is meant to avoid such defeatist eventualities in deserving cases."**

46. It was therefore held in the case of **Tabro Transporters Ltd. vs. Absalom Dova Lumbasi [2012] eKLR**, thus:

> **"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination."**

47. I agree with the position adopted in Bungoma High Court Misc Application No 42 of 2011 - **James Wangalwa & Another vs. Agnes**

Naliaka Cheseto that:

> **"The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.''**

48. I therefore appreciate the sentiments expressed by the High Court in **John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another [2016] eKLR** that:

> **"There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief."**

49. What has troubled me however, is the fact that the Respondents are suing in their capacity as the administrators of the estate of a deceased person. Whereas, the Respondents in their individual capacities may well be able to refund the decretal sum, when it comes to their representative capacities, it is another issue altogether. It is however not lost to me that from the averments in the supporting affidavit, the Applicants are more concerned with the apportionment of liability and the assessment of damages flowing from that liability. In those circumstances, it boils down to how much the court ought to have awarded as opposed to whether any award ought to have been made at all.

50. Accordingly, the order which commends itself to me and which I hereby grant is that there will be stay of execution pending the hearing of this appeal on condition that the Appellant pays half of the decretal sum to the respondent and deposits the balance in a joint interest earning account in the names of the advocates for the respective parties in Kenya Commercial Bank, Machakos or gives a Bank Guarantee from a reputable financial institution covering the said balance for the whole duration of the intended appeal. Both conditions to be complied with within 30 days from the date of this ruling and in default this application shall be deemed to have been dismissed with costs to the Respondent.

51. The costs of this application will be in the intended appeal.

52. It is so ordered.

Read, signed and delivered in open court at Machakos this 29th day of July, 2021.

G V ODUNGA

JUDGE

Delivered in the absence of the parties

CA Simon