REPUBLIC OF KENYA

IN THE HIGH COURT OFKENYA AT SIAYA

CIVIL APPEAL NO. 14 OF 2018

PASCAL OBONYO AGWENA .....1ST APPELLANT

PETER WERE AJULU.....2ND APPELLANT

EDWARD OCHAYE .....3RD APPELLANT

ROSEMARY OGUTU .....4TH APPELLANT

VERSUS

SIMON JUMA ODIYO..... RESPONDENT

RULING VIA SKYPE

1. By a Notice of motion dated 14th March 2020 the appellants/applicants herein seek for orders that this court do review, set aside and or vary its Ruling delivered on 25th February 2020 dismissing the appellants' application dated 12th February 2020 on the ground that the applicants' application was filed without the requisite Notice of appeal.

2. The applicants also prayed that upon such review, the court do determine the application for stay pending the intended appeal to the Court of Appeal on its merits.

3. The grounds upon which the application is predicated are that there was an error apparent on the face of the record as the court record shows that there was a Notice of Appeal filed and that the applicants were issued with an original official receipt for the said Notice of Appeal. Secondly, that counsel appearing at the hearing of the said application for stay pending appeal did not comprehend the court's inquiry on the whereabouts of the receipt for the payment of the Notice of Appeal and that she understood the inquiry to relate to the letter seeking for proceedings together with original payment receipt for the said proceedings. It was further asserted that counsel for the applicants must have misunderstood the inquiry by the court which mistake she owns up and so the same should not be visited upon her clients who are innocent. That if the receipt for payment of the Notice of Appeal is missing in the court file then the mistake is on the part of the court staff who issued the original receipt and failed to place the counterfoil copy into the court file hence the applicants should not be punished for errors committed by court staff. The applicants also asserted that it was in the interest of justice that the court corrects the errors committed and proceeds to deliver a ruling on the application for stay pending appeal dated 12th February 2020 on the basis of submissions by parties already on record.

4. The application was further supported by the affidavit sworn by Linda A. Oduor Advocate restating the grounds reproduced hereinabove and urging the court to grant the prayers sought. The said affidavit also annexed copy of the impugned ruling and copy of original receipt for Kshs 450 being payment for the Notice of Appeal dated 28th November, 2019.

5. The application for review is opposed by the Respondent through his counsel who filed grounds of appeal dated 8th May 2020 contending that there is no error apparent on the face of the record; that an erroneous conclusion of law or evidence is not a ground of review; that the application is another attempt at seeking to frustrate the Respondent enjoying the fruits of his judgment; that the remedy available to the applicants is to prefer an appeal ; and that litigation ought to be brought to an end.

6. Parties' advocates filed written submissions to canvass the application. In the applicants' submissions dated 11th May 2020 supported by case law and statutory provisions, the applicants 'counsel set out the principles guiding applications for review as set out in section 80 of the civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, insisting that there was an error apparent on the face of the record as the court issued them with an original receipt number 0400008 on 28th November 2019 when they filed and paid for the Notice of Appeal but that the said receipt seem not to have been in the court file and that when the court at the hearing of the application for stay pending appeal asked counsel for the original receipt, counsel understood the court to be asking for original receipt and letter asking for proceedings and judgment of the court. Counsel submitted that the registry staff could not have stamped the Notice of Appeal if there had been no payment for the same and that the respondent would suffer no prejudice of the application is allowed as the parcels of land for the applicants

was already saved as collateral for the due performance of decree in this matter.it was submitted that unless the orders sought are granted the intended appeal shall be rendered nugatory. Reference was placed on the cases of **Zablon Mokua v Solomon M. Choti &3 others [2016] e KLR; Re estate of Livingstone M'Mung'ania(deceased) [2018]e KLR;CMC Holdings Limited v Nzioki [2004] 1 KLR 173 and Phyllis Kariuko Njagi v Waguama Njagi &Another [2018]e KLR.**

7. Opposing the application, the Respondent through his counsel Mr. Odongo filed written submissions dated 8th May 2020 reiterating the grounds of opposition and contending that the application is intended to bog down the respondent with litigation and to frustrate his bid to realize the fruits of his judgment. It was further submitted that an error on the face of the record ust be clear on the appeal record and should not be supplemented with additional evidence and that that is what the applicants have done here by annexing documents in support of their application. Further submission by the respondent was that the ruling delivered on 25th February 2020 was clear at paragraph 21 that when counsel for the applicants was asked to produce the official receipt of the filing of Notice of Appeal she fumbled through her files and di not produce any, although the Notice of Appeal was in the court file and duly stamped but that there was no evidence of payment of fees for the same and that the applicants have not demonstrated that the receipt they have annexed was issued on 28th November 2019. That the applicants are gasping straws when they attempt to blame themselves for not presenting the official receipt to court and at the same time blame the court staff for not filing the receipt in the court file.

8. The respondent's counsel urged the court not to grant the orders sought.

DETERMINATIONS

9. I have carefully considered the application for review of the ruling of 25th February 2020, the grounds thereof, depositions and annextures as well as the grounds of opposition, submissions for and against the said application. The main issue for determination are whether the application for review is merited and if so, whether the court should determine the application for stay of the judgment of this court dismissing the appellant's appeal, pending the intended appeal to the Court of Appeal on its merits. Secondly, what orders should this court make.

10. The commencement point is to examine the principles for grant of the orders of review of orders of the court.

11. **Section 80 of the Civil Procedure Act is on review and it provides:**

> ***"Any person who considers himself aggrieved—***
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> ***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."***

12. **Order 45, rule 1 of the Civil Procedure Rules stipulates thus:**

> ***"1. (1) Any person considering himself aggrieved—***
>
> ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***
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> ***(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"***

13. Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist:

> **(a)** There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
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> **(b)** There was a mistake or error apparent on the face of the record; or
>
> **(c)** There were other sufficient reasons; and
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> **(d)** The application must have been made without undue delay.

14. The germane question for determination is whether the Applicants/Appellants have established any of the above grounds to warrant an order of review and upon such review, whether this court should determine the application for stay pending the intended appeal and if so, on

what terms.

15. In **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243,** the Court of Appeal described an error apparent on the face of the record as follows:

> ***"…In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."(emphasis mine)"***

16. On discovery of new evidence and important matter which was not within the knowledge of the Appellant, the Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014]e KLR** held:

> ***"In Francis Origo & another v. Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This Court stated:***
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> ***"our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."***
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> ***We do not find it necessary to comment on the exercise of Court's discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J.***
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> ***We think Bennett J was correct in Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557 when he held that:***
>
> ***"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal."***

17. The applicant's counsel asserts that it was her mistake not to understand the inquiry by the court on the official receipt for filing of Notice of Appeal. She further blmes court staff for not placing the receipt issued on 28th November 2019 in the court file. On the part of the respondent, it is contended that there is no error apparent on the face of the record to warrant review and further that in any event the applicants have not shown that the said receipt was issued on 28th November 2019 for Notice of Appeal.

18. What this court does recall vividly is what is contained in my ruling of 25th February 2020 at paragraph 21. At the time of oral hearing of the application by the applicants for stay of execution of decree pending appeal, I asked counsel for the applicants, Ms Oduor on the whereabouts of the official receipt for payment for the Notice of Appeal which was duly filed on 28th November 2019 but counsel fumbled through her files and silently appeared to dismiss the court on that inquiry. The inquiry was predicated on the fact that I had perused the entire court file but traced no receipt for payment for the Notice of Appeal and therefore the burden of proof lay on the applicants to place before the court evidence of such payment to enable the court appreciate such payment which was necessary prior to consideration of the application for stay pending appeal on its merits, as stated in the impugned ruling. As it were, counsel for the applicants appeared to ignore and assume the court's inquiry and that is how they ended up where we are today.

19. In support of the application for review, the applicants have annexed a copy of original receipt for payment for Notice of Appeal filed on 28th November, 2019. I have taken the liberty to inquire from the court staff whether that receipt is genuine and iam assured that the same is genuine as it was issued the same day with another receipt for proceedings and the serial numbers are not far apart. However, for unexplained reasons, there is no copy of that receipt in the court file and it is possible that it may have been misplaced. Had counsel for the applicants not ignored the court's inquiry and placed before me the receipt in question, I would have determined the application on its merits.

20. That being the case, iam persuaded that there is sufficient reason to warrant review of the order of 25th February 2020 dismissing the application by the applicants for stay of execution pending appeal.

21. Accordingly, I hereby review, set aside and vacate the order of 25th February 2020 dismissing the applicants' application dated 12th February 2020 seeking for stay of execution of the judgment delivered on 25th November, 2019 pending lodgment, hearing and determination of the intended appeal to the court appeal. The application dated 12th February 2020. I reinstate the said application for consideration on its merits.

22. As the parties had already argued the said application inter partes, I now proceed to determine the question of whether I should grant the application for stay of execution of judgment min this appeal pending hearing and determination of the intended appeal to the Court of Appeal.

RULING ON APPLICATION FOR STAY PENDING APPEAL

23. Vide a Notice of Motion dated 12th February 2020 brought under certificate of urgency under the provisions of Sections 1A,1B &3A of the Civil Procedure Act and Order 42 Rule 6(1),(2) and Order 51 Rule 1 of the Civil Procedure Rules, the Appellants/ Applicants herein seek for orders of stay of execution of the decree and or judgment delivered by this court on 25th November 2019 and the decision of the subordinate Court in Bondo PM Civil Suit No 102 of 2018 pending the hearing and determination of the Applicants 'intended appeal to the Court of Appeal.

24. The application is premised on the grounds on the face of the Notice of Motion and a supporting affidavit sworn by Peter Were Ajulu the second appellant/applicant herein on the signed authorization of all the appellants/applicants, restating the grounds in support of the application.

25. In the grounds and supporting affidavit, the applicants assert that they were aggrieved by the judgment of this court delivered on 25/11/2019 which dismissed their appeal against judgment and decree in Bondo PM CC No 102 of 2018 wherein the trial court found that the appellants were liable in damages for defaming the Respondent.

26. The applicants claim that on 28th November 2019 which was within seven days of the date of judgment they filed a Notice of Appeal and that they also applied for certified copies of proceedings and Judgment which they have not received.

27. Further, it is claimed that the Respondent is likely to execute the decree in the subordinate Court in the Bondo case and that this court had during the pendency of this appeal granted the applicants stay pending appeal on condition that the applicants deposited two title documents in court namely Siaya/Nyaguda/ 2412 and Siaya/Nyaguda/2235 which the applicants have offered to this court as security for the due performance of decree in the subordinate court. They claim that they hold sentimental value to the said parcels of land as farmers hence they stand to suffer irreparably if the said land is sold in execution of decree of the subordinate court

28. The applicants further claim that they stand to suffer substantial loss if stay is not granted and execution is carried out as they are farmers who have no other means of income hence they are not in apposition to settled the decree and that should the decree be executed then this application and the intended appeal shall be rendered nugatory with immense prejudice and inconvenience to the applicants who shall be condemned without legitimate opportunity to ventilate their undeniable statutory right to appeal as granted under section 66 of the Civil Procedure Act.

29. The applicants also deposed that they had made the application without unreasonable delay and that the Respondent had not demonstrated that he would be prejudiced in any way if stay is granted pending hearing and determination of the intended appeal.

30. The applicants attached to their affidavit copies of Notice of Appeal as filed on 28/11/2019 and served upon the Respondent's counsel on 5th December 2019 the letters requesting for proceedings and Judgment delivered by this court on 25/11/2019, the ruling of stay made by this court on an application for stay of execution of decree of the lower court pending hearing and determination of this appeal, the title documents deposited in court as security for the due performance of decree of the trial court and valuation Reports for the security deposited in court.

31. The Notice of Motion was opposed by the Respondent through a Replying Affidavit sworn by the Respondent Simon Juma Odiyo on 20th February 2020 deposing that the purported authority is undated hence it lacks probative value as an authority to act; that a Notice of Appeal only acts as an intention to appeal and not an appeal *perse* hence there is no appeal preferred against the judgment of this court; that no decree has been taken pout or warrants issued for execution hence the application is a misplaced misapprehension.

32. That the title documents being security for the due performance of decree cannot be of sentimental value yet they were voluntarily offered as such security with full knowledge of the consequences likely to happen should the appeal not be successful.

33. That the applicants have not demonstrated any substantial loss they are likely to suffer if stay is not granted and that there is no memorandum of Appeal filed to the Court of Appeal hence the application is intended to delay and frustrate the Respondent in his bid to realize the fruits of his judgment.

34. The application was argued orally with Ms. Oduor Advocate counsel for the applicants arguing that the application had met the threshold for granting of stay pending appeal as the stay granted pending this appeal had expired. She added that the application had been timeously as they had applied for abut not received copies of proceedings. The rest of the oral submissions were a replica of the grounds and depositions by the second appellant/applicant.

35. On the delay, counsel for the applicants argued that it was occasioned by the negotiations for an out of court settlement which did not materialize. She urged the court to consider the security deposited in court as sufficient cover for the due performance of decree in the lower court and grant stay. She also submitted that the Respondent had not demonstrated that he was capable of refunding the decretal sum if the appeal succeeds as by that time the land in question would have been sold and hence it would be difficult to recover the decretal sum.

36. I opposing the application, Mr. Ooro Advocate holding brief for Mr. Odongo counsel for the Respondent submitted that the application was unmeritorious and a waste of the court's time. Further, that the application was premature and unfounded as no execution had been set in motion. That there was no demonstration of any loss by the applicants who voluntarily surrendered their title documents to their parcels of

land as security for the due performance of decree hence they ought to have known the consequences thereof. In. on alleged negotiations for a settlement Mr. Ooro argued that it was not a bar to execution and that there was no evidence of such negotiations ongoing between the parties. To explain the substantial delay. Additionally, counsel argued that the application was filed after inordinate delay which was inexcusable as it was not explained. He urged this court to dismiss the application with costs.

37. In a brief rejoinder, Ms. Oduor submitted that the application had not been filed prematurely as they were served with a bill of costs and the same was due for taxation on 25/2/2020.

DETERMINATION

38. I have considered the applicants' Notice of Motion, the Grounds and supporting Affidavit and annextures as well as the replying affidavit in opposition and the oral submissions for and against the Notice of Motion.

39. In my humble view, the main issue for determination is whether the application for stay of execution pending hearing and determination of the intended appeal has any merit.

40. The application for stay of execution of judgment is primarily governed by the terms of Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

> ***6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.***
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> ***(2) No order for stay of execution shall be made under sub-rule (1) unless—***
>
> ***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***
>
> ***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.***

41. An Applicant has to satisfy a four-part test as was highlighted in the case of **UAP Provincial Insurance Company Limited v Michael John Becrett, Civil Application Number 204 of 2004**. They must demonstrate that:

> *a.* ***The appeal they have filed is arguable;***
>
> ***b. They are likely to suffer substantial loss unless the order is made. Differently put, they must demonstrate that the appeal will be rendered nugatory if the stay is not granted;***
>
> ***c. The application was made without unreasonable delay; and***
>
> ***d. They have given or are willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on them.***

42. Rule 75 (2) of the Appellate Jurisdiction Rules provides that Notice of Appeal shall be filed within 14 days of the date of judgment or order or decision sought to be appealed against. The Notice of Appeal herein was filed within 14 days as judgment was delivered on 25th November 2019 and the Notice of Appeal filed on 28th November, 2019.

43. Under Order 22 Rule 22 of the Civil Procedure Rules, this court has power to stay execution of decree upon sufficient cause being shown. This court would therefore not delve into the merits of the intended appeal but will consider some of the grounds that the Court of Appeal considers in applications before it for stay of execution of decree of the High Court as was settled in the case of **MULTIMEDIA UNIVERSITY & ANOTHER –VS- PROFESSOR GITILE N. NAITULI** (2014) eKLR where the Court of Appeal whilst considering an application under **Rule 5 (2) (b)** expressed itself as follows:

> ***"When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underling those decisions was summarized in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103[eKLR as follows:***
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> ***i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court.***

ii. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.

iii. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

iv. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.

v. An applicant must satisfy the Court on both the twin principles.

vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.

vii. 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.

viii. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.

ix. the term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved."

44. ***In Joseph Gitonga Kuria vs Elizabeth Wambui Gitonga & Another (2016) eKLR*** it was held:

"….. The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.(5) *What constitutes substantial loss was broadly discussed by* ***Gikonyo J*** *in the case of* ***James Wangalwa & Another –vs- Agnes Naliaka Cheseto(6)*** *where it was held inter alia that:-*

"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under ***Order 42 Rule 6 of the CPR****. This is because execution is a lawful process* ***as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein –vs- Chesoni,(7) … the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***

..... The importance of complying with the said requirement in my view was well emphaised in ***Machira T/A Machira & Co. Advocates –v- East African Standard (No. 2)(17)*** *where it was held that:-*

"to be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one part 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 judgment 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."

……. It should also be noted that the judgment in question is a money decree. In considering whether a money decree or a liquidated claim would render the success of an appeal nugatory, the Court of Appeal in the case of ***Kenya Hotel Properties Ltd –vs- Willesden Properties Ltd (21)*** *had this to say:*

"The decree is a money decree and normally the courts have felt hat the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not in a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all."

45. The Respondent was awarded **Kshs.600,000/=** as general damages. If the decree is not stayed, then the very essential core of the Applicants as the successful party in the intended appeal will have been negated causing an irreparable state of affairs.

46. This is because the Applicant would already have utilized the **Kshs. 600,000/=** plus costs of the suit in the lower court and in this appeal, which, from the state of affairs of this case, can only be realized by selling the parcels of land which were given as security for the due performance of decree of the lower court pending appeal, which the Respondent may or may not be in a position to transfer back to the applicants. In addition, as the procedure for selling the securities offered is quite elaborate and involves other costs, my humble view is that stay of execution outweighs the execution of decree at this stage.

47. Notice of Appeal was filed within 14 days and the application for stay was lodges without unreasonable delay. In **WINFRED NYAWIRA MAINA –VS- PETERSON ONYIEGO GICHANA [2015] EKLR,** the Court held:

> ***"The foundation of the stay pending appeal is that the party is intending to file or has filed an appeal in the exercise of his constitutional right of appeal. He must, however, show sufficient cause and preponderantly, that, if his appeal succeeds, he will suffer substantial loss unless stay is ordered. Moreover, he must bring his application without unreasonable delay and give security sufficient to cover performance of the decree which may ultimately be payable by him. The Applicant filed the appeal in a supersonic speed but did act likewise to cover his back by applying for stay of execution pending appeal."***

48. On security, the Applicants urged the court to take the same security as offered being land parcels whose title deeds were surrendered to court as security for the due performance of such decree or order as may ultimately be binding on the Applicants. In **KILIMANJARO SAFARI CLUB LTD –VS- COUNTY COUNCIL OF OLE KEJUADO (2013)** Ogola J stated:

> ***"Security, if it is monetary should not necessarily equal the decretal sum, but should where the decretal sum is a hefty sum, be enough to demonstrate good faith on the part of the Applicant that it will settle the entire decree if the appeal fails. Putting the amount of security too high would deny the Applicant its constitutional right of appeal. Putting it too low may deny the Respondent the fruits of its judgment should the appeal fail."***

49. In **COMMERCIAL BANK LTD -VS- SUN CITY PROPERTIES LTD & 50 OTHERS** where Mabeya J,held:

> ***"...In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should be balanced. In a bid to balance the two competing interests, the courts usually make an order for suitable security for due performance of the decree as the parties wait for outcome of the appeal. ……."***

50. The court takes cognizance of the fact that the Respondent decree holder is at liberty to execute decree of the subordinate court as affirmed by this court in this appeal, against the appellants without necessarily selling the securities placed before this court as there are many modes of executing decree of the court.

51. On the basis of all the above, I find that the threshold for stay of execution pending appeal has been met by the applicants. I therefore order for stay of execution of decree of the lower court giving rise to this appeal pending appeal to the Court of Appeal on the following conditions:

> *a.* ***That applicants' Land Title Deeds in their original forms together with professional valuation reports for the respective parcels of land Nos. SIAYA/NYAGUDA/1242 and SIAYA/NYAGUDA/2235 and their current Search certificates as surrendered in court to serve as security for performance of the decree as condition for stay of execution of decree in the subordinate court pending hearing and determination of this appeal vide order made in Civil Miscellaneous Application No. 3 Of 2018 on 19th September 2018 be retained into court for purposes of these proceedings. I grant the appellants twenty one (21) days of this day to comply with this condition.***
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> *b.* ***That a restriction be and is hereby placed on the said Land Title Nos. SIAYA/NYAGUDA/1242 and SIAYA/NYAGUDA/2235 and the Siaya County Land Registrar is hereby directed to place such restrictions on the two parcels of land until the appeal as intended is heard and determined or until further orders of this court. The Deputy Registrar to serve this order and ruling upon the Land Registrar, Siaya County for compliance.***
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> *c.* ***The Respondents shall have costs of these two applications for review and for stay of execution of judgment of the trial court as affirmed by this court pending the intended appeal.***
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> *d.* ***Orders accordingly.***

Dated Signed and Delivered at Siaya this 28th Day of May 2020 via skype due to Covid 19 situation.

R.E.ABURILI

JUDGE