



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 14 OF 2020

KENYA WOMEN MICROFINANCE LTD.....APPLICANT/APPELLANT

VERSUS

MARTHA WANGARI KAMAU.....RESPONDENT

RULING

1. By a Motion on Notice dated 20th May, 2020, the applicant herein seeks an order for stay of the order and decree issued in Kajiado SPMCC No. 272 of 2016 pending the hearing and determination of this appeal.
2. According to the Appellant/Applicant, judgment delivered on 12th May 2020 by **Hon. M. Kasera – SPM** in Kajiado Civil Case No. 272 of 2016 and the Applicant being dissatisfied with the said judgment has preferred an appeal against the whole of the judgment. It was averred that after the delivery of the said judgement, the applicant was granted a 30 days stay of execution. The applicant is now apprehensive that if the respondent proceeds with execution proceedings at the lapse of the said 30 days, the applicant will suffer substantial and irreparable loss as the Respondent has no known income, is otherwise a woman of straw and in any event shall not be able to refund the decretal amount and costs if the same is paid to her in execution.
3. It was the applicant's belief that it has an arguable appeal citing the following grounds;
 - a) Failure by the trial court to consider the counterclaim pleaded by the defendant/applicant for the amount of Kshs. 3,175,913.70/= even though it was not in dispute that the respondent was indebted to the plaintiff;
 - b) The trial court failed to find that the Plaintiff did not prove, to the required legal standards, the special damages awarded to the plaintiff. That the trial court proceeded to award special damages on items not proved and neither particularized in the plaint;
 - c) Awarding the plaintiff excessive and unjustified general damages for Kshs. 7,000,000/=. The trial court failed to take into consideration important facts in the suit among them being the loan amount advanced to the plaintiff a sum of Kshs. 3,000,000/= being ideally the subject matter of the suit and which was admitted took into account irrelevant factors, misapprehended evidence adduced.
 - d) Error in admitting the plaintiff's amended plaint dated 18th May 2018 even though it was accompanied by a defective verifying affidavit for want of signature and date while striking out the defendant's counterclaim on a technicality as abhorred by Article 159 of the constitution of Kenya 2010. This amounted to differential treatment of pleadings filed by parties and therefore elevating technicalities at the expense of administering justice to the parties
 - e) Generally applying the wrong principles of law and thereby arriving at a wrong decision.
4. According to the applicant it is ready to give security for the due performance of the decree that may be passed herein in any event pending the hearing and determination of the appeal. It therefore prayed that this Court issues a stay of the said judgment and decree.
5. The application was however opposed and in so doing, the Respondent deposed that the application is fatally defective, bad in law and an abuse of the Court process. In the Respondent's view, **once an application has been dealt with by a court of competent jurisdiction and**

between the same parties, a similar application cannot be filed before another court as that would be an abuse of the court process or at best, res judicata. It was disclosed that on the 20th day of May 2020 the applicant made a similar application at the magistrate court in Kajiado and the same was granted the orders are still subsisting, as they have not been set aside .

6. Based on legal advice, the Respondent deposed that whereas **an application for stay has to be accompanied by a draft appeal or the appeal, the applicant has not attached any memorandum of appeal to this application hence it is therefore** fatally defective, bad in law and an abuse of the Court process.

7. It was further averred, based on the same advice, that for the applicant to make an application for stay he needs to have first filed an appeal. However, her advocate has not been served with any memorandum of appeal, thus rendering the application fatally defective and is for dismissal.

8. In the Respondent's view, this application is an afterthought and procured in bad faith with the sheer motive of denying her the fruits of the Judgment and decree and that the orders sought herein only aims at perpetuating an ancient and untenable injustice perpetrated by the applicant by resorting to seemingly endless streams of legal manoeuvres.

9. The Respondent denied the allegation that she was facing hard economic times and averred that she is economically unstable. According to her, despite the negligence visited upon her by the applicant, she recovered financially and is financially stable and in a position to refund any monies paid to her in the highly unlikely event the applicants appeal succeeds. To prove this averment, the Respondent attached copies of her Mpesa statement and bank account statements. To further prove her financial status and the fact that she can repay any amounts paid by the defendant she provided my daughter's bank account which she also operates as she is below maturity age. Further she deposed that she has continued to acquire properties which can be liquidated to pay the defendant and attached copies of two title deeds and an agreement to prove her financial position.

10. On the legal advice received from her Advocate, she deposed that there are four principles that a person seeking stay of execution of the Judgments of the Court pending any determinations whether an application or an appeal must satisfy proof and/ or comply and she set them out and averred that from her reading of the contents of the Applicant's application and the supporting affidavit of the applicant the same does not meet the prescribed requirements. In her view, **in the absence of an appeal for the Court to consider, whether the arguments that the appeal has high chances of success, the grounds listed in the application are mere statements which are of no persuasive value. In her view,** the grounds for the said appeal as listed in the supporting affidavit, are unmerited and a conglomeration of lies, half-truths and concealments of true facts and have very laws chances of success on appeal.

11. It was deposed that the applicant is a leading financial institution with massive profits the decretal amount is comparatively insignificant to their income and to the applicant's operational costs to cause any suffering or damage and she attached the financial statements of the defendant prove the defendants financial position.

12. It was further noted that the applicant has not offered proper security as required by law which security ought to be offered at the time of filing the application.

13. It was her position that the applicant shall not in any way, suffer loss and prejudice if the application now before this court is dismissed with costs. Further, though the applicant being a limited liability company incorporated under the **Companies Act**, is a juristic person capable of suing and or being sued in its own capacity through the resolution of its board of directors, the deponent of the affidavit in support of the instant motion has failed to demonstrate that he is authorized by the applicant to swear affidavit on its behalf as no authority has been exhibited to prove the same, hence the Affidavit sworn in support of the instant Motion should therefore be struck out with costs.

14. The Respondent averred that she stands to suffer irreparable damage if the application now before Court is allowed owing to the fact that she has used a lot of resources in obtaining the judgment herein and prayed that the court dismisses the application herein with costs.

15. It was further disclosed that the applicant has not complied with the courts orders issued on the 20th day of May 2020 wherein the court specifically ordered the applicant to serve the application together with submissions within seven days. The respondents advocate was served with the application and court order via his email on the 29th day of May 2020 the applicant wrote that the submissions would follow shortly after, the same was served via email on the 9th day of May 2020 which is after the seven day leave. The Respondent therefore prayed that the applicant's submissions be struck out, for non-compliance with the courts directions and order.

Determination

16. I have considered the application, the affidavit both in support of the application and in opposition, the submissions filed as well as the authorities relied upon.

17. The first issue for determination is whether this application is *res judicata*. The Respondent contends that there is a similar application pending before the trial court. The Applicant, on the other hand, contends that what it applied for was a stay pending the filing of the application and the stay that was granted was for 30 days. Since it is the Respondent that is alleging *res judicata*, it was incumbent upon her prove that fact pursuant to section 109 of the **Evidence Act**. If as the Applicant contends, the application was for stay to enable it make a formal application, then this application cannot by that mere fact be construed as being *res judicata* since an application for stay pending an appeal is not the same in substance as an application for stay pending the making of a formal application. The Respondent has therefore failed to prove her allegation that this application is *res judicata*.

18. ResOrder 42 rule 6(1) of the **Civil Procedure Rules** provides as follows:

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

19. In Stanley Karanja Wainaina & Another vs. Ridon Anyangu Mutubwa [2016] eKLR, it was held that:

“Counsel for the Respondent submitted on the provision of Order 42 Rule 6 (1) of the Civil Procedure Rules and argued that the Appellants had been granted a stay of execution by the trial court and in bringing the present application it was an abuse of the court process. In my view, Order 42 Rule 6(1) allows a party to file another application for stay of execution in the High Court whether the application for such stay shall have been granted or refused by the court appealed from. I appreciate the argument by the learned counsel and this court shares the same sentiment in that once an application has been dealt with by a court of competent jurisdiction and between the same parties, a similar application cannot be filed before another court as that would be an abuse of the court process or at best, *res judicata*. Unfortunately, that legal provision is part of our laws and until the same has been amended, we have no choice but to live with it as it is.”

20. Similarly, in Patrick Kalava Kulamba & Another vs. Philip Kamosu and Roda Ndanu Philip (Suing as the Legal Representative of the Estate of Jackline Ndinda Philip (Deceased) [2016] eKLR it was held by Meoli, J that:

“12. For the purposes of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court “shall be at liberty...to consider” an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed “original jurisdiction”. And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof...”

[17. So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6 (1) of the Civil Procedure Rules can be entertained afresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the Githunguri Case concerning the court’s original jurisdiction, vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2) b (as it is now). The foregoing has a bearing on the interpretation of Order 42 Rule 6 (6) of the Civil Procedure Rules and in particular the highlighted phrased therein.

18. Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6 (1) however does not preclude the Applicant from approaching this court as it has done.

19. I would venture to add that the wording of Order 42 Rule 6 (1) of the Civil Procedure Rules effectively grants the same jurisdiction to this court as an appellate court as Rule 5 (2) (b) does to the Court of Appeal: to entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6 (1).

20. It suffices, in my opinion, in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment of the lower court. To insist in this case that the Applicant must first file a separate appeal on the ruling of the lower court, apart from the judgment would in my view not only lead to confusing duplication of proceedings in respect of the same matter but also cause delay. . The provisions however must be applied under the guiding principles of Article 15 9 (2) d) of the Constitution.

21. In the circumstances of this case, I consider that driving the Applicant from the seat of justice when there exists a substantive appeal, and in disregard of the full import of Order 42 Rule (6) (1) would amount to raising a technicality, namely, the filing of an appeal on a supplemental matter that actually touches on the appeal where a substantive appeal already exists, above purpose and substance. There may arise in certain cases allegations of abuse of procedure but that must be established.”

21. In arriving at its decision the Court relied on Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR, where it was held by Githinji, JA that:

“[13] It is trite law that in dealing with (Rule 5 (2) (b) applications the court exercise discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6 (1) of Order 42 of the Civil Procedure Rules and refused, the court in dealing with a fresh application still exercises original independent discretion as opposed to appellate jurisdiction (Githunguri –Versus- Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838.”

22. In his judgment **Musinga, JA** observed on the same question that:

“The court is said to be exercising special independent original jurisdiction because on considering whether to grant or refuse an application for stay, it is not hearing an appeal from the High Court decision. It can grant orders of stay, irrespective of whether or not such an application had been made in the High Court. (See Stanley Munga Githunguri –Vs-

Jimba Credit Corporation Ltd (Supra).”

23. **Kiage, JA** in his judgment quoted a passage from the judgment of the Court of Appeal in **Gurbux Singh Suiri & Anor. –vs- Royal Credit Ltd. Civil Application NAI 281 of 1995** expounding the court’s reflection in its dictum in the **Githunguri** case as follows:-

“In ordinary circumstances the court has only appellate jurisdiction and in the absence of Rule 5 (2) (b) a party who has been refused a stay of execution or an injunction by the High Court would have been obliged to apply to the Court of Appeal to set aside the refusal and then, having done so, to grant the stay or injunction...But because of the existence of Rule 5 2 (b) one does not have to apply to the court to first set aside the refusal by the High Court and then having set aside the High Court order, to grant one itself. That is clearly the sense in which the expression ‘independent original jurisdiction’ is to be understood and that was made abundantly clear in the Githunguri case, supra, by use of the expressions such as “we have to apply our minds *de novo* or it is not an appeal from the learned Judge’s discretion to ours.”

24. It is therefore clear that under the said provision, whether the application for stay was granted or refused by the trial court, this court is at liberty to consider such application and to make such order thereon as it deems just. Where an order of stay is granted but any person feels aggrieved by such an order of stay he may apply to this court to have the same set aside.

25. It was further contended that though the applicant being a limited liability company incorporated under the **Companies Act**, is a juristic person capable of suing and or being sued in its own capacity through the resolution of its board of directors, the deponent of the affidavit in support of the instant motion has failed to demonstrate that he is authorized by the applicant to swear affidavit on its behalf as no authority has been exhibited to prove the same, hence the Affidavit sworn in support of the instant Motion should therefore be struck out. In this case the deponent of the supporting affidavit disclosed that he is Applicant’s Legal Officer and is competent to make and swear affidavits on behalf of the defendant. In **Presbyterian Foundation & another –vs- East African Partnership Limited & Another [2012] eKLR** this Court expressed itself as follows:-

“...The Civil Procedure Rules do not define what an authorized officer of a company is. If the Rules Committee had intended that in cases involving corporations, affidavits be sworn by either the directors or company secretaries nothing would have been easier than for it to have expressly stated so. Accordingly, we must apply the ordinary grammatical meaning of the word “authorize” which is defined by oxford Dictionary as “sanction”, give authority, “commission.” That being the position, whether or not the 2nd Plaintiff was given authority to swear the verifying affidavit is a matter of evidence and cannot certainly be the subject of a preliminary objection unless the said fact is admitted. There exists no law or precedent to support the argument that a Plaintiff Company is obliged to file a resolution of said Company authorizing the appointment of counsel to act on behalf of the said Company...In the supporting Affidavit dated 8th April 2019 and the supplementary Affidavit dated 26th June 2019, Shane Leahy stated that he was a Director of the Plaintiff Company and had been duly authorized to swear the Affidavit on behalf of the Company. This in my view is sufficient...”

26. That was the position adopted in the case of **Saraf Limited vs. Augusto Arduin [2016] eKLR** where the Court of Appeal stated that:-

“...We know of no law that makes it a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that it’s Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict time-lines within which appearance and defence must be filed. A limited liability company is a legal person with capacity to sue and be sued (se Solomon & Solomon [1897]AC 22 (H.L). Because it has no blood and tissue, a limited liability company acts through its Board of Directors. The directors are invested with management and superintendence of its affairs and may lawfully exercise all its powers subject to the Articles of Association and to the law...”

27. I therefore find no warrant for striking out the supporting affidavit.

28. 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.

29. 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 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.

30. 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.

31. The same position was adopted by *Kimaru, J* in *Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007* where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...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 an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

32. 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.”

33. 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”.

34. 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.”

35. 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.”

36. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred 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.”

37. Where the allegation is that the respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree, the burden is upon the applicant to prove that that is the position. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

38. 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 since lack of means per se is not necessarily a ground for granting stay. 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. Suffice to state that the respondent, at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime.

39. If the applicant surmounts that hurdle, then pursuant to section 112 of the *Evidence Act*, the evidential burden shifts to the Respondent to prove otherwise. The law, therefore, 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 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.**

40. That was the position in the case of **Stanley Karanja Wainaina & Another vs. Ridon Ayangu Mutubwa Nairobi H.C.C.A. 427/2015** where it was stated that:

“...It is not enough for the Respondent to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge. The Court of Appeal while dealing with a similar situation...”

41. A similar position was upheld in **National Industrial Credit Bank Limited vs. Aquinas Francis Wasike and Another (UR) C.A. 238/2005** where the Court of Appeal restated that:-

“...This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses 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. In this case it was the applicant’s case that the Respondent has no known income, is otherwise a woman of straw and in any event shall not be able to refund the decretal amount and costs if the same is paid to her in execution. Although these were serious allegations, the Applicant did not disclose the source of information or the grounds for forming such belief.

43. In this case however, the decree sum is over Kshs 15 million. While the general rule is that poverty of the judgement creditor is not necessarily a ground for granting stay of execution, where the award is on the face of it high, that is a factor which this Court may take into account.

44. Therefore, with respect to the issue whether or not the applicant stands to suffer substantial loss in **Job Kilach vs. Nation Media Group**

& 2 Others Civil Application No. Nai. 168 of 2005 the Court of Appeal citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. In the said case the amount in question was Kshs. 4,000,000.00. In this case, the Respondent concedes that the Applicant is a stable financial institution. The Respondent also states that she is a person of means.

45. Though the Respondent has taken issue with the omission to annex a copy of the memorandum of appeal, in my understanding what is required is the disclosure of the grounds upon which the appeal or intended appeal is grounded and the format for doing so is not really material. In this case it is my view that an award of Kshs 7,000,000.00 in general damages is clearly an arguable issue. I have also taken into account the fact that the Respondent has taken issue with the failure by the court to take into account its counterclaim of Kshs 3,175,913.70.

46. As regards the offer of security, I associate myself with the position adopted in **Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another [2018] eKLR** that: -

“...Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay...”

47. I also agree with the views expressed by **Nagillah, J** in **Civil Appeal No. 5 of 2016 - Patrick Mwenda vs. Evans Omari Mwita [2016] eKLR** that:

“...In my view this rule gives the court unfettered discretion to issue any orders pending the hearing of the appeal. I have no doubt therefore that I have power to order such security for the due performance of decree or order and that the appellant did not have to furnish such security upfront before arguing the application for stay pending appeal. In any event where the court orders for security deposit and there is default then the orders for stay are rendered useless for a defaulting party...”

48. In the premises the order which commends itself to me is that a stay ought to be granted but on condition. Accordingly, there will be a stay of execution of the decision in question pending the appeal on condition that the Appellant pays to the Respondent a sum of Kshs 5,000,000.00. The balance of the decretal sum to be deposited in a joint interest earning account in the names of the advocates for the parties in a stable financial institution to be agreed upon by the parties. Both conditions to be complied with within 30 days from the date of this ruling and in default the application shall be deemed to have been dismissed and the Respondent will be at liberty to execute.

49. It is so ordered.

Read, signed and delivered in open Court at Machakos this 24th day of June, 2020.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey