REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

MISCELLANEOUS APPLICATION NO. 59 OF 2020

AINUSHAMSI MULTIPLE HAULIERS AGENCIES LIMITED.....APPLICANT

-VERSUS-

FRANCIS NDEGWA KARANJA &

MARY WAMBUI NDEGWA (Suing as the Administrators of the Estate of

JOHN MUYA NDEGWA-DECEASED).....RESPONDENT

RULING

1. By a Motion on Notice dated 26th June, 2020, the applicant herein seek the following orders:

1) THAT the application be at the first instance be certified urgent and heard exparte;

2) The court be pleased to grant leave to the Applicant to appeal out of time against the ruling made by the Hon. D. ORIMBA (S.P.M.) delivered on 12/2/2020; in Kangundo SPMCC No. 293 of 2018.

3) Stay of execution be granted in the judgment in Kangundo SPMCC No. 293 of 2018 pending the hearing and determination of this application and pending the hearing and determination of the intended Appeal.

4) The costs of this application be in cause.

2. The application was based on the following grounds:

a) THAT the judgment in Kangundo SPMCC No. 293 of 2018 was delivered by the Hon. D. ORIMBA (S.P.M.) on 12th February 2018 and there was no stay of execution granted.

b) THAT immediately the Applicants' advocates learned of the contents of the judgment in Kangundo SPMCC No. 293 of 2018, they informed the Applicant's about the same.

c) THAT due to the COVID-19 pandemic, there has been a breakdown of communication between Applicant's Advocates and their clients.

d) THAT the Applicant's Advocates had scaled down their operations due to the COVID-19 pandemic and thus the advocates did not follow up with their clients to know whether they had satisfied the terms of the judgment or not. The Applicant was also not able to communicate with their advocates.

e) THAT it was not until 22nd June 2020 that the Applicants' Advocates received instructions to proceed and lodge an appeal on the court's decision in Kangundo SPMCC No. 293 of 2018.

f) THAT it is in the interests of justice that the Applicants be allowed to appeal out of time the judgment in Kangundo SPMCC No. 293 of 2018.

g) THAT the Respondent has already issued a Proclamation Notice and Attached the Applicant's Property for sale. The same is to be sold on 26th June 2020.s

h) THAT unless an order for stay execution is granted as prayed, the respondent will proceed to sell the Applicant's property and a great loss will be occasioned upon the applicant.

i) That the judgment sum in Kangundo SPMCC No. 293 of 2018 is Kshs. 1,613,500/= and the Applicant may not be able to recover the same from the Respondent once this application and the subsequent appeal succeeds since their means of earning are unknown.

j) THAT the Applicant is willing to deposit the half of the decretal sum in a joint interest earning account held in the names of the Applicant's and Respondents' Advocates.

k) THAT the Applicants be allowed to file its memorandum of Appeal out of time and the same be deemed as duly served.

l) That the Respondent will not be prejudiced if the said leave is granted.

3. The application was supported by an affidavit sworn by the Applicant's advocate, **Philip M. Mulwa**.

4. According to the deponent, the judgment in Kangundo SPMCC No. 293 of 2018 was delivered on 12th February, 2020 and no stay of execution was granted. His firm immediately informed the client of the contents of the judgment vide a letter dated 27th February, 2020. However, due to COVID-19 pandemic the firm scaled down its operations and there was no communications between them and their clients until the month of June and it was not until 22nd June, 2020 that the clients communicated to them that they were dissatisfied with the outcome of the judgment particularly on quantum and instructed them to launch an appeal vide an email dated 22th June 2020.

5. It was therefore deposed that the delay in appealing within the statutory thirty (30) days was caused by the lack of communication between the firm and its client due to the COVID-19 Pandemic and restriction of movement in and out of Nairobi where its client is based.

6. According to the Applicant, it is only fair and just to grant leave to the Applicant to lodge the appeal in Kangundo SPMCC No. 293 of 2018 out of time as the Appellant is aggrieved with the said judgment as indicated in the annexed draft Memorandum of Appeal as the application has been made without any further delays.

7. It was disclosed that the Respondent has already extracted the decree in Kangundo SPMCC, issued a proclamation Notice and Attached the Applicant's Property and the same was to be auctioned on 26th June 2020 necessitating an order for stay of execution pending the inter partes hearing and determination of the application herein and the subsequent appeal. The applicant contended that respondent's means of earning is unknown and may not raise the judgment sum (Kshs. 1,290,800/=) once the application and subsequent appeal succeed hence t is in the interest of justice that the said appeal be heard and determined on its merits.

8. The application was however opposed by the Respondent vide a replying affidavit sworn by **Clifford Keya**, an advocate in the firm of advocates representing the Respondent.

9. According to the deponent, the intended appeal contains dubious interest. It was his view that lack of communication on the Part of the Applicant and their advocate ought not to be visited upon the Respondent since litigation must come to an end and the Respondent allowed to enjoy its fruits.

10. The Court was however urged, in the event that it decided to grant he stay sought to do so on condition that the Applicant is directed to pay half the decretal sum to the Respondent and deposit the other half in an interest earning joint account in the names of both advocates and be directed to pay the costs to the Respondent.

11. On behalf of the Applicant it was submitted that the Applicant being aggrieved by the said judgment on quantum is now approaching this court for leave to file an appeal out of time and orders of stay of execution pending hearing and determination of the application and the intended appeal. The application for leave to appeal out of time was grounded on Sections 79G and 95 of the **Civil Procedure Act** . While reiterating the contents of the supporting affidavit, it was submitted that the intended Appeal is arguable and has high chances of success and that this Court has unfettered discretion in granting leave to file an appeal out of time. The applicant affirmed its readiness to prosecute its Appeal expeditiously and willingness to abide by any conditions to be set by this Honourable Court for the grant of the orders sought herein. In support of its case the Applicant relied on the case of **Apa Insurance Limited vs. Michael Kinyanjui Muturi [2016] eKLR.**

12. As regards stay, it was submitted that if the contested amount is paid over in full to the plaintiffs/respondents, it will be difficult for the plaintiffs/respondents to refund the substantial amount in case the appeal is heard and allowed. It was submitted that the applicants do not know the abode of the respondents and their means of livelihood and the respondents have not sworn an affidavit to show their financial status and material possession to assuage the applicant's fear of substantial loss in case the appeal is allowed. This will make it difficult for the applicant to recover the decretal amount if the appeal succeeds. It was submitted that during the trial, the Respondent stated that she used to depend on the deceased for survival. Thus respondents do not have any known source of livelihood in which the amount can be recovered from. In support of its case the Applicant relied on the case of **National Industrial Credit Bank Limited –vs- Aquinas Francis Wasike & Another (Nairobi Civil Application No. 238 of 2005)** and ***Bungoma Hc Misc Application No 42 of 2011 James Wangalwa & Another vs. Agnes Naliaka Cheseto.***

13. It was further submitted that the Applicant's Counsel received instructions to appeal the decision in Kangundo SPMCC No. 293 of 2018 on 22nd June 2020 and filed the present application on 26th June 2020. Thus the Application was filed without delay.

14. The Applicant submitted that it is ready, able and willing to provide any reasonable security that this honourable court may order and that the Respondents shall not suffer any prejudice, irreparable loss and or damage since they will also have their time in court to be heard.

15. On the other hand, the Respondent submitted that Applicant has not satisfied this court that if stay is not granted that it would suffer irreparably. It clutches on basic tenets of stay seeking despite the fact that the same is late in the day and to the detriment of the Plaintiff. The Memorandum of appeal as filed is materially lacking and one that is calculated to drag this case. The current application is directed towards suppressing and further delaying the Plaintiff's case. Your honour, it is a general principle that litigation must come to an end.

16. It was further submitted that the Applicant has not satisfactorily demonstrated that the Plaintiffs/Respondents are of meagre financial position that they may not be able to refund the Applicant in the unlikely event the appeal succeeds and reliance was placed on the case of **Keshra Kanji & Sons Ltd vs. Caroline Kanuthu Kaniu & Another [2006] eKLR.** In the present case the Applicant has not satisfied the court that the Respondent is not a person of means to refund the money and that no good cause has been shown in the present case to keep the Plaintiffs away from fruits of litigation. The Respondent further relied on the case of **Abok James Odera T/A A.J. Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2006] eKLR**.

17. In any case, it was submitted that the Plaintiffs/Respondents are of the view that half of the money can be deposited in a joint interest earning account of both counsels plus costs and interests while the other half paid to the Plaintiff. That way the fears of the Applicant will be put to rest. The idea of them proposing only half of the decretal amount shows lack of goodwill and commitment on their part.

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 explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant. 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 by the restrictions posed by the COVID19 pandemic. This is the position is not seriously disputed, the Respondent simply insisting that she ought not to be blamed for the circumstances in which the Applicant finds itself and that litigation must come to an end.

27. That COVID19 Pandemic has given rise to circumstances which have turned the normal course of life upside down is not in dispute. It is also a well known fact that during the period immediately after mid-March, legal proceedings were sevely hampered with court matters being scaled down including court staff a situation which also meant that the operations of the legal firms were similarly scaled down. In those circumstances, neither rthe Applicant nor the Respondent should be blamed for the inability to take necessary steps within the prescribed time limits.

28. 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.

29. 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.

30. 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.

31. 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."**

32. 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."**

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 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."**

36. 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".**

37. 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.**

38. 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.**

39. 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.

40. 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…"**

41. 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."**

42. 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."**

43. 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.''**

44. 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."**

45. What has troubled me however, is the fact that the Respondent is suing in their capacity as the administrators of the estate of a deceased person. In matters dealing with one's financial status, the law 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.**

46. 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."**

47. 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."**

48. Having considered the instant application, it is my view that this a case where a stay ought to be granted but on conditions since it would seem that the fulcrum of the applicant's case will be on quantum. 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. 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.

49. The costs of this application will be in the appeal.

50. It is so ordered.

Read, signed and delivered in open court at Machakos this 27th day of July, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of

Mr Mutinda for the Applicants

CA Geoffrey