REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

MISC. APPLICATION NO. 83 OF 2020

FRANCIS KIMEU MUTUA&ANN MBINYA MUTUA (Suing as the Administrator of the

Estate of ANTHONY MUTINDA MUTUA (DECEASED).....PLAINTIFF/RESPONDENT

VERSUS

JASAN MACHARIAH MWANGI.....DEFENDANT/APPLICANT

RULING

1. By a Motion on Notice dated 20th July, 2020, the applicant herein seeks the following orders:

> **1. SPENT.**
>
> **2. THAT this honourable court be pleased to extend time and grant leave to the applicants to lodge an appeal and file a memorandum of appeal out of time against the Judgment and Decree of the Honorable Opanga Martha delivered against the defendant/Applicant on 3rd March 2020 in Kangundo Civil suit no. 23 of 2019.**
>
> **3. THAT this Honourable Court be pleased to stay and set aside warrants of attachment extracted by Mutrix Auctioneers and issued on 14th of July 2020 by the Court.**
>
> **4. THAT this honourable court be pleased to stay the execution of the said judgment and decree pending the hearing and determination of this application.**
>
> **5. THAT this honourable court be pleased to stay the execution of the said judgment and decree pending the hearing and determination of the intended appeal.**
>
> **6. THAT this court be pleased to give any other and or further orders that it may deem fit, just and expedient in the circumstances and in the interest of justice.**
>
> **7. THAT the costs of this Application be in the cause.**

2. The application was based on the following grounds:

> **a. Judgment herein was delivered on 3rd March 2019 and the 30 days within which an appeal is to be filed have since lapsed.**
>
> **b. The defendant/applicant is aggrieved by the Judgment on Quantum delivered on 28th May 2018 in Kangundo civil suit no 23 of 2019 by the Honorable Opanga Martha and seeks leave to appeal out of time.**
>
> **c. The Plaintiff/Respondent's counsel instructed Mutrix Auctioneers to take out warrants and execute against the Defendant/Applicant.**

d. The Applicants have been served with warrants of attachment as well as a proclamation of attachment dated 16th July 2020 where the attachment of property is due to take place on 23rd of July, 2020 upon the lapse of the Seven days period as indicated on the said proclamation.

e. The defendant /applicant is desirous of filing an appeal against the said judgment.

f. That upon obtaining a copy of the said judgment the applicant's advocates received instructions to appeal against the said judgment after the period of filing an appeal had lapsed hence the delay.

g. That the delay was inadvertent and not deliberate and this application is brought timeously without unreasonable and undue delay.

h. The defendant /Applicant stands to suffer substantial and irreparable loss and damage as there is a real likelihood that the Respondents will proceed and execute the said judgment and decree.

i. Unless this application is allowed, the Applicants' intended appeal will be rendered nugatory.

j. The Applicant has a strong arguable appeal with high chances of success.

k. The application is made in good faith and the respondent/plaintiff will not suffer any prejudice or any damage should the prayers sought herein be granted.

l. The defendant/Applicant is apprehensive that the Respondent may levy execution against it.

m. The applicant is ready and willing to comply with such reasonable conditions as this court may grant to enable the applicant pursue its intended appeal

3. In the supporting affidavit, it was deposed that on the on 3rd March 2020 in Kangundo Civil suit no. 23 of 2019, judgment was entered in favour of the Respondents against the Applicant whereby the Defendant/Applicant was found to be 100% liable. The Court went ahead to award General damages in the following manner: Pain $Suffering -Kshs. 70,000/-, Loss of Expectation of life Kshs. 150,000/-, Loss of dependency Kshs. 25,000 x 12 x 2/3 x 20 = 4,602,800/-. Special Damages Kshs. 382,800/=/-. - Plus costs and interests. The Respondent went ahead and furnished the Applicant with Costs assessed at Kshs. 261,160/-. Total sum payable in terms of quantum Kshs. 4,602,800/. The defendant/applicant being dissatisfied with the said judgment preferred an Appeal and consequently sought for leave of this Honourable court prior to its filing.

4. Aggrieved by the said decision he Applicant instructed its advocates to appeal against the said judgement, an appeal which the applicant believes is merited, arguable and raises pertinent points of law hence has overwhelming chances of success. The applicant deposed that it was ready, able and willing to furnish such reasonable security as the court may deem fit hence the need to stay the execution of the said judgement. According to the applicant, the Respondent stands to suffer no prejudice or damage that is not capable of being compensated by way of costs. On the other hand, the applicant stands to suffer prejudice and substantial loss as there is a likelihood that his insurer will only pay a sum of Kshs 3,000,000/= which sum is unlikely to be recovered once paid over to the Respondent before the determination of the appeal already filed.

5. The application was however opposed by the Respondent. According to the Respondent, the advocates who have filed this instant application have not complied with the mandatory requirement of Order 9 Rule 9(a) and (b) and Rule 10 of the Civil Procedure Rules having not obtained leave of the Court to come on record in place of the firm of Kairu & McCourt.

6. It was deposed that the applicant has not demonstrated any justifiable cause to warrant the court in exercising its discretion of extending the time within which the applicant should lodge his appeal. According to the Respondent, judgement was delivered on the 3rd March, 2020 and the applicant secured thirty days stay of execution hence he had time to initiate the appellate process. He has however failed to explain the delay in so doing.

7. According to the Respondent, the annexed memorandum of appeal does not raise any serious issues to be considered which may lead to the setting aside of the trial court's decision.

8. It was further contended that the application does not meet the threshold warranting stay of execution as provided in Order 42 rule 6 of the Civil Procedure Rules.

9. It was contended that since from the draft memorandum of appeal, the applicant does not challenge the finding on liability but only intends to challenge the quantum, the applicant ought to have provided security for the grant of the stay of execution and the Respondent urged the Court if minded to stay execution to do so on condition that a sum of Kshs 3,000,000/- be deposited in the joint names of the advocates. It was the Respondent's case that the grant of the stay orders is likely to prejudice the Respondent.

Determination

10. I have considered the foregoing. 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.

11. It is however noteworthy that section 79G aforesaid employs the use of the phrase "an appeal may be admitted out of time" as opposed to "time may be extended to lodge an appeal out of time". However, even in cases where the law uses the latter phraseology, it has been held that it is prudent to regularise the default before seeking to extend time. This was the position in **Mugo & Others vs. Wanjiru & Anor [1970] EA 482** where it was held that:

"Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused."

12. In this case however the law expressly provides that an appeal may be admitted out of time. That this is so was affirmed by **Emukule, J** in **Gerald M'limbine vs. Joseph Kangangi [2009] eKLR,** in which he expressed himself as follows**:**

"My understanding of the proviso to Section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process which under Section 79B says……"

13. 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.

14. 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..."

15. 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."

16. 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."

17. 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..."**

18. In this case the Applicant has not even attempted to explain the reason why the appeal was not filed within time. In fact, in the supporting affidavit, it is suggested that an appeal has been filed yet the particulars of the said appeal are not disclosed. I 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. …"**

19. In the premises I find that the applicant has failed to even make an attempt at explaining the delay in filing the appeal. There is simply no material on the basis of which this Court can exercise its discretion in favour of the applicant.

20. Without such exercise of discretion, a stay of execution pending an intended appeal is rendered still born.

21. Nevertheless, even if I had found that there was merit in the application for extension of time to file the appeal, the next hurdle for the applicant would have been whether or not the threshold for grant of stay pending an appeal had been met. 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.**

22. 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.

23. 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."**

24. 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."**

25. 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".**

26. 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."**

27. 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."**

28. 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".**

29. 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.**

30. 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.**

31. 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.

32. In this case, the applicants have not disclosed their grounds for believing that the Respondents would not be able to refund the decretal sum. In my view it is not sufficient to simply make a bare averment that the Respondent will not be able to refund. As far as the Court is concerned the Respondent is the successful party and has a right to enjoy the fruits of his judgement unless the circumstances dictate otherwise. It is upon the party seeking to deprive the successful party from enjoying his fruits of judgement who ought to prove that those circumstances do exist. That threshold cannot be said to have been attained by mere bare allegations devoid of sources of information or grounds of belief. 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…"**

33. 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."**

34. 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."**

35. In this application the applicant is rather economical with its material. Nowhere in the affidavits filed has it shown the manner in which it stands to suffer substantial loss. It is not for example contended that the Respondent's position is so precarious that she is unlikely to refund the decretal sum once the same is paid over to her. Instead, the applicant has concentrated on the difficulties that bedevil the applicant as opposed to the impecuniosity of the Respondent.

36. 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.''**

37. 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."**

38. Having considered the instant application, it is my view that the applicant has failed to satisfy me that its application meets the threshold in Order 42 rule 6 of the ***Civil Procedure Rules***.

39. I therefore find no merit in the application dated 20th July, 2020 which I hereby dismiss with costs.

40. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 17th day of August, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Munyao for Mr Munyendo for the Applicant

Mr Muhia for the Respondent

CA Geoffrey