REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL CASE NUMBER 6 OF 2020

CAPITAL REALTY LIMITED.....PLAINTIFF

VERSUS

HOUSING FINANCE.....1ST DEFENDANT

LEGACY AUCTIONEERING SERVICES.....2ND DEFENDANT

RULING

1. On 17th September, 2020, this Court delivered a ruling in this matter by which the Applicant's Motion application dated 21st February 2020 that sought in its relevant part a temporary injunction restraining the 1st and 2nd Defendants whether by themselves, their agents and their servants from selling, dealing, interfering, alienating or disposing off all those Town Houses known as House Nos. A1, A6, A10, A15, B5, B13, B19, C17, C18, C19, C20, C21, C22, C24 and C26 erected on Land Reference Number 12715/11742, within the development known as The Gables Park situated off Mombasa Road, in the Syokimau area of Machakos County pending the hearing and determination of this Suit was dismissed.

2. In dismissing the said application, the Court arrived at, *inter alia*, the following findings:

> **1) Without evidence at this stage that the said third parties acquired their interests in the suit property based on the contract between the Plaintiff and the Defendant, this Court cannot state for the purposes of thee injunction sought that the Plaintiff has established a *prima facie* case in so far as that issue is concerned.**
>
> **2) That the Plaintiff was admittedly in default in its repayments.**
>
> **3) That the Plaintiff failed to establish a *prima facie* case for the purposes of the grant of an injunction pending the hearing and determination of the suit.**
>
> **4) That the Plaintiff is more concerned about the interests of the third party purchasers than its own interests yet the Court was not satisfied based on the material placed before it, that the interests of the third parties who were in any case not parties to this suit establish a *prima facie.*0**

5) That in the event that the injunction sought was granted, the net effect would be to inflict greater financial hardship on the 1st Defendant/Respondent and even the Plaintiff because the interest on the outstanding principal would continue to accumulate.

3. Aggrieved by the said decision the Plaintiff herein intends to appeal to the Court of Appeal and has intimated that it intends to do so. In the meantime, by a Motion on Notice dated 23rd October, 2020 it seeks the following orders:

> **1) THAT this Application be certified urgent and be heard ex-parte in the first instance.**
>
> **2) THAT a Stay of execution in respect of the Ruling delivered by this Honourable Court on 17th September 2020 be granted pending the hearing and determination of this Application.**
>
> **3) THAT a Stay of execution in respect of the Ruling delivered by this Honourable Court on 17th September 2020 be granted pending the hearing and determination of the Appeal.**

4) THAT the costs of the Application be in the cause.

4. The said application was supported by an affidavit sworn by **Francis Anthony Mburu,** one of the Directors of the Plaintiff Company on 23rd October, 2020. According to the deponent, due to the delivery of the Ruling by email, the Plaintiff's Advocates were unable to apply orally for a temporary stay of execution as provided for under the ***Civil Procedure Rules***. However, being aggrieved by the said Ruling and the implications thereof, it has instructed its Advocates to proceed and file an Appeal and a Notice of Appeal has in fact been filed and served and in the Applicant's view, based on legal advice, it has a meritorious Appeal that ought to be accorded an opportunity to be heard and determined. It was disclosed that the Plaintiff's Advocates are in the process of compiling the Record of Appeal in accordance with the provisions of the ***Court of Appeal Rules***.

5. Notwithstanding the foregoing, the Defendants have proceeded to advertise 11 Maisonettes for sale by Public Auction scheduled for 29th October 2020 and the Plaintiff is justifiably apprehensive that unless stopped by this Court, the sale by auction shall proceed unabated and the Maisonettes being the subject matter of this suit sold and alienated. The Plaintiff was apprehensive that in that eventuality the entire purpose of the intended appeal shall be rendered nugatory hence it in the interests of justice and equity that the subject matter of this Suit and the intended Appeal be preserved pending the hearing and determination of the issues raised in the Appeal.

6. According to the Plaintiff, they sold the Maisonettes to 3rd parties with the express knowledge and consent of the 1st Defendant, that the 1st Defendants received and/or are beneficiaries of the proceeds of sale and ought to be estopped from what is in essence a 2nd sale of the same Maisonettes, to the detriment of the Plaintiff and more importantly the 3rd parties as innocent purchasers for value. Based on the foregoing it was deposed that the said 3rd parties stand to suffer irreversible damage, loss and injury in the event the Orders for Stay sought herein are not granted.

7. It was therefore deposed that the prejudice occasioned to the Plaintiff in the event that the Orders for Stay are not granted greatly outweighs the prejudice likely to be occasioned to the 1st Defendant especially if it is later established and proved that the 1st Defendant received and/or was a beneficiary of the proceeds paid by the 3rd parties in consideration for the Maisonettes.

8. In the Applicant's view, the conditions for issuance of a Stay pending Appeal were met and this Court was urged to so find and allow the application as prayed in the interests of justice and equity.

9. The said averments were reiterated by **Mr Gachanja** Learned Counsel for the Applicant both in his skeleton arguments and in his oral address to the Court.

10. It was submitted that under on Order 42 Rule 6(1) of the ***Civil Procedure Rules***, the Court, being the Court appealed from has the necessary jurisdiction to hear and determine the Application while Order 42 Rule 6(2) thereof sets out the criteria for grant of such relief. It was reiterated that the subject matter of this suit and the intended Appeal is the several maisonettes earmarked for sale by Public Auction which if sold, would render the entire Appeal shall be rendered nugatory and the suit properties will be irreversibly out of reach of the Applicants. This, it was contended, will occasion substantial loss to the Applicants who claim to have previously sold or conveyed the suit properties to 3rd parties with the express and/or implied consent of the 1st Defendant and that the 1st Defendant is a beneficiary of such proceeds of sale which were utilised to pay the loan and interest.

11. According to the Applicant, no delay has been occasioned or alleged in the filing of this Application having been filed a few days after the advertisement of the sale by the 2nd Defendant and that the application could not have been made before as there would have been nothing to be stayed.

12. As regards the security, it was contended that the provision of security should not apply in this matter on the basis that the 1st Defendant already enjoys a first legal charge over the suit properties and property is usually deemed as an appreciating as opposed to a depreciating asset. This is to be distinguished from money decrees or other types of situations where the decree holder is left with no security or recourse in the event the Appeal is unsuccessful. In the instant case and in event that the Applicants are subsequently unsuccessful in the intended Appeal, the 1st Defendant would still be in a position to dispose of the asset and recover any money allegedly due. However, on the other hand, if the Orders are not granted and the Appeal is subsequently successful, the suit properties shall have been disposed off and be lost irreversibly.

13. Learned counsel drew the court's attention to the unique facts of this case and the basis of stating that the loss is not recoverable or easily quantifiable in damages by submitting that the Applicant as Chargor is alleging that it sold the properties to 3rd parties with the express/implied consent or approval of the 1st Defendant. It is this 3rd parties who are in possession of the Properties and who have a beneficial interest in the suit premises, some of which constitute their matrimonial homes. If the issue was solely between the Plaintiff and the Defendant then it is arguable that damages would be an adequate remedy. However, in his view, irreversible harm and injury would be occasioned if it is subsequently proved that the suit properties were sold by the Plaintiffs with the approval of the 1st Defendant and that the 1st Defendant received the proceeds of sale paid by 3rd parties and then in disregard of the sanctioned sales, proceeded to dispose of the very same units (for a 2nd time).

14. In support of the submissions Learned Counsel relied on the decision of the Court of Appeal in **Civil Application No.322 of 2018 Nairobi – Oliver Collins Wanyama -vs- Engineers Board of Kenya (eKLR)** where it was held that:

> **"This Court in applications brought under Rule 5(2)(b) exercises jurisdiction similar to that of a court of first instance. It can grant and has on many occasions granted an injunction pending the hearing and determination of an appeal or intended appeal primarily in order to preserve the subject matter of the intended appeal, or where it would facilitate a proportionate resolution of the dispute. We need only add that, whether the application is for stay of execution, injunction, or stay of further proceedings, the consideration and applicable principles are the same. To borrow from the passage cited above**

in Equity Bank Limited V. West Link Mbo Limited, an injunction under Rule 5(2)(b) is designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."

15. The applicant also relied on **Environment and Land Court Appeal No.8 of 2018 Makueni – Julius Kerika -vs- Wilson Kaata (eKLR)** where it was held that:

"15. Arising from the above, the Applicant herein is in occupation of the suit property. Even though he has not indicated the value of the investment he has put in the suit premises, it seems to me that he will suffer substantial loss if the order of stay is not granted. The judgement in Makindu Civil Case No.51 of 2011 was delivered on 25th May, 2018 while the present application was made on 14th June, 2018 which in my view is not an undue delay.

16. The interest of justice herein demands that the court does exercise its discretion in favour of the Appellant/Applicant and consequently, I hereby proceed to order for stay of execution of the judgement and decree in Makindu Civil Case No.51 of 2011 pending the hearing and determination of the appeal herein."

16. In further support of its case, the Plaintiff cited **Environment and Land Case 150 of 2008: David Oyiare Ntungani vs Matuiya Ole Naisuaka Orket** for the holding that:

"11. According to the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, an order of stay of execution can be granted if the court is satisfied that substantial loss may result to the Applicant unless the order is made and when the Application has been made without unreasonable delay. The Applicant is also required to give security for the due performance of the decree.

16. The Application was filed without unreasonable delay and the subject matter being land, the deposit of security is not necessary.

17. Consequently, and to avoid the said substantial loss that the Applicant is likely to suffer with the demolition of his house(s), the Judgment of this court should be stayed pending the hearing of the appeal. The order of stay of execution will be granted in the following terms;

a. Pending the hearing and determination of the intended appeal, an order be and is hereby issued staying execution of the Judgment of 12th May, 2017 on condition that the Applicant files the Record of Appeal within six (6) months from the date of this Ruling."

17. According to the holding in **High Court Civil Case No.25 of 2012 at Nairobi – RWW -vs- EKW (2019) eKLR;**

"12. It is not in dispute that the distribution of the assets the subject of the decision in the High Court was contested. The Applicant has demonstrated an intent to challenge that decision. In my view the Applicant will suffer substantial loss if he is forced to distribute the property 50:50 or sell them pending the intended appeal.

The law is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. I am however of the considered view that in the circumstances of this cause....., the court can grant stay of execution of its orders without demanding that the Applicant furnish the Court with security for the due performance of the orders."

18. Lastly, the Applicant relied on **Environment and Land Court No.48 of 2012 Machakos – Sundiata Nathan Mutende -vs- Willy Mwololo Muindi [2020] eKLR** where it was held that:

"8. As was held in the case of *Selestica (supra),* the purpose for a stay of execution pending Appeal is to preserve the suit property in dispute so that the rights of the Appellant who is exercising his undoubted right of appeal is safeguarded, and the Appeal is not rendered nugatory.

10. It is therefore obvious that if the said Decree is executed, and in view of the fact that it is the Defendant who is in possession of the suit land, the Defendant may dispose or charge the suit property before the Appeal has been heard and determined. This will not only occasion the Defendant substantial loss, but will also have the effect of removing the suit property from the purview of the Court of Appeal, thus rendering the appeal nugatory.

11. The Application was filed within two months of the Judgment, which is not inordinate delay. Considering that it is the Plaintiff who is in possession of the suit property, an order for security for the due performance of the Decree is not necessary. The land will be there even after the Appeal is heard and determined.

12. For those reasons, the Application dated 18th February, 2019 is allowed as follows:

a) An order staying the execution of the Judgment and Decree of this court made on 7th December, 2018, pending hearing and determination of the appeal be and is hereby granted."

19. The application was opposed by the 1st Defendant based on the following grounds of opposition:

> **1) The application is incompetent, bad in law and incurably defective.**
>
> **2) The application is frivolous, vexatious and totally unmerited as the Applicant has not established sufficient cause to warrant a stay of execution of the Ruling and Order of this Court given on 17th September 2020.**
>
> **3) The Application thus lacks merit, is bad in law and cannot be sustained; and therefore should be dismissed summarily with costs to the 1st Defendant.**

20. In his submissions, **Mr Kanjama**, Learned Counsel for the 1st Defendant who appeared together with Miss Owano for the 1st Defendant submitted that the application is founded on the underlying reality of the exercise by the 1st Defendant of its statutory power of sale, a power which has been substantially tested and found to be in compliance with the law. It was contended that there are important commercial considerations which were taken into account including the accumulation of interests which might not be recovered. According to Learned Counsel, the Applicant is attempting to seek the same goal. It was his view that the considerations for an injunction pending trial are also relevant in determining an application for injunction pending an appeal.

21. In this case it was submitted that since this Court did not make a positive order but a negative one in declining to grant the injunction, what the Applicant ought to have sought was an injunction pending appeal whose conditions are similar to those of injunction pending trial and to that extent the application is incompetent, bad in law and incurably defective.

22. It was submitted that in any event for stay to be granted the applicant must satisfy the Court of the existence of substance loss that it intends to suffer. However, there is a long line of authorities to the effect that a charge converts a property into a commodity for sale susceptible to sale whose value is quantified ad therefore in the event that it is found that the sale was improperly conducted the plaintiff can be compensated by the value in the charge. According to him, there is no further harm beyond the rights accorded to the chargee in the charge and in support of this position he relied on **Julius Wahinya Kang'ethe & another v Muhia Muchiri Ng'ang'a [2017] eKLR** where the Court of Appeal **(Waki, Karanja & Kiage, JJ.A)** (while referencing **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR** on the responsibility of the applicant to show how harm will be occasioned. He also relied on **Tabro Transporters Ltd vs Absalom Dova Lumbasi [2012] eKLR** where it was held that:

> **"In law, the fact that the process of execution is likely to be put in motion, by itself, is not a ground for granting stay of execution. The Applicant must show that substantial loss will occur if the execution is not stayed. But what does substantial loss entail? This court in the case of Bungoma Hc Misc Application No 42 Of 2011 James Wangalwa & Another V Agnes Naliaka Cheseto stated 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..."**

23. Further reliance was placed on **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR** where it was held that:

> **"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process…**I **agree with the respondent that the Applicants have not offered or proposed any security for the due performance of the decree of the lower court. This should be done as a sign of good faith that the Applicant is ready and willing to commit to giving security. But my reading of order 42 rule 6(2) (b) of the CPR reveals that, it is the court that orders the kind of s[security the applicant should give as may ultimately be binding on the applicant. This modelling of the law is to ensure the discretion of the court is not fettered. In light thereof, the Applicants shall within 30 days from the date of this ruling, give such security as shall be approved by the court for the due performance of the decree appealed from. Failure to give security in the terms of this ruling will terminate the stay granted herein."**

24. According to the 1st Defendant there would be substantial loss to the Bank in terms of accumulation of interests yet the applicant has not offered any security. Based on the foregoing the Court was urged to find the application unmerited and to dismiss the same with costs.

Determinations

25. I have carefully considered the application, the affidavits filed, submissions made as well as authorities cited by counsel for both parties. **Order 42 rule 6(1) and (2)** of the ***Civil Procedure Rules*** provides as follows:

> ***"(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.***
>
> ***(2) 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."

26. 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.

27. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA** on 20/11/09 held *inter alia* that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.

28. The same Judge in **Kenya Commercial Bank Limited Vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** held that:

"where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case".

29. 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 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."

30. 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."

31. 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."**

32. The ruling intended to be appealed from arose from a dismissal of an application for injunction. The general rule is that where the orders granted by the High Court in civil proceedings are capable of being executed, the same are amenable to stay of execution. However, there is a long line of authorities where the Court of Appeal has held that where the High Court has dismissed an application the court has not granted any positive order in favour of the Respondents which is capable of execution. See **Yagnesh Devani & Others vs. Joseph Ngindari & 3 Others Civil Application No. Nai. 136 of 2004**, **Mombasa Seaport Duty Free Limited vs. Kenya Ports Authority Civil Application No. Nai. 242 of 2006** and **William Wambugu Wahome vs. The Registrar of Trade Unions & Others Civil Application No. Nai. 308 of 2005.**

33. The issue whether a Court would competently grant an order of stay as opposed to an injunction pending an appeal where an application for injunction has been dismissed was dealt with by the Court of Appeal in **Umoja Service Station Ltd & 5 Others vs. Hezy John Ltd Civil Application No. Nai. 39 of 2006,** where it stated that a prayer seeking for the stay of an order dismissing an injunction application is futile as the grant of the same would not in any way advance the applicants' cause. In other words, what the Court meant was that the grant of an order of stay would only have the effect of maintaining the *status quo* and since the applicant was denied what it did not have in the first place when it came to court a stay would only have the effect of maintaining the same *status quo* which would be of no use to the applicant.

34. In **The Hon. Peter Anyang' Nyong'o & 2 Others vs. The Minister for Finance & Another Civil Application No. Nai. 273 of 2007,** the Court of Appeal expressed itself as follows:

> **"It is trite law that the Court of Appeal is a creature of statute and can only exercise the jurisdiction conferred on it y statute. The jurisdiction of the Court of Appeal to grant interim reliefs in civil proceedings pending appeal is circumscribed by rule 5(2)(b). It is apparent that under that rule the Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction and a stay of further proceedings. That rule has been construed to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from. Where the High Court has merely dismissed the suit with costs, any execution can only be in respect of costs since the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum and therefore there is nothing arising out of the High Court judgement for the Court of Appeal in an application for stay, to enforce or to restrain by injunction. A temporary injunction asked for is extraneous to a stay of execution as it does not relate to what the High Court ordered to be done or not to be done and the Court of Appeal has no jurisdiction to entertain it...."**

35. Similarly, in **Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010**, **Makhandia, J** (as he then was) held:

> **"The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree. The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant's appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court's judgement or decree."**

36. Where therefore the application for stay is directed to a decision against which the intended appeal is not directed a stay of execution pending that appeal, it has been held, is not available and the application is rendered incompetent on that score. See **Muhamed Yakub & another vs. Mrs Badur Nasa Civil Application No. Nai. 285 of 1999.**

37. However, even if this Court was of the view that the Court could in the circumstances of this case grant the order of stay sought the Court would be obliged to consider the grounds upon which such an order ought to be granted. In an application for stay pending appeal to the Court of Appeal there is no requirement that the Court considers the chances of success of the intended appeal. Whereas I appreciate that in an application for stay pending appeal, it is permitted for the applicant to disclose the nature of its intended appeal so that the Court satisfies itself that in determining whether or not to exercise its discretion in its favour, it is not doing so on frivolous grounds, under Order 42 rule 6 of the ***Civil Procedure Rules***, it is not a condition for grant of stay that the applicant satisfies the Court that his appeal or intended appeal has overwhelming chances of success. In my view the omission to include such a condition is for good cause. It is, in my view, meant to insulate the Court from which an appeal is preferred from the embarrassment of holding a mini-appeal as it were. Accordingly, whereas the Court of Appeal is in a better position to gauge the chances of success of an appeal or intended appeal, this Court in an application seeking stay of execution of its decision pending an appeal to the Court of Appeal is not enjoined to consider such condition. In fact, it would be highly undesirable to do so, though it may superficially make reference to the grounds of the intended appeal. This was the position adopted in **Universal Petroleum Services Limited vs. B P Tanzania Limited [2006] 1 EA 486** where the Court held that:

> **"The granting or otherwise of an order of stay of execution under rule 9(2)(b) is at the discretion of the court and in the exercise of that judicial discretion the court as and where is relevant considers a number of factors, notably, whether the refusal to grant stay is likely to cause substantial and irreparable injury or loss to an applicant, whether the injury or loss cannot be atoned by damages, balance of convenience, and whether prima facie the intended appeal has likelihood of success. Above all, further to considering the above factors the court takes into account the individual circumstances and merits of the case in question…At this stage one has to be careful not to pre-empt the pending appeal and for that reason, the court has to discourage a detailed discussion of the weaknesses or otherwise of the decision intended to be impugned on appeal… There is also a danger in saying or making a finding that an appeal has an overwhelming chances of success."**

38. **In Mangungu vs. National Bank of Commerce Ltd [2007] 2 EA 285**, the Court expressed itself on the issue as follows:

> **"Generally the merits of a party's case in a stay application is not a particularly relevant matter for consideration at this stage. Although it is true that the Court under rule 9(2)(b) has discretion to stay execution, but only on grounds which are relevant to a stay order. Whether or not the appeal has good chances of success is a matter, which should be raised in the appeal itself. The correctness of the judgement should not be impugned in an application for stay of execution save in very obvious cases such as lack of jurisdiction."**

39. Accordingly, I will avoid the temptation to embark on such a potentially perilous and embarrassing voyage. That is a requirement where the Court of Appeal is considering an application under Rule 5(2)(b) of the ***Court of Appeal Rules*** since the intended appeal would be heard by the Court of Appeal. Even then that Court only finds whether the appeal or intended appeal is arguable and not frivolous as opposed to having overwhelming chances of success.

40. One of the considerations to be taken into account is whether substantial loss is likely to result to the applicant if the stay is not granted. In this case the substantial loss alluded to by the Applicant relates to the said third party purchasers. Whereas the applicant's fears may well be real the applicant has not in the said affidavit expounded on how the enforcement of the said Notice would occasion it substantial loss as opposed to third parties.

41. In the ruling intended to be appealed against this Court found that the Plaintiff was more concerned about the interests of the third party purchasers than its own interests yet the Court was not satisfied based on the material placed before it, that the interests of the third parties who were in any case not parties to this suit established a *prima facie.* The said third parties are not the intended appellants. Nothing barred them from lodging an appeal if they so wished since rule 75(1) of the ***Court of Appeal Rules*** provides that:

> ***Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.***

42. By employing the phrase "any person" as opposed to any party, it is clear that the right to appeal is not restricted to parties and the alleged third parties could have appealed in their own rights and based thereon they could have applied for stay since Order 42 rule 6(1) and (2) of the ***Civil Procedure Rules*** does not similarly restrict the right to apply for stay to the parties to a suit.

43. It is true that in the said ruling, this Court found that in the event that the injunction sought was granted, the net effect would be to inflict greater financial hardship on the 1st Defendant/Respondent and even the Plaintiff because the interests on the outstanding principal would continue to accumulate. There is therefore no certainty that by the time the intended appeal is heard and determined, the amount due and payable would be static such that if the intended appeal does not succeed, the 1st Defendant would be adequately secured. Accordingly, the Applicant's view that no security was necessary is not entirely correct. The subject matter of this suit is not land. Land is just but a collateral. The subject of the dispute is a financial facility advanced by the 1st Defendant to the Plaintiff which facility continues to accrue interest. It is trite that the offer for security must come from the supplicant for stay. See **Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997.**

44. The importance of complying with the said requirement in my view was reflected in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** where 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".**

45. In the premises, I find no merit in the Notice of Motion dated 23rd October, 2020 both incompetent and unmerited and the same is dismissed with costs to the 1st Defendant/Respondent.

46. It is so ordered.

Ruling read, signed and delivered through Skype at Machakos this 29th day of October, 2020.

G.V. ODUNGA

JUDGE

In the presence of:

Mr Gachanja for the Plaintiff/Applicant

Miss Owano for Mr Kanjama for the 1st Defendant/Respondent

CA Geoffrey