



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**MISC. APPLICATION NO. 49 OF 2020**

**JOSPHAT KIMANI MWANGI.....APPLICANT**

**-VERSUS-**

**SAMUEL WANYOIKE MWANGI & WANYOIKE DANSON MWANGI**

**(Suing on their own behalf and as administrators of the estate of the late**

**JOHN MUIRURI MWANGI).....RESPONDENT**

**RULING**

1. By a Motion on Notice dated 2<sup>nd</sup> March, 2020, 2020, the applicant herein seek the following orders:

1) Spent.

2) The Applicant be granted leave to appeal out of time the judgement delivered on 16/10/2019 and the orders emanating therefrom.

3) Spent.

4) This Honourable court do issue stay of execution in KITHIMANI SRMCC NO 388 OF 2018 SAMUEL WANYOIKE MWANGI & ANOR VERSUS JOSPHAT KIMANI MWANGI pending the hearing and determination of the intended appeal.

5) The costs of this application be provided for.

2. The application was based on the following grounds:

a) The Applicant intends to appeal against the judgement by the Honourable Mr. G. O Shikwe delivered on 16<sup>th</sup> October 2019.

b) The subject appeal is arguable with high chances of success for the following reasons:-

i. The appeal is challenging the Honourable Court's application of income that was not proved contrary to Superior Courts Authorities.

ii. The appeal is challenging award of dependency to the Respondents who are neither the deceased's spouse nor children and are all adults.

c) The delay in filing the appeal was occasioned by the change in legal department at the Applicant's insurance office. The previous officer Ms. Mikhala Barasa left in October 2019 while the new officer Mr. Josphat Mukuna came in January 2020. During that changeover, there was failure to issue instructions to the advocates on record to file an appeal on time.

d) **The delay in lodging the appeal was purely inadvertent and is excusable.**

e) **There is a good explanation for the failure to file within the prescribed time.**

f) **The delay was not inordinate.**

g) **It is in the interests of justice that the Applicant be granted extension of time within which to file an Appeal.**

3. The application was supported by an affidavit sworn by **Elizabeth Wachira**, the Claims Manager at Resolution Insurance Company Limited, the insurers of the vehicle the subject of the suit in the lower court.

4. According to the deponent, the previous Legal Manager **Ms. Mikhala Barasa** left the employment of Resolution Insurance Company at the end of October 2019 and the staff member currently handling her docket **Mr. Josphat Mukuna** came in January this year to perform the same duties. Though the insurance company was advised by their advocates on record Kiruki & Kayika Advocates of the delivery of the judgment and they were dissatisfied with the same since it was inordinately high and not guided by the law and precedent, due to the change in staff, there was no proper handover and hence the instructions to appeal were never given to their advocates on record.

5. It was not until during the reviewing of the files in February 2020, that they found that instructions to appeal had never been issued to their advocates on record and they forwarded the instructions to appeal on 17<sup>th</sup> February 2020 by which time the time within which to file the appeal had lapsed and thus it is necessary to seek this Court's leave to file an appeal out of time.

6. In the deponent's view, the intended appeal is arguable and has high chances of success because:-

i. The appeal is challenging the Trial Court's application of income that was not proved contrary to Superior Courts Authorities.

ii. The appeal is challenging award of dependency to the Respondents who are neither the deceased's spouse nor children and are all adults.

7. According to the deponent the delay in lodging the appeal which was not inordinate but purely inadvertent and is excusable has been satisfactorily explained. Similarly, this application has been brought without undue delay.

8. It was deposed that the Applicant is likely to suffer substantial loss if the application herein is not allowed since the Respondent's advocate has threatened to proceed with execution. The Applicant undertook to comply with any conditions that this Court may impose to be allowed to file its appeal out of time which ought to be done in the interests of justice.

9. The deponent in a further affidavit deposed that the sum awarded is too high and if allowed to proceed without the court granting leave to appeal, the applicant would suffer loss because his property will be sold because the judgment sum is inordinately high and/or his insured maybe compelled to pay the judgement sum which may not be recovered if the intended appeal is successful.

10. It was averred that the Respondents will not suffer any prejudice since the court will give conditions on grant of leave to appeal out of time and stay of execution to ensure that no party suffers unnecessarily.

11. The Application was opposed by an affidavit sworn by the Respondent herein.

12. According to the Respondent, the application is incompetent, misconceived bad in law and ought to be struck out as it is solely meant to further delay the enjoyment of the fruits of the judgment, and the same should be dismissed with costs. It was averred that the application contravenes Section 3 (b) and (c) of the **Judicature Act** as the *jurat* ends in a different page with the rest of the affidavit.

13. The Respondent took issue with the capacity of the deponent of the supporting affidavit to swear the said affidavit contending that neither her nor Resolution Insurance Company is a party to the suit and no authorization from the Applicants has been adduced authorizing the said deponent to swear the supporting affidavit and seek the orders sought on their behalf. According to the Respondent, the deponent has sworn the supporting affidavit on the basis of the principle of subrogation, but the principle does not apply herein since the principle of subrogation applies after the insurer has compensated or paid the insured which is not the position here.

14. It was deposed that the deponent has deposed to matters that are not within her personal knowledge, thus offending Order 19 Rule 3 of the **Civil Procedure Rules**.

15. On the merits it was averred that the intended appellant has not laid reasonable grounds for the grant of the orders sought. It was deposed that judgment in **Kithimani PMCC No. 388 of 2018 - Samuel Wanyoike Mwangi and Wanyoike Danson Mwangi (Suing on their own behalf and as the administrators of the Estate of the late John Muiruri Mwangi) –V- Josphat Kimani Mwangi** was delivered on the 16<sup>th</sup> October, 2019 and the same was advised upon the intended appellant. Stay of execution of the judgment was not granted as the intended appellant chose not to attend to take it, however, the respondents' counsel on record did indulge them and granted them thirty (30) days which lapsed on 16<sup>th</sup> November, 2019.

16. According to the Respondent, the intended appellant has not bothered to explain why he failed to file the appeal in time and in the Respondent's view, the intended appellant has been twiddling his thumbs and it is only when execution is imminent that he has moved to action, simply to frustrate the Respondents efforts at realizing the fruits of their judgment, and in such regard there is no merit in the application and it should be dismissed. To the Respondent, the explanation for the delay tendered in the supporting affidavit reeks of sheer

laxity, negligence, and bad faith on the part of the intended appellant in addition, nothing has been annexed in their application to show that indeed the alleged legal officer's termination date was to end on October 2019. Having failed to explain the delay in filing the appeal, it follows then that the application for leave to file the appeal out of time should be dismissed.

17. As far as the prayer for stay of execution goes, it was deposed that the intended appellant has failed to meet the threshold set under Order 42 Rule 6(2), for grant of stay of execution since he has not demonstrated what substantial loss he will suffer if the stay is not granted. In other words, the intended appellant has not demonstrated what prejudice he will suffer if the respondents proceed for execution as it was due to his own indolence and sheer laxity that he did not utilize his constitutional right enshrined in the constitution under Article 50 of fair hearing to appeal the suit on time, a right which is not absolute since a litigant's right is only the right to being given ample opportunity to be heard, and in the event that the said litigant does not take up that right, then the same is deemed as forfeited.

18. According to the Respondent, an appeal cannot be rendered nugatory by a money decree being satisfied by payment particularly where substantial loss has not been demonstrated, and therefore, the intended appellant's appeal will not be rendered nugatory if stay is not granted.

19. The Applicant averred that the intended appellant has not fulfilled the seven (7) conditions to be considered by the court while extending time as was set out in **Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, and lamented that he will be greatly prejudiced if the prayers sought in this application are granted, not only will it delay the enjoyment of the fruits of the successful litigation, but together with **Wanyoike Danson Mwangi**, his co-administrator, they require the money to run the affairs comprising the estate of their late brother.

20. In support of the said submissions, the Applicant relied on Sections 79G and 95 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and the cases of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR**, **Samuel Mwaura Muthumbi vs. Josephine Wanjiru Ngugi & another [2018] eKLR**, and submitted that the matter before this Court is as regards to whether the Applicant herein has given enough reasons to merit the grant of time to file an appeal out of time.

21. As regards stay, the Applicant relied on **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another [2006] eKLR** and **James Njenga & Another vs. Samwel Ngetich [2018] eKLR** and submitted that the Application should be allowed because the Applicant will suffer substantial harm if it is not allowed because the Respondent's Advocates have threatened to proceed with execution. Further the Applicant is willing to comply with any conditions that this Honourable Court may impose to be allowed to file its appeal out of time. Therefore, it is in the interest of justice that this Application should be allowed.

22. On behalf of the Respondent reiterated the contents of the replying affidavit and relied on **Joseph Ngigi Ibare –vs- Myovi James & Another [2016] eKLR**, **Kenya Shell Limited –vs- Kariga [1982 -88] 1 KAR 1018**, **Lucy Nyamanu Kimani –vs- Lawrence Mburu Muthiga [2006] eKLR**, **Caneland Ltd Malkit Singhpandhal & Another –vs- Delphis Bank Ltd [2000] eKLR**, **Isaac Muteti Kisua –vs – Felix Mwangi Ndegwa [2016] eKLR**, **Socfinac Company Limited –vs- Nelphat Kimotho Muturi [2013] eKLR**, **Van Den Berg (K) Limited –vs- Charles Osewe Osodo [2015] eKLR**, **Antoine Ndiaye –vs- African Virtual University [2015] eKLR** and **Electric Link (East Africa) Limited & Another –vs Mary Mueni Kioko & Another [2015] eKLR** it was submitted that the application has no merit and should be dismissed.

### **Determination**

23. I have considered the foregoing.

24. It is alleged that the supporting affidavit is defective on the ground that the *jurat* appears on a separate page. I have looked at the affidavit in support of this application and I find no merit in this contention since it is clear that that is not the position.

25. It is also contended that the deponent of the supporting affidavit is not a party to the suit and there is no evidence that she has been authorised to swear the affidavit in question. The law as I understand it is that affidavits should be confined to such facts as the deponent is able of his own knowledge to prove provided that in interlocutory proceedings, or by leave of the Court, an affidavit may, contain statements of information and belief showing the source and grounds thereof. There is no law that states that affidavits must be sworn by parties. In this case it is not contended that the matters deposed to by the deponent of the supporting affidavit were not within her knowledge. I therefore see nothing wrong with the said affidavit.

26. 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.***

27. 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 be based 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 applicant 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.

28. 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...”**

29. 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 Thuitha 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.”**

30. 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.”**

31. That was the position in Stanley Kangehe 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...”**

32. In this case the Applicant contends that the reason why the appeal was not filed within time was due to the change in the officials of the insurance company and that the previous officer left without a proper handing over. In Charles Karuri Mbutu vs. Samuel Muhoro Civil Application No. Nai. 51 OF 1999, time for filing an appeal was extended where it was alleged that the failure to lodge the appeal in time is due to the fact that the clerk of counsel for the applicant charged with responsibility of lodging the record of appeal left the employment of counsel for the applicant without warning and without lodging the requisite record.

33. In the premises I find that the applicant has satisfactorily explained the reason for the delay in filing the appeal and I do not find the period of delay inordinate.

34. 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.***

35. 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.

36. 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.”

37. 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.”

38. 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”.

39. 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.”

40. 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.”**

41. 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”.**

42. 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.**

43. 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.**

44. 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.

45. 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...”**

46. 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.”**

47. 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.”**

48. In this application however, I agree with the respondent that the applicant was very economical with in terms of material. Whereas the applicant contends that he is apprehensive that the Respondent is unlikely to repay the decretal sum once paid to him, no basis has been laid for that apprehension. As this court held in Socfinac Company Limited –vs- Nelphat Kimotho Muturi [2013] eKLR:

**“The appellant’s belief that the respondent will be unable to repay the same is solely based on the appellant’s lack of knowledge as to the respondent’s financial ability or capability. In my view, the mere fact that an appellant does not know the respondent’s financial capability does not give rise to the presumption that the respondent will be unable to repay the sum. There must be other factors that lead to that presumption. On the material before the Court I am not satisfied that the appellant has shown that it stands to suffer substantial loss if the stay sought is not granted.”**

49. 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.”**

50. What has troubled me however, is the fact that the Respondent is an administrator of the estate of a deceased and deposed that he will be greatly prejudiced if the prayers sought in this application are granted, not only will it delay the enjoyment of the fruits of the successful litigation, but together with **Wanyoike Danson Mwangi**, his co-administrator, they require the money to run the affairs comprising the estate of their late brother. In other words, the Respondent requires the decretal sum for the purposes of spending the same in the estate. If that is the position, it is clear that in the event that the appeal succeeds, it might not be easy to have the sum refunded.

51. 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.

52. 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.”**

53. 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.”**

54. In this case the financial status of the estate is unknown. However, the applicant only intends to appeal against the quantum of the award. Clearly the Applicant appreciates that at the end of the day the Respondent will be entitled to some award. Having considered the instant application, it is my view that this a case where a stay ought to be granted but on conditions.

55. Accordingly, the orders which commend themselves to me and which I hereby grant are that the memorandum of appeal be filed and served within 7 days and 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 the stay will lapse.

56. The costs of this application are awarded to the Respondent.

57. It is so ordered.

**Read, signed and delivered in open court at Machakos this 18<sup>th</sup> day of November, 2020.**

**G V ODUNGA**

**JUDGE**

**In the absence of the parties.**

**CA Geoffrey**