



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISCELLANEOUS APPLICATION NO. 226 OF 2016
IN THE MATTER OF THE ADVOCATES ACT, CAP 16
IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER, 2014
NASIBWA WAKENYA MOSES.....RESPONDENT
VERSUS
THE UNIVERSITY OF NAIROBI.....1ST RESPONDENT
THE STUDENT ORGANIZATION OF
NAIROBI UNIVERSITY (SONU).....2ND RESPONDENT

RULING

1. By way of a notice of motion dated 6th December 2018 expressed under the provisions of Rule 11(3) of the Advocates Remuneration Order, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act,^[1] The University of Nairobi and The Student Organization of Nairobi University (SONU) (the applicants) moved this court seeking orders:-

- a. Spent.
- b. **That** the applicants be granted leave to appeal to the Court of Appeal against the whole of the judgment dated 21.11.2018.
- c. **That** the Notice of Appeal filed and annexed to this application be deemed as properly filed upon grant of leave.
- d. Spent.
- e. **That** there be a stay of execution of the judgment and decree delivered on 21.11.2018 pending the hearing and determination of the intended appeal.
- f. **That** the applicants will offer security for the judgment.
- g. **That** this honourable court be pleased to make such further orders to meet the end of justice.
- h. **That** costs of this application be in the intended appeal.

2. The grounds relied upon are that the applicants are:-

- a. aggrieved by the Ruling delivered on 21/11/18, the applicants desire to appeal at the Court of Appeal;
- b. that under Rule 11(3) of the Advocates Remuneration Order, an appeal is not as of right, but, with the leave of the court;
- c. that the Respondent has commenced the execution process and has proclaimed, attached and issued notifications and unless stay is granted, the auctioneers are likely to sell and/or dispose the attached property.

d. that the Respondent is claiming the decretal sum of Ksh. 5,790,331/= plus interests and costs and if the stay is not granted, the applicant will suffer irreparable loss and the appeal which has got high chances of success will be rendered nugatory;

e. that the application has been filed without delay;

f. that the applicants applied for a copy of the Ruling vide a letter dated 29.11.2018 and only received a copy it on 3.12.2018.

g. that the Respondent will not suffer any prejudice or damage that cannot be compensated should the appeal be unsuccessful.

h. the applicant will offer such security as the court may deem necessary for the due performance of the decree.

Respondent's/Applicant's Notice of Preliminary Objection.

3. On 14th December 2018, the Respondent filed a Notice of Preliminary Objection stating *inter alia* that there is no valid Notice of Appeal filed by the applicants and that the same is fatally incurably defective. Further, it is contended that the Notice of Appeal is null and void since it was filed without courts leave. The Respondent also contends that the Notice of Appeal offends the mandatory provisions of the Advocates Remuneration Order, Rule 11(3) and other relevant provisions. It is also contended that the applicants seeks to convert a nullity to a legality by failure to comply with the mandatory provisions of the Advocates Remuneration Order in abuse of court process. The Respondent also states that the Notice of Appeal has not been signed by the Deputy Registrar, hence, it is invalid. Further, it is stated that there is no valid Notice of Appeal before this court and that the applicants have not come to court with clean hands nor can they request the court to legitimize an irregularity. Lastly, it is contended that this court lacks jurisdiction to hear and determine the application, hence, the application and the Notice of Appeal be truck off.

The arguments.

4. **Miss Mochama**, counsel for the applicants adopted the above grounds and urged the court to allow the application. She explained that the reason for the delay in filing the application was because the client gave instructions late. She argued that the appeal has high chances of success, and, that the decretal amount is in excess of Ksh. 5 Million, and, that the Respondent is a student, hence, the chances of recovering the money if paid to him are minimal. She stated that the applicant is ready, able and willing to offer security as a price for the stay by way of a Bank guarantee and urged the court to grant the orders sought.

5. The Respondents counsel **Mr. Nyangito** argued that the Notice of Appeal is defective. He cited Rule 11 of the Advocates Remuneration Order and submitted that leave ought to be sought within 14 days, and, that, the application and the Notice of Appeal were filed after 14 days, hence, it is incompetent. Also, he argued that substantive loss has not been established, and, that, the Respondent is entitled to the fruits of the judgment, and, that the applicant did not establish that they have an arguable appeal.

Determination.

6. I find it convenient to start by reproducing the provisions of paragraph 11 of the Advocates Remuneration Order which provides for Objection to decision on taxation and appeal to Court of Appeal in the following words:-

11.

1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

7. The opposing arguments presents by the parties is a clear invitation to this court to interpret the meaning of the above provisions. In interpreting statutory provisions, the court should attach such meaning and interpretation that meets the purpose of the enactment. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

8. Therefore, a court must try to determine how a statute should be enforced, but I am alive to the fact that in constructing a statute, the court can make sweeping changes in the operation of the law so this judicial power should be exercised carefully. There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. *Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete.* The implication is that when the language is clear, then it is not necessary to belabour examining other rules of

statutory interpretation.

9. It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Courts decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.

10. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual.^[2] In any event, one possible suggestion of the indeterminacy of canons is that statutory construction should be a narrow pursuit, not a broader one:-

"[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others.... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."^[3]

11. A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim *noscitur a sociis* (meaning of a word should be known from its accompanying or associating words) has much relevance in understanding the import of words in a statutory provision.^[4]

The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

12. A reading of Paragraph **11(1)** reveal that it only applies to a party objecting to the decision of a taxing officer. It provides for **14** days for the objection under the said section. Paragraph **11(2)** provides for the steps to y the taxing master after the objection. Simply put, these two provisions are not applicable to a party desiring to appeal against a decision made by a judge pursuant to a reference. Counsel for the Respondent premised his argument that the application and the Notice of Appeal were filed after the 14 days provided under paragraph **11(1)**. Clearly, his argument was founded on an inapplicable provision.

13. Paragraph **11(3)** is the correct provision. It provides that "Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal." This provision does not prescribe a time limit for a party to appeal to the Court of Appeal.

14. The decision in question, though a refusal to allow a taxation reference culminated in the decree dated 28 November 2018 decreeing that was entered in favour of the Respondent in the sum of **Ksh. 5,419,516/=** as appears in the Certificate of Taxation dated **7th** June 2018 together with interests at 14% per annum from the date of taxation until payment in full. With tremendous respect, the bulk of the Respondents objection to the application was founded on the misapprehension that the matter paragraph **11(1)** & **(2)** were still applicable. What is being challenged is a decision of a judge which culminated in a judgment which is being appealed against. The law on filing of appeals and or stay pending an appeal applies.

15. The first question is whether this court has powers to extent time for filing a Notice of Appeal. Fortunately for me, this route has been travelled before. The court in **Loise Chemutai Ngurule & Another v. Winfred Leshwari Kimung'en & 2 Others**^[5] captures the correct legal position on this issue in the following words:-

"It was argued that this court has no jurisdiction to entertain an application for extension of time to lodge a Notice of Appeal out of time, and that jurisdiction is only in the Court of Appeal. Reliance was made on the decision in the case of Simon Towett Martim v Jotham Muiruri Kibaru, Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004 (2004)eKLR. In the matter, it was held that Rule 4 of the Court of Appeal Rules grants the Court of Appeal exclusive jurisdiction to grant extension of time to file an Appeal to the Court of Appeal. The Court (Kimaru J) held that in the circumstances, the High Court had no jurisdiction to entertain an application for extension of time to lodge Notice of Appeal out of time.

With respect I disagree with the above decision. Section 7 of the Appellate Jurisdiction Act, CAP 9, is drawn as follows: S. 7 Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

It will be seen from the above that Section 7 is explicit, that the High Court ... may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.

Neither am I of the view that there is any conflict between the above provision and the provisions in the Court of Appeal Rules. Rule 4 of the Court of Appeal Rules also gives the Court of Appeal power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a Notice of Appeal is concerned. That provision is drawn as follows:-

Rule 4 : Extension of time

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior court, for the doing of any act authorized or required by the Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

In my opinion, the power to extend time for the filing of a Notice of Appeal is vested in both the High Court ...and the Court of Appeal. One can approach either court for the order. This is indeed the import of Rule 41 of the Court of Appeal Rules which provides as follows:-....

One is therefore free to approach either the High Court or the Court of Appeal for extension of time to lodge Notice of Appeal out of time.

The matter indeed arose in the case of Kenya Airports Authority & Another vs Timothy Nduvi Mutungi, Court of Appeal, Civil Application NO. NAI 165 of 2013 (UR 113/2013) (2014) eKLR. In the case, an application for extension of time to lodge Notice of Appeal was filed in the High Court and the High Court declined to hear it, instead asking the applicant to file the application in the Court of Appeal. Githinji JA, had this to say on that point:-

"The application of 10th December, 2012, was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to Rule 7 of the Court of Appeal Rules (sic) (clearly meant Section 7 of the Appellate Jurisdiction Act) which provides:- (Section 7 of the Appellate Jurisdiction Act set down)... Since the application for extension of time for lodging a notice of appeal made in the High Court was competent and which the High Court should have determined..."

It will be observed that the Court of Appeal did hold that the application for extension of time to lodge a Notice of Appeal out of time had been filed properly in the High Court and the High Court ought to have determined it.

I do not therefore agree with the argument that this court has no jurisdiction to entertain the present application in so far as it seeks extension of time to lodge a Notice of Appeal out of time..."

16. It is therefore my conclusion that this court has the requisite jurisdiction to entertain the matter before me. Having so concluded, the next step is to consider the guiding principles. The principles that guide a court in considering an application for leave to file an appeal out of time were laid down by the Court of Appeal in the Case of Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited^[6] thus:-

"The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour."

17. The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. It is not possible to draw a closed list. It is upon the applicant to place sufficient material before the court which would explain why there was delay. The court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case M/S Portreiz Maternity v James Karanga Kabia^[7] where the Court stated:-

"That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right."

18. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised. There have been numerous judicial pronouncements on this precise point. In Monica Malel & Anor v R, Eldoret,^[8] stated:-

"When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay."

19. The inherent power, as observed by the Supreme Court of India^[9] "has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it." Lord Cairns^[10] stated as follows:-

"One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

20. The fundamental duty of the court is to do justice between the parties. Discussing the nature and objects of the inherent powers of the court, Sir Dinshah Mulla^[11] observes that:-

"... The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act ex debito justitiae, and to do real and substantial justice for the administration, for which alone, it exists."

21. A common definition of judicial discretion is the act of making a choice in the absence of a fixed rule, i.e. statute, case, regulation, for decision making; the choice between two or more legally valid solutions; a choice not made arbitrarily or capriciously; and, a choice made with regard to what is fair and equitable under the circumstances and the law. Whenever the court is invested with the discretion to do certain act as mandated by the statute, the same has to be exercised judiciously and not in an arbitrary manner and capricious manner. The classic definition of 'discretion' by Lord Mansfield in *R. vs. Wilkes*^[12] that 'discretion' when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, 'but legal and regular'.

22. Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit.^[13] Discretion must be exercised in accordance with sound and reasonable judicial principles. The King's Bench in *Rookey's Case*^[14] stated as follows:-

"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."

23. The discretionary powers of the court are constrained by the objectives of the Constitution to grant access to justice. 'Discretion' signifies a number of different legal concepts. Here the order is discretionary because it depends on the application of a very general standard— what is 'just and equitable' — which calls for an overall assessment in the light of the factors mentioned in the Constitution or a statutory provision, each of which in turn calls for an assessment of circumstances.^[15] Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends.^[16] There is nothing arbitrary or capricious about exercising a discretion in order to give effect to a constitutional right.

24. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*^[17] succinctly laid down the principles to guide courts in applications for extension of time as follows:-

"... we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

- i. 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;*
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court*
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;*
- vi. Whether the application has been brought without undue delay; and*
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."*

25. Broadly speaking, the exercise of the court's discretionary power is influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it. In this regard what an applicant is required to show, in essence, is a reasonable explanation for his default (it has also sometimes been described as an "acceptable" explanation. The applicants counsel stated that the reason for the delay was because their client gave them instructions late. This reason was not challenged. I find no reason to doubt this explanation.

26. The next question is whether the delay was inordinate. The ruling was rendered on 21st November 2018. The applicants moved this court on 6th December 2018, after a period of 15 days. I am not persuaded that 15 days is an inordinate delay in the circumstances of this case nor is there argument before me to suggest so.

27. The next hurdle is whether the applicants have satisfied the requirements of Order 42 of the Civil Procedure Rules, 2010 which provides as follows:-

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court

to which such appeal is preferred shall be at liberty, on application being made, to consider such application and 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 of stay shall be made under sub rule (1) unless-

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and 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

28. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. However, it is necessary to consider the considerations for granting applications for stay pending hearing and determination of an appeal. The Court of appeal in the case of *Butt vs Rent Restriction Tribunal* [18] while considering an application of this nature had this to say:-

a. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

d. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

29. It is clear from the wording of Order 42 Rule 6 (1), for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; (a) Substantial loss may result to the applicant unless the order is made; (b) The application has been made without undue delay; (c) such security as to costs has been given by the applicant.

30. The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. [19] What constitutes substantial loss was broadly discussed in *James Wangalwa & Another vs Agnes Naliaka Cheseto* [20] where it was held *inter alia* 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.

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, a question that was aptly discussed in the case of *Silverstein vs. Chesoni*. [21]...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

31. The applicants states that the Respondent is a student and that the decretal sum is in excess of Ksh. 5 Million. The applicants' fear that they will not recover the money if execution proceeds. Faced with this assault, the Respondent had a burden of at least demonstrating that he is not a man of straw and in the event the money being paid to him, and, in the event of the appeal succeeding, he would be able to refund. Unfortunately, counsel for the Respondent did not deem it fit to address this pertinent issue. So crucial is the issue that it was necessary for the Respondent to give it some attention. In fact, an affidavit of means would have sufficed.

32. In *Equity Bank Ltd vs Taiga Adams Company Ltd*, [22] the court stated that the only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means.

33. Apart from proof of substantial loss the applicant is enjoined to provide security. [23] Counsel for the applicants stated that the applicants are ready to provide security by way of a Bank guarantee for the entire decretal sum. There is therefore an offer of security coming from the applicants in satisfaction of the said requirement. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. [24]

34. The offer for security must come from the applicant as a price for stay. **In the above cited case of *Equity Bank Ltd vs Taiga Adams Company Ltd* [25] it was held that:-**

“...of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...”

35. In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. [26] These twin principles go hand in hand and failure to prove one dislodges the other. It should also be noted that the judgement in question is a money decree. In considering whether a money decree or a liquidated claim would render the success of the an appeal nugatory, the court of appeal in the case of *Kenya Hotel Properties Ltd vs. Willesden Properties Ltd* [27] had this to say:-

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not in a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant./ However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all.” (Emphasis added)

36. I find that the applicants have satisfied the tests for granting the orders sought. Consequently, I find that this is a proper case for the court to exercise its discretion and grant the orders sought. The upshot is that the applicants application dated 6th December 2018 succeeds. Consequently, I allow the application and make the following orders:-

a. **That** the applicants be and are hereby granted leave to appeal to the Court of Appeal against the whole of the judgment/Ruling dated 21.11.2018.

b. **That** the applicant's are hereby granted leave to file their Notice of Appeal out of time and that the said Notice of Appeal be filed within seven days from the date f this Ruling.

c. **That** the applicants be and are hereby granted leave to file their Appeal in the Court of Appeal out of time, and, in any event, the applicants are ordered to file the said appeal within **28** days from the date of this Ruling.

d. **That** pending the filing, hearing and determination of the applicants' intended appeal to the Court of Appeal, there be a stay of execution of the judgment/ruling and decree delivered on 21.11.2018.

e. **That** as a condition to the stay herein above granted, the applicants are ordered to provide security for the due performance of the decree issued in this case by way of a Bank Guarantee for the payment of the entire decretal sum plus interests thereon. Such guarantee shall be furnished within **twenty one** days from the date f this order.

f. **That** in the event of failing to comply with any of the time frames ordered above on filing of the Notice of Appeal and the Appeal or failure to furnish the security herein above ordered within the time ordered, the orders granted herein shall automatically lapse.

g. **That** there be no orders as to costs for this application.

Right of appeal.

Dated at Nairobi this 27th day of February 2019

John M. Mativo

Judge

[1] Cap 21, Laws of Kenya.

[2] The Supreme court of India in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others* {1987} 1 SCC 424

[3] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The Court takes much the same approach when it chooses congressional intent rather than statutory text as its touchstone: a canon of construction

should not be followed “when application would be tantamount to a formalistic disregard of congressional intent.” *Rice v. Rehner*, 463 U.S. 713, 732 (1983).

[4] *K. Bhagirathi G. Shenoy and others v. K.P. Ballakuraya and another* {1999} 4 SCC 135.

[5] {2015} eKLR.

[6] {2015} eKLR.

[7] *Civil Appeal No. 63 OF 1997*.

[8] *Civil APP No. NAI 246 oF 2008*

[9] In Raj Bahadur Ras Raja vs Seth Hiralal AIR {1962} AC 527

[10] In Roger Vs Comptoir D' Escompts De Paris.

[11] The Code of Civil Procedure 18th Edition Reprint 2012.

[12] 1770 (98) ER 327

[13] Sir Dinshah Fardunji Mulla, *The Code of Civil Procedure*, 18th Edition, Reprint 2012, paragraph 1381.

[14] [77 ER 209; (1597) 5 Co.Rep.99].

[15] *Norbis v Norbis* [1986] HCA 17; 161 CLR 513; 60 ALJR 335; 65 ALR 12.

[16] Ibid.

[17] {2014} eKLR.

[18] Civil App No. NAI 6 of 1979.

[19] See Gikonyo J in HCC NO. 28 of 2014, *Trans world & Accessories (K) Ltd vs Commissioner of Investigations & Enforcement*.

[20] HC Misc No. 42 of 2012 OR {2012} eKLR.

[21] {2002} 1 KLR 867.

[22] {2006} eKLR.

[23] See judgement in Republic vs Commissioner for Investigations & Enforcement, Misc App no 51 of 2015 (NBI).

[24] Ibid.

[25] Supra.

[26] As was held in *Hassan Guyo Wakalo vs Straman EA Ltd* {2013} eKLR.

[27] Civil Application number NAI 322 of 2006 (UR).