



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISC CIVIL APPLICATION NO. 393 OF 2018

KENYA RED CROSS SOCIETY.....APPLICANT

VERSUS

MBONDO KATHEKE MWANIA.....RESPONDENT

RULING

1. By a Motion on Notice dated 5th November, 2018, the applicant herein substantially seeks that there be a stay of execution of the decree issued in Kitui CMCC No. 61 of 2017 pending the hearing and determination of its intended appeal. It further seeks an order that the time for filing and serving of the Memorandum of Appeal and Record of Appeal against the said judgement be extended by such period as the court deems fit.
2. The application was supported by an affidavit sworn by **Edwine Okuta**, the applicant's Group Head, Legal. According to the deponent, on 13th March, 2014 the Respondent filed a suit against the Applicant for damages suffered as a result of an alleged accident involving motor vehicle registration no. GKA 679C in which he was a passenger. However, the Appellant denied liability on the ground that the Respondent was not its employee and that the vehicle in question belonged to the Government of Kenya.
3. It was deposed that on 20th August, 2018 the Respondent's advocates informed the applicant's advocates that on 15th August, 2018 the Chief Magistrate's Court delivered a judgement in the said case in which the applicant was ordered to pay the sum of Kshs 3,500,000/= to the Respondent together with costs. According to the deponent, the Applicant's advocates were not informed of the delivery of the said judgement. Though the applicant's advocates sought, both from the court and from the respondent's advocates, a copy of the said judgement, the same was not provided and to date the applicant's advocates are yet to receive the same hence their inability to file the appeal which they intend to lodge against the same.
4. It was deposed that the delay in filing the appeal against the said judgement was not deliberate but was caused by the failure by the court to furnish the applicant with a copy thereof.
5. According to the applicant, the sum of Kshs 3,940,640/- is substantial hence it stands to suffer significant loss and damage if a stay is not granted in the circumstances. On the other hand, the Respondent stands to suffer no prejudice if the orders sought are granted since the applicant is a well-known reputable charitable organisation with known address and assets unless the respondent whose address and assets are unknown hence there is a great danger that if he executed against the applicant, the applicant will never be able to recover in the event that its intended appeal succeeds. It was the applicant's position that this application has been brought without unreasonable delay.
6. The application was however opposed by the Respondent. According to the Respondent, the lower court's judgement was delivered on 15th August, 2018 and it was directed that the stay of execution would start running from the date when the applicant was served with the details of the judgement. According to the Respondent, the applicant was notified of the judgement on 20th August, 2018 through service of the draft decree. However, the applicant went to sleep until 6th November, 2018, a period of close to three months when they were woken up by the Auctioneers. According to the Respondent, it was the applicant's duty to peruse the judgement if they intended to get one and not to simply apply and wait for the court to furnish them with the same. However, no such efforts have been demonstrated.
7. It was therefore contended that no reasons have been advanced as to why an appeal was not preferred against the said judgement in time other than indolence on the part of the applicant. To the respondent, this application is an afterthought meant to harass the respondent and deny him the fruits of his lawfully obtained judgement. He lamented that since he filed the suit on 24th August, 2007, the same has been pending in court for the last 11 years hence delaying the matter further will not be in the interest of justice. It was deposed that the applicant's inaction since the delivery of the judgement smacks of malice and ill-will hence the application ought to be dismissed with costs.
8. It was submitted on behalf of the applicant that it has never been served with a Decree in this matter. Instead, the Respondent served the

Applicant with a draft decree for the Applicant's comments. The Applicant accordingly wrote to the Court and to the Respondent's Advocates to be furnished with a copy of the Judgment to enable it make comments on the draft decree and decide on the appropriate course of action.

9. It was submitted that the Applicant has satisfied the conditions for grant of leave to file an appeal out of time pursuant to section 79G of the **Civil Procedure Act**. In the applicant's submissions, it is a requirement of the law under section 79G that time starts running for purposes of filing an appeal when the decree has been prepared and a copy thereof served upon the Appellant. However, the Respondent herein seeks to rely on an unsigned draft decree as the basis of executing against the Applicant. In support of its submissions the applicant cited the case of **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR** and **Thuita Mwangi vs. Kenya Airways Ltd [2003] eKLR**.

10. According to the Applicant, it has good reasons why this Honourable Court should exercise discretion in its favour and extend the time for the filing of the appeal. First, the judgment was delivered in the absence of the Applicant or its Advocates. The Applicant was never informed of the delivery of the judgment until on 20th August 2018 when the Respondent's Advocate wrote to the Applicant's Advocates informing them of the delivery of the judgment but not attaching a copy of the same.

11. Secondly, the Applicant through its Advocates promptly wrote to the Court on 23rd August 2018 requesting for a copy of the judgment to enable it consider the same and file an appeal. On the same date, the Applicant similarly wrote to the Applicant's Advocates requesting for a copy of the judgment. None of these requests elicited a response. Further, on 16th October 2018, the Applicant through its Advocates again wrote to the Court requesting for a copy of the judgment but to date, the Applicant has not received a copy of the said Judgment and has therefore been unable to file the intended Appeal.

12. It was accordingly submitted that the delay in filing a Memorandum of Appeal against the said Judgment was not deliberate but was caused by the failure by the Court to supply the Applicant with a copy of the Judgment. It cited the case of **Edward Njane Nganga & Another vs. Damaris Wanjiku Kamau & Another [2016] eKLR**.

13. According to the Applicant, similar circumstances as in the **Edward Njane case (supra)** obtain in the instant case hence the court was urged to allow the Application for leave to file an appeal out of time.

14. As regards the prayer for stay pending the intended appeal, the applicant submitted that its intended appeal raises triable issues of fact and law that should be rightly heard, and justly determined. Specifically, and without the benefit of having read the Judgment in this matter, the Applicant submitted that the Respondent seeks to execute against the Applicant without first having extracted a decree. The Respondent placed reliance on a draft decree to issue instructions to Auctioneers to execute against the Applicant in complete contravention of the law. It is thus in the interest of justice that execution of the Judgment delivered on 15th August 2018 be stayed pending the hearing and determination of the intended appeal. In this regard, the Applicant relied on **Kenya Commercial Bank Limited vs. Nicholas Ombija [2009] eKLR** and **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR**.

15. The applicant also relied on **Butt vs. Rent Restriction Tribunal [1982] KLR 417**.

16. According to the applicant, it is trite law that when considering an application for stay, the court must address its mind to the question of whether to refuse it would occasion substantial loss to the applicant and in turn, render the appeal nugatory and relied on **the case of Jason Ngumba Kagu & 2 Others vs. Intra Africa Assurance Co. Limited [2014] eKLR**.

17. As regards substantial loss the applicant reiterated the contents of the supporting affidavit and relied on the case of **Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation) (2004) E.A. LR 331**.

18. The Applicant submitted that the sum of the sum of Kshs. 3,940,640/- and interest and costs of the suits, and auctioneer charges total to a sizeable amount. Further emphasising the Applicant's determination to pursue the appeal is of judicial enterprise, in the interest of justice, and not a delay tactic as alleged by the Respondent. In the applicant's view, based on **Butt and Rent Restriction Tribunal (CA No Nairobi 6 of 1979)**, there is no overwhelming hindrance as to why stay ought not be granted. It further relied on the case of **Kenya Airports Authority vs. Mitu-Bell Welfare Society & Another (2014) eKLR**, **Tabro Transporters Ltd. vs. Absalom Dova Lumbasi [2012] eKLR** and **John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another [2016] eKLR**.

19. According to the applicant, the Respondent has not indicated in its Relying Affidavit that it is capable of paying the decretal sum in the event that this Honourable Court allows the Applicant's intended appeal. The Applicant submitted that it is in the interest of justice that the Application herein be allowed so as not to render the Applicant's intended appeal nugatory and a mere academic exercise.

20. It was the applicant's case that there has been no unreasonable delay by the Applicant and that it filed the Application for Stay within a reasonable time since the Chief Magistrates' Court at Kitui delivered its Judgment on 15th August 2018 and the Applicant filed its Application for Stay on 5th November 2018. As regards the issue of security, the Applicant averred that it is ready to comply with any other conditions that may be imposed by this Honourable Court.

21. In view of the foregoing, the Applicant was of the view that it has demonstrated sufficient grounds for the grant of the stay of execution orders sought herein and leave to appeal out of time and prayed that the application 5th November 2018 be granted as prayed.

22. On behalf of the Respondent it was submitted that Judgment in the lower court matter was delivered on 15/8/2018 and the learned trial Magistrate ordered that stay of execution of the said Judgment will start running from the date the Applicant was made aware of the judgment which was done vide our letter dated 20/8/2018 and served on the Applicant on the same date. Three days later, on 23/8/2018, the Applicant wrote to court requesting for a copy of the judgment and went to sleep and from the record it is clear that there was no follow up on the part of the Applicant to secure a copy of the judgment for the rest of the month of August 2018 through to the whole of September

2018. Regarding the letter dated 16/10/2018, it was noted that the same was not even filed in court and was written on the date when Auctioneers commenced execution. It was therefore submitted that the only letter that was sent to court requesting for judgment was the letter of 23/8/2018 and there has been no follow-up to date either through another letter or attendance at the registry in an effort to get a copy of the judgment to date, four months after the delivery of the judgment.

23. It was therefore the Respondent's view that there is no reason at all why an Appeal was not preferred within time since no genuine efforts were made to secure a copy of the judgment if that was the reason the Appeal was not filed. Instead, the Applicant just sat on their laurels and could only be prompted when they received a letter from the Respondent's Lawyers or when warrants were issued and executed by the Auctioneers. There is completely no reason why an extension of time to file Appeal out of time should be granted to the Applicant. In this regard the respondent relied on **Civil Application No. 3 of 2016 - County Executive of Kisumu –vs- County Government of Kisumu & 7 Others.**

24. In this application, it was submitted that the delay had not been explained and the reason for the delay was not reasonable. He also relied on **Civil Application No. Nai 10 of 2015 (UR 10/2015) - Donald O. Raballa –vs- The Judicial Service Commission & Another.**

25. The Respondent lamented that the case whose judgment was delivered on 15/8/2018 is a 2007 case which has been in court for eleven (11) years during which time the Respondent who has been on a wheel – chair since 25/5/2004 (fourteen years) and remains uncompensated to date. It was noted that there is no annexed draft memorandum of Appeal for this court to gauge whether there is an Appeal with any chances of success or not and this makes this application frivolous and malicious.

26. The court was therefore urged to dismiss the application with costs to the Respondent.

Determination

27. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.

28. 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.

29. It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words "sufficient cause" and "good cause". It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

30. 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..."

31. Similarly, in **Leo Sila Mutiso vs. Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231** the Court of Appeal set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant. However, in the case of **Thuita Mwangi vs. Kenya Airways Ltd [2003] eKLR**, the Court explained that follows:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

32. 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.”

33. That was the position in Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR where the court held that:

“...On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous...”

34. I also associate myself with the decision of the Supreme Court in Civil Application No. 3 of 2016 - County Executive of Kisumu –vs- County Government of Kisumu & 7 Others at page 5 where the said Court said:-

“... 23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the NICHOLAS SALAT case to which all the parties herein have relied upon. The court delineated the following as:-

“the underlying principles that a court should consider in exercise of such discretion:

- 1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**
- 5) ...”**

35. In this case the Applicant contended that the delay in filing the appeal was due to the fact that they were unable to obtain a copy of the judgement within time. According to it, the judgement was delivered in the absence of its counsel. That this is the position is not disputed and seems to be the case because the Respondent averred that the trial court stated that the stay of execution would only start running after the applicant was notified of the particulars of the judgement. However, instead of notifying the applicant of the contents of the judgement, the respondent instead drew a draft decree which was sent to the applicant for approval. A decree is clearly not a judgement and cannot be equated thereto. Ordinarily, where a judgement is delivered in the absence of a party without notification and the party becomes aware of the same after the lapse of the time prescribed for taking action, that constitutes sufficient ground for extension or enlargement of time to take the necessary step. This is my understanding of the decision in Edward Njane Nganga & Another vs. Damaris Wanjiku Kamau & Another [2016] eKLR, where in allowing an application for leave to appeal out of time, the Court expressed itself as follows:

“The applicant has annexed to his supporting affidavit a letter dated 20th July, 2015 addressed to the Deputy Registrar of this Court requesting for a certified copy of the proceedings. Through a letter dated 22nd September, 2015 the applicant also applied for a certified copy of the order in the decision/judgment hereto. There is evidence of payment in respect of the documents requested. Counsel for the applicant informed the court that there was delay in obtaining the documents required to prepare the record of appeal and explained that the delay in obtaining those documents is not attributable to the applicant... I have considered the peculiar circumstances of this case. The judgment appealed from was delivered in the absence of the applicant/his counsel; there was no inordinate delay in bringing the application...”

36. The applicant then sought for copies of the judgement from the court which according to it was not furnished. Here I must agree with the respondent that the applicant’s conduct clearly manifested lack of diligence. Nothing would have been easier for the advocates for the applicant in the interest of their clients to simply seek to make a copy of the judgement instead of sitting pretty and waiting for the same to be furnished to them by the court or the respondent’s advocates.

37. It therefore follows that the conduct of both counsel for the applicant and the respondent was clearly inappropriate.

38. However, I do not see the reason why the applicant ought to pay for the sins of its counsel. It is therefore my view that the applicants had a sufficient reason for not appealing.

39. As to the length of the delay, the same reasoning must apply. It would seem that counsel for the parties opted to engage in unhelpful hide and seek without regard to the interest of their respective clients. In the premises, I am unable to find that the delay was inordinate.

40. I however disabuse the applicant from the notion that the time for filing an appeal starts running from the date of notification of the judgement. That is not what the law says.

41. Accordingly, I grant leave to the applicants to file the appeal out of time. Let the Memorandum of Appeal be filed and served within 10 days from the date hereof. In default the application shall stand dismissed.

42. As regards stay, the principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the **Civil Procedure Rules** which provides as follows:

No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

43. 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.

44. 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."

45. 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."

46. 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."

47. 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."

48. 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."

49. 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".

50. 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**.

51. 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**.

52. 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.

53. 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...”

54. 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.”

55. 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.”

56. In this application the applicant is rather economical with its material. Nowhere in the affidavits filed has it shown the manner in which it stands to suffer substantial loss. It is not for example contended that the Respondent’s position is so precarious that she is unlikely to refund the decretal sum once the same is paid over to her. Instead it is stated that the respondent’s means is unknown. That however does not necessarily satisfy the threshold that the respondent will be unable to refund the decretal sum once the same is paid over to her. Conversely, the Appellant does not contend that if compelled to pay the decretal sum it is likely to fold up. To the contrary, it seems to be the Appellant’s case that it is financially solid.

57. 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.”

58. 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.”

59. Having considered the instant application, it is my view that this a case where a stay ought to be granted but on conditions since it would seem that the fulcrum of the applicant’s case will be on quantum. Accordingly, the order which commends itself to me and which I hereby grant is that there will be stay of execution pending the hearing of this appeal on condition that the Appellant deposits the entire decretal sum in a joint interest earning account in the names of the advocates for the respective parties in Kenya Commercial Bank, Machakos within 30 days of this decision. Failure to adhere to the conditions for stay will automatically lead to vacation of the stay.

60. The costs of this application will be borne by the applicant.

61. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 23rd day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Mulondu for Mr Oyoo for the applicant

Miss Mbilo for the Respondent

