REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 106 OF 2019

GEORGE NJIRAINE KARANJA..................................APPLICANT

=VERSUS=

GODFREY KARIUKI NJOROGE............................RESPONDENT

RULING

1. By a Motion on Notice dated 13th August, 2019, the applicant herein seeks an extension of time to lodge and serve an appeal against the judgement and decree of **Hon. J A Agonda** (SRM) delivered on 14th December, 2018 in Mavoko CMCC No. 556 of 2016. There was also a subsequent Motion dated 17th September, 2019 by the same applicant seeking stay of execution of the said judgement pending the hearing and determination of this appeal.

2. In support of the application for extension of time to lodge the appeal out of time, the applicant averred that following the delivery of the judgement in the said case on 14th December, 2018 in favour of the Respondent, he instructed his then advocates on record, Kibungei & Company Advocates to file an appeal challenging the said judgement. However, the said firm instead of filing a memorandum of appeal on 16th January, 2019 filed a Notice of Appeal. All along the applicant believed that a proper appeal had been filed and that the record was pending typing and certification of the proceedings o the trial court. It was deposed by the applicant that only recently, through his current advocates on record, McKay Advocates, that he has come to learn that no proper appeal exists as no memorandum of appeal was ever filed.

3. It was the applicant’s case, based on the Memorandum of Appeal herein that his appeal has merit. The applicant pleaded that his advocate’s mistake ought not to be visited against him. Since he has already deposited security for costs as directed by the trial court, it was the applicant’s case that the Respondents will not be prejudiced.

4. Regarding the application for stay, the applicant deposed that following the delivery of the said judgement, he was granted a stay pending appeal on 15th March, 2019 on condition that he deposits Kshs 1,500,000.00 as security within 30 days failure to which the stay would lapse. However, due to financial constraints he was unable to raise the said sum within the specified time. As a result, he filed an application dated 7th June, 2019 and was granted a stay conditional upon his depositing the said sum within 5 working days which he did on 12th June, 2019. However, the said application was eventually dismissed. It was the applicant’s case that it would be prejudicial to him if the Respondent is allowed to execute despite him having deposited the said sum. According to him, the grant of this application would not prejudice the Respondent.

5. The two applications were opposed by the Respondent. According to him, the judgement sought to be appealed against was delivered on 14th December, 2014 in his favour in the presence of the applicant’s advocate. On 20th December, 2018 the Applicant field an application seeking stay of the said judgement pending the hearing of the appeal which application, though opposed was on 15th March, 2019, 1granted on condition that the Applicant deposits Kshs 1,500,000.00 in court within 30 days. The Applicant having defaulted to comply 100 days later, the Respondent averred that he instructed auctioneers to execute. Faced with the impending execution, the applicant on 7th June, 2019 filed another application seeking that he be allowed to deposit the sum in question and reviving the orders of stay and temporary ex parte orders of stay were granted and time expanded for complying with the said orders.

6. According to the respondent at no point during the hearing before the trial court did the Applicant produce the alleged notice of appeal. The Respondent averred that he perused the court file severally and never saw the said notice of appeal. The Respondent therefore challenged the Applicant to produce the court receipt for the said notice of appeal since the same, though purportedly filed on 16th January, 2019, the executive officer executed it as being lodged on 13th February, 2019. The respondent disputed the applicant’s contention that he was waiting for proceedings since there is no evidence that he applied for the same. The Respondent therefore contended that the Applicant’s delay in filing the present application is inordinate and inexcusable and goes against the overriding objective provisions of sections 1A and 1B of the

Civil Procedure Act. The Respondent also took issue with the failure by the Applicant to comply with the directions of this court with respect to filing of further affidavit and submissions.

7. In response to the application for stay, the Respondent averred that this is the third such application and in his view the filing of several applications is an abuse of the court process which ought to be frowned upon. According to the Respondent, the instant application having been brought over 270 days from the date of the judgement is inordinately late.

8. It was averred that the applicant herein has failed to plead or demonstrate that a substantial loss will ensue and that the intended appeal will be rendered nugatory if the orders sought herein are not granted. The Respondent disclosed that he has known assets including House No. 3C2, Everest Park Estate, Mombasa Road and that should the intended appeal succeed there would be no difficulty in him repaying the decretal sum. The Respondent further averred that the Applicant has not indicated an intention to furnish security as required by the law.

Determination

9. I have considered the application, the affidavits in support of and in opposition to both applications, the submissions filed as well as the authorities relied upon.

10. Section 79G of the ***Civil Procedure Act*** provides that:

> ***Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***
>
> ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.***

11. It is 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.

12. 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..."**

13. 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."**

14. 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."**

15. 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..."**

16. 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) …"**

17. In this case the Applicant contended that though he instructed his advocate to file the appeal, the said advocate instead filed a notice of appeal. The Respondent has however taken issue with that allegation and stated that he in fact perused the record and never saw any such notice. He challenged the Applicant to furnish the court filing receipt for the same. However, the Applicant has not furnished the same. Cn it therefore be said that the applicant has shown that he has a sufficient cause for not appealing? According to **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001**, in those circumstances the Court would be constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in section 3 of the ***Evidence Act*** Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved.

18. In **John Kiragu Mwangi vs. Ndegwa Waigwa Civil Application No. Nai. 179 of 2000**, it was held by **Shah, JA** in dismissing a similar application for extension of time that a delay (simple inaction) to file appeal within time, that is sought to be explained away by contrived grounds is not made *bona fide.* In my view favourable orders cannot be sought and obtained on the basis of an affidavit that is less than candid and is meant to mislead. In that event, the application would be refused since default ought not to be explained away by contrived grounds. Not much emphasis can be placed on a deposition, which shows that the deponent is not candid enough in his affidavit and having been evasive and economical on the truth. Therefore, an application seeking exercise of the court's discretion must be supported by an honest explanation and it is a serious matter to attempt to mislead the court by untruthful or half-baked affidavits since sufficient reason for the purposes of the exercise of discretion cannot be established on the basis of an obviously incorrect or twisted affidavit. See **Hon. Mzamil Omar Mzamil vs. Rafiq Mohamed Walimohamed Ansari Civil Appeal No. 44 of 1982, Shaban Hamisi Kuriwa & Another vs. Joe M Mwangi & 3 Others Civil Application No. Nai. 122 of 1996, Peter Gachege Njogu vs. Said Abdalla Azubedi Civil Application No. Nai. 370 of 2001, Koyi Waluke vs. Moses Masika Wetangula & 2 Others Civil Appeal (Application) No. 307 of 2009** and **John Kiragu Mwangi vs. Ndegwa Waigwa Civil Application No. Nai. 179 of 2000.**

19. In the premises I decline to admit this appeal which was clearly filed out of time. As the applicant has failed in satisfying the conditions extension or enlargement of time to file an appeal out of time or admission of this appeal out of time, the said limb of the application must fail and without an order extending time the stay cannot be granted in vacuum and must similarly collapse.

20. However, for the completeness of the record, I will nevertheless proceed to deal with the said application. 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.***

21. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay

may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is nolonger limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. According to section 1A(2) of the ***Civil Procedure Act*** "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

22. 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."**

23. 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."**

24. 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".**

25. 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."**

26. 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."**

27. 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".**

28. 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.**

29. 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.**

30. 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.

31. 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…"**

32. 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."**

33. 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."

34. 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 he is unlikely to refund the decretal sum once the same is paid over to him. In this case the Respondent has disclosed that he has property which may be liquidated to repay the decretal sum in the event that the appeal is successful. That contention has not been disputed. Accordingly, the applicant's averments do not satisfy the threshold for the grant of stay.

35. 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.''

36. 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."

37. The applicant having failed to meet the threshold for the grant of stay, the said application must similarly fail and is dismissed.

38. What then should the Court do in those circumstances? The Court of Appeal in the case of **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** held *inter alia* that:

"…the applicant cannot be allowed to invoke the "O2 principle" and at the same time abuse it at will...All provisions and rules in the relevant Acts must be "O2" compliant because they exists for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day."

39. Similarly, the same Court in **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009** expressed itself thus:

"Section 3A and 3B of the Appellate Jurisdiction Act gives the Court the freedom in the circumstances of this case to ensure that the matter is handled in accordance with the relevant provisions of the Arbitration Act because it is in doing so that justice will be done to the parties. That is what matters. The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow."

40. It would therefore be pointless sustaining this appeal whose substratum nolonger exists, the application for extension or enlargement of time to file an appeal out of time or admission of this appeal out of time having been unsuccessful since without an order extending time this appeal is rendered incompetent. Accordingly, the same stands struck out with costs to the Respondent.

41. The Respondent will also have the costs of both applications.

42. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 24th October, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munyao for Ms Thiongo for the Applicant

Respondent present in person

CA Geoffrey