KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Wayaffe v Toner Holdings Limited & another (Environment & Land Case E112 of 2022) [2023] KEELC 22485 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22485 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E112 OF 2022

JO MBOYA, J

DECEMBER 20, 2023

BETWEEN

ALEXANDRE WAYAFFE .... PLAINTIFF

AND

TONER HOLDINGS LIMITED .... 1ST DEFENDANT

CORRINE MARIE MADELEINE GENEVIEVE .... 2ND DEFENDANT

RULING

1. The First Defendant/ Applicant herein has approached the Honourable Court vide the Notice of Motion Application dated the 15th November 2023; brought pursuant to the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010; and wherein the same has sought for the following Reliefs/ Prayers: [verbatim]:

    i. Spent.

    ii. That pending the hearing and determination of this Application, there be interim stay of execution of the Judgment by Honourable Justice Oguttu Mboya, Judge; delivered on the 16th day of October 2023; in ELC Case No. E112 of 2022- Nairobi.

    iii. That pending the hearing and determination of the intended Appeal, there be a stay of execution of the Judgment by Honourable Justice Oguttu Mboya, Judge; delivered on the 16th day of October 2023; in ELC Case No. E112 of 2022- Nairobi.

    iv. That the costs of this Application be in the Cause.

2. The instant Application is premised and anchored on numerous grounds which have been enumerated at the foot thereof. Furthermore, the Application is further supported by the affidavit of one, namely, Joseph Schwartzman, sworn on even date; and in respect of which, the Deponent has annexed four

[4] documents, inter-alia, a copy of the Memorandum of Appeal, which is intended to be escalated to the Court of Appeal.

3. Suffice it to point out that upon being served with the subject Application, the Plaintiff/Respondent filed Grounds of opposition dated the 20th November 2023; and wherein same has contended, inter-alia, that the instant Application, which essentially seeks an order of stay of execution pending appeal, is Res-judicata; and thus unavailable at this juncture.

4. Be that as it may, the instant Application came up for hearing on the 28th November 2023; and whereupon the advocates for the respective Parties covenanted to canvass and dispose of the Application by way of written submissions.

5. Pursuant to and in line with the request by the advocates for the respective Parties, the Honourable Court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions by and on behalf of the respective Parties.

6. Notably, the 1st Defendant/Applicant thereafter proceeded to and filed written submissions dated (sic) the 6th December 2022 [but which essentially, should be the 6th December 2023]; whereas the Plaintiff/Respondent filed written submissions dated the 12th December 2023.

7. For coherence, the two sets of written submissions are on record.

Submissions by the Parties:

a. Applicant's Submissions:

8. The Applicant herein adopted the grounds at the foot of the Application and similarly reiterated the averments contained in the supporting affidavit. Furthermore, the Applicant thereafter proceeded to and highlighted two [2] salient issues for determination by the Honourable court.

9. Firstly, Learned counsel for the Applicant has submitted that the Applicant herein has established and demonstrated a basis to warrant the grant of the orders of stay of execution pending the hearing and determination of the intended Appeal.

10. Instructively, Learned counsel for the Applicant has submitted that upon the delivery of the Judgment by the court, the Applicant herein felt aggrieved and dissatisfied and thereafter lodged a Notice of Appeal, evidencing her desire to approach the Court of Appeal with a view to impugning the Judgment of the court under reference.

11. Additionally, Learned counsel for the Applicant has also submitted that the amount of money at the foot of the Judgment sought to be appealed against is quite colossal and substantial in nature and hence, if the money is paid out to and in favor of the Plaintiff/Respondent, then there is a likelihood that the Applicant herein would suffer Substantial loss.

12. Further and in any event, Learned counsel for the Applicant has submitted that the Plaintiff/Respondent is a foreign National, who is resident and domiciled outside the Jurisdiction of the Honourable court and thus should the appeal succeed, it would be difficult to recover the monies, if any, that shall have been paid out to and in favor of the Plaintiff/Respondent.

13. Based on the amount of money bespoken to at the foot of the Judgment, Learned counsel for the Applicant has therefore submitted that the Applicant herein has duly placed before the Honourable court sufficient evidence and/or material to vindicate the claim that substantial loss shall arise and/or accrue, if the orders sought are not granted.

14. In support of the submissions that the Applicant herein has established and demonstrated that an order of stay of execution pending appeal ought to be granted, Learned counsel for the Applicant has cited and relied on, inter-alia, the case of *Ujagar Singh v Runda Coffee Estate* (1966)EA 263; and *G.N Mwema T/a Mount View Maternity & Nursing Home v Mariam Maalim Vishar & Another* (2018)eKLR, respectively.

15. Secondly, Learned counsel for the Applicant has submitted that even though the court is obliged to consider security to be decreed towards the due performance of the decree that may ultimately arise, Learned counsel has submitted that the court needs to take cognizance of various factors including the economic situation and the hardships, [if any], that may be caused to the Applicant, if the security decreed is unreasonable and/or exorbitant.

16. Further and in addition, Learned counsel for the Applicant has contended that the nature or kind of security ordered should be such as to afford and/or facilitate the Applicant to pursue the appeal, without feeling intimidated, restricted and hindered by the quantum of money, if at all, ordered as part of security for the Due performance of the Decree that may ultimately arise.

17. On the other hand, Learned counsel for the Applicant, has implored the Honourable court to find and hold that the amount of money being alluded to by and on behalf of Plaintiff/Respondent, is so exorbitant that same would cripple the affairs and/or financial status of the Applicant company, unless an order of stay is granted.

18. Nevertheless, Learned counsel for the Applicant has proposed and/or adverted to her willingness to avail a Bankers guarantee (sic) for the entire decretal sum, as reasonable security for the Due performance of the Decree that may ultimately ensue and/ or arise.

19. Additionally, Learned counsel for the Applicant has submitted that it would be in the interests of Justice, if the court were to decree provision of a Bankers guarantee and not to insist on monetary deposit, in the manner proposed by and at the instance of the Plaintiff/Respondent.

20. In support of the submissions that a Bank guarantee is an appropriate form of security, Learned counsel for the Applicant has cited and quoted, *inter-alia*, the case of *Peter Osoro Omagwa & Another v Birthseba Mwango Maikini* (2021)eKLR, *Gitahi & Another v Warugongo* (1998)eKLR; and *Kellen Wangari Gitonga v Judith Majuma Matibu* (2022)eKLR, respectively.

21. Premised on the foregoing, Learned counsel for the Applicant has therefore implored the Honourable court to find and hold that the Application beforehand is meritorious and thus ought to be allowed.

b. Plaintiff's/Respondent's Submissions:

22. The Plaintiff/Respondent filed written submissions dated the 12th December 2023; and in respect of which same has adopted and highlighted the Grounds of opposition dated the 20th November 2023.

23. Further and in addition, the Learned counsel for the Respondent has thereafter raised, amplified and canvassed three [3] pertinent issues for determination by the Honorable court.

24. First and foremost, Learned counsel for the Applicant has submitted that following the delivery of the Judgment under reference, the Applicant herein made an informal Application for an order of stay of execution over and in respect of the subject decree.

25. Furthermore, the Respondent herein has contended that upon the making of the informal Application, the Honourable court proceeded to and indeed, granted an order of stay of execution.

26. Consequently and based on the fact that the Honorable court had granted an Order of Stay of Execution, which was granted on the 16th October 2023, Learned Counsel for the Respondent has thus contended that the instant Application is therefore barred by the Doctrine of *Res-Judicata*.

27. Arising from the foregoing, Learned counsel for the Respondent has therefore submitted that the current Application is therefore barred and/or prohibited by dint of the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

28. In support of the contention that the current Application is Res-Judicata, Learned counsel for the Respondent has ventured forward and cited, *inter-alia*, the decision in *Kennedy Mokua Ongiri v John Nyasende Mosioma & Another* (2022)eKLR and *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others* (1996)eKLR, respectively.

29. Secondly, Learned counsel for the Respondent has further submitted that insofar as this Honourable Court heard and entertained an informal Application for stay of execution, then the court is now *Functus officio*.

30. Furthermore, Learned counsel has contended that having heard and considered the informal Application, this court cannot therefore appropriate further Jurisdiction and proceed to grant an order of stay of execution pending appeal, either as sought or at all.

31. To buttress the submissions touching on and concerning the question of *Functus officio*, Learned counsel for the Respondent has cited and relied on, *inter-alia*, the holding in the case of *Moyale Liner Bus Services v Gacho Ibrahim* (2021)eKLR; and *Raila Odinga & 2 Others v IEBC & 3 Others* (2013)eKLR, respectively.

32. Arising from the foregoing, Learned counsel for the Applicant has thus implored the Honourable Court to find and hold that the court is divested of the requisite Jurisdiction to entertain and adjudicate upon the Application for stay of execution pending appeal, either as sought by the Applicant or at all.

33. Thirdly, Learned counsel for the Respondent has submitted that in the event that the court finds that same is seized of the requisite Jurisdiction to hear and entertain the subject Application, then the court should consider various factors, *inter-alia*, the fact that the Respondent holds a Judgment as against the 1st Respondent. Secondly, that the Judgment in question needs to be secured and/or protected and that the rights of the Respondent, which have since accrued, ought to be considered and taken into account prior to and before the grant of an order of stay.

34. Further and in any event, Learned counsel for the Respondent has also submitted that if the court were to grant the orders of stay sought, the Honorable court ought to decree that the entire decretal sum [Principal sum plus Interests]; and not an order for deposit of a Bank guarantee, in the manner proposed by the Respondent.

35. Besides, Learned counsel for the Respondent has submitted that it behooves the Honourable court to balance the competing rights and/or interests of the Parties; and thereafter to make appropriate and mete finding, which protects and secures the Interests of both.

36. In support of the submissions that only a deposit of the decretal sum in a Joint interest earning account [Escrow Account], would suffice, Learned Counsel for the Respondent herein, has contended that a Bank Guarantee may culminate into further proceedings, being taken by the Plaintiff/ Respondent, once the Appeal is determined.

37. Conversely, in support of the submissions that Bank guarantee is not a suitable form of security to be deposited with the court, Learned counsel for the Respondent has cited and quoted, *inter-alia*, the

case of *Mwaura Karuga T/a Limit Enterprises v Kenya Bus Services & 4 Others* (2015)eKLR, *Nyoko v Matheka* (Civil Appeal No. E061 of 2023) (2013) KEHC 23844, respectively.

38. Be that as it may, Learned counsel for the Respondent has submitted that the Applicant herein has neither established nor demonstrated the requisite ingredients envisaged vide the provisions of Order 42(6)(2) of the *Civil Procedure Rules*, 2010, to warrant being granted an Order of Stay of Execution pending the hearing and determination of the Intended Appeal.

39. Owing to the foregoing, Learned counsel for the Respondent has impressed upon the Honourable Court to find and hold that the Applicant herein is not deserving of the orders of stay of execution pending the hearing and determination of the intended appeal or at all.

40. Further and in any event, Learned counsel has also contended that in the event that the court is persuaded to grant the orders sought, then the Applicant herein ought to facilitate the deposit of the decretal sum in an Escrow/ Joint Interest Earning Account, in the names of the respective advocates.

41. Notwithstanding the foregoing, Learned counsel for the Respondent has submitted that the entire Application is devoid and bereft of merits and thus same ought not to be granted.

42. Nevertheless, Learned counsel has contended that in unlikely event, that the court is persuaded to grant the orders sought, counsel has invited the Honourable court to order and direct the Applicant herein to deposit the sum of Kes.31, 805, 437.60/= only, which is claimed to constitute the Decretal sum, inclusive of interests, in an Escrow Account in the names of the Advocates for the respective Parties.

Issues for Determination:

43. Having reviewed and analyzed the Application under reference together with the supporting affidavit thereto; and the Response filed by the Respondent, and upon taking into account the written submissions filed by the respective Parties, the following issues do emerge and are thus worthy of determination;

    i. Whether the Applicant herein has established and demonstrated the existence of sufficient cause, or otherwise.

    ii. Whether the Applicant herein shall suffer Substantial Loss or otherwise, unless the orders sought are granted.

    iii. If the court is disposed to grant the orders of stay, what security would suffice for the Due Performance of the Decree, if any.

Analysis and Determination:

1. Whether the Applicant herein has established and Demonstrated the Existence of Sufficient Cause, or Otherwise.

44. Before venturing to deal with the issue hereinbefore mentioned, it is imperative to underscore that the dispute beforehand arose out of a Letter of offer which was issued by and on behalf of the Applicant herein and in respect of which the Applicant offered to sell to and in favor of the Plaintiff/Respondent a designated Apartment Number 2, Level 4; Block A and DSQ Number 11, Basement; situate on LR No. 209/12981 [hereinafter referred to as the suit property].

45. Suffice it to point out that upon the issuance of the Letter of offer, the Plaintiff/Respondent herein duly accepted the terms at the foot of the Letter of offer and thereafter proceeded to and executed same.

46. Other than the foregoing, the Respondent herein also proceeded to and paid the deposit/the stakeholder sum, to and in favor of the Applicant herein, who duly admitted and acknowledged receipt thereof.

47. Subsequently, the Plaintiff/Respondent also ventured forward and paid various moneys to and in favor of the Applicant and at the point in time when the subject dispute arose, the 1ST Defendant/ Applicant conceded that the Plaintiff herein had paid a total of Kes.21, 692, 000.00/= only, towards and on account of the purchase price.

48. Be that as it may, the suit apartment was ultimately transferred to and registered in the name of the 2nd Defendant; and thus provoking the filing of the instant suit by the Plaintiff/Respondent, who contended that the First Defendant/ Applicant had breached the terms of the Sale Agreement.

49. Moreover, the instant suit was heard and disposed of vide Judgment rendered on the 16th October 2023; and wherein the Honourable court found and held that the Respondent had duly established his case and thereafter proceeded to and ordered, inter-alia, refund of the sum of Kes.18, 593, 280/= only, plus Interests at 14% per annum, w.e.f 20th June 2019.

50. Notably, upon the rendition and/or delivery of the Judgment under reference, the Applicant herein (sic) felt aggrieved and/or dissatisfied and thereafter proceeded to and lodged a Notice of Appeal dated the 27th of October 2023.

51. Having filed and/or lodged the requisite Notice of Appeal, [details in terms of the preceding paragraph], it is imperative to state and observe that the Applicant herein has therefore satisfied the pertinent ground envisaged by dint of Order 42(6)(1) of the *Civil Procedure Rules*, 2010.

52. Furthermore, it is also not lost on this Honourable court that a Notice of Appeal filed by and on behalf of an Applicant, the current Applicant not excepted, is deemed to constitute an Appeal for all intents and purposes. [See the provisions of Order 42(6)(4) of the *Civil Procedure Rules* 2010].

53. Consequently and in the premises, it is therefore evident and apparent that the Applicant herein has since taken the requisite steps, envisaged under the law, towards and for purposes of appealing against the Judgment and decree of this Honourable court.

54. In view of the foregoing, it is therefore my finding and holding that the Applicant has duly Established and demonstrated the Existence of a Sufficient Cause, which constitutes a significant ingredient towards the consideration of whether or not to grant an order of stay of execution pending the hearing and determination of an Appeal, or Intended Appeal.

55. Further and in any event, it is important to underscore that sufficient cause denotes the existence of a good cause, which is being propagated in good faith [bona-fides], with a view to attracting a decision on the questions/issues in dispute as between the Parties/Disputants.

56. Nevertheless and without belaboring the point, what constitutes sufficient cause was duly considered and elaborated upon in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, where the court held thus;

> " It's important for me to mention that in the above case, the court defined what constitutes sufficient cause and in this respect the following paragraph is highly relevant to the issues before me:-
>
> > " Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any

> conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.
>
> Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions"

The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean.? The Court of Appeal of Tanzania in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & Others*[9] discussing what constitutes sufficient cause had this to say:-

> " It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)

In *Daphene Parry v Murray Alexander Carson*[10] the court had the following to say:-

> 'Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles. If the appellant has 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, ..."(Emphasis added)

57. Consequently and in view of the foregoing, my answer to issue number one [1], is to the effect that the existence of the Notice of Appeal and coupled with the fact that the Appellant has exhibited a draft Memorandum of appeal raising prima facie arguable issues, constitutes Sufficient cause.

2. Whether the Applicant herein shall suffer Substantial Loss or Otherwise, unless the Orders Sought are Granted.

58. Suffice it to point out, that once an Applicant seeking an order of stay of execution, the current Applicant not excepted, has demonstrated sufficient cause; then same is called upon to venture forward and deal with the critical questions/issue of Substantial loss.

59. Pertinently, proof of the existence of a sufficient cause is a preliminary question, which (sic) operates to open the door of Justice to allow the Applicant to pursue the grant of an order of stay of Stay of Execution pending the hearing and determination of an Appeal, or intended Appeal.

60. Nevertheless and for good measure, the cornerstone to granting an order of stay of Execution pending an Appeal relates to and depends on proof and demonstration that substantial loss, [in its various forms and/or perspectives], is likely to arise and/or ensue, unless the orders sought are granted.

61. To this end, it suffices to take cognizance of the dictum in the case of *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* (1986)eKLR, where the Court of Appeal stated thus;

> "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.

62. Furthermore, the essence of substantial loss, [whose import is to avert a situation where the appeal or intended appeal is rendered academic], was similarly highlighted and elaborated upon by the Court of Appeal in the case of *Hashmukhlal Virchand Shah & 2 others v Investment & Mortgages Bank Limited* [2014] eKLR, where the Court held as hereunder;

> "As for the second requirement, we have to ensure that the word "nugatory" has been given its full meaning, namely that the appeal will not be rendered worthless, futile; invalid or even trifling (*Reliance Bank Ltd v Nor Lake Investment Ltd* [2002] IEA 227. Secondly we have to consider whether what has been sought to be stayed is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved."

63. Having taken cognizance of the importance of substantial loss, in an application for stay of execution, it is now worthy/ appropriate to revert back and consider whether the Applicant herein has established and/or demonstrated substantial loss, to warrant the grant of the orders of stay of Execution pending the hearing and determination of the Intended Appeal.

64. First and foremost, the Applicant herein has contended that the amount of money that was decreed at the foot of the Judgment herein is colossal and/or substantial; and hence the quantum of money herein by itself, suffices to demonstrate the likelihood of Substantial Loss.

65. Additionally, the Applicant has contended that if the orders sought are not granted and the monies decreed paid out, the Applicant company is likely to suffer undue prejudice and grave injustice, inter-alia, being forced to ground her operations.

66. Thirdly, the Applicant has also contended that the Respondent herein has not exhibited and/or demonstrated his capacity to refund and/or repay the decretal sum, if the intended appeal is successful.

67. Suffice it to point out that upon being served with the instant Application, the Plaintiff/Respondent herein chose to respond thereto by way of Grounds of opposition dated the 20th November 2023. Consequently and in this regard, it is not lost on the Honourable Court that the Plaintiff/Respondent has therefore neither challenged nor controverted the factual depositions alluded to at the foot of the Supporting affidavit.

68. To the extent that the contents of the Supporting affidavit have neither been challenged and/or uncontroverted, the Honourable Court is left with no alternative, but to accede to the averments that the monies at the foot of the Judgment/decree herein are likely to cripple and/or paralyze the operations of the Applicant, unless the orders ought are granted.

69. To vindicate the fact that where a Respondent choses to file and rely on Grounds of position, the factual deposition contained in an affidavit stand uncontroverted, it suffices to adopt, restate and reiterate the

succinct position espoused by the Court of Appeal in the case of *Daniel Kibet Mutai & 9 Others v The Attorney General* (2019)eKLR, where the court held as hereunder;

> '[34] The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted.
>
> Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants' claims?

70. Similarly, it is also worthy to cite and highlight the holding in the case of *Peter O. Nyakundi & 68 others v Principal Secreary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR, where the court captured the position in the following terms

> " As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see *Mereka & Co. Advocates v Unesco Co. Ltd* [2015] eKLR, *Prof Olaka Onyango & 10 Others v Hon. Attorney General* Constitution Petition No. 8 Of 2014 And *Eliud Nyauma Omwoyo & 2 Others v Kenyatta University*). The Respondents have failed to refute specifically the allegations in the Petitioner's sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence."

71. Arising from the foregoing, there is no gainsaying that the evidential position alluded to and highlighted in the supporting affidavit; and which have not been controverted, are hence believable.

72. Other than the foregoing, it is also worthy to point out that the amount of money that was decreed by the court at the foot of the Judgment rendered on the 16th October 2023, is similarly substantial, nay, colossal; and in the absence of proof of ability/ capacity by the Plaintiff/ Respondent to refund same, there is prima facie evidence that Substantial Loss, may arise.

73. In a nutshell, it is my finding and holding that the Applicant herein has been able to demonstrate, through the contents of the supporting affidavit [which has not been controverted], that same [Applicant] shall indeed be exposed to suffer substantial loss, if the orders of stay sought are not granted.

3. If the Court is Disposed to Grant the Orders of Stay, what Security would Suffice for the Due Performance of the Decree, if any.

74. Having found and held that the Applicant herein has established and demonstrated the likelihood of substantial loss occurring, unless an order of stay of execution is granted, there is yet one more hurdle to be surmounted by the Applicant herein.

75. Instructively, where a court of law is inclined to grant and/or decree an order of stay of execution pending the hearing and determination of an appeal, like in the instant case, the Honourable court is obliged to consider/ calibrate upon the security to be provided by the Applicant, for the due performance of the decree that may ultimately arise.

76. Furthermore, it is imperative to state and point out that whilst considering the nature, type, scope and extent of the security to be provided by an Applicant, before partaking of an order of stay of stay of Execution pending Appeal, the court is called upon to take into account several factors including, inter-alia, the nature of claim beforehand.

77. Other than the foregoing, it is also worthy to recall that in determining the nature and quantum of security, the court must undertake a delicate balance of the competing interests/ Rights of the respective Parties; and thereafter, the court must endeavor to arrive at a conclusion that safeguards both the Interests of the Judgment Creditor, whilst not compromising the undoubted rights of the Judgment Debtor [Applicant herein], to pursue the appeal. [See the holding in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR]

78. Notwithstanding the foregoing, it must never be lost on the Honourable court that by the time a Judgment debtor is preferring an appeal, [like in the instant case], there is already a Judgment of sorts, in favor of the Judgment creditor, which Judgment ought to be secured. For coherence, such a win, underpinned by the Judgment, ought not to be treated lightly.

79. Arising from the foregoing, it is therefore my position that the security that the court thus ought to consider and thereafter decree must be such security that would suffice to meet and satisfy the Judgment being appealed against, in the event, that the appeal being preferred fails.

80. Additionally, it is worth noting that the security should be such that upon the determination of the intended appeal, the Decree holder [read the Plaintiff/Respondent herein], shall not be called upon to commence further proceedings with a view to procuring the satisfaction of the decree in question.

81. In a nutshell, I come to the conclusion that the appropriate security in the circumstances of this matter shall entail the deposit of the decretal sum, namely, the Principal sum plus Interests in a Joint interests earning/ Escrow account, in the names of the advocates for the respective Parties and not otherwise.

82. To underscore the foregoing position and more particularly, the aspect pertaining to the nature of security to be offered/provided, it suffices to adopt, restate and reiterate the holding of the Court in the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, where the court stated and held thus;

> "Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal. In *Arun C Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* Justice Gikonyo the Court stated that:
>
> > "The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.......... Civil process is quite

different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

83. Further and in any event, it suffices to point out that the nature and type of security to be decreed upon by the court, squarely falls within the discretion of the court; and hence, it is imperative to underscore that the court thus has a final say on the type, nature and scope of security to be availed and/or provided. [See Order 42(6)(2) of the *Civil Procedure Rules* 2010].

84. Pertinently, the fact that the security to be provided is at the discretion of the court and not otherwise, was also highlighted and elaborated upon by the Court in the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, where the court stated and held as hereunder;

> " Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."

85. Finally, having come to the conclusion that the nature and type of security to be availed is in the form of deposit of the decretal sum [Principal sum plus interests], it is now appropriate to venture forward and compute what then constitutes the decretal sum, which is to be deposited as security.

86. To this end, it is worthy to recall that the Honourable court entered Judgment in favor of the Plaintiff/ Respondent in the sum of Kes.18, 593, 280/= only, plus Interest at 14% per annum, w.e.f 20th June 2019.

87. Consequently and in this regard, what constitutes the Decretal sum is worked out as hereunder;

Kes.18, 593, 280 x 14/100 x 41/2 years = Kes. 11,713,766.40/= only

88. Arising from the foregoing computation, the decretal sum thus works out thus;

Kes.18, 593, 280 + Kes. 11,713,766.4 = Kes. 30,307,046.40/= only

89. To surmise, the decretal sum which the Applicant herein is called upon to deposit and/or provide as security for the due performance of the decree that may ultimately arise and/or ensue, is in the sum of Kes. 30,307,046.40/= only.

Conclusion and Disposition:

90. Before venturing forward to proclaim the final and dispositive Orders, it is appropriate to mention and address two [2] short issues, which were raised by the Learned Counsel for the Plaintiff/ Respondent, but, which in the humble opinion of the Court are ex-facie non-issues.

91. Firstly, Learned Counsel for the Respondent herein had contended that because the Applicant made an informal Application for stay of Execution upon the delivery of Judgment and which Application was granted, then the current Application is [sic] Res- Judicata and barred by the Provisions of Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

92. Nevertheless, it is appropriate to point out and to underscore that the informal application that was made by and on behalf of the Applicant is provided for by dint of Order 42 Rule 6(5) of the *Civil Procedure Rules*, 2010; and in any event, same does not deprive the Court of the requisite Jurisdiction to entertain and adjudicate upon a formal application for stay of Execution as provided for under the Law.

93. Further and in any event, it is common ground that no previous Application for Stay of Execution pending the hearing and determination of Appeal, has hitherto been filed and adjudicated by the Honourable Court to warrant the invocation and application of the Doctrine of Res-Judicata, either as vouched by the Learned Counsel for the Respondent or at all.

94. Consequently and in the premises, the contention by the Learned Counsel for the Respondent that the current Application for stay of Execution pending the Hearing of the Intended Appeal is *Res-Judicata*, is not only misconceived, but founded on misconception of the import and tenor of the said Doctrine. [See the Supreme Court of Kenya decision in the case of *John Florence Maritime Service Limited v Minister for Transport, Infrastructure and Public Works and Others* [2021]eKLR paragraphs 58 and 59, respectively.]

95. Secondly, the Learned Counsel for the Respondent had also contended that the Honourable Court is Functus Officio and thus devoid of Jurisdiction to entertain and adjudicate upon the current Application, merely because the Court entertained and granted an informal application for stay of Execution at the time of delivery of the Judgment.

96. To my mind, the position taken and adverted to by Learned Counsel for the Respondent is similarly, mistaken and misconceived. Quite clearly, the Learned Counsel does not seem to have correctly internalized and appraised himself of the true import of Doctrine of Functus officio.

97. Nevertheless and without belaboring the point, the Doctrine was well amplified by the Court of Appeal in the case of *Telkom [K] Limited v John Ochanda [Suing on his own behalf and on behalf of 996, former Employees of Telkom Kenya Limited]* [2024] eKLR; and by the Supreme Court of Kenya in *Raila Amollo Odinga and Others v I.E.B.C and 3 Others*[2013]eKLR, respectively]

98. In short, the Court finds and holds that the twin Doctrine(s) of *Res-Judicata* and *Functus officio*, adverted to by Learned Counsel for the Respondent, are irrelevant and not applicable, taking into account the obtaining circumstances in respect of the instant matter.

Final Orders:

99. From the foregoing analysis, there is no gainsaying that the Applicant herein has been able to demonstrate that same shall be disposed to suffer substantial loss, unless the orders of stay of execution are granted.

100. Consequently and in the premises, the Application dated the 15th November 2023; is meritorious and thus same be and is hereby allowed, albeit, on terms as hereunder;

    i. There be and is hereby granted an order of stay of execution of the Judgment and decree of the court issued on the 16th October 2023, pending the hearing and determination of the intended appeal to the Court of Appeal.

    ii. However, the Applicant herein shall provide security for the Due performance of the Decree by way of Depositing the sum of Kes. 30,307,046.40/= only, in an Escrow account in the names of the advocates for the respective Parties in a reputable Bank and/or Financial Institution to be agreed upon by the advocates.

iii. In the event of default by the advocates to agree on a Bank and/or Financial institution wherein the Escrow account shall be opened and/or operated, either Party shall be at liberty to apply.

iv. For coherence, the deposit in the Escrow account, in terms of clause (ii) hereof shall be undertaken within a duration of sixty (60) days from the date hereof [subject however, to the provisions of Order 50 of the *Civil Procedure Rules*, 2010].

v. That in default to comply with the terms articulated in clause (ii) and (iv) hereof, within the set timeline, the order of stay shall automatically lapse and the Decree holder, shall be at liberty to proceed with Execution.

vi. Nevertheless, Costs of the Application shall abide the outcome of the intended Appeal.

101. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2023.

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court Assistant.

Mr. Hans Oichoe for the Plaintiff/ Respondent.

Mr. Paul Maina for the 1st Defendant/ Respondent.

No appearance for the 2nd Defendant/ Respondent.