



**Jimmy & 2 others v Wakulwa (Civil Appeal E088 of 2023)  
[2024] KEHC 1105 (KLR) (5 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1105 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E088 OF 2023  
MW MUIGAI, J  
FEBRUARY 5, 2024**

**BETWEEN**

**REAGAN WAITA JIMMY ..... 1<sup>ST</sup> APPLICANT**

**DANIEL OKOTH OKELO ..... 2<sup>ND</sup> APPLICANT**

**JUBILEE INSURANCE COMPANY ..... 3<sup>RD</sup> APPLICANT**

**AND**

**SILAS SYLVESTER WAKULWA ..... RESPONDENT**

*(Being an Appeal from the judgment and decree of the Chief Magistrate  
at Kangundo by Honorable Martha Opanga Delivered on 4th April, 2023)*

**RULING**

**Background**

1. By a Notice of Motion under Certificate of Urgency dated and filed in Court on 21<sup>ST</sup> August, 2023 brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.
2. The Applicants seeks the following orders that:
  - a. Spent
  - b. Spent
  - c. This Honorable Court be pleased to grant to the Applicants an interim stay of execution of the judgment granted on the 5<sup>th</sup> April, 2023 and consequent decree issued on 19<sup>th</sup> June, 2023 in terms of warrants of attachment on 17<sup>th</sup> July, 2023 pending inter parties hearing and determination of the Applicants prospective appeal
  - d. This Honorable Court be pleased to give any such other and further orders as it may deem fit.



- e. The costs of this Application be in the cause.
3. The grounds upon which the application is based are in the body of the said application.

### **Supporting Affidavit**

4. The application was supported by supporting affidavit dared and filed in court on 21<sup>st</sup> August,2023 sworn by Beatrice Muriithi, the legal officer at the Applicant's insurers wherein she deposed inter alia that on 24<sup>th</sup> July,2023 the Defendants/Applicants were served with Warrants of Attachment the Defendants/Applicants for alleged attachment of goods in execution of the judgment and decree for the sum of Kshs. 5,684,293.10/-. (annexed and marked copy of the Warrants of Attachment dated 17<sup>th</sup> July,2023).
5. Deposing that on 18<sup>th</sup> July,2023 Regent Auctioneers visited their Business Premises to proclaim goods and thereafter execute the Applicants goods.
6. Further it is deposed the Applicants' insurer Messrs. Jubilee Allianz General Insurance Co. (K) Limited who are the instructing client herein are willing and ready to pay deposit of security for the Appeal in the amount that the Honorable Court would deem reasonable.
7. She deposed that if the orders for stay of execution are not granted and the execution process commences, the Appeal will be rendered nugatory.
8. Lamenting that substantial loss may result to the Applicants unless the order for stay of execution is made.
9. It is deposed that the Appellants' appeal raises arguable points of law and fact and an order of stay of execution ought to issue pending the hearing and determination of the appeal.

### **Replying Affidavit**

10. This application was opposed vide a replying affidavit dated 29<sup>th</sup> August,2023 and filed in court on 15<sup>th</sup> September,2023 sworn by Silas Sylvester Wakulwa, the Respondent herein, wherein he deposed inter alia that it is indeed not true that it is indeed not true that third Appellant/Applicant's herein Jubilee Allianz General Insurance Company Limited are just but Insures and will only be ultimately called upon to settle the Judgment but rather Jubilee Allianz General Insurance company Limited is and was a party to these proceeds and it must not be forgotten that it is the third Appellant/Applicant herein whom Judgment was entered against by the trial court.
11. Deposing that it is indeed true that the applicants herein filed an appeal against the judgment and decree of lower court delivered on the 4<sup>th</sup> April,2023 and were subsequently granted 30 days stay of execution which lapsed on the 4<sup>th</sup> May,2023. Further that the Applicants thereafter filed an application dated 24<sup>th</sup> July,2023 for stay of execution before the lower court and were granted interim orders but their application was dismissed on the 14<sup>th</sup> August,2023. (annexed and marked copy of the application and order dismissing the application).
12. He deposed that he is advised by his advocate on record that this honorable court lacks jurisdiction to handle this application since it is res judicata for raising similar issues, between the same parties which were heard and determined on their merits by a court of competent jurisdiction vide the Applicants notice of motion Application dated 24<sup>th</sup> July,2023.
13. Lamenting that the Applicants have partially satisfied the decretal sum by paying the Respondent Kshs. 2,000,000/= . Further that the Applicants have failed to establish the substantial loss that will be



occasioned to them if the orders sought are not granted having already partially satisfied the decretal sum.

14. He deposed that he stands to suffer loss over and since the applicants are hell bent on denying him the fruits of his judgment to his detriment and in total disregard of his interest and or rights as a decree holder.
15. Deponing that the appeal does not raise any arguable points of law, the parties having entered into a partial consent before the trial court. further that if this Honorable Court is inclined to grant the orders sought, he prayed that the balance of the decretal sum and the coats be deposited in a joint interest earning account in the names of the advocate for the Applicants and the Respondent herein within 30 days and in default of which execution to issue.

### **Supplementary Affidavit**

16. By a Supplementary Affidavit dated 28<sup>th</sup> September,2023 and filed in court on 2<sup>nd</sup> October,2023 sworn by Beatrice Muriithi, the legal-claims officer, deposed that the replying affidavit by the respondent in this matter introduces extraneous issues and sideshows which do not form part of the legal/material issues of the Applicants' Notice of Motion application dated 21<sup>st</sup> August,2023.
17. He deposed further that the Respondent has failed to specifically and/or sufficiently plead res judicata premised on section 7 of *Civil Procedure Act*. That the Applicants' Notice of Motion dated 24<sup>th</sup> July,2023 was dismissed in lower court and the Applicants filed this present application properly before the High Court which has inherent and appellate jurisdiction to hear and determine it accordingly.
18. He deposed that the Kshs. 2,000,000/= was paid as a condition for stay as agreed vide a consent dated 18<sup>th</sup> August,2023 but the Respondent refused to sign the consent after the said amount had been remitted to his account. (annexed and marked copy of the consent and email forwarding the consent to the Respondent to sign the consent respectively).
19. it was deponed that the Respondent has already admitted having received Kshs. 2,000,000/= the same be held as security for stay pending the hearing and determination of the appeal. (annexed and marked copy of Remittance Advice confirming payment of Kshs. 2,000,000/=).

### **Preliminary Objection on the point of law**

20. The Respondent Vide a Preliminary Objection dated 18<sup>th</sup> October,2023 and filed in court on 19<sup>th</sup> October,2023 against the entire Application dated 21<sup>st</sup> August,2023 on the grounds that:
  1. The entire Application as brought out and filed offends the provisions of Section 7 of the *Civil Procedure Act*.
  2. The Application dated 21<sup>st</sup> August,2023 is res judicata for raising the single issue of stay of execution, which had already been raised by the applicants' in the lower court vide their application dated 24<sup>th</sup> July,2023 at Kangundo law courts in Civil Case Number E20 of 2021.
  3. The parties in this application are the same as those before the lower court in the applicants' application dated 24<sup>th</sup> July,2023.
  4. The Application dated 24<sup>th</sup> July,2023 was dismissed by the lower court on the 14<sup>th</sup> August,2023 which is a court of competent jurisdiction.



5. The actions of the applicant filling the present application before this honorable court, at the very least is a disguised attempt by the Applicants to appeal against the lower court's ruling and order without the appropriate legal channels.
  6. This honorable court therefore lacks jurisdiction to hear and determine the Application dated 21<sup>st</sup> August,2023 for being res judicata.
  7. To proceed to hear and determine this Application would be tantamount to judicial craft and innovation rendering the final decision of this honorable court null and void.
  8. In view of the what is stated above, the Application dated 21<sup>st</sup> August,2023 is an abuse of the court process, bad in law and incapable of being entertained by this honorable court at this point in time.
21. The Respondent prayed that the entire application dated 21<sup>st</sup> August, 2023 be struck out with costs for want of jurisdiction.
  22. The Applicants filed their written submissions on 3<sup>rd</sup> November, 2023 opposing the Applicant's preliminary objection and submitted that the Preliminary Objection only targets one prayer that the Applicants' application dated 21<sup>st</sup> August,2023 be struck out with costs for want of jurisdiction. Contending that the prayer is grounded on the Applicants' Notice of Motion application dated 24<sup>th</sup> July,2023 filed in the lower court, this is a factual issue, to be established by evidence from both parties. Averring that the court is unable to dispose of the question without first evaluating evidence from the parties hence those grounds raises no pure point of law on their own. To buttress this point reliance was placed on the case Oraro v Maja [2005] as cited in the case of Margaret Njeri Gitau v Julius Mburu Gitau & 2Others [2022] eKLR.
  23. It was submitted that the issue of res judicata will require probing of evidence as it already evident from the submissions filed by the Applicants, they are incapable of being handled as preliminary objections because of the limited scope of jurisdiction on preliminary objection. To cement this averment reliance was placed on the case George Kamau Kimani & 4 Others v County Government of Trans-Nzoia & Another [2014] eKLR.
  24. While relying on Order 42 Rule 6 (1), it was submitted that this provision of the law is clear that the High Court has jurisdiction to entertain an application for stay whether or not the same has already been heard by subordinate Court and dismissed. To substantiate this position reliance was made to the case of Patrick Kalva Kulamba & Another v Philip Kamosu and Roda Ndanu Philip (suing as the Legal Representative of the Estate of Jacline Ndinda Philip (deceased) [2016].
  25. It was prayed that this Honorable court find that the preliminary Objection dated 18<sup>th</sup> October,2023 lacks merit and should be dismissed with costs.
  26. The Application Dated 21<sup>st</sup> August,2023 was canvassed by written submissions.

## **Submissions**

### **Applicants' submissions**

27. The Applicants in their submissions dated 28<sup>th</sup> September,2023 and filed in court on 2<sup>nd</sup> October,2023, wherein counsel for the Applicants raised the following issues for determination:
  - a. Is the appeal arguable and has it been made without unreasonable delay?
  - b. Will the Applicants suffer substantial loss if the stay is not granted?



- c. Should a deposit of the security be made?
28. On an arguable and unreasonable delay, counsel submitted that the judgment was delivered on 4<sup>TH</sup> April,2023 and the Applicants herein filed a Memorandum of Appeal on 26<sup>th</sup> April,2023 and further requested for certified copies of proceedings and judgment via a letter dated 20<sup>th</sup> April,2023.
29. On substantial loss, reliance was placed on the cases of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eklr as quoted in the case of Nicholas Stephen Okaka & Another v Alfred Waga Wesonga [2022] eklr, Richard Muthusi v Patrick Gituma Ngomo & Another [2017] eklr and the court of appeal in the case of Nairobi Civil Application No. 238 of 2005; National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another (UR) quoted with approval in Stanley Karanja Wainaina & Another v Ridon Anyangu Mutubwa [2016] eklr
30. It was submitted that the Applicants have already filed their record of appeal and the appeal has been admitted. Contending that if orders are not granted they will suffer substantial loss.
31. As to the deposit of security, it was contended that this issue invokes the discretion of the court which ought to be exercised judiciously and in accordance with the law. Reliance was placed on the cases of Nairobi Civil Application No. 238 of 2005; National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another (UR) quoted with approval in Stanley Karanja Wainaina & Another v Ridon Anyangu Mutubwa [2016] eklr, and submitted that the applicants having been paid Kshs. 2,000,000/= to the Respondent should be a sufficient deposit security for stay pending Appeal.
32. It was submitted that the Respondent is unable to pay back any judgment amount that may be paid back to him. Contending that should the court be inclined to order any deposit or security to be paid, being the balance of the decretal sum (Kshs. 3,254,700.67/=), they submitted that they are willing and ready to offer a bank guarantee for the said amount until the determination of the Appeal.

### **Respondent's Submissions**

33. The Respondent in his submissions 18<sup>th</sup> October,2023, wherein counsel for the Respondent raised the following issues for determination:
- a. Whether the application dated 21<sup>st</sup> August,2023 is res judicata?
- b. Whether the Applicants have satisfied the requisite conditions to warrant the grant of the orders sought?
- c. Who is entitled to costs.
34. On whether the application dated 21<sup>st</sup> August, 2023 is res judicata, counsel made his reliance on Section 107, 108 and 109 of the *Evidence Act* and submitted that the Applicants bear the burden of proof on a balance of probability to establish the requisite and necessary grounds to warrant the exercise of this honorable court's discretion in their favour by granting the orders sought.
35. Similarly, reliance was made on Section 7 of the *Civil Procedure Act* and submitted that the orders sought in the Appellants' application dated 21<sup>st</sup> August,2023 are similar to those sought in its Application dated 24<sup>th</sup> July,2023 before the lower court, the application are with respect to the same parties over the sole issue of stay of execution of the judgment and decree delivered on 4<sup>th</sup> April,2023. Contending that the said application was dismissed by the lower court which is a court of competent jurisdiction on the 14<sup>th</sup> August,2023. While relying on the case of Kennedy Mokua Ongiri Vs John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eklr, counsel submitted that the Applicants acknowledged in their Supplementary Affidavit they filed an application for stay



of execution at the chief Magistrates court, Kangundo law courts dated 24<sup>th</sup> July,2023 and that the said Application was dismissed by the lower court. averring that they have acknowledged that their applications dated 24<sup>th</sup> July,2023 and 21<sup>st</sup> August,2023 all seek stay of execution of the judgment and decree of the Chief Magistrates Court at Kangundo delivered on the 4<sup>th</sup> April,2023 in Civil Suit E20 of 2021 between the same parties.

36. It was argued that by virtue of the Applicants' own admissions it is clear that the Respondent has established all the grounds under Section 7 of the Civil Procedure Act as such this Honorable court lacks Jurisdiction to handle this Application being Res judicata.
37. On whether the Applicants have satisfied the requisite conditions to warrant the grant of the orders sought, Counsel relied on Order 42 Rule 6 of the Civil Procedure Rules, further, he quoted the case of Centre for Mathematics, Science and Technology Education in Africa (CEMASTEA) Vs Apex Security Services [2018] eKLR, and submitted that the Applicant failed to establish all grounds necessary to warrant the grant of the orders sought.
38. It was the position of the Respondent through his counsel that it is not disputed that the applicants approached this Honorable court after over four months from the date the judgment sought to be stayed was delivered and that the applicants have not explained the reason for inordinate delay of over four months.
39. Regarding who is entitled to costs, counsel relied on Section 27 of the Civil Procedure Act and submitted that the Respondent has established all grounds necessary to warrant the denial of the orders sought. Contending if this Court is inclined to grant the orders sought then the balance of the decretal sum should be deposited in a joint interest earning account in the names of the Advocates for the Appellants and Respondent.

#### **Determination/analysis**

40. I have considered the Application, the supporting affidavit, the Replying Affidavit, the Supplementary Affidavit, the Preliminary Objection and the Submissions filed as well as the authorities relied upon by counsels for their respective clients.
41. Before considering Application herein, I am enjoined to first dispense with the Preliminary Objection raised by the Respondent. The question to be asked is whether the Preliminary Objection is Sustainable.
42. The case of Mukisa Biscuits Manufacturing Ltd v West End Distributors [1969] EA 696 is notorious on the issue of what constitutes a preliminary objection where their Lordships observed thus:

“---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”. (Emphasis added)

In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but



unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop". (Emphasis added)

43. In the Preliminary Objection herein, is brought on the grounds inter alia that the entire Application herein is res judicata for raising the single issue of stay of execution which had already been raised by the Applicants in the lower court vide Application dated 24<sup>th</sup> July,2023 at Kangundo Law Courts in Civil Case Number E20 of 2021 which Application was dismissed for non-attendance and non- prosecution by the Trial Court on the 14<sup>th</sup> August,2023 which is a court of competent jurisdiction. Hence, according to the Respondent herein this Honorable court lacks jurisdiction to hear and determine the Application dated 21<sup>st</sup> August,2023 for being res judicata.
44. Indeed, the locus classicus case on the question of jurisdiction is the celebrated case of Owners of the Motor Vessel "Lillian S" v Caltex Kenya Limited. [1989] KLR 1 where the Court held:
- "Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." (Emphasis added)
45. The *Civil Procedure Act* at Section 7 as follows:
- "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."
46. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of Henderson v Henderson [1843-60] All ER 378, observed thus:
- "...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."
47. From what is available on the court record I am unable to find any record or document inferring that there was a similar application such as the one before this court that had been heard and/or dismissed. The Respondent herein has not produced any proceedings to help the court navigate on the issue of the Preliminary Objection herein and consider the application on its merits on whether the matter at hand is res judicata. An appeal is not res judicata.



48. For these reasons, I find that the Application herein is not res judicata. Whether the Application would render the final decision of this honorable court null and void will be the subject of the main hearing and determination of the said Appeal.

### **The Application for stay of execution Dated 21st August,2023**

49. Having considered the Preliminary Objection, the attention of this court is on the Application dated 21<sup>st</sup> August,2023.

50. The issue that commends itself for determination is whether the applicant has demonstrated that the orders for stay of execution pending appeal are merited.

51. The guiding principles for grant of execution pending appeal are well established. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which is to the effect that:

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

- (a) 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.”  
(Emphasis added)

52. Further to the forgoing, court in determining on whether to grant a stay or not is enjoined to have regard to the sufficient cause. The overriding objective espoused under Section 1A and 1B of the Civil Procedure Rules no longer limit the court. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under Civil Procedure Act or in the interpretation of any of its Provisions.

53. 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 objectives 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.” (Emphasis added)

54. In the case Stephen Boro Gittha v Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA on 20/11/09 held inter alia that:

“The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.” (Emphasis added)

55. It therefore follows that all the Pre-Overriding Objective decisions must now be looked at in the light of the said provisions established past 2010. 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. The Court shall enforce the overriding objective in Section 1A as read with section 1B of the Civil Procedure Act likely effect of granting the stay of execution or the proceedings in question. The Court shall 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. The Court takes into account the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties



before the Court on equal footing and the scales of justice lie to secure that any transitional motions before rendering nugatory and not meeting the ultimate end of justice. In exercising its discretion, shall opt for the lower rather than the higher risk of injustice. See *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589.

56. The Applicant applying for stay of execution of Decree or any consequential orders thereto pending Appeal should demonstrate and/or satisfy the conditions set out under Order 42 Rule 6(2) of the Civil Procedure Rules namely:
- a. that substantial loss may result to the applicant unless the order is made;
  - b. that the application has been made without unreasonable delay; and
  - c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (Emphasis added)

### **Substantial Loss**

57. As to what substantial loss is, the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, observed that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.” (Emphasis added)

58. In this instant case, the Applicants submitted that they have already filed their Record of Appeal and the Appeal has been admitted. According to them if stay orders are not granted then they would suffer substantial loss. The Applicant herein has not placed any allegation that payment of the decretal sum would adversely affect his financial position or his insurer. The Respondent has not established that if the appeal succeeds he/she may refund/pay the same back to the Applicant with competing considerations there is likelihood of substantial loss. No one can foretell the outcome of the appeal at this stage.

59. In the case of *Kenya Shell Limited v Kibiru* [1986] KLR 410, at page 416 wherein he 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.” (Emphasis added)



60. Similarly, on the part of Gachuhi, Ag. JA (as he then was) at 417 held thus:

“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.” (Emphasis added)

61. Regarding the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, Hancox, JA (as he then was) in the above cited case 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.” (Emphasis added)

62. From the forgoing case, the three Judges of Court of Appeal (as they then were) carefully, ably and respectfully distilled the import of substantial loss noting that it is not sufficient to state the sum is a lot of money and the Applicant will suffer loss if the money is paid. The Applicant must establish what loss it would be. In the instant case the decretal sum is Kshs,5,684,293/- and the means of the Decree holder can be mitigated by terms of security.

### **Security**

63. On the issue of security, it is a requirement under Order 42 rule 6 aforesaid, that the applicant is to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder.

64. I am persuaded the case of Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others [2015] eKLR, it was held that:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.” (Emphasis added)



65. The Court of Appeal in *Nduhiu Gitahi vs Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100, expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so... The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it” (Emphasis added)

66. In the instant case, the Applicants submitted that they had paid Kshs. 2,000,000/= to the Respondent which should be a sufficient deposit security for stay pending appeal. The deposited Kshs. 2,000,000/= as security for the due performance of the decree has not been challenged by the Respondent. Further, I note that the Respondent was awarded 5,254,700.67/= hence having deposited Kshs. 2,000,000/= the balance to be satisfied is 3,254,700.67/= which amount the Applicant submits they are willing and ready to offer a bank guarantee for the determination of the Appeal. I find this proposition reasonable as security and merited for the determination of the appeal.
67. As to appeal being brought without unreasonable delay, I find no delay was occasioned in bringing the appeal herein, noting that judgment was delivered on 4<sup>th</sup> April, 2023 and the Memorandum of Appeal filed on 26<sup>th</sup> April, 2023.

### **Disposition:**

68. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff I grant a stay of execution of the decree herein in the following terms:
- a. The Applicant to the Respondent with a valid Bankers Guarantee from a reputable Bank for the remaining decretal amount being Kshs. 3,254,700.67/=
  - b. The said conditions (a) to be met within 30 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.
  - c. The appeal is deemed as filed and directions shall be obtained after compliance.



d. Costs of this Application to be in the cause.

It is so ordered.

**RULING DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 5TH  
FEBRUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

