Mugwiri aka Eric Njoroge Mugwira v Limo & another (Suing as administrators of the Estate of Brian Kipkoech aka Kipkoech Brian Bett) (Miscellaneous Application E376 of 2023) [2024] KEHC 2334 (KLR) (6 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2334 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MISCELLANEOUS APPLICATION E376 OF 2023

HM NYAGA, J

MARCH 6, 2024

BETWEEN

ERICK NJOROGE MUGWIRI AKA ERIC NJOROGE MUGWIRA APPELLANT

AND

CHRISTOPHER KIBET LIMO & ANNA CHEPKEMOI MOSONIK (SUING AS ADMINISTRATORS OF THE ESTATE OF BRIAN KIPKOECH AKA KIPKOECH BRIAN BETT) .... RESPONDENT

RULING

1. Before me is an Application dated 8th November, 2023 brought under Sections 3A, 79G and 95 of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules. The applicants seek for stay of execution of the judgment of 21st December, decree and all consequential orders arising from NAKURU CMCC No. E078 pending the hearing and determination of the Appeal and leave/ enlargement of time of filing the Appeal out of time, and costs to be in the cause.
2. The Application is supported by grounds set out on the face of it and the Supporting Affidavit of the Applicant Eric Mugwira Njoroge.
3. In a nutshell, the Applicant states that the delay in filing the Memorandum of Appeal was occasioned by his previous advocates who failed to notify him of the Judgment in time, and he got to know about the the same when Saddabri Auctioneers commenced execution against his property.
4. He avers that he moved to court seeking to reopen his case and have the judgment set aside but his application was dismissed. He attributed the delay in filing the instant application to financial constraints.
5. He contends that unless stay of execution is granted the respondent shall proceed with execution against him to his detriment as his appeal shall be rendered nugatory.

6. He believes he has an arguable appeal and is willing to abide by any condition imposed by the court as regards security.

7. In opposition to the Application the 1st respondent swore a replying affidavit on his behalf and on behalf of the 2nd Respondent on 27th November, 2023. He avers that the application is bad in law, unmerited and does not meet the threshold to warrant issuance of the orders sought.

8. He states that the allegations by the Applicant on the delay of filling the application is unsubstantiated as no serious litigant or advocate will sit on a judgment for 11 months after its delivery without appealing if such intentions existed from the beginning.

9. He avers that it is trite that the case belongs to a litigant and it is his duty to follow up on the progress of their suit and ensure it is being conducted as per their instructions and failure to do so should be visited on the litigant himself.

10. He contends that the applicant has not been vigilant in this matter hence underserving of this court's discretion being exercised in his favour.

11. He asserts that the applicant having not honoured the judgment makes his hands unclean and amounts to denial of justice to them as to date they have never enjoyed the fruits of their judgment.

12. It is his averment that the appeal does not raise any triable issues and has nil chances of success as their case on liability was unchallenged and award on quantum was within the range of decided cases.

13. He states that allegations of substantial loss are bare and urged this court to dismiss the application with costs to them.

14. The Application was canvassed through written submissions.

Applicant's Submissions

15. The Applicant submitted that he has met the threshold for grant of stay of execution set out in Order 42 Rule 6 of the Civil Procedure Rules.

16. The applicant argued that if his application is disallowed he will suffer substantial loss because his appeal will be rendered nugatory. In buttressing his submissions, he relied on the case of Kenya Airports Authority vs Mitu-Bell Welfare Society & Another [2014] eKLR which cited the case of Githunguri –Vs-Jimba Credit Corp.Ltd Nor [1988] KLR 838; Magnate Ventures Ltd vs E.N.G, Kenya Limited [2009] KLR 538 where the court held 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"

17. The Applicant also argued that he is willing to abide by any security that may be imposed by this court. He contended that if the respondents are allowed to execute and his appeal succeeds, the respondents being men of straw will not be able to refund the decretal sum and any incidental costs thereto. In buttressing his submissions, the Applicant referred this court to the cases of Edward Kamau & another; vs Hannah Mukui Gichuki & another [2015] eKLR where the court relied on National Industrial

Credit Bank Ltd vs Aquinans Francis Wasike Court Of Appeal Civil Application No. 238/2005, the Court of Appeal held: -

> "This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is un reasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge."

18. In further support of the above position, the Applicant relied on Eldoret HCCC No.23 of 1997, Samson Kiplimo Joel vs David Kipsang Boit & Anor; James Finlay (K)Ltd vs Jared Otwori Mogere Civil Appeal No.40 of 2009 (Kericho) & Siret Tea Estate vs Peter Kimani, Civil Appeal No.106 of 2000 (Eldoret).

19. On whether time for filing the appeal should be extended, the applicant cited the provisions of Section 79 G of the *Civil Procedure Act*, Rule 4 of the Court of Appeal Rules and the case of Stanley Kahoro Mwangi & 2 Others vs Kanyamwi Trading Co Ltd [2015] eKLR where it was held that an applicant seeking an extension to file an appeal out of time under Rule 4 of the Rules had to explain to the satisfaction of the court that it should exercise discretion in his favour.

20. The applicant submitted that the delay in filing the appeal was caused by his former advocate failure to inform him of the delivery of the judgement.

21. He argued that denying him right to appeal would be contrary to the overriding objective espoused under Sections 1A and 1B of the *Civil Procedure Act* and tantamount to focusing on procedural technicalities at the altar of substantive justice. Reliance was placed on the case of Banco Arabe Espanol vs Bank of Uganda {1999} 2 EA 22 where the Court held:

> "The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuant of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."

22. The applicant also relied on the case of Factory Guards Limited vs Abel Vundi Kitungi [2014] eKLR for the proposition that right of appeal should not be impeded as it is a constitutional right and the cornerstone of the rule of law and where delay has been explained, the court accepts that explanation in order to render substantive justice and to facilitate access to justice for all.

23. On costs, the applicant prayed that the same be in the cause.

Respondent's Submissions

24. On whether leave to appeal out of time should be granted, The Respondent submitted that the applicant's allegation on delay to file appeal is unsubstantiated and without explanations of the steps he took to follow up on his case with his said advocates, this court cannot exercise its discretion in his favour. He relied on the case of Rajesh Rughani vs Fifty Investments Limited & another [2016] eKLR

cited with approval in Mutungi Ngulo vs Pan African Insurance Co. Ltd & 4 others [2019] eKLR where the court held that:

> "...when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straight away. In Habo Agencies Limited vs Wilfred Odhiambo Musingo [2015] eKLR this Court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. In Mwangi vs Kariuki (199) LLR 2632 (CAK) Shah, JA ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude. In the instant case, there is nothing on record to show what action the appellant took between 24th October 1998 and 7th April 2005 to ensure that the suit he had filed at the High Court was prosecuted."

25. The Respondents contends that the contention by the Applicant that he became aware of the lower court's judgement in November, 2023 is untrue as the record shows that he was aware of the same as early as April 2023 when his goods were proclaimed and subsequently filed an application to set aside the said judgement and prosecute it. The respondents thus posit that this application is bad in law as it is not only tainted with untruthfulness and nondisclosure of material facts but it is also meant to enable the Applicant have a second bite at the cherry. To buttress his submissions, the respondents placed reliance on the case of Serephen Nyasani Menge vs Rispah Onsase [2018] eKLR where the court stated as follows: -

> "in the present case, the applicant exhausted the process of review up to appeal and now wishes to go back to the same order she sought review of and failed and to try her luck with an appeal. The applicant wants to have a second bite of the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of the process of the court and the same must surely fail. The applicant had her day in court when she chose to seek a review of the order that she now wishes to appeal against. Litigation somehow must come to an end and for the applicant, the end came when she applied for review and appealed the decision made on the review application. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure to be adhered to. The applicant invoked the provisions of the law and the procedure thereto and the court rendered itself on the basis of the law and the evidence."

26. The respondents also relied on the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR for the proposition that it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay & Josephine Lunde Matheka vs Gladys Muli [2018] eKLR for the proposition that favourable orders cannot be sought and obtained on the basis of an affidavit that is less than candid and is meant to mislead.

27. The respondents submitted that the right to appeal does not supersede or trample the Respondents right to enjoy the fruits of his judgement. In this regard he cited the case of Nginyanga Kavole vs Mailu Gideon [2019] eKLR where the court stated inter alia that when a party is afforded an opportunity of being heard on appeal and he does not utilise it then he can no longer complain of denial of that opportunity but can only be heard on the reasons for not utilising that opportunity.

28. The respondents argued that the delay of eleven (11) months in filing the instant application is an indictment of lethargy on the part of the Applicant which disentitles him the equitable orders sought. In this regard, the respondents relied on the case of H. Young & Co. (E.A) Limited vs L B (minor suing through her mother and next friend J M B) [2014] eKLR & Multiple Hauliers vs Enock Bilindi Musundi & 2 others [2021] eKLR.

29. The Respondents submitted that the applicant has not met the threshold to warrant extension of time to file appeal and prayed that same be declined.

30. On whether stay pending the intended appeal should be granted, the respondents submitted the that Applicant has not in any way in his affidavit suggested that they are incapable of refunding any money that may be paid to them and hence he has not proved substantial loss. In support of his submissions, reliance was placed on the cases of Antoine Ndiaye vs African Virtual University [2015] eKLR; Delina General Enterprises Ltd vs Monica Kilonzo Nzuki (Suing as The Legal Representative of the Estate of Elizabeth Mutheu Paul(Deceased) [2018] eKLR; James Wanganga vs Wilberforce Situma Mulati [2021] eKLR; Joseph Mwinzi Mututa vs Jane Wanza Mwangangi [2008] eKLR.

31. On security, the respondents submitted that security ordered by the court must accord with the principle of proportionality and the need to create a level playing ground for all parties by reconciling and striking a balance between their respective and competing interests and rights as was held in the case of Machira t/a Machira & Co Advocates vs East African Standard [2002] eKLR.

32. Secondly, the respondents argued that when considering the appropriateness of security, the court must also consider special circumstances obtaining in the matter at hand e.g. in the instant case the security must be one which shall achieve due performance of the decree which might be ultimately binding on the applicant & likeness or unlikeness of the respondent getting any award. To support their submissions, the respondents cited the cases of Safaricom Limited vs 1st Respondent & Another (Civil Appeal E174 of 2021) [2022] KEHC 3141 (KLR) (5 May 2022) (Ruling); Harrison Mbaabu Marete vs Janet Nkirote Muthomi [2021] eKLR; & Silpak Industries Limited vs Nicholas Muthoka Musyoka [2017] eKLR.& Nakuru High Court Civil Appeal No. 136 of 2023 James Muchiri Mwangi & Another vs Benson Maritah Mwangi.

33. The respondents thus urged this court to order that half of the decretal sum be paid to the respondents and the remaining balance deposited in court or in a joint interest earning account in the name of the advocates for both parties herein.

34. On the issue of liability, the respondents submitted that their case on the same was uncontroverted as the respondents did not tender any evidence in support of their case and as such it was inevitable for the court to hold the applicant 100% liable for the accident.

35. On quantum, the respondents urged this court to find that the same was within the range of decided cases.

Analysis & Determination

36. The issues that fall for determination are: -

    a. Whether the application seeking leave to appeal out of time is merited.

    b. Whether stay orders sought should be granted.

Whether the application seeking leave to appeal out of time is merited

37. I have duly considered the submissions by the parties on the issue.

38. Section 79G of the *[Civil Procedure Act](#)*. The section 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.”

39. Section 95 of the *Civil Procedure Act* provides thus: -

> “Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

40. The applicant approaching the Court under this section must demonstrate “good and sufficient cause” for not filing the appeal in time. In Thuita Mwangi vs Kenya Airways [supra], the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in Mutiso v Mwangi [1997] KLR 630 as follows:

> “It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

41. While the discretion of the court is unfettered, the applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor.

42. The Court of Appeal in Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR held as follows:

> “For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable.”

43. It is thus clear that even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. (See also Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018] eKLR.

44. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR set out the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

> " The underlying principles a court should consider in exercise of such discretion include;
>
> 1. Extension of time is not a right of any 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 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. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
> 6. Whether the application has been brought without undue delay.

45. These principles were also considered in the earlier case of Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi Civil Appeal 255/ 1997, where the court held as follows: -

> " It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted."

46. These principles were also reiterated in First American Bank of Kenya Ltd vs Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65 and listed them as follows: -The explanation if any, for the delay;The merits of the contemplated action, whether the appeal is arguable;Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.

47. I will therefore proceed to determine whether the Applicant has advanced plausible grounds for delay in filing the appeal.

48. The lower court's judgement was delivered on 21st December,2022 and subsequently the Applicant filed an application dated 19th June,2023 seeking to set aside the judgement and decree and all consequential orders and the defence case to be reopened but the same was, indisputably, dismissed in July,2023.

49. The instant application was filed on 9th November,2023. That is about 11 months after the judgment. In Nairobi HCC No. 32 of 2010, Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & another [2014] eKLR, the Court in considering what amounted to inordinate delay had this to say;

> " Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances

of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable"

50. I associate myself entirely with the above findings. The Applicant herein averred that the delay was occasioned by his previous advocates who failed to notify him of the Judgment in time, and that he learnt of the same when Saddabri Auctioneers levied execution against his property.

51. He contended that he also delayed in filing the instant application immediately due to financial constraints. He however, did not lead any evidence to substantiate the same.

52. The Applicant also did not show efforts he made in following up his case. In Alice Mumbi Nyanga vs. Danson Chege Nyanga & Another (2006) eKLR, the Court stated that:-

> " a Civil case once filed is owned by a Litigant and not his advocate. It behoves the litigant to always follow up his case and check its progress."

53. In Bi-Mach Engineers Limited vs James Kahoro Mwangi [2011] eKLR the Court of Appeal held:

> " The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate. It would also appear that there was unnecessary and unexplained delay after 30th December, 2010 and the filing of the motion on 2nd February, 2011. Without explanation, there would be no basis for the exercise of any discretion. The filing of a notice of appeal is a simple and mechanical task and could even have been done on 30th December, 2010 or soon after the applicant became aware of the judgment. Such conduct militates against the overriding objective and the principles stated above."

54. In light of the above, I find the Applicant has not given plausible explanation to the satisfaction of the court to exercise its discretion and grant the orders sought. The delay in filing the application was inordinate as it has been filed five (5) months after the said Ruling and eleven (11) months after the impugned judgement.

55. Be it as it may, I think that the applicant deserves a chance to canvass his appeal, a right provided by the law. The court should not be harsh on him on account of inactivity on the part of his advocates.

56. With regard to whether the intended appeal is arguable, I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case as that is under the purview of the appellate court after hearing the merits of the same. The court should therefore only be concerned with the question of whether or not the appeal will be rendered nugatory.

57. A cursory look at the Memorandum of Appeal shows that the grounds raised with respect to quantum are triable. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate court overturn that of the trial court. I therefore find that the Appellant's intended Appeal is arguable.

58. The other limb is whether the Respondents can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. The answer is in the affirmative. I find that no prejudice will be caused to the Respondents that cannot be compensated by an award of costs if the Application is allowed.

59. Considering that extension of time is an equitable remedy, I hold that he should not be denied a seat in the altar of justice.

Whether stay orders sought should be granted.

60. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates:

> "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside."

61. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

   a. Substantial loss may result to him/her unless the order is made;

   b. That the application has been made without unreasonable delay; and

   c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

62. These principles were enunciated in Butt vs Rent Restriction Tribunal [1982] KLR 417 where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

> "The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
>
> Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
>
> Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
>
> Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse."

63. Under the head of substantial loss, an applicant must clearly state what loss, if any, he stands to suffer. This principle was expressed in the case of Shell Ltd vs Kibiru and Another [1986] KLR 410. Platt, JA which set out two different circumstances when substantial loss could arise as follows: -

> "The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts...."

64. The learned judge continued to observe that: -

> " 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 cornerstone of both jurisdictions for granting 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.

65. The Applicant's averment that if stay of execution is disallowed he stands to suffer irreparable loss as the intended appeal shall be rendered nugatory.

66. With regard to whether the intended appeal is arguable, I have already held that on the face of it, the intended appeal raises triable issues. I find that the applicant has succeeded on this particular limb.

67. On whether the application has been made without unreasonable delay, I have already dealt with the issue.

68. Regarding the issue of security for costs, the Applicant avers that he is willing to comply with any conditions on security as may be imposed by this Court.

69. The determination of what amounts to a suitable security is a matter of court's discretion. In Focin Motorcycle Co. Limited vs Ann Wambui Wangui & another [2018] eKLR, the court stated that:

> " 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...."

70. The Applicant has similarly succeeded on this limb by submitting himself to the discretion of the court.

71. Having considered the application, I am inclined to allow it on the following terms;

    a. The applicants' application to appeal out of time is allowed. The Memorandum of Appeal is to be filed and served within the next 14 days from the date of this Ruling.

    b. The applicant to pay to the respondent 50% of the decretal sum, being Ksh. 1,503,275/-, within the next 45 days from the date of this Ruling.

c. The rest of the decretal sum to await the determination of the intended Appeal.

d. There will be a stay of execution of the decree of the lower court pending the determination of the appeal, but subject to (b) above and in default thereof, these stay orders shall stand vacated without further reference to the court.

e. The applicants to file and serve the record of appeal within the next 45 days.

f. The applicants shall bear the costs of this application in any event.

SUBPARA g. The applicant shall also bear the auctioneer's costs to be agreed upon or taxed.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 6TH DAY OF MARCH, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Oleperon

Ms Kuree for Njuguna for Respondents

Ms Adongo for Applicant