Automobile Warehouse (Nakuru) Ltd & another v Mang'era & 4 others (Civil Appeal 48 & 59 of 2019 (Consolidated)) [2024] KEHC 11062 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11062 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 48 & 59 OF 2019 (CONSOLIDATED)

SM MOHOCHI, J

SEPTEMBER 19, 2024

BETWEEN

AUTOMOBILE WAREHOUSE (NAKURU) LTD ..... APPELLANT

AND

TIMOTHY MOMANYI MANG'ERA ..... 1ST RESPONDENT

IMPERIAL BANK LIMITED (IN LIQUIDATION) ..... 2ND RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 59 OF 2019

BETWEEN

IMPERIAL BANK LIMITED (IN LIQUIDATION) ..... APPELLANT

AND

TIMOTHY MOMANYI MANG'ERA ..... 1ST RESPONDENT

REUBEN MONG'ARE KABA ..... 2ND RESPONDENT

AUTOMOBILE WAREHOUSE (NAKURU) LTD ..... 3RD RESPONDENT

RULING

1. Before me is a Notice of Motion dated 8th December 2023 filed pursuant to Section 1A, 1B and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 42 Rule 6 and Order 51 Rule1) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law for the following Orders:

    i. Spent.

ii. Spent.

iii. That, pending the hearing and determination of the Appellant's intended appeal to the Court of Appeal from the decree herein, this Honorable Court be pleased to Order Stay of execution of judgment/decree, delivered on 9th November 2023 in Nakuru Civil Appeal No. 48 of 2019 or otherwise of the decree in Nakuru CMCC No 1299 of 2012.

iv. That, costs of this application be costs in the cause.

2. The Application is premised on the following eleven (11) grounds is further supported by the annexed affidavit of Prakash Shah: -

i. That, this Honorable Court delivered its judgment on 9th November 2023 which, like the primary decree directed the Appellant to pay substantial sums to the 1st Respondent. Consequently, the 1st Respondent is at liberty to execute either of the decrees to recover the sum ordered therein.

ii. That, the Appellant/Applicant herein being aggrieved by the aforementioned judgment/ decree has lodged a notice of appeal and intends to appeal against the said decree to the Court of Appeal.

iii. That, the intended appeal raises arguable if not formidable and meritorious grounds with very high chances of success.

iv. That, this Application has been brought without unreasonable delay just barely a month since judgment/decree herein was delivered.

v. That, if this application is not heard on a priority basis and orders for stay of execution granted, the Appeal will be rendered nugatory exposing the Appellant/Applicant to substantial and irreparable loss.

vi. That, the Applicant herein had partially paid the original decree and deposited the balance in an interest earning joint account in the names of counsel for the relevant parties.

vii. That, the appellant is exercising its constitutional right of appeal and as aforesaid, the Court has already considered the merits of staying execution to allow it pursue appeal. The situation still holds, therefore the need and justification for continued stay of execution upon similar terms.

viii. That, the appellant would be otherwise is willing to provide such additional or varied security as this Honorable Court orders for due performance of such decree or order as may be ultimately binding on it.

ix. That, no prejudice or difficulty will be suffered by the Respondents herein because he has been paid large part of the original decree and the rest us secured as aforesaid at any rate, the Appellant/Applicant is a reputable company with the financial capability to compensate the Respondents should the appeal be dismissed.

x. That, this honorable Court is clothed with wide and unfettering discretion to grant the orders sought.

xi. That, it is in the interest of justice that this honorable Court, grants the orders sought to enable the Applicant herein proceed with his appeal.

3. The 1st Respondent filed his replying Affidavit on the 26th February 2024 written submissions on the 27th March 2024 pursuant to directions issued on the 23rd January 2024.

4. The Applicant filed its written submissions dated 9th day of May 2024.

Applicants Submissions

5. The Applicant in its written submission identified following issues for resolution by the Court:

    1. Whether this Honorable Court is clothed with the jurisdiction to entertain the instant application?

    2. Whether the Applicant/Appellants' application is merited?

    3. Who shall bear the costs of the application?

6. As to whether this Honorable Court is clothed with the jurisdiction to entertain the instant application? The Applicant contends that, like in any cases, the question that a Court determines before adjudicating a dispute is invariably that of jurisdiction. That the applicant takes cognizance of this fundamental and primordial issue or question before addressing any other consequent issue unique or a play in the instant application.

7. On this question, it is the submission of the Applicant/Appellant that this Court no doubt possesses the requisite jurisdiction to entertain the instant application. The application seeks for orders of stay of execution pending the intended appeal from the decree of the honorable Court to the Court of Appeal.

8. That as a matter of procedure, the only filing that the Applicant would have made at this stage of the proceedings is a Notice of Appeal and a letter requesting for proceedings for purposes of eventual filing of Record of Appeal and the timelines for doing so are governed by the Appellate Proceedings Act. For purposes of the extant application, both the procedural rules and case law settles that the honorable Court becomes seized of jurisdiction as soon as a notice of appeal is filed, if not earlier, because the Court may indeed entertain an informal application for stay at the delivery of judgment or ruling as the case may be.

9. That, it is trite, that the existence of a valid Notice of Appeal, grants Courts the requisite jurisdiction to entertain the same. The jurisdictional importance of a Notice of Appeal is emphasized with reference to the case of *Kariuki v CIC General Insurance (Civil Application E161 of 2022*) [2022] KECA 1166 (KLR) (28 October 2022) (Ruling) where the Court quoted with approval the decision of the California Supreme Court in Silverbrand v. County of Los Angeles [2009] 46 Cal. 4th 106, 113 where the former stated as follows:

> " 1. the filing of a timely notice of appeal is a jurisdictional prerequisite. Unless the notice is actually or constructively filed within the appropriate filing period, an appellate Court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal. The purpose of this requirement is to promote the finality of judgments by forcing the losing party to take an appeal expeditiously or not at all." (Emphasis Ours).

10. That, the Applicant/Appellant filed its Notice of Appeal dated the 15th day of November, 2023 and lodged in Court on the 16th day of November, 2023.

11. That, the said Notice was filed timeously and as such, the Court is vested with the jurisdiction to entertain the intended appeal.

12. As to Whether the Applicant's application is merited? the Applicant contends that, the instant application is merited as the former stands to suffer substantial and irreparable loss, since its intended appeal will be rendered nugatory if orders for stay are not granted.

13. That the discretion granted upon Courts to grant orders for stay of execution of a decree or order pending appeal is enshrined in the provisions of Order 42, Rule 6 (2) of the Civil Procedure Rules, 2010. The stated provision provides as follows:

> " No order for stay of execution shall be made under sub rule (1) unless—
>
> (a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
>
> (b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

14. That, it is trite law, that an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules 2010 which conditions were condensed and framed by the Honorable Court in Hamisi Juma Mbaya v Asman Amakecho Mbaya [2078] eKLR into three requirements as follows:

> " 1. Substantial loss may result to the applicant unless the order is made.
>
> 2. The application has been made without unreasonable delay, and
>
> 3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant."

15. That the Applicant/Appellant has fully satisfied the pre-requisites for grant of the orders of stay of execution pending appeal set out above.

16. The Applicant/Appellant herein stands to suffer substantial loss unless the order for stay of execution pending appeal is not granted since the former's intended appeal will be rendered nugatory.

17. That, the precept of 'substantial loss' was aptly dealt with by the Court in James Wangalwa & Another v Agnes Naliaka Chesefo [2012] eKLR where the Court asserted as follows:

> " 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 Civil Procedure Rules, 2070. 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 Ours).

18. Reference is made to the case of DNW v FWK [2019] eKLR, the Court quoted with approval the decision of the Court in RWW v EKW [2019] eKLR when considering the purpose of the orders of stay of execution pending appeal and contemplating the pre-requisite of substantial loss as follows:

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
>
> 9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent." (Emphasis Ours).

19. That in the instant case, it is apparent that the Applicant/Appellant stand to suffer substantial loss if the orders for stay of execution pending appeal in the instant case are not granted. Execution of the decree in the current case presents imminent danger as it would, in effect, render any intended appeal nugatory thereby exposing the Applicant to irreparable loss and prejudice. It is undisputed that the Applicant/Appellant has lodged a Notice of Appeal dated the 15th day of November, 2023. Apart from the lodgment of said Notice, the Applicant/Appellant has also requested for typed proceedings and judgment to facilitate the lodgment and expeditious filing of the Record of Appeal.

20. That, the intended appeal raises weighty and serious questions of law with high chances of success and the same will require time to prepare, an event that would not be possible if orders for stay of execution are not granted.

21. That, in any event, the Respondents in the instant case do not stand to suffer any prejudice or difficulty that cannot be compensated by costs if the instant application is allowed. The Applicant/Applicant herein is a reputable company with the financial capability to compensate the Respondents should the appeal be dismissed.

22. The Applicant/Appellant submits that, the instant application has been made without unreasonable delay and that the Applicant/Appellant has met this key pre-requisite with regards to the substantive requirements for grant of orders for stay pending appeal. In his Replying Affidavit dated the 26th day of February, 2024, the 1st Respondent asserts, without any factual basis that the Applicant/Appellant has not moved the Court timeously. The facts on record are to the contrary.

23. That, judgment in the cause was entered on the 30th day of November, 2023, the instant application was presented before Court on the 8th day of December, 2023 and any assertion to the effect that said application was made with unreasonably delay is not only factually incorrect but is also meant to actuate malice.

24. Regarding this limb, the Applicant relies on the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR, where the Court of Appeal gave the rationale for 'security for costs' which is to ensure;

> firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty;

secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party.

25. That in the instant case, it has been demonstrated that the Applicant/Appellant herein is a reputable company with the financial capability to compensate the Respondents should the appeal be dismissed and therefore the Respondent will not be left without any recompense for costs in this regard.

26. That, the Applicant/Appellant has already paid to the 1st Respondent a substantial portion of the original decree and deposited the rest in a joint account which continues to be held in the names of Advocates for the 1st Respondent and the Appellant on the orders of the Honorable Court in a previous similar application.

27. That the Applicant/Appellant has therefore provided ample security to the Respondents and is also otherwise willing to provide such other or varied security as this Honorable Court may finally order for the due performance of such decree or order as may ultimately be binding on it.

28. The Applicant/Appellant asserts that it has met the threshold for grant of the orders for stay of execution pending appeal, and it is the interests of justice that said orders are granted in order to enable the Applicant/Appellant exercise its constitutional right of appeal.

Respondent's Submissions

29. The 1st Respondent in his written submission identified following four issues for resolution: -

    a. Whether the Applicant/ Appellant moved the Court timeously

    b. Whether the Applicant/ Appellant is likely to suffer substantial loss unless the order is made

    c. Whether the Applicant/ Appellant has provided security

    d. Whether the intended appeal is arguable

30. As to whether the Applicant/ Appellant moved the Court timeously, the 1st Respondent relies on the case of Jaber Mohsen Ali & another v Priscillah Boit & another E&L NO. 200 of 2012[2014] eKLR, the Court stated as follows;

> " The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the Court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret F&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the Court holding that, the application ought to have come before expiry of the period given to vacate the land".

31. In this case, the Judgment of this Honourable Court was delivered on 9th November, 2023. Inasmuch as the Appellants lodged their Notice of Appeal on 16th November, 2023, their application for stay was filed on 17th January, 2024; more than two (2) months after delivery of the judgment.

32. This Court will appreciate that the Appeal does not operate as a stay of execution. According to Order 42 Rule 6 of the Civil Procedure Rules:

> " No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order set aside."

33. It is the 1st Respondent's submissions that the delay of more than two (2) months by the Appellant herein in filing the application for stay is unreasonable.

34. The 1st Respondent categorically states in his Replying Affidavit that he is able to make good the decretal sum should the appeal succeed

35. In Civil Appeal No. 186 of 2007 Standard Assurance Co. Ltd —vs- Alfred Mumea Komu, the Court stated: -

> " Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money."

36. The 1st Respondent was able to deposit a sum of Kshs. 2,900,000.00 and went ahead to pay to the Appellant a sum of 6,953,363.00 before buying the truck which is the subject of the suit herein. Further, from the Judgment dated 5th March, 2019, the 1st Respondent is now the legal owner of the motor vehicle registration number KBQ 181Q Mitsubishi Lorry which motor vehicle is worth Kshs. 6,851,380 and the 1st Respondent earns on a daily basis a sum of Kshs. 25,000 from the said motor vehicle.

37. As to what amounts to substantial loss the Court in James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR observed as follows:

> " 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."

38. That, the Applicant has not demonstrated what loss it stands to suffer if the order for stay is not granted.

39. That, in Jaber Mohsen Ali & another v Priscillah Boit & another E&L No. 200 of 2012[2014] eKLR, the Court stated as follows;

> It must be appreciated that the Respondent is a successful litigant who is entitled to benefit from the fruits of the judgment. The interests of both parties therefore need to be balanced as was stated by the Court of Appeal in the case of Reliance Bank vs Norlake Investments Ltd (2002) 1 EA 227.

40. Reference is made to the case of *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997* Warsame, J (as he then was) expressed himself as hereunder:

> It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. lt means the Court will not consider assertions of substantial loss on the face value but the Court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.

41. Reliance is placed on the case of Kenya Shell Limited vs. Kibiru [1986] KLR 410, at page 416Platt, Ag. JA (as he then was) expressed himself as follows:

> 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.

42. That, it is the 1st Respondent's submission that, the Applicant has not been able to establish or demonstrate any 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 incase the appeal succeeds.

43. That, the Applicant has not tendered before this Court, any empirical or documentary evidence to support the contention that it will suffer any substantial loss in the event that stay is not granted. As a successful litigant, the 1st Respondent should be allowed benefit from the fruits of the judgment.

44. Reliance is made to the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR the Court observed as follows: -

> This should be done as a sign of good faith that the Applicant is ready and willing to commit to giving security. But my reading of order 42 rule 6(2) (b) of the CPR reveals that, it is the Court that orders the kind of security the applicant should give as may ultimately be binding on the applicant. This modeling of the law is to ensure the discretion of the Court is not fettered.

45. And in Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR, the Court observed:

> "The applicant must show and meet the condition of payment of security for due performance of the decree...it is trite that the winner of litigation should not be denied the

opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.

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 ... This the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that Courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the Court to determine".

46. It is the 1st Respondent's submission that, the Appellant has yet to demonstrate its willingness to provide security in any way. Should the intended appeal fail, there is a danger of return to the status quo, which situation will prejudice the 1st Respondent and he urges this Court not to assist the Appellant in delaying execution of the decree.

47. That, an arguable appeal has been described as an appeal that is not necessarily expected to succeed but one in which there is at least one issue upon which the Court should pronounce its decision.

48. Reference is made to the case of Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001 where the Court stated that;

> " He (the applicants) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision."

49. That the intended appeal herein is a second appeal to the Court of Appeal. As such, the appeal is on matters of law. In as much as the Appellant has claimed that the intended appeal is arguable, no Memorandum of Appeal has been tendered before the Court to proof that there is at least one issue upon which the Court should pronounce its decision.

50. The 1st Respondent re-echoes Kuloba, J in Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:

> To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.

51. That the Appellant has not proved any of the requirements for grant of stay execution orders pending appeal.

52. As such the 1st Respondent urges this Court to allow him as the successful litigant to enjoy the fruits of his judgment.

Analysis and Determination

53. As to whether the Applicant is entitled to the orders sought? stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure- Rules, 2010 which provides as follows: -

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order set aside.
>
> (2) No order for stay of execution shall be made under sub rule (1) unless
>
> (a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
>
> b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
>
> (3) Notwithstanding anything contained in sub rule (2), the Court shall have power, without formal application made. to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application."

54. That, the power of a Court to grant stay of execution is discretionary and this discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial Court's decision.

55. The above provisions operate as principles to guide the Court. This was so held by C.W. Githua in Civil Appeal No. 135 Of 2014 Alhyder Trading Company Limited -Vs- Lucy Jepngetich Mibei (2016] eKLR where the learned judge opined,

> "I must state at this juncture that the decision whether or not to grant stay of execution pending hearing ofan appeal is at the dis cretion of the Court. The conditions set out under
>
> Order 42 Rule 6 of the Civil Procedure Rules are only meant to be guidelines to assist the Court in the exercise of its discretion."

56. Similarly, in Civil Application No Nai. 6 of 1979 Butt -vs- Rent Restriction Tribunal, in allowing an application for stay of execution, cited the passage of Brett LJ in Wilson -Vs-Church (No. 2) 12 Ch D (1879) 454 Madan JA (as he then was) opined,

> "It is in the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory"
>
> The Court went further to elaborate,
>
> > "1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
> >
> > 2. 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 that appeal Court reverse the judge's discretion.
> >
> > 3. 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.
> >
> > 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
> >
> > 5. 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 for costs as ordered will cause the order for stay of execution to lapse."

57. Further, the Court of Appeal in RWW vs. EKW (2019) ekLR addressed itself on this as hereunder: -

> "The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful. is not rendered nugatory. However, in doing so. The Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs."

58. Having guidance of the aforementioned principles/case laws, as to whether substantial loss may result if stay is not granted? The Applicants posits that, the first condition required of an Applicant seeking an order of stay of execution is to satisfy the Court that substantial loss would occur if the order of stay is not granted. That it has lodged a Notice of Appeal dated the 15th day of November, 2023. Apart from the lodgment of said Notice, the Applicant/Appellant has also requested for typed proceedings and judgment to facilitate the lodgment and expeditious filing of the Record of Appeal and that, in this case, the decretal award is a money decree which the Applicants are apprehensive that, if execution of the

decree is levied, the appeal if successful would not only be rendered nugatory but also the Applicants will suffer substantial loss as it will not be possible for them to recover the decretal sum not knowing the Respondent's financial status.

59. Platt Ag JA in Civil Application No. Nai 97 Of 1986 Kenya Shell Limited -Vs- Benjamin Karuga Kibiru & Another [1986] eKLR held 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 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."

60. The Court of Appeal sitting in Nairobi in Civil Application No Nai 95 Of 1987 Rhoda Mukuma - Vs- John Abuoga [1988] eKLR reiterated its earlier decision in the case of Kenya Shell Limited (supra) when it held that:

> " Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being - (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2) (b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore, it is necessary to preserve the status quo."

61. It is the Applicants submission that, no evidence has been tendered to indicate that the 1st Respondent is capable of refunding the decretal sum herein should the appeal succeed as seen in the replying affidavit'.

62. Thus, in the very likely event that the appeal succeeds, the Applicants will suffer Substantial loss if execution will have been already been carried out. The Applicants herein are more that capable of paying the decretal sum in full in the unlikely event that the appeal fails as it is a corporate body with perpetual existence.

63. In Bonface Kariuki Wahome v Peter Nziki Nyamai & another [2019] eKLR J. R. Nyakundi held that: -

> " . the evidential burden resides with the Respondents to prove that he is not a man of straw as alleged. None of the two Respondents in the instant case has made any attempt to discharge this burden. It is expected that a respondent would depone and show the means she has to refund the decretal sum. It is enough for the applicant to depone that they are not able to refund. He cannot be expected to dig deep into the financial standing of the respondents, which is for the respondent to produce and prove."

64. That it is therefore clear from the foregoing that, the 1st Respondent has not discharged his evidential burden of proof proving that he can refund the decretal sum herein should the appeal succeed. As much as the 1st Respondent is entitled to the fruits of the judgment, the Applicant's humbly submit that this Court should as well ensure that the Applicant's interests are secured such that in the event the Applicant's appeal succeeds, the decretal amount would be available to them. In addition to the aforesaid, it is clear that the 1st Respondent has not indicated in his replying affidavit what loss he will incur should the Court grant stay orders pending appeal and it is only fair and just that the orders

sought in the instant application be granted to preserve the subject matter pending the outcome of the appeal.

65. That, 1st Respondent had the obligation of demonstrating how the Appellant would recover the decretal sum from him should his Appeal be successful after execution of the judgment sought to be stayed. It is thus safe to say that, the partial or full realization of the fruits of the judgment sought to be Appealed against is untenable where the Appeal is against the judgment in its entirety.

66. That the second condition required of an Applicant seeking an order of stay of execution is to make the application without unreasonable delay. Reference is made to, the Court of Appeal sitting in Meru in Civil Appeal No. 45 of 2015 M'ndaka Mbiuki -vs- James Mbaabu Mugwiria (2016] eKLR held that,

> " This ground is normally easy to determine and is usually straight forward. Although there is no exact measure as to what amounts to unreason able delay, it will not be difficult to discern inordinate delay when it occurs. lt must be such delay that goes beyond acceptable limits given the nature of the act to be performed."

67. That, the instant application has been brought without unreasonable delay. The judgment was delivered on 9th November 2023 wherein the Applicant was granted 30 days stay of execution of the judgment/decree, and moved Court vide the Application dated 8th December 2023.In his Replying Affidavit dated the 26th day of February, 2024, the 1st Respondent asserts, without any factual basis that the Applicant/Appellant has not moved the Court timeously. The facts on record are to the contrary. It is therefore apparent that the Applicant moved this Court in good time and meets the second threshold required for grant of stay of execution.

68. That, the third condition required of an Applicant seeking an order of stay of execution is to provide such security as the Court orders for the due performance of such decree or order as may ultimately be binding upon an Applicant.

69. The Applicant/Appellant has already paid to the 2nd Respondent a substantial portion of the original decree and deposited the rest in a joint account which continues to be held in the names of Advocates for the 2nd Respondent and the Appellant on the orders of the Honorable Court in a previous similar application.

70. That the Applicant/Appellant has therefore provided ample security to the Respondents and is also otherwise willing to provide such other or varied security as this Honorable Court may finally order for the due performance of such decree or order as may ultimately be binding on it.

71. The 1st Respondent contends that, the Appellant has yet to demonstrate its willingness to provide security in any way. Should the intended appeal fail, there is a danger of return to the status quo, which situation will prejudice the 1st Respondent and he urges this Court not to assist the Appellant in delaying execution of the decree

72. That the Applicants has already provided security prior, which security is yet to be disturbed the ante situation prevailing satisfies this condition binding to them. In Focin Motorcycle Co. Limited v 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.....".

73. It is the Applicants submission that this Honorable Court has the unfettered discretion to issue any orders to preserve the subject matter pending the hearing and determination of the appeal and the Applicants herein has already provided such security.

74. Notwithstanding, the lengthy arguments for or against, this Court has to safeguard the right to Appeal while balance the same against the Right of the Plaintiff Respondent to access the fruits of the judgment and in ensuring the Applicant is unsuccessful on Appeal then the Plaintiff should access the fruits without need for further proceedings.

75. I am thus constrained to consider the Solo Issue as to whether the Application has satisfied the condition for grant of the orders sought?

76. Firstly, that the appropriateness of security pending appeal is a matter purely at the discretion of the Court and it is not bound by any security proposed by a party. (See the case of *Nyamwaya v Ondera (Civil Appeal E071 of 2021)* [2022] KEHC 619 (KLR) (9 May 2022) (Ruling). In this instance I find that the Security prevailing on 1st Appeal satisfies this condition

77. Secondly, that the Court's discretion has to be exercised within the requisite parameters while taking into consideration the overriding objective in civil litigation as was held in the case of Samuel Ndungu Mukunya v Nation Media Group Limited & another [2016] eKLR:-

> A stay pending appeal is a discretionary remedy and in dealing with an application like the one before the Court, its discretion is wide but at the same time such discretion should be exercised judiciously. With the overriding objective in civil litigation, the Court is now enjoined to take into account substantive and proportionate justice, act fairly and balance the relative interests of all the parties... Some of the principal aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before he Courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing.

78. Thirdly, that security ordered by the Court must accord with the principle of proportionality and the need to create a level playing ground for all the parties by reconciling and striking a balance between their respective and competing interests and rights as was held in the case of *Mutiso & another v Ngoma (Civil Appeal E109 of 2021)* [2021] KEHC 344 (KLR)(14 December 2021) (Ruling): -

> " The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation."

79. Further reliance is placed on the case of Machira t/a Machira & Co Advocates v East African Standard [2002] eKLR:-

> In the exercise of the Court's discretion in a judicial fashion, the Court cannot legitimately look at a matter on one assumption alone, favoring one party and ignoring the other party.

> In applications of this nature there is no rule of law or practice or sound principle requiring a Court to start and proceed on initial presumption that the appeal or intended appeal shall succeed and so prima facie the applicant is the preferred party. There would be no sound principle to back up such a presumption. The matter must remain in the discretion of the Court always exercised judicially, ie circumspectly and considering all the material circumstances of the case and excluding everything that is extraneous, and never shutting one's eyes to the interests of any party. As the appellant or intended appellant exercises his right of appeal nothing ought to be done which will jeopardize his interests in case his appeal is successful, or which may be a futile endeavor trying to take further steps; but on the reverse side of things, from the point of view of the party who is, at least for the time being, successful to a point, nothing should be done to unduly delay or deny expeditious justice to him in the event that the appeal or intended appeal in question fails. In bleak economic times, a weakened currency might change the matrix in hours or overnight, so that delayed further proceedings as appeal or intended appeal is awaited (which may well be unsuccessful) may have adverse effects so that assessment of damages after a failed appeal may likewise be an exercise in futility and costs a poor solace. To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion.

80. And the case of Peter Osoro Omagwa & another v Bathseba Mwango Maikini [2021] eKLR):-

> " As a principle a successful party is entitled to the fruits of his judgement. That must however be balanced against the applicant's right to appeal...no party should be worse off by virtue of an order of stay of execution given the rights of the parties on the one hand to pursue their appeal and on the other hand to benefit from the fruits of their judgment."

81. Fourthly, the Court when considering the appropriateness of security must also consider special circumstances obtaining in the matter at hand as was held in the case of Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017| eKLR):-

> The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.

82. The special circumstances and unique requirements that a Court considers are among others the subject matter of the Appeal. Where the subject matter is monetary Decree like in this case, the security must be one which shall achieve due performance of the decree and be binding on the Appellant in the sense that if the Appellant fails to succeed on appeal, the Respondent should just have the decretal sum availed to him without being subjected to further Court proceedings be it execution, enforcement/ realization of Security or otherwise as was held in the case of Safaricom Limited & another (Civil Appeal E174 of 2021) 2022] KEHC 3141 (KLR) (5 May 2022) (Ruling):

> 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.

83. That, the other special circumstances that a Court should consider is the likeliness or unlikeliness of the Respondent getting any award following the Appeal. Where it is likely that the Respondent will get some award after the Appeal, the Court will order some money be paid to him notwithstanding

the fact that the Appeal is on both liability and quantum as was held in the case of Harrison Mbaabu Marete v Janet Nkirote Muthomi [2021] eKLR :-

> The Memorandum of Appeal annexed to the Applicant's supporting affidavit reveals that the intended appeal seeks to challenge both quantum and liability. The Applicant has indicated his willingness to offer security for the due performance of the decree, only that the same should be reasonable so as not to stifle access to justice. The Respondent has asked that half of the amount be released to her and to have the other half be deposited in a joint interest earning account. This Court considers that despite the likelihood of suffering substantial loss, it is unlikely that the Respondent may not get any award following the appeal. It would thus be fair to order for some amount to be paid and the rest to be deposited in a joint interest earning account...The Applicant shall within Thirty (30) days' pay to the Respondent the sum of Ksh 380, 600/= being 1/3 of the decretal sum within the said thirty (30) days in ii) above, the Applicant shall deposit the balance of the decretal Sum being Ksh.761,200/ in a joint interest earning account in names of the respective Advocates for the parties.

84. See also the case of Silpak Industries Limited v Nicholas Muthoka Musyoka [2017] eKLR:-

> On substantial loss that may occur if the stay is not granted, it must be considered that just as the appellant wishes to challenge both liability and quantum, as set out in the memorandum of appeal, there is legitimate expectation that the respondent should enjoy the fruits of his judgment. The fear of the respondent not being able to refund the decretal sum if the appeal succeeds may be well founded but at the same time, it must he considered that the entire judgement may not be set aside by the appellate Court. Indeed. in earlier submissions, the appellant had argued that an award of Kshs. 500.000/- would adequately compensate the respondent for the injuries sustained. The appellant is ready to comply with any conditions that may be set by the Court. Balancing the interests of both parties, I allow the application on the following terms; the appellant will pay the respondent a sum of Kshs. 500,000/= out of decretal sum and the balance thereof shall be deposited in an interest earning account in the joint names of the advocates on record. The said payment to the respondent and deposit shall be done within 30 days from the date of this ruling.

85. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the Applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.

86. Courts shall always presume validity of the trial Court judgment and as such, pending hearing and determination of the Appeal, the Respondent judgment cannot be impeached under the guise of seeking stay against execution orders.

87. I have considered that the intended Appeal contests the judgment in its entirety and thus in exercise of my discretion, having in mind all principles for grant of stay of execution of judgment and decree pending hearing of the Appeal to find the Application to be of merit and allow the same on the following conditional terms;

    a. That, there already exists Joint Interest-Earning Bank Account at the Bank of Baroda in the joint Names of the Respondent' Advocate and the Appellant Advocates, to continue serving as security for costs pending hearing and determination of the Appeal.

    b. An Order of Stay against execution of the judgment made on 9th November 2023, pending the hearing and determination of the Appeal, is hereby issued.

c. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIA TEAMS PLATFORM AT NAKURU ON THIS DAY OF 19TH DAY OF SEPTEMBER, 2024.

S. MOHOCHI

JUDGE