Pannar Seeds (K) Limited v Gogar Farm Limited (Civil Case 5 of 2017) [2024] KEHC 11856 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11856 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL CASE 5 OF 2017

SM MOHOCHI, J

SEPTEMBER 19, 2024

BETWEEN

PANNAR SEEDS (K) LIMITED ..... DEFENDANT

AND

GOGAR FARM LIMITED ..... PLAINTIFF

RULING

1. Before me is a Notice of Motion dated 18th August 2023 filed pursuant to Section 1 A, 1B and 3A of the *Civil Procedure Act*. Cap 21 Laws of Kenya. Order 42 Rule 6 and Order 31 Rule1) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law for the following Orders;

   I. Spent.

   II. Spent.

   III. Spent.

   IV. That pending the hearing and determination of the Appeal lodged at the Court of Appeal by the Applicant herein, there be a stay of execution of the judgment herein delivered on 20th July 2023.

   V. That the costs of this application follow the results of the intended Appeal.

2. The Application is premised on the following grounds is further supported by the annexed affidavit of Isabelle Nyaboke Advocate: -

   That, the Applicant is aggrieved by the judgment of this Honorable Court delivered on 20th July 2023 and has lodged a Notice of Appeal against the whole of the said decision as per Rule 77 of the Court of Appeal Rules 2022.

i. That, the Honorable court is currently on High Court Vacation hence leave to be heard is mandatory under the High Court (Practice and Procedure) Rules.

ii. That, the Applicant has an arguable appeal in the Court of Appeal with very high chances of success on the grounds inter alia that:

a. The learned Judge failed to consider all the issues and the evidence tendered by Defendant and its witnesses as well the written Submissions made before her with regard to misrepresentation with regard to the suitability of maize variety PAN 4M-19.

b. The learned Judge erred in finding that the variety PAN 4M-19 took up to 180 days to reach 20% moisture content despite there being no evidence whatsoever from Plaintiff on when the PAN 4M-19 achieved maturity or the alleged delayed maturity.

c. The learned Judge failed to consider that the Plaintiff's losses were attributable to its own negligence of planting out of season and the change in weather patterns, including the El Nino rains of 2010

d. The learned Judge erred by finding that it was not disputed that the variety failed to perform to the Plaintiff's expectation despite the Plaintiff testifying that they were happy with the In February 2010 before the onset of the rains in 2010.

e. The learned Judge erred by failing to consider that the period that the PAN 4M-19 maize vanaly attained physiological maturity as alleged by the Plaintiff was different from the date of harvesting which was affected by the rains experienced in Nakuru County, which affected the dry down period of the maize.

f. The learned Judge failed to take into account that the Plaintiff did not produce audited accounts despite PW1 having admitted that the company had annual audited accounts, essentially meaning that Plaintiff's claim was speculative.

g. The learned Judge erred by finding that Plaintiff's witness PW6 had adduced evidence on the loss incurred by the Plaintiff despite the said witness having testified that she was preparing the records produced by the Plaintiff in support of the claim in 2018, five years after the suit was filed.

h. The learned Judge failed to consider that the Plaintiff's alleged loss was computed based on its alleged profits earned from the maize yield of the year 2008 while the optimum comparator to measure the Plaintiff's loss ought to have been the earning's from the first maize crop planted in 2009.

i. The learned Judge erred by failing to consider that the Plaintiff had not specifically proved its claim for farm inputs of Kshs. 10,305.017.52 and further failed to consider the Plaintiff's evidence that showed that there was double claiming as the Plaintiff sought to recover unrelated costs as well as cost of inputs and alleged lost profits.

j. The learned Judge failed to take into consideration the claim for loss in 2009 of Kshs.33,313,490/= was speculative and failed to meet the governing principle on proof of special damages.

k. The learned Judge erred by finding that the Plaintiff had proved the total loss of Kshs.46,784,064.03 being the loss from the year 2010 resulting from the prolonged harvesting despite this claim being remote and uncertain.

l. The learned Judge erred in awarding liability at the ratio of 70:30 in favour of Plaintiff, with no rationale, explanation and analysis for the basis of the apportionment of liability.

m. The learned Judge erred by failing to take into consideration the Plaintiff's own evidence that only the fields planted in the first week of October 2009 would have attained physiological maturity before the onset of El Nino rains and by so failing has erred in her apportionment of liability at the ration of 70:30

n. The learned Judge erred by awarding the special damages of Kshs. 90,402,572 without any adherence to the strict standard of proof of special damages by including estimated gross income, anticipated earnings for the following year, taxes and operational costs which ought to have been deducted.

iii. That at the time of delivery of judgment, the Court ordered 30 days stay of execution against the said judgment in the interim which orders lapse in a day, on 19th August 2023.

iv. That the Respondent/Judgment creditor is likely to execute the said Judgment and Decree and unless the orders of stay of executionare granted, the Applicant stands to lose a significant sum of Kshs. 63,281,800.40/ which is substantial should the execution proceed and the appeal will be rendered nugatory. Additionally, the Respondent's ability to refund the decretal amount should the appeal be successful is unknown.

v. That the Applicant is ready and willing to afford such security as may be in the Court's discretion suffice for the due performance of the decree at the ultimate determination of Appeal and is willing to comply with any other orders/directions that this Honorable Court may deem fit to grant.

vi. That this application has been made without any unreasonable delay.

vii. That it is the foundation of the judicial system that a party who comes to a Court will be will also be allowed to ventilate his rights on appeal. heard fairly and

viii. That it is in the best interest of justice that the stay of execution sought herein be granted pending the hearing and determination of the Appeal against the said judgment of this Honorable Court.

ix. That the Respondent will not be prejudiced if the stay is granted.

x. That it is just and equitable to grant the orders sought in this application.

3. Applicants and the Respondents filed written submissions on the 14th December 2023 pursuant to directions issued 14th November 2023

Applicants Submissions

4. The Applicant refined a sole issue for determination before this honorable court whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.

5. As to whether the Applicant has demonstrated that the orders of stay of execution pending appeal are merited? He contends that, the law governing the court's discretion to grant stay of execution orders

pending appeal is well settled. The principles guiding the same are expressly laid out in the provisions of Order 42 rule 6(1) and (2) of the Civil Procedure Rules that provide as follows:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 dectee 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." (emphasis ours)

6. Reference is made to the Court of Appeal in Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365 distilled the three conditions for grant of stay of execution orders stating that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 Rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

7. It is the Applicant's submission from the outset and as emphasized above, that the framing of the rule suggests that the law contemplates that the mere fact of filling of an appeal shall not lead or warrant stay of execution. The stay of execution is the exception rather than the rule. And even where stay is to be ordered, it must be on the basis of satisfaction by the applicant of the conditions set out both in statute and by case law.

8. That the Applicant seeks to address and dispel the baseless allegations outlined in the Respondent's Replying Affidavit, sworn on 07/09/2023, particularly in paragraphs *6*,*7* and *14*.

9. That, in the said paragraphs the Respondent questions the Applicants legal standing in the country, contending that the court should scrutinize the same. The Respondent asserts that it did an online search and its findings were that the Applicant is a subsidiary of a South African company. This is a blatant lie and the Applicant directs the court to paragraph 7 of its Supplementary Affidavit, sworn on 03/10/2023, and its Annexure LI-5 This annexure, accessible at www.coevk.com/danes.html provides a comprehensive list of companies affiliated under the Corteva Umbrella, including the Applicant. The Applicant submits that like the other companies listed therein, it has a distinct identity and autonomy within the Corteva umbrella and possesses its own directors and operational autonomy in this country.

10. Additionally, the Applicant submits that its ongoing status as an active company is well substantiated by Annexure LI-4, which shows its operational continuity since its establishment in 1999. The Applicant has actively participated throughout these proceedings, culminating in the pursuit of an

Appeal against the judgment, Respectfully, these are not actions that would be preferred by a company whose legal presence in the country was questionable. It is clear that the Respondent's allegations are a baseless and malicious attempt to hoodwink the court as concerns the Plaintiff's status and standing in Kenya into dismissing the and we urge the court to reject this prevarication

11. That this legal threshold has been buttressed in several decisions among them, in Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, where the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay.

12. That, the Respondent avers that the Applicant has not demonstrated that it will suffer substantial loss should the court fall to issue an order for stay pending Appeal. Nothing could be further from the truth. Ground 5 of the Notice of Motion and Paragraphs 8 and 9 of the Supporting Affidavit sworn by Linet Isaboke the Applicant has averred that it stands to suffer irreparable loss should the court fail to grant the stay of execution. The Applicant submits that it stands to suffer a substantial financial loss if the orders for a stay of execution are not granted, with the Respondent/Judgment creditor poised to enforce the Judgment.

13. The Applicant faces a significant risk of losing Kshs. 63,281,800.40/=, This potential loss not only poses an immediate threat to the Applicant's financial stability but also jeopardizes the efficacy of the impending appeal, which would be rendered nugatory.

14. Furthermore, the Applicant has demonstrated that there is a huge uncertainty surrounding the Respondent's ability to refund the decretal amount in the event of a successful appeal heightens the gravity of the potential loss. The Respondent has failed to prove its ability to refund the decretal sum should it be paid. Financial evidence presented during the trial is questionable, and no valuation report credible evidence has been provided regarding the Respondents ability to repay the decretal sum.

15. The court is invited to take judicial party. The substantial loss in the company to significant financial jeopardy. The in majorly through the stalling of the Applicant's operations and further as follows a compromise.

16. The execution of the decretal sum while the Appeal is pending holds the potential to significantly tarnish the Applicant's reputation, creating adverse repercussions suppliers, and other stakeholders-furthermore, the awarded sum 63,281,800.40 is not an on relationships with client in the judgment of Kshs inconsequential amount. If the Respondent is unable to pay this amount poses a substantial threat to the Applicant's ongoing operations. This threat inched the potential for disruptive impacts on regular business activities, hindering the Applicant's aby to conduct its operations smoothly. Therefore, proceeding with execution to meet the decretal could result in severe disruptions to the company's business activities and overall financial stability.

17. Should the Appeal succeed, the Applicant would be subjected to unnecessary legal costs and miscellaneous expenses in an attempt to recover its costs from the Respondent

18. What constitutes substantial loss was discussed by Hon. Justice Gikonyo in James Wangalwa & Another Vs Agnes Naliaka Cheseto where it was held inter alia 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... 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... Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory

19. The Respondent has in paragraphs 6, 7 and 8 of the further Affidavit sworn on 13/10/2023 asserted that it can refund the decretal sum. It is a well-established principle that when a judgment debtor raises doubts about the judgment creditor's ability to repay the decretal sum, the burden shifts to the judgment creditor to substantiate its capacity to refund.

20. This position was buttressed in National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another where 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 that an appeal would be rendered nugatory because a respondent because would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses 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 that is peculiarly within his knowledge.

21. In the present case, the title deed of the Plaintiff's land, the alleged farm animals owned by the Plaintiff, and the purported undated and unexecuted sale agreement annexed to the Respondent's Further Affidavit do not instill any confidence in the Plaintiff's capability to refund the decretal sum and we say so for the following reasons:

    a. The Respondent has not furnished a valuation report for their land, or audited accounts leaving Its actual value undisclosed/unknown/undivulged.

    b. No visual evidence or documented information, such as pictures or a detailed record, has been provided by the Plaintiff regarding the farm animals, including their exact number and market value.

    c. The sale agreement presented by the Plaintiff is merely a draft, explicitly labeled with a watermark stating "draft - not binding until signed by all parties."

    d. Additionally, the Plaintiff's pleadings, specifically a copy of its email dated 12/7/2018 to its current and previous Advocates submitted alongside its bill of costs filed in this cause, acknowledged that it's financial liquidity is contingent upon the outcome of this case. Notably, the Plaintiff's managing director has in the email explicitly stated that the settlement of advocate's fees for this case waslis dependent on the success of this case. This admission further underscores the financial uncertainty surrounding the Plaintiff, casting doubt on its ability to refund/repay the decretal sum should the appeal be successful. The email is attached and marked "1" for the court's ease of reference.

22. The Applicant submits that the Respondent has not sufficiently discharged the evidential burden of showing its ability to repay the decretal sum as stated in National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another (supra). These above inadequacies fail to establish the Plaintiff's ability to repay the decretal sum in the event of execution. We urge this court to recognize that the Plaintiff has not met the burden of proof regarding its financial capacity in this regard. As such, it would not be in a position to effect a refund if the appeal is allowed hence the same would be rendered nugatory and the Applicant shall suffer irreparable loss.

23. Reference is made to the case of Njuca Consolidated Co. Ltd & another v Lineth Chemutai Moritim [2017] eKLR where the court held as follows:

> " The Respondents relied on a number of authorities to urge the Court to order that the Applicants do pay part of the decretal sum to the Respondent. There are circumstances when an order for part-payment of the decretal sum is the fairest way to balance the rights between the Judgment Creditor and Judgment debtor. However, in this case, I am handicapped by the fact that I have absolutely no information about the capacity of the Respondent to refund any decretal sums paid to her."

24. The Applicant contends that it filed its Notice of Appeal on 31/7/2023, within the stipulated timelines, without undue delay, The Applicant submit that the judgment was delivered virtually on 20/07/2023 by the Hon. Lady Justice Ngetich, who had been transferred to Kabamet High Court. Following the virtual delivery of the judgment, the honorable Judge communicated that the physical file and judgment would be sent to the Nakuru registry, which took some time but was eventually traced/avalled on 02/08/2023 and the delay in having the physical file in Nakuru High Court posed some challenges to the Applicant but nonetheless that application was filed timeously.

25. That the Judge also issued a 30-day stay of execution, which was set to expire on 19th August 2023. The filing of this application was aligned with the expiration of the stay orders noting that filing before the lapse would have been premature, as the stay orders were still in effect. This application was submitted a day before the lapse of these orders, demonstrating timeliness and adherence to procedural threshold.

26. The Applicant reiterates the tenth ground of its Supporting Affidavit in the application sworn on 17/8/2023 which states;

> " The Applicant is ready and willing to comply with any order issued by this Honourable Court for the due performance of such decree or order as may be deemed to be ultimately binding on it."

27. That, the Respondent's assertion in paragraphs 15 and 17 of the Replying Affidavit, that the Applicant has failed to meet this prerequisite is based on a misapprehension of the law as courts have previously held that the deposit of security for the due performance of a decree is a matter for the court to determine, not a matter of willingness by an Applicant. This position was buttressed in the case of Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd [2019] eKLR where the court held:

> " 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."

28. The court further cited with approval the decision in Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR, where It was held 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. The Applicant has offered to provide security and has therefore satisfied this ground for stay."

29. That, in accordance with the court's discretion and the Applicant's commitment to complying with any such orders that this Court shall issue to meet this prerequisite, the Applicant is willing to deposit the sum of Kshs. 63,281,800/, the decretal sum less the 30% contribution from the Plaintiff. We wish to point out the Respondent's assertion that the Applicant should be directed to deposit a sum of Kshs. 139,000,000/- lacks substantiation, given that costs and interest are yet to be taxed or assessed.

30. It is the Applicant's submission therefore that sufficient cause has been shown to warrant grant of the orders sought in the said Application. As such, it pray that application herein be allowed with costs.

Respondent's Case

31. The Application is opposed vide Respondent's replying affidavit sworn on 7/09/2023 and 13/10/2023. The only issue the Respondent contests in the application is whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited and hence its submissions filed on 4th December 2023 shall be restricted.

32. That the law governing the court's discretion to grant stay of execution orders pending appeal is well settled. The principles guiding the same are expressly laid out in the provisions of Order 42 rule 6(1) and (2) of the Civil Procedure Rules that provide as follows:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 dectee 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." (emphasis ours)

33. The Court of Appeal in Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365 distilled the three conditions for grant of stay of execution orders stating that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 Rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

34. It is the Respondent's submission that, from the outset and as emphasized above, that the framing of the rule suggests that the law contemplates that the mere fact of filling of an appeal shall not lead or warrant stay of execution. The stay of execution is the exception rather than the rule. And even where stay is to be ordered, it must be on the basis of satisfaction by the applicant of the conditions set out

both in statute and by case law. In this case, the Respondent asserts that, the Applicant has failed to meet the conditions for the grant of orders for stay of execution pending appeal and is undeserving of said orders. Further, that the Applicant's application dated 18th August, 2023 is a gross abuse of the court process and is only meant to convolute the dispute and prevent the Applicant from accessing the fruits of its judgment.

35. That the Applicant has failed to lead evidence to demonstrate that it would suffer substantial loss if the stay orders are not granted. It is our humble submission that this failure is fatal to the Applicant's application and the course of action that best commends itself to this honorable court at this point is to dismiss the same.

36. In Kenya Shell Limited vs. Kibiru [1986] KLR 410, at page 416, the court expressed itself as follows regarding the aspect of substantial loss:

> "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 ours).

37. The court went further to provide illustrations of the ramifications of the phrase 'substantial loss' as follows:

> "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 judgment. 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 judgment." (Emphasis Ours)

38. That, the court in James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, pronounced itself as follows regarding the question of substantial loss:

> "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 Ours).

39. That, it is apparent that the Applicant has failed to demonstrate that it would suffer any degree of substantial loss if the orders for stay are not granted by this honorable court.

40. It is the Respondent's submission that, the court proceedings herein would be rendered nugatory if the Defendant/Applicant Company is not compelled to immediately pay the decretal sum.

41. The Defendant/Applicant's existence and operations in the country are tenuous and the same is characterized by convoluted processes making it very difficult to trace its assets in the most probable event that it becomes necessary to levy execution to recover the decretal sum herein after its appeal is eventually dismissed.

42. That, a cursory search of the status of the Applicant reveals that the Applicant is, or was, a subsidiary of Pannar South Africa which is now a subsidiary or part of Corteva Agriscience (USA) Company. As such, its commitment or continued presence in the country cannot be guaranteed, much less the reach of the legal process of the honorable court to its assets outside Kenya to ensure compliance or satisfaction.

43. Further, under the UK register gov.uk Pannar Limited, the South African Parent of the Applicant is described as 'dissolved'. It is therefore cumbersome or and even impossible to fully contextualize the exact legal status of the Applicant.

44. It is the Respondent's humble view that, the decretal sum herein already adjudged by this honorable court is better off with the Plaintiff/respondent herein as they are a solid company domiciled in Kenya whose livestock assets and landholding are in Kenya and are demonstrably worthy many times the value of the decree herein.

45. That, the importance of the requirement of security cannot be overstated. In Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR, where 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 Ours).

46. The Respondent associates with the position held by the court in Gianfranco Manenthi & another vs, Africa Merchant Assurance Company Ltd [2019] eKLR where the court stated as follows:

> " .. the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, 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.'

47. It is the Respondent's submission that, in the unlikely event that the court finds that there is justification for staying execution of the decree or part thereof, that tangible and accessible security be provided for the entirety of the judgment, the interest that is easy to compute and costs that are in the process of taxation and whose proposal is about Kes 20 million bringing the cumulative amount to about Kes 166 million. This amount should be deposited in a solid bank in the joint names of the advocates on record. This way the amount is within reach of the plaintiff who has succeeded in proving its case before a court of competent jurisdiction but also reversible to the defendant in the event is succeeds in the proposed appeal.

Analysis and Determination

48. 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.

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

50. 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).

51. 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.

52. 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."

53. Further reliance is placed on the case of Machira t/a Machira & Co Advocates v EastAfrican 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.

54. 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.

55. 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.

56. 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.

57. That it 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... In this regard and in relation to the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it should be seen from the point of view that a debt is already owed and due for payment to the successful litigant and the security must therefore be such that if the appellant fails to succeed on appeal, there could be no return to status quo on the part of the plaintiff that will necessitate him to initiate further recovery

proceedings where the judgement involves a money decree. In such cases, the security offered must be that which the court will just order to be released to the Respondent.

58. 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.

59. 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.

60. Lastly, the other special circumstances that a court should consider is the nature and extent of the Appeal. Therefore, and where the Appeal is on both liability and quantum, courts have generally held that, it will be prejudicial to the Appellant if the Respondent is paid some money irrespective of the Respondent's financial capability as was held in the case of Julius Thuranira Muriungi v Grace Kathure [2021l eKLR): -

This Court observes that;

> "the intended appeal being one on quantum following a fatal accident, the Appellant will inevitably have to pay the Respondent some amount of money and payment to the Respondent of some amount of money will not entirely be prejudicial. Accordingly, this

Court...grants an order for stay of execution ...The Applicant shall within Thirty (30) days' pay to the Respondent the sum of Kshs.1,063, 000/= being a half of the decretal sum".

61. 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 applicants have fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.

62. 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.

63. I have considered this draft Memorandum of Appeal Dated 31st July 2023 noting that, the intended Appeal contests the judgment in its entirety I am unable to determine its prospects of success but I deem the same arguable 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, the Appellants shall Deposit in Joint Interest-Earning 1st Tier Bank Account, in the joint Names of the Respondent' Advocate and the Appellant Advocates, a sum of (Kshs 62, 281, 800/-) the Decretal sum, within Forty-Five (45) Days from today.

    b. An Order of Stay against execution of the judgment/Decree made on 20th July 2023 pending the hearing and determination of the Appeal is hereby issued.

    c. Default and/or failure to comply with a) above by the Appellant shall automatically result to the vacation of the Stay Orders against execution of Judgment/Decree Order(s);

    d. 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