



**Mwinga v SAI & 2 others (Miscellaneous Application E180 of 2023)  
[2023] KEHC 23382 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23382 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E180 OF 2023  
HM NYAGA, J  
OCTOBER 11, 2023**

**BETWEEN**

**STEPHEN BABU MWINGA ..... APPELLANT**

**AND**

**SAI ..... 1<sup>ST</sup> RESPONDENT**

**PZO (MINOR SUED THROUGH HER MOTHER AND NEXT FRIEND**

**SAI) ..... 2<sup>ND</sup> RESPONDENT**

**STELLA WAMBUI MWANGI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before me is an Application dated 31<sup>st</sup> May,2023 brought under Section 79G and 95 of the [Civil Procedure Act](#), Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#) wherein the Applicant, Stephen Babu Mwinga seeks for orders That;
  - a. Spent
  - b. Spent
  - c. This Honourable Court be pleased to stay execution of the judgment/decree of the Small Claims Court delivered on 24<sup>th</sup> January,2023 in Nakuru Small Claims Court Civil Case No.E211,212 and 223 of 2022(Consolidated) pending the hearing and determination of the intended Appeal herein;
  - d. Leave be granted to appeal out of time against the whole judgment and decree of the small claims court delivered on 24<sup>th</sup> January,2023 in Nakuru Small Claims Court Civil Case No.E211,212 and 223 of 2022(Consolidated)



- e. The Memorandum of Appeal dated 31<sup>st</sup> May, 2023 annexed to the supporting Affidavit be deemed properly filed.
  - f. Costs of this Application be awarded to the Appellant/Applicant.
2. The Application is supported by grounds set out on the face of it and the Supporting Affidavit of the applicant.
3. In a nutshell, the applicant states that he was dissatisfied with the judgment and decree of the subordinate court in Nakuru Small Claims Court Civil Case No.E211,212 and 223 of 2022(Consolidated)and that leave to file an appeal out of time has since lapsed .
4. He avers that the intended appeal, evidenced by the annexed Memorandum of Appeal raises serious points of law, has overwhelming chances of success, is meritorious and arguable and unless stay of execution sought is granted, the intended appeal shall be rendered nugatory.
5. He further deposes that the respondents have commenced the execution proceedings and unless stay is granted the respondent will proceed with execution despite his willingness to appeal and have a just determination of the issues in question. He avers that he paid the Respondents Ksh. 306,850/- on 27<sup>th</sup> March, 2023 and is ready and willing to deposit the balance of the decretal sum being Ksh. 613,400/= in court or in a joint interest earning account in the name of the advocates of the parties.
6. He contends that he made the above payment believing to be his portion of liability for the judgement yet the respondents are keen to execute the whole judgement against him to the exclusion of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the primary suit. He also avers that the application is made in good faith, has been brought without any undue delays, and that no prejudice shall be suffered by the respondents if this application is allowed.
7. The Application is opposed. Stella Wambui Mwangi, the third respondent, swore a replying affidavit on 15<sup>th</sup> June, 2023 on her behalf and on behalf of her co-respondents.
8. She avers that the application is an afterthought, incompetent, misconceived bad in law and in contravention of Section 80 and Order 45 Rule 1(b) of the *Civil Procedure Rules* as the applicant having opted to apply for review of the judgement cannot come back to seek to appeal after the review application was denied.
9. She also deposes that the applicant has not provided a good and sufficient cause for not filing the appeal within time. She contends that the applicant has not met the legal threshold for grant of stay pending appeal. She also states that this application is a tactical ruse to delay the wheels of justice and deny them the enjoyment of the fruits of their judgement.
10. The application was disposed of by way of written submissions.

### **Appellant/Applicant Submissions**

11. The Applicant framed three issues for determination, namely;
  - a. Whether the Appellant/Applicant should be granted leave to file an Appeal out of time.
  - b. Whether the Appellant/Applicant sought review or interpretation of the judgement delivered on 24<sup>th</sup> January,2023
  - c. Whether execution of the subordinate court's Decree should be stayed.



12. On the first issue, it was submitted that leave to file an appeal out of time has lapsed and the applicant is desirous of exercising his right of appeal. It was argued that the intended appeal has overwhelming chances of success, is meritorious and arguable and unless stay is granted it shall be rendered nugatory.
13. Reference was made to the case of *Evans Kiptoo vs Reinhard Omwonyo Omwoyo* (2021) eKLR where Justice Olga Sewe was in agreement with the reasoning of Emukule, J. in *Gerald M'limbine vs Joseph Kangangi* [2008] eKLR, where he stated that:

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period.”
14. Citing the provisions of section 79 of the *Civil Procedure Act*, the Applicant submitted that appeal may be admitted out of time but the same ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal.
15. He contended that he has duly complied and referred this court to the case of in *Mugo & Others vs. Wanjiru & Anor* [1970] EA 482 where it was held that:

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”
16. The applicant submitted that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of court’s discretion. The applicant relied on the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR on the principles governing grant extension of time to file an appeal.
17. With respect to the second issue, the applicant submitted that he moved the trial court under Order 22 Rule 22 and 59 of the *Civil Procedure Rules* vide an application dated 29<sup>th</sup> March 2023 seeking an interpretation of the court’s judgment delivered on 24<sup>th</sup> January 2023 by dint of the fact that the respondent had proceeded to execute the full judgment against the applicant to the exclusion of the other respondents’ in the main suit. He argued that that was not an application for review of the judgment as envisioned under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1(b) of the *Civil Procedure Rules* 2010.
18. On the last issue, the applicant submitted that respondents have commenced execution through proclamation dated 19<sup>th</sup> May, 2023 and unless stay sought is granted, he will suffer irreparable loss and intended appeal shall be rendered nugatory. He submitted that he is ready and willing to abide by the reasonable conditions as may be directed by this Honourable Court. He prayed that the decree in issue be stayed till the intended appeal is expeditiously dispensed with.
19. To buttress his submissions the applicant relied on the cases of *Halai & Another .v. Thornton & Turpin 1963 Ltd* 1990 KLR 365, where the court of appeal circumscribed the jurisdiction of this Court while considering an application of stay. Also cited was *Butt v Rent Restriction Tribunal* 1982 KLR 97 on the considerations for granting an application for stay and the case of *Machira t/a Machira & Co Advocates v East African Standard* [2002] eKLR where the court stated inter alia that an applicant’s ground for



substantial loss must be specific and detailed as it is not enough to merely state that substantial loss will result or that if the appeal is successful it will be rendered nugatory.

### Respondent's Submissions

20. On whether a party can file a review once an application for review has been rejected, the respondent cited the provisions of Section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#) and submitted that the applicant having applied for review cannot appeal from the same decree and order.
21. Reliance was also placed on the case of [HA v LB](#) [2022] eKLR where the court stated inter alia that to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed amounts to an abuse of the court process.
22. With respect to whether the Applicant has met the requirements to warrant extension of time to file an appeal out of time, the respondent relied on the case of [Nation Media Group & another v William Kimutai B. Keitany](#) [2017] eKLR where the court set out the principles to be considered in an application for leave to enlarge time to file an appeal out of time then submitted that the applicant has not demonstrated a reasonable cause for delay in filing the appeal out of time. The respondent argued that extension will be highly prejudicial to them as they are being denied a chance to enjoy the fruits of litigation as successful litigants.
23. With respect to whether the applicant has satisfied the principles governing stay of execution, precisely on whether the applicant's appeal is arguable, the respondent submitted in the negative. The respondents relied on the case of [Commissioner of Customs v. Anil Dosbi](#) [2007]eKLR for the proposition that that rationale for this requirement is to guard against frivolous appeals whose intention is to delay a successful litigant from enjoying the fruits of litigation.
24. With regard to whether this Application has been filed without unreasonable delay, the respondent contended that the judgement appealed against was rendered on 24<sup>th</sup> January, 2023 while the instant application was filed on 31<sup>st</sup> May, 2023 which is about 4 months after the time for filing an appeal had lapsed. According to the respondents, the same consists of inordinate delay abhorrent to the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#).
25. The Respondents argued that the applicant has not provided good reasons for inordinate delay in filing the Appeal and the instant application.
26. To buttress their submissions reliance was placed on the case of [Mombasa County Government v Kenya Ferry Services & another](#) [2019] eKLR where the court observed that the applicant need to satisfactorily declare and explain the whole period of delay to the court and considering the application for stay was filed more than two months later, the court observed that the applicant had not provided a satisfactory explanation for two months delay.
27. In regards to whether the Applicant will suffer substantial loss if stay orders are not granted, the respondents citing the case of [Danros \(K\) Limited & another v Murtaza Adaamjee](#) [2021] eKLR submitted that the applicant has not demonstrated the likelihood of substantial loss should execution proceeds. According to them, execution is lawful processes through which a decree holder enjoys the fruits of litigation and a means of enforcing a debt decreed by the court, therefore the court should as far as possible allow a successful party to enjoy what is rightly theirs.



28. On whether security for due performance of the decree has been given, the respondents submitted that it is trite that an applicant cannot succeed in an application for stay of execution pending appeal unless they give security for due performance of the decree. For this proposition reliance was placed on the cases of *John Kinuthia Njoroge v Marjorie Murigu Saidi* [2021] eKLR & *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014 eKLR].
29. On a Without prejudice basis, the respondents submitted that if the court exercises its discretion in favour of the applicant, then he should be ordered to deposit the decretal sum in a joint interest earning account in the joint names of the advocates within 30 days of the order failing which execution should issue.

### **Analysis & Determination**

30. The issues that fall for determination are :-

- a. Whether the Applicant sought for review before the trial court.
- b. Whether the application seeking leave to appeal out of time is merited.
- c. Whether stay orders sought should be granted.

31. Section 80 of the *Civil Procedure Act* provides that:

“

- “ 80. . Any person who considers himself aggrieved –
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Additionally, Order 45, rule 1 provides that:

“1. (1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellants, or when, being respondent, he can present to the appellate court the case on which he applies for the review”



32. Thus, Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review while Order 45 sets out the jurisdiction and scope of review. The latter limits grounds of review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.
33. In the instant matter, the Respondents contend that the Applicant having opted to apply for review of the judgement cannot sequentially seek to appeal after the review application was denied.
34. It is true that the two remedies cannot be pursued either concurrently or sequentially. See the cases of *Chairman Board of Governors Highway Secondary School v William Mmosi Moi* [2007] eKLR, *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR & *Mary Wambui Njuguna v William Ole Nabala & 9 others* [2018] eKLR.
35. According to the Applicant he did not seek for review before the lower court but rather for trial court's interpretation of joint and several liability in its judgment. I have perused the application in issue dated 29<sup>th</sup> March, 2023 and I note the same was brought under section 1A, 1B, 3A of the *Civil Procedure Act*, Order 22 Rule 22 and 59 of the *Civil Procedure Rules* wherein the Applicant sought for inter alia ;
- I. Stay of execution of the warrants of sale dated 9<sup>th</sup> March, 2023 in suits no. SCCC E211,E212 and E 223 of 2022 (consolidated)
  - II. Interlocutory injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents and their agents or servants from executing the warrants by way of sale over Motor Vehicle Registration Number KBU 654Y belonging to the 1<sup>st</sup> Applicant to recover the full judgment of Ksh.920,550/=
  - III. A determination that the 1<sup>st</sup> Applicant was only liable for a third of the Judgment amount as per the judgment dated 24<sup>th</sup> January, 2023.
  - IV. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and their agents from attaching any property belonging to the 2<sup>nd</sup> Applicant who was not a party in suits no. SCCC E211,E212 and E 223 of 2022(consolidated).
36. It is thus apparent from the above orders that the Applicant did not seek for review of the Lower Court's judgment. That argument fails.
37. I will now delve into the second issue.
38. Section 79G of the *Civil Procedure Act*. The section provides that:
- “Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
- Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
39. Section 95 of the *Civil Procedure Act* provides thus: -
- “Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”



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

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

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

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

“The underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time is a consideration to be made a case- to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.

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

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

44. These principles were also reiterated in *First American Bank of Kenya Ltd -vs- Gulab P. Shah & Others* HCC 2255/2000 [2002] IEA 65 and listed them as follows: -The explanation if any, for the delay;The merits of the contemplated action, whether the appeal is arguable;Whether or not the respondent can



be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.

45. I will therefore proceed to determine whether the Applicant has advanced plausible grounds for delay in filing the appeal.
46. The lower court's judgement was delivered on 24<sup>th</sup> January, 2023 and subsequently the Applicant filed the aforesaid application dated 29<sup>th</sup> March, 2023. It is not clear when the ruling of the same was delivered by the trial court. The instant application was filed on 31<sup>st</sup> May, 2023. That is precisely 4 months and 7 days after the judgment. In Nairobi HCC No. 32 of 2010, *Utalii Transport Company Limited & 3 Others v NIC Bank Limited & another* [2014] eKLR, the Court in considering what amounted to inordinate delay had this to say;

“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable”

47. I associate myself entirely with the above findings. The Applicant herein has not expressly offered any explanation for delay in filing his appeal within time. He has only deposed that he is desirous of pursuing an appeal and that the said appeal has overwhelming chances of success.
48. The Court of Appeal in Nakuru Civil Appeal No. 1/2007;- *William K. Too v Simion K. Langat* [2007] eKLR, refused to interfere with the ruling of the High Court, where the learned judge found that an unexplained delay of forty two days was inordinate.
49. The Court of Appeal in *Aviation Cargo Support Limited v St. Mark Freight Services Limited* [2014] eKLR held as follows:

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

50. It is thus clear that even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. (See also *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR.)
51. It is noted from the lower court record that the applicant had made an earlier application before the trial court as stated. The date of the delivery of the ruling is unknown. The applicant could not have simultaneously made the application before the trial court and filed an appeal. He was entitled to first seek the interpretation of the judgment by the trial court, as he did. In my view, although the delay of 4 months is inordinate, and no express explanation was given, there is an inferred explanation for it, which I find to be sufficient.
52. With regard to whether the intended appeal is arguable, I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case as that is under the purview of the appellate court after hearing the merits of the same. The court should therefore only be concerned with the question of whether or not the appeal will be rendered nugatory.



53. A cursory look at the Memorandum of Appeal shows that the grounds raised therein are triable. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate court overturn that of the trial court. I therefore find that the Appellant's Appeal is arguable.
54. The other limb is whether the Respondents can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. The answer is in the affirmative. I find that no prejudice will be caused to the Respondents that cannot be compensated by an award of costs if the Application is allowed.
55. Considering that extension of time is an equitable remedy and there are plausible reasons advanced by the applicant for failing to file an appeal within time, I hold that he is entitled to the orders sought, so that he can ventilate his appeal.
56. Should the court grant a stay of execution? Having found that there is reason to grant the applicant leave to appeal out of time, it is inevitable that the court grants a stay of execution. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:

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

57. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:
- a. Substantial loss may result to him/her unless the order is made;
  - b. That the application has been made without unreasonable delay; and
  - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
58. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

“The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.



Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.”

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

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

60. The learned judge continued to observe that:-

“It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.

61. As already observed above, this court at this stage should only be concerned with the question of whether or not the appeal will be rendered nugatory. The annexed memorandum of appeal raises triable issues and the same will be rendered nugatory should the decision of the appellate court overturn that of the trial court.

62. I find that the applicant has also succeeded on this particular limb.

63. The applicant submitted that he has paid Ksh.306, 850/= to the respondents and he is ready and willing to deposit the balance of the decretal sum in court or in a joint interest earning account in the names of the advocates of the parties, and further willing to abide by the reasonable conditions as may be directed by this Honourable Court.

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

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

65. Going by the above, I find that the Applicant has similarly succeeded on this limb, by submitting himself to the discretion of the court.



66. To succeed, an applicant in the circumstances of the applicant herein must satisfy all the three conditions for grant of stay. The court in *Trust Bank Limited vs Ajay Shah & 3 Others*, [2012] eKLR at page 23 stated that :-

“The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff’s Notice of Motion dated 24th April, 2012 it without merit.”

67. The Applicant herein has, in my opinion, succeeded on all the limbs of his application. I therefore allow the application on the following terms;

- a. The appellant/applicant’s application to appeal is allowed out of time and is to be filed and served within the next 7 days from the date of this ruling.
- b. The appellant/applicant to deposit the balance of the decretal sum of Ksh. 613,400/= in a joint interest earning account in the name of the advocates for the parties herein within the next 30 days.
- c. The appellant/applicant to file and serve the record of appeal within the next 30 days.
- d. There will be a stay of execution of the decree of the lower court pending the determination of the appeal, but subject to (a) and (b) above and in default thereof, the stay orders shall stand vacated without further reference to the court.
- e. The applicant shall bear the costs of this application in any event.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 11<sup>TH</sup> DAY OF OCTOBER, 2023.**

**H. M. NYAGA**

**JUDGE**

In the presence of;

C/A Jeniffer

Mr. Omondi for Applicant

N/A for respondent

(Ms Saringi now present)

