



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. E001 OF 2021

(FORMERLY HCCA NO. E030 OF 2021)

WEST AFRICAN FOODSTUFFS CO. LTD.....1ST APPELLANT

MOJIRADE IDAYAT OLAYANJU.....2ND APPELLANT

Y.A. OLAYANJU.....3RD APPELLANT

-VERSUS-

KAYSER INVESTMENT LTD.....RESPONDENT

RULING

INTRODUCTION

1. The Ruling herein relates to three different Applications, two of which dated the 28th of January 2021 and the 23rd of August 2021, have been filed and/or lodged by the Appellants, whereas the third Application dated the 13th of September 2021, has been filed by the Respondent.

2. The Notice of Motion Application dated the 28th of January 2021, seeks the following Reliefs;

i.(Spent

ii. *This Honorable Court be pleased to grant a temporary stay of proceedings and Execution of the Ruling and all consequential orders delivered on the 19th of January 2021, vide Nairobi MCOMMSU No. 84 of 2020, between **Kayser Investments Ltd vs West African Foodstuffs Co. Ltd & 2 others**, pending the hearing and determination of this Application for stay of execution pending Appeal*

iii. *This Honorable Court be pleased to grant a temporary stay of proceedings and Execution of the Ruling and all consequential orders delivered on the 19th of January 2021, vide Nairobi MCOMMSU No. 84 of 2020 between **Kayser Investments Ltd vs West African Foodstuffs Co. Ltd & 2 others**, pending the hearing and determination of the Appellants/Applicants Appeal.*

iv. *Costs of this Application be provided for.*

3. The aforesaid Application is premised on the grounds that have been enumerated at the foot thereof and same is further supported by the joint Affidavit of **Mojirade Idayat Olayanju and Y.A. Olayanju**, sworn on the 28th of January 2021 and to which the Appellants/Applicants have attached three annextures thereto.

4. Upon the filing and service of the Application dated the 28th of January 2021, the Respondent herein filed and/or lodged a Notice of Preliminary Objection whereby same objected to both the Application and the Appeal and the Notice of Preliminary Objection was subsequently canvassed and disposed of vide the Ruling rendered on the 30th of June 2021, whereby the Honorable Judge found and held that the subject matter belongs to and/or falls within the jurisdiction of the Environment and Land Court. Consequently, the subject file was thereafter directed to be placed before the presiding judge of the Environment and Land Court.

5. The second Application is the one dated the 23rd of August 2021, and similarly filed by the Appellants/Applicants and in respect of which

the following Reliefs are sought;

i.(Spent)

ii. *This Honorable Court be pleased to grant a temporary stay of proceedings and execution of the Ruling and all consequential orders delivered on the 11th August 2021 and 19th of January 2021, vide **Nairobi MCOMMSU No. 84 of 2020 between Kayser Investments Ltd vs West African Foodstuffs Co. Ltd & 2 others**, pending the hearing and determination of this Application for stay of execution pending Appeal.*

iii. *This Honorable Court be pleased to grant a temporary stay of proceedings and execution of the Ruling and all consequential orders delivered on the 19th of January 2021 and 11th August 2021 vide **Nairobi MCOMMSU No. 84 of 2020 between Kayser Investments Ltd vs West African Foodstuffs Co. Ltd & 2 others**, pending the hearing and determination of the Appellants/Applicants Appeal.*

iv. *This Honorable Court be pleased to set down the Appellants Notice of Motion dated 28th January 2021 for hearing and determination on priority basis.*

v. *Costs of this Application be provided for.*

6. The Notice of Motion Application herein is premised on the various grounds enumerated at the foot thereof and same is further supported by the joint Affidavit of **Mojirade Idayat Olayanju and Y.A. Olayanju**, sworn on 23rd August 2021, before a Notary Public based in the State of Illinois, in the United States of America and in respect of which the Appellants/Applicants have attached three annexures, including the order of Garnishee nisi, issued on the 11th of August 2021.

7. Upon the filing and service of the said Application, the Respondent herein filed a Replying Affidavit sworn by one Dorothy Mbaye on the 29th of October 2021 and to which the Deponent has attached a Bundle of Documents, which have been serialized as **annexture DM**.

8. The Third Application in respect of this matter is the one dated 13th September 2021, filed by the Respondent and in respect of which the following Reliefs have been sought;

i.[Spent]

ii. *The Appellants be and are hereby ordered to furnish security for the Respondent's costs in the sum of Kshs. 1,000,000 only to be deposited in a joint interest earning account or such amount as may be determined by the Court as security for costs of the Appeal herein within 14 days of the Order of this Honorable Court.*

iii. *The Appellants be and are hereby ordered to further deposit the entire decretal sum herein of Kshs. 4,026,084.07 in an interest earning bank account in the joint names of the Advocates on record for the parties within 14 days of the Order of this Honorable Court.*

iv. *The hearing of the Appeal be stayed pending the deposit of the security and the decretal sum.*

v. *In default of deposit of the security within 14 days from the date of the Order for deposit being issued by this Court, the Appeal herein be dismissed with costs.*

vi. *Costs of this Application be borne by the Appellants on full indemnity basis.*

9. The Subject Application has been founded and/or based on a total of 15 grounds, which have been enumerated at the foot thereof and same is further supported by the Affidavit of Dorothy Mbaye sworn on 13th of September 2021 and to which the Deponent has attached a bundle of documents serialized and marked as **annexture DM**.

DEPOSITIONS BY THE PARTIES

The Appellants/Applicants Case

10. Vide the Affidavit sworn on 28th January 2021, the 2nd and 3rd Appellants/Applicants have averred that sometime on the 17th of November 2020, same instructed the law firm of M/s Christine Oraro & Company Advocates, to enter appearance and conduct defence on their behalf.

11. It is further averred that simultaneously, the said Advocate was also instructed to file an Application seeking to set aside the Exparte judgment and in this regard, an Application dated the 17th of November 2020, was duly filed.

12. It is further averred that during the pendency of the Application to set aside the Exparte judgment, the learned trial magistrate proceeded to and delivered what is otherwise referred to as an *Interim Ruling*, delivered on the 19th of January 2021, whereby the trial magistrate directed that the sum of Kshs. 3,810,737.35 only, being the decretal sum be deposited in a joint interest earning/ Escrow account in the names of the Advocates for the parties.

13. The Deponents have further averred that the nature of the orders that were granted by the learned magistrate on the 19th of January 2021, during the pendency of the Application to set aside the Exparte judgment, were extremely prejudicial and as a result of the foregoing, same proceeded to and filed an Application for stay of proceedings and execution of the orders made on the 19th of January 2021.

14. On the other hand, the Deponents have further averred that as result of the impugned orders made on the 19th of January 2021, same proceeded to and filed the subject Appeal, which is now pending hearing and determination.

15. It is the Deponents further averment that same are apprehensive that unless the orders sought herein are granted, the Respondent herein would proceed and execute the decree, arising from and/or attendant to the Ex-parte judgment and that such a cause of action would defeat the Appellants/Applicants pending Application for setting aside the Ex-parte judgment.

16. Besides, the Deponents have further averred that a failure to grant the orders sought would be tantamount to denying and/or depriving same of a right to be heard on the dispute beforehand and consequently such an action shall amount to an abrogation of the Appellants/Applicants' Constitutional Right of Access to justice.

17. As pertains to the Application dated the 23rd of August 2021, the 2nd and 3rd Respondents herein have further repeated the foregoing averments and thereafter added that despite the pendency of the Application dated the 17th of November 2020, seeking to set aside the Exparte judgment, the Respondent herein has since proceeded to and commenced Garnishee proceedings culminating into an issuance of an order of Garnishee Nisi, which was issued on the 11th of August 2021.

18. It is the Deponent's further averment that the issuance of orders of Garnishee Nisi, has since frozen the Appellants/Applicants bank accounts held at M/s Diamond Trust Bank Ltd and I & M Bank, respectively.

19. It is the Deponent's further averment that based and/or premised on the manner in which the proceedings in the Surbordinate court are being undertaken, there is a likelihood that execution would be completed and thus such a scenario would defeat both the subject Appeal, as well as the pending Application to set aside the Ex-parte judgment, which is at the foot of the execution proceedings.

20. Owing to the foregoing, the Appellants/Applicants have thus implored the Honorable Court to avert the imminent loss or prejudice and thereby grant the orders sought at the foot of the two Applications, dated the 28th of January 2021 and 23rd of August 2021, respectively.

The Respondents Case

21. The Respondent has reacted to and/or opposed the Applications by the Appellants/Applicants vide Replying Affidavit sworn on the 29th of October 2021 and in respect of which one Dorothy Mbaye has averred as hereunder;

22. Firstly, that the Supporting Affidavits in respect of the two Applications, which have been sworn jointly by the 2nd and 3rd Appellants/Applicants are barred in law, to the extent that the law does not allow the swearing and filing of joint Affidavits. In this regard, the Deponent has attacked the legality of the Supporting Affidavits and thus implored the Court to proceed and expunge same from the records.

23. Secondly, the Deponent has further averred that the latter Affidavit, namely, the Affidavit in support of the Application dated the 23rd of August 2021, other than being sworn by two deponents, has also been attested by a Notary Public based in the USA, but whose attestation has not been verified by an Affidavit or otherwise, to confirm that the Notary Public was authorized and/or mandated so to do. In this regard, the Respondent has referred the Court to the provisions of **Section 88 of the Evidence act, Chapter 80, Laws of Kenya**.

24. Thirdly, the Deponent has averred that the Appellants/Applicants herein are foreigners or better still the 1st Appellant herein is controlled by foreigners, who do not have any known and/or established properties within the country and therefore the subject Application if granted, shall unduly prejudice the rights of the Respondent, particularly as to the recovery and/or realization of the Decretal sum.

25. On the other hand, the Deponent has averred that the Appeal on behalf of the Appellants/Applicants herein does not raise any arguable points and thus the Appeal is frivolous and thus same amounts to an utter waste of judicial time. It has further been averred that the Appeal is Dead on arrival.

26. Finally, the Deponent to the Replying Affidavit has averred that the Appellants/Applicants herein have not availed and/ or supplied evidence of the Substantial loss or prejudice that same are exposed to suffer and that to the extent that no such evidence has been tendered, the Appellants/Applicants are not deserving of the orders of stay of Appeal and proceedings in the manner sought or at all.

THE RESPONDENT'S APPLICATION:

27. In support of the Respondent's Application dated the 13th of September 2021, one Dorothy Mbaye has sworn an Affidavit and wherein same has averred that the Respondent already has a decree for the sum of Kshs. 4,026,084.07 only, as against the Appellants/Applicants and that there is need to secure the decree even as the Appellants/Applicants pursue the subject Appeal.

28. Besides, the Deponent has further averred that there is a likelihood that costs to the subject Appeal shall fall in the region of Kshs. 1,000,000 and that in this regard, there was need for the Appellants/Applicants to provide security for costs by depositing the sum of Kshs. 1,000,000 Only, in a joint deposit account in the names of the respective Advocates.

29. On the other hand, the Deponent has further averred that the Appellants/Applicants would not suffer any prejudice at all if the Honorable Court were to direct provision of security for costs, as well as Deposit of the Entire decretal sum in a joint interest earning account, because in the event of success of the Appeal, the security for costs and the monies deposited shall be Refunded or paid back to the Appellants/Applicants.

30. Conversely, the Deponent has averred that the Respondent shall suffer prejudice, if the said orders are not granted because the 2nd and 3rd Appellants, are not ordinarily resident in Kenya and same have no sufficient property in Kenya, that shall be capable of liquidating any resultant decree that may arise and/or ensue from the subject matter.

31. In the premises, the Deponent on behalf of the Respondent has implored the Court to dismiss the Appellants/Applicants Applications, which have been alluded to herein before and to allow the Respondent's Application.

SUBMISSIONS BY THE PARTIES

32. The subject matter herein came up for mention on the 21st of October 2021, when directions were made to the effect that the three Applications shall be canvassed and disposed of simultaneously. Besides, it was similarly directed that the said Applications be canvassed by way of written submissions to be filed and exchanged by the parties.

33. Pursuant to and in line with the directions of the Court, the Appellants/Applicants filed their written submissions on the 5th of November 2021, whereas the Respondent filed her submissions on the 2nd of November 2021. For clarity, the Respondent filed her submissions ahead of the Appellants.

34. It is also imperative to note that the parties herein have also filed various authorities in support of their respective arguments and the said authorities form part of the record of the Court and shall be duly considered and applied by the Court, where appropriate.

ISSUES FOR DETERMINATION

35. Having reviewed and/or evaluated the Notice of Motion Applications filed herein, namely, the Applications dated 28th January 2021, 23rd August 2021 and 13th September 2021, together with the Supporting Affidavits thereto, as well as the submissions filed by the parties, I am of the humble opinion that the following issues are germane to the determination of the foresaid Applications;

i. Whether the swearing and filing of joint Affidavits by the 2nd and 3rd Appellants is fatal and whether such Affidavits should be expunged from Record.

ii. Whether the Notarization of the Affidavit by the 2nd and 3rd Appellants/Applicants before a Notary Public in the United States of America renders the said Affidavit incapable of admissibility by this Honorable Court and whether same offends the provision of Section 88 of the Evidence Act.

iii. Whether the Appellants/Applicants have met and/or satisfied the conditions to warrant grant of the orders of Stay of Execution pending the Hearing of the Appeal.

iv. Whether the orders for security for costs and deposit of the entire decretal sum are merited on the face of the unique and peculiar circumstances of the subject matter.

ANALYSIS AND DETERMINATION

Issue Number One

Whether the swearing and filing of joint Affidavits by the 2nd and 3rd Appellants is fatal and whether such Affidavits should be expunged from record.

36. The Respondent herein has contended that the law does not allow or provide for the swearing and filing of joint Affidavits, either in the manner done by the 2nd and 3rd Applicants or at all. In this regard, the Respondent has sought that the two [2] Affidavits supporting the Applications dated the 23rd January 2021 and 28th August 2021 respectively, be struck out and that consequently the two Applications shall thus remain bare without any supporting evidence or at all.

37. It is the Respondent's further submission that should the Honorable Court proceed to and find that the joint Affidavits are legally untenable, the two Applications should therefore be struck out.

38. In support of the foregoing proposition, the Respondents have relied on the decision in the case of **Francis Kariu Gakumbi & Another vs Piliska Njoki Maina [2008] eKLR** where Hon. Justice Omollo JA expressed himself as hereunder;

“I do not know that two different people can swear one oath at the same time. An affidavit is sworn evidence and that being so, each party ought to swear a separate affidavit, even if the facts on which they are swearing the affidavits are the same. The practice of the people swearing and signing one affidavit must stop and if the motion had been opposed on the ground that it was not supported by a competent affidavit, I might well have struck it out on that basis.”

39. However, what the Respondent's Counsel has not made clear to the Court is that the aforesaid decision was a decision of a single judge of the Court of Appeal and the subject decision, wherein the Hon. Judge expressed himself as captured above, was indeed the subject of a Reference to a three-judge bench, the latter which overruled the Decision of the single judge.

40. In this regard, it is imperative to take note of the Decision of the Court of Appeal in **Francis Kariu Gakumbi & Another vs Piliska Njoki Maina [2008] eKLR** whereby the Court observed as hereunder;

“But Miss Mwai pointed out Form No. 11 of the 1st Schedule of the Law of Succession Act, Cap 160 Laws of Kenya, which appear to State otherwise and which as material provides as follow:

“FORM 11

AFFIDAVIT OF JUSTIFICATION OF PROPOSED SURETIES

We, GN of and JK of jointly and severally make oath and say as follows: -

1. We are the proposed sureties on behalf of CD the intended administrator (with Will (and Codicil) annexed) of the estate of the above-named AB in the sum of Kenya Shillings (Kshs)

2. I, GH, for myself say that I am after payment of all my just debts and having taken into account all my liabilities, well and truly worth

3. I, JK, for myself say that I am after payment of all my just debts and having taken into account all my liabilities well and truly worth net of such debts and liabilities.....

4. The facts herein deposed (continue as in Form 2)”

FORM No. 2 concludes thus:

“The facts herein deposed to are known to me of my personal knowledge save that (set out any matters falling within the proviso to O.XVIII rule 3(1) of the Civil Procedure Rules).”

O.XVIII rule 3 (1) of the Civil Procedure Rules makes provision as to matters to which affidavits shall be confined, namely “such facts as the deponent is able of his own knowledge to prove” except in interlocutory applications when an affidavit may contain statements of information and belief, but showing sources and grounds thereof.

In view of the foregoing Miss Mwai's submission that an affidavit may be sworn by two or more persons is not without merit. Support for that proposition can also be found in O.19 rule 7 of the Indian Code of Civil Procedure (Allahabad), and The Supreme Court Practice 1997, O.41 rule 2. The latter provides that:

“2. Where an affidavit is made by two or more deponents the names of the persons making the affidavit must be inserted in the jurat except that, if the affidavit is sworn by both or all the deponents at one time before the same person, it shall be sufficient to state that it was sworn by both (or all) of the “above named deponents.”

41. It is sufficient to note that the decision of a full bench of the Court of Appeal is binding on a single judge of the Court of Appeal. In any event, the decision of the single judge alluded to herein was the subject of a reference to the full Court and same was overruled.

42. In the premises, the correct position of the law, is not the one ventilated by and/or on behalf of the Respondent, but the one which emanated from the decision of the full Court.

43. But even assuming that the observation of the single judge of the Court of Appeal in the decision [supra], was not overruled by the full Court, it must be observed that the said decision was made pre-2010 Constitution, and in the post-2010 Constitution era, undue reliance on form and procedural technicalities, which do not go into substance, were negated and are currently frowned upon.

44. In view of the foregoing, even in the absence of the decision of the full Court, I would have been constrained to apply and/or comply with the provisions of **Article 159(2)(d) of the Constitution 2010**.

45. In my humble view, the objection to the joint Affidavits by the Respondent herein is without merit and in any event same is contrary to the provisions of **Order 19 Rule 7 of the Civil Procedure Rules** which provides as hereunder;

“[Order 19, rule 7.1

Irregularity in form of affidavit.

7. The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription

of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”

Issue Number Two

Whether the notarization of the Affidavit by the 2nd and 3rd Appellants/Applicants before a Notary Public in the United States of America renders the said Affidavit incapable of admissibility by this Honorable Court and whether same offends the provision of Section 88 of the Evidence Act.

46. The Respondent has further contended that the Supporting Affidavit to the Application of 28th of August 2021, other than being a joint Affidavit, same was also Notarized in the USA by one Shaunice Trainer, and that because the USA does not fall within the Commonwealth, such Affidavit cannot be accepted and/or admitted in our jurisdiction without authentication either by Affidavit or otherwise.

47. In support of the foregoing objection, the Respondent has relied and placed emphasis on the provisions of **Section 88 of the Evidence Act, Chapter 80, Laws of Kenya**, which provides as hereunder;

“88. When any document is produced before any court, purporting to be a document which, by the law in force for the time being in England, would be admissible in proof of any particular in any Court of Justice in England, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed— (a) the court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims in such document; and (b) the document shall be admissible for the same purpose for which it would be admissible in England.”

48. On the other hand, the Respondent has fortified the argument on the foregoing issue by relying on the decision in the case of **Techno Service Ltd vs Nokia International Oy-Kenya & 3 others [2020] eKLR** where the Court observed as hereunder;

“18. Techno further opposed the application on the ground that the affidavit in support of the application was sworn before a Notary but that there was no evidence before court that the said Notary had the power to carry out the purported notarial act, in other words the notary’s signature was not legalized.

19. Justice A. G. Ringera (as he then was) in the case **Pasatificio Lucio Garofalo SPA v Security & Fire Equipment Co & Another (2001) eKLR** considered affidavits sworn outside the Commonwealth and stated:

“...it follows that the affidavit in the instant case which was taken in Napoli, Italy, has to be proved by affidavit or otherwise to have been taken by a Notary Public in Italy and that the signature and seal of attestation affixed thereto was that of such Notary Public. There is no such proof here. It may very well be that the certificates in Italian and the other writing in Italian was meant to do that. However, as there was no translation of the same into English-which is the official language of the High Court-this Court cannot and will not know the position.”

20. The learned judge made the above statement after finding that Section 88 of the Evidence Act permitted, as admissible in the Kenyan Court, documents which were admissible in the English court. The learned judge proceeded to find, as stated above, that for any documents from a non-commonwealth country, such as the subject affidavit in this matter, needed to have the Notary’s signature and seal attesting proved or authenticated by affidavit or otherwise.

Techno was right to argue that the affidavit of Cynthia Randall was sworn before a Notary public, Amber L. Brazier, in the state of Washington but there was no authentication of that Notary. That objection by Techno is accordingly upheld.”

49. In opposition to the foregoing objection, Counsel for the Appellants contended that the said objection pays undue premium to procedural technicalities, which do not board well with the provisions of **Article 159(2) of the Constitution 2010**. For clarity, the Counsel for the Appellant reminded the Court of the duty to do substantive justice and to ensure that the provisions of the statutes that were obtaining pre-2010, are construed with necessary adaptation and moderation, so as not to contravene the general principles and the values of the Constitution 2010.

50. On the other hand, the Appellants invited the Honorable Court to take cognizance of the decision in the case of **Qad Software South Africa (Pty) Limited v Rift Valley Railways Investments (Pty) Limited [2013] eKLR** where the Court observed as hereunder;

“In other words, a party that acquiesces that a Verification Affidavit is properly drawn cannot in the same vein object to subsequent affidavit that were notarized in the same manner as being irregular and of no consequence. In the circumstances, in the absence of any proof by the Defendant that the said Replying Affidavit would not have been admissible in a court in the United Kingdom and the Netherlands where it was notarised, the court finds that the irregularity was more on form and not substance, which would not go to the substance of the matter herein.”

51. On the same issue as to admissibility of Affidavits that are sworn or Notarized outside the Republic of Kenya, my attention has also been drawn to the decision in the case of **Tanga Investments (K) Limited v N F Metals Corporation [2021] eKLR** where the Court observed as hereunder;

“34. The plaintiff’s Counsel contended that the supporting affidavit bears a Notary Public stamp dated 30th September, 2020, yet it is dated 2nd November, 2020. I find that this defect and/or omission is a matter of form and not substance, it does not in any way affect the correctness and admissibility of the supporting affidavit. It is my finding that in line with the provisions of Order 19 Rule 7 of the Civil

Procedure Rules, 2010 and Article 159(2)(d) of the Constitution of Kenya, 2010, it would not be in the interest of justice to strike out the supporting affidavit on mere technicalities.”

52. On my own account, I must point out that the various decisions that I have referred to are decisions of the High Court and courts of equal status and same are thus not binding on me.

53. Suffice it to say, that I am bound to analyze the applicable law and take into account the provisions of the Constitution 2010 and in this regard, I am prepared to subscribe to the decisions in the case of **Qad Software South Africa (Pty) Limited v Rift Valley Railways Investments (Pty) Limited [2013] eKLR** as well as the decision in **Tanga Investments (K) Limited v N F Metals Corporation [2021] eKLR**.

54. Consequently, it is my finding and holding that the objection to the Affidavit notarized in the USA is similarly unmerited.

55. Notwithstanding the foregoing, even assuming that the objection was merited, same would only affect the said Application and would still leave the Application of 28th of January 2021, unstuck and given that the two Applications seek near similar orders, the Court would still be disposed to consider the earlier Application on merits.

56. Be that as it may, I have stated that gone are the days when procedural technicalities and form, would attract undue premium and thus be elevated to a pedestal beyond substantive justice. Today and in this era, the transformative Constitution 2010 has elevated substantive justice to a higher ground and thus every matter must be looked at from a substantive point of view.

57. Before I depart from the subject issue, I am compelled to refer to the decision in the case of **Chase International Investment Corporation and Another v Laxman Keshra and 3 others [1978]eKLR** where the Court observed as hereunder;

“If the circumstances are such as to raise an equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed. As I have said, all three ingredients are satisfied in this case. Lord Mansfield said (in Moses v Macferlan) “obliged by the ties of natural justice and equity to refund the money”. Anything else would be against conscience. The recovery is based upon an obligation imposed by law which, to use an expression I have employed previously, justice demands, therefore the law requires, to be done. It is a rule of reason. As Lord Atkin said in United Australia Ltd v Barclays Bank Ltd [1941] AC 1, 29:

When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course of the judge is to pass through them undeterred.”

58. Emboldened by the decision in the aforesaid case, coupled with the provisions of **Article 10(2)(b)** that espouses inter-alia Equity and Social justice, as part of the national values and principles of governance, I am of the humble view that the mediaeval chains of the past must not shackle the cause of justice, by placing procedural technicalities to defeat access to substantive justice.

59. Similarly, I would thus dismiss the Second set of objections.

Issue Number Three

Whether the Appellants/Applicants have met and/or satisfied the conditions to warrant grant of the order of Stay of Execution pending Appeal.

60. An Applicant who seeks an order of stay of execution is called upon to establish or satisfy the conditions stipulated under **Order 42 Rule 6(2) of the Civil Procedure rules, 2010** which provide as hereunder;

“[Order 42, rule 6.]

Stay in case of appeal.

6. (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.”

61. From the foregoing provision, it is apparent that an Applicant must establish the following;

i. The existence of sufficient cause.

ii. Proof of substantial loss.

iii. Application must be filed without unreasonable or undue delay.

iv. Provision of security for the due performance of the decree that may ensue, however the issue of security is within the mandate or discretion of the judge.

62. As pertains to the two Applications seeking stay of execution of the respective orders, which were made on the 19th of January 2021 and 11th of August 2021, respectively, it is apparent that the two Applications were made without unreasonable delay.

63. In respect of the issue of whether or not there is sufficient cause, it is worthy to note that the Appellants herein have filed an Appeal challenging the manner in which the learned trial magistrate proceeded to render an interim ruling whereby same decreed deposit of the entire decretal sum in an escrow account, during the pendency of an Application challenging the Exparte judgment and consequential decree.

64. It is trite that where a Court of law is faced with an interlocutory Application, the interests of justice demand that such an interlocutory Application be dealt with beforehand. However, in respect of the instant matter, it appears that a different process was followed and thus culminating into substantive orders being issued prior to determination of the interlocutory Application.

65. The manner in which the learned trial magistrate dealt with the subject matter is the basis of the current Appeal and without delving into the merits or otherwise of the Appeal, it is my observation that there are arguable points, that can very well be considered during the plenary hearing of the Appeal.

66. Simply put, the Appeal that has been filed and/or lodged by the Appellants/Applicants herein is arguable and raises arguable issues, and on this account, it is my finding and holding that the Appellants/Applicants have established a sufficient cause.

67. In support of the foregoing observation, I echo the decision of the Court in the case of **Tanga Investments (K) Limited v N F Metals Corporation [2021] eKLR** where the Court held as hereunder;

“It has been held time without number that an arguable case need not be one that must eventually succeed at the end of trial. In light of the provisions of Article 50(1) of the Constitution, it is appropriate to give the defendant the right to be heard.”

68. Perhaps for emphasis purposes, what constitutes an arguable Appeal has been variously defined by the Honorable Court of Appeal as an Appeal that raises even one arguable point and the arguable point must not of necessity, be one that shall succeed. Suffice it to say that it is a point that the Court should be able to ventilate and address with a view to resolving the dispute beforehand.

69. In support of the foregoing position, I rely on and adopt the decision of the court in the case of **Josephine Koki Raymond versus Philomena Maingi (personal Representative of Maingi Musila Mulava, eKLR)**, where the Court held as hereunder:

“.....[vi] On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised; Damji, Praggi Mandavia versus Sara Lee Household and Body care(K Limited) Civil Application, No. Nai 345 2004.

[V11] An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court: one which is not frivolous. C. Joseph Gitah Gachau And Another versus Pioneer Holdings (A)Ltd and Two Others. Civil Application 124 of 2008.”

70. In respect of the subject matter, the Appellants herein have raised various grounds of Appeal, including the one where the Appellants contend that the learned trial magistrate was in error in proceeding to order and or direct deposit of the entire decretal sum in a joint interest earning account in the names of the advocates for the respective parties, during the pendency of an application challenging the propriety of the proceedings and seeking to set aside the Ex-parte judgement.

71. It is the Appellants further argument, that in ordering the deposit of the entire decretal sum which was in excess of Kshs. 4,000,000 Only, in a joint interest earning account before dealing with the Application for setting aside, the Learned Magistrate condemned the Appellants without being afforded the opportunity to be heard and thus violating the doctrine of natural justice.

72. On the other hand, it cannot be gainsaid that having raised and or lodged the Application seeking to set aside the ex-parte judgment, the Appellants herein had a legitimate expectation that the said Application, would be heard and or dealt with in accordance with the law and in particular, the provisions of **Article 50 (1) of the Constitution, 2010.**

73. In my humble view, the right to be heard by a party, coupled with the right to equal protection and benefit under the law, are fundamental rights, which cannot be trampled upon by the Learned Trial Magistrate and if a breach has been pointed out, such a breach, requires to be suitably investigated and where appropriate be redressed. For clarity, the Appeal that has been filed, is neither a waste of the precious judicial time, nor is it one that can be referred to as dead on arrival in the manner vaunted by the Respondent herein.

74. On the issue of substantial loss, it is important to note that though the Application seeking to set aside ex-parte judgement is still pending, the Learned Trial Magistrate has gone ahead to make an order that effectively pre-empts the hearing and determination of the said pending Application. Indeed, the Learned Trial Magistrate has unwittingly placed a serious fetter on the rights of the Appellants to be heard.

75. As if the foregoing is not enough, the Learned Trial Magistrate has again proceeded to and entertain an Application for Garnishee nisi, (which is an Application for execution), yet the Application to set aside, which should take precedence, has been swept beneath the carpet for reasons only known to the learned trial magistrate.

76. In my humble view, proceeding with and granting orders on an Application for execution, including the orders freezing the appellants bank accounts, is literally meant to force the Appellants to part with the decretal sum , before same are heard on the Application for setting aside, which remains pending, albeit without any directions.

77. It is imperative to note that the manner in which the proceedings are being conducted in the lower court are such that the Appellants/Applicants right to equal protection and benefit under the law, entitlement to the benefits of the national values and right of access to justice, in terms of **Articles 10 (2)(b), 27 and 48 of the Constitution 2010**, have been compromised.

78. Suffice it to say that the Appellants herein are confronted with a scenario where same are disposed to be driven away from the seat of justice and condemned to part with over Kshs. 4,000,000, before being heard. In this regard, the nature of the loss is not only substantial, but one that has debilitating effects, aimed at punishing the Appellants.

79. In support of the foregoing observation, and particularly the nature of the loss that is likely to accrue, it is imperative to take cognizance of the decision in the case of **David Morton Silverstein v Atsango Chesoni [2002] eKLR where the court referred to the decision in Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another, Civil Application No. Nai 50 of 2001 (29/2001 UR), (Unreported)** where it held that:

"... The onus of satisfying us on the second condition, that unless stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant.

In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless."

80. Taking into account the foregoing excerpt, the question that needs to answered is what shall happen to the Application seeking to set aside the ex-parte judgment, if the garnishee proceedings, which are scheduled to be confirmed or otherwise on 11th November, 2021 are allowed to go on and the monies held by the garnishees, are released to the Respondents. Certainly, the pending Application would be rendered moot, academic and inconsequential.

81. In my humble view, the facts of this case and the manner in which the proceedings are being driven are quite unique and consequently, Equity and Social Justice demand that an intervention be made to restore sanity and in particular breath life to the Doctrine of the Rule of Law.

82. Finally, on the issue herein, the Respondent has also argued that the Applicants have not offered to provide security for the due performance of the decree that may ensue and/or arise from the subject Appeal and because of the said failure, the Application for stay of execution should fail.

83. Contrary to the assertions by the Respondents' Counsel, the orders for provision of security and the nature of security to be offered fall within the domain of the Judge and not the Applicants seeking for an order of stay.

84. For the avoidance of doubt, the Honorable Judge is enjoined to make any such order and/or direction, even without the invite by the Applicants. In this regard, it is important that the provisions of **Order 42 rule 6 (2) of the Civil Procedure Rules**, be read and be assigned the grammatical interpretation, without importation of extraneous perception and/or persuasions, whose import would be to convolute the otherwise unequivocal provisions of the law.

85. Based on the foregoing position, I do not share, and/or circumscribe to the decision in the case of **Equity Bank Limited vs Taiga Adams Company Ltd [2006] eKLR** where the court held as hereunder:

"Of even greater impact is the fact that the applicant has not offered any security at all, and this is one of the mandatory tenets under Order 41 rule 4, especially sub rule (2) (b) of the Civil Procedure Rules, under which the application is brought. As a matter of fact, security is not mentioned either in the grounds of the application nor in the Supporting Affidavit of the appellant/applicant."

*Accordingly, I find that the Applicant has not satisfied two of the four mandatory requirements under **Order 41 Rule 4 of the Civil Procedure Rules, 2010**, which are precedent to a grant of a stay order.*

*The pre-amble of **Order 41 Rule 4(2)** is couched in very clear language and words: "**No order for stay of execution shall be made under sub-rule (1) unless.....**" then follows the requirements, above, which have not been met by the Applicant herein.*

Let me conclude by stressing that all the four, not one or some, must be met before this Court can grant an order of stay.

86. Be that as it may, appreciating as I do that the issue of provision of security is at the discretion of the Judge, to determine the nature, type and quantum thereof and taking into account the peculiar circumstances of the subject matter, I am of the humble view that provision of a Bank guarantee in the sum of Kshs. 1, 203,948.00 only, which is stated to be the Rent in arrears, shall be provided for and tendered by the Appellants within 30 days of the orders herein.

Whether the orders for security for costs and deposit of the entire decretal sum are merited on the face of the unique and peculiar circumstances of the subject matter.

87. On the part of the Respondent, same have sought that the Court be pleased to direct provision of security for the cost that may arise and/or be incurred in the prosecution of the instant Appeal. In this regard, the Respondent has sought for an order that the Appellant do deposit the sum of Kshs. 1,000,000 only, in a joint interest earning account in the names of the respective Advocates.

88. Despite the plea that the court be pleased to order and/or direct the order for provision for cost and the estimation that such costs are in the region of Kshs. 1,000,000 only, the Respondent has not tabulated how and what basis, same arrived at the chosen figure.

89. Be that as it may, the issue for provision of security for cost can and do issue in very exceptional circumstances, which are circumscribed vide the provision of **Order 42 Rule 14 (2) of the Civil Procedure Rules 2010**, which provide as hereunder:

Security for costs [Order 42, rule 14.]

(1) At any time after the memorandum of appeal has been served the court, in its discretion, may order the appellant to give security for the whole or any part of the costs of such appeal.

(2) If the appellant is not ordinarily resident in Kenya and has no sufficient property in Kenya (other than property to which the appeal relates) the court shall order the giving of security for the whole or part of the costs of the appeal within a time to be limited in the order.

(3) If security for costs is not given within the time ordered the court may dismiss the appeal.

90. From the foregoing provision, one of the essential conditions to be satisfied, is that the Appellant should be ordinarily resident outside the jurisdiction of the Court. However, in respect of the subject matter, the principal Appellant and the party who contracted with the Respondent, is a company duly registered in the Republic of Kenya, pursuant to the provisions of the **Company's Act Chapter 486, Laws of Kenya, (now repealed and replaced by the Company's Act 2015)**.

91. By virtue of being a company incorporated and registered in the Republic of Kenya, the 1st Appellant herein is resident and domiciled in the Republic of Kenya and same cannot therefore be said to be a foreign company and put differently, resident outside Kenya.

92. On the other hand, before granting an order for security for costs, the Court is also enjoined to consider whether the request for such provision is being used oppressively and/or meant to fetter the right of a party to access and partake of justice. Suffice it to say, the Honorable Court is enjoined to take into account the circumstances of the matter, before making any such orders for provision for security, noting that such orders may constitute an obstacle and/or limitation to the hallowed provision of the Right of Access to justice. **See Article 48 of the Constitution of Kenya, 2010.**

93. In support of the foregoing finding and holding, I am minded to rely on and seek solace in the decision in the case of **Raw Bank PLC v Yusuf Shaa Mohamed Omar & another [2020] eKLR** which held:

“36) An order for security for costs is a discretionary one as per the provisions of Order 26 rule 1 of the Civil Procedure Rules which is the relevant provision in these circumstances. It confers discretion on the court, which is recognition that there may be many cases where a call for security for costs may be refused. In fact, even where a company is foreign or insolvent, the court would still refuse to order security to be lodged if circumstances do not support any lodgement of security. The discretion is, however, to be exercised reasonably and judicially by taking absolute reference to the circumstances of each case. Such matters as:

(a) absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs;

(b) the general financial standing or wellness of the Plaintiff;

(c) the bona fides of the Plaintiff's claim; or

(d) any other relevant circumstance or conduct of the Plaintiff or the Defendant the list is not even exhaustive. The court had this to say in the case of GUFF ENGINEERING (EAST AFRICA) LTD v AMRIK SINGH KALGI, at page 281 quoting the dictum of Lord Denning MR in Sir Lindsay Parkinson & Co. Ltd (1973) 2WLR 632 and at page 284 quoting Maughan L J in Gill All Weather Bodies Ltd Vs All Weather Motor Bodies Ltd.

“...if there is reason to believe that the company cannot pay the costs, then, security may be ordered, but not must be ordered... Some of the matter which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has reasonably good prospects of success. Again it will consider whether there is an admission by the Defendant on the pleadings or elsewhere that money is due.

...the court might also consider whether the application for security was being used oppressively – so as to stifle a genuine claim. It would also consider whether the company's wand of means has been brought about by any conduct by the Defendants, such as delay in payment or delay in doing their part of the work.”

94. In my humble view and taking into account the circumstances pertaining to the subject matter, which I have addressed herein before in details, the request for provision for costs in the Appeal, is yet another concerted, but deliberate effort by the Respondent, to ensure that the Appellants herein do not partake of their day in Court.

95. Simply put, I am not persuaded that the Respondent has satisfied and/or otherwise complied with the requisite provisions of the law to warrant a direction of provision of costs, pending the hearing and determination of the subject Appeal.

96. The other issue that has been raised by the Respondent, is a prayer that the Court be pleased to direct the Appellant to deposit the entire decretal sum amounting to Kshs. 4,026,084.07 Only, in a joint interest earning account within a period of 14 days on account of security for the Due performance of the decree arising from the Subordinate Court.

97. I have pointed out elsewhere herein before, that the determination of the nature and kind of security to be decreed, where appropriate, falls within the discretion and/or the mandate of the judge and particularly, the judge does not require any persuasion and/or dictation as to what to direct.

98. As pertains to the subject matter, I am not disposed to surrender the jurisdiction and/or mandate that falls within the domain of the Court, to the Respondent to choose and dictate the type of security to be decreed against the Appellants.

99. Nevertheless, I have stated that in exercise of my jurisdiction, premised and/or predicated on the basis of my understanding of the provisions of **Order 42 rule 6(2) of the Civil Procedure rules 2010**, the Appellant shall provide bank guarantee in the sum of Kshs. 1,203,948.00 only, within 30 days.

100. In the premises, I am not prepared to inflict Double jeopardy upon the Appellants by granting the subject application, or any limb thereof. To do so, would amount to a travesty to Justice.

FINAL DISPOSITION

101. Having dealt with and addressed all the issues that were enumerated herein before and taking into account the decision in the case of **Butt v Rent Restriction Tribunal (1979) eKLR, where Madan JA stated as hereunder;**

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, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

Megarry J, as he then was, followed Wilson (supra) in Erinford Properties Limited v Cheshire County Council [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the Attorney General v Emerson and Others 24 QBD (1889) 56 at p 59.”

102. And persuaded by the foregoing excerpt, I am disposed to make the following Orders:

i. The Notice of Motion Applications dated 28th January, 2021 and 23rd August 2021, respectively, filed by the Appellants/Applicants be and are hereby granted.

ii. There be and is hereby granted an order of stay of execution of the judgement and decree issued by the lower court vide Milimani Commercial CMC Case No. 84 of 2020, pending the hearing and determination of the subject Appeal.

iii. There be and is hereby granted an order of stay of proceedings and/or further proceedings, including the garnishee proceedings in Milimani Commercial CMC Case No. 84 of 2020, pending the hearing and determination of the subject Appeal.

iv. The order of Garnishee Nisi, issued on 11th August 2021, be and is hereby stayed and/or suspended and for clarity, the Appellants’ bank accounts held at the garnishee banks, which are the subject of the garnishee proceedings are hereby unfrozen, forthwith.

v. The Appellants herein shall provide a Bank guarantee for the sum of Kshs. 1, 203,948 only, from a reputable banking institution, within 30 days from the date hereof.

vi. The Respondent’s Application dated 13th September 2021, be and is hereby dismissed.

vii. The Appellants/Applicants shall have costs of the 3 Applications and same to be borne by the Respondents.

103. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER 2021.

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

ENVIROMENT AND LAND COURT,

MILIMANI.

In the Presence of;

June Nafula Court Assistant

Mr. Omondi h/ b for Ms Christine Oraro for the Appellant/Applicants

Mr. Ataka for..... For the Respondent.