REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL APPEAL NO. 98 OF 2019

JOHN MULI.....1ST APPELLANT/APPLICANT

SAMUEL MUISYO.....2ND APPELLANT/APPLICANT

VERSUS

THOMAS NZIOKA WAMBUA & MARGARET WANZA NZIOKA(Suing as Administrators

of the Estate of **MICHAEL MAKAU NZIOKA (DECEASED).....RESPONDENTS**

(Being an appeal from the judgement and Decree of Principal Magistrate's Court at Kangundo of the Learned Magistrate Hon. Martha Opanga (SRM) delivered on the 25/6/2019 in Kangundo Senior Principal Magistrate's Court Civil Case No. 118 of 2018)

BETWEEN

THOMAS NZIOKA WAMBUA & MARGARET WANZA NZIOKA(Suing as Administrator

of the Estate of**MICHAEL MAKAU NZIOKA (DECEASED).....PLAINTIFFS**

VERSUS

JOHN MULI.....1ST DEFENDANT

SAMUEL MUISYO.....2ND DEFENDANT

RULING

1. This is an appeal that arose from the judgement of Hon. Martha Opanga SRM delivered on 25/6/2019 at Kangundo law courts. While the appeal was pending directions, both the appellants and respondents filed two applications dated 20/11/2019 and 24/8/20 respectively. The Notice of Motion dated 20/11/2019 seeks the following orders:-

(1) Spent

(2) The Honourable court be pleased to stay the execution of the judgment entered on the 25th day of June, 2019 in Kangundo Senior Principal Magistrate's court Civil Suit No.118 of 2018 pending interparte hearing and determination of this Application

(3) The Honourable court be pleased to stay the execution of the judgment entered on the 25th day of June, 2019 in Kangundo Senior Principal Magistrate's court Civil Suit No.118 of 2018 pending interparte hearing and determination of this Appeal.

(4) Costs of the Application be provided for.

The Appellants application is based on the following grounds:-

(1) That on 25/6/2019, judgment was entered in favour of the Respondent against the Appellants for Kshs. 3,320,075 and the Appellants and their insurers being dissatisfied have lodged an appeal against the said judgment.

(2) That on 5/11/2019 the Respondents served a letter on the Appellants insurer demanding settlement of the decretal amount, costs and interest amounting to Kshs. 3,607,173.42/- within 7 days thereof failure to which they would institute a declaratory suit.

(3) That the amount of Kshs. 3,607,173.42/- is substantial.

(4) That the appeal has good chances of success and if the Respondents are allowed to execute against the Appellants, then the intended appeal will be rendered nugatory.

(5) That the Appellants shall suffer irreparably if execution proceeds and the intended appeal succeeds as the said sum of Kshs. 3,607,173.42/- will be beyond the reach of the Respondents as it is not clear if the said funds can be refunded if the same is paid to the Respondents.

(6) That the Appellants insurer is prepared to comply with any such condition(s) as this Honourable Court may deem just and in particular depositing the decretal amount inclusive of costs in an interest earning account in the joint names of the Advocates for both parties herein.

(7) That the Appellants have sufficient cause for seeking the orders sought.

The Appellants Notice of Motion is supported by the affidavit of Judith Onyango, the Legal Manger for the Appellants insurer. She avers that she has been advised by the Appellant's advocate on record that a Memorandum of Appeal had been filed as Exhibit A. She has been advised by the advocate that on 5/11/2019 the Respondents served a letter on the Appellants insurer demanding settlement of the decretal amount, costs and interest amounting to Kshs. 3,607,173.42/- within seven days failing which a declaratory suit would be instituted. She averred that the decretal sum of Kshs. 3,607,173.42/- is substantial as the Appellants shall suffer irreparably if execution proceeds while the intended appeal succeeds in the end since the incomes of the Respondents are unknown and uncertain and can't be refunded if paid to the Respondents. She also averred that the appeal will be rendered nugatory as the monies will have been paid. She stated that the Appellants insurer is ready to comply with conditions imposed by the court in respect of depositing the decretal sum inclusive of costs in an interest earning account in the joint names of the Advocates for parties herein.

The Respondents have opposed the Appellant's application vide the replying affidavit sworn by the Respondents on 1/12/2019 and filed on 4/12/2019. The Respondents aver that the supporting affidavit to the stay of execution application is fatally defective, incompetent and ought to be struck out. The Respondent aver that the deceased was the sole bread winner of the family hence they do not have any support to survive since they are waiting for the judgment outcome. The Respondents have asked the court to order that the Appellants pay half of the decretal sum and the balance be deposited in a joint account.

2. The Notice of Motion dated 24/8/2020 is seeking the following orders:-

(1). The Appellant's appeal being the instant suit against the Respondent/Plaintiff be dismissed for want of prosecution.

(2).The Appellant's application dated 20/11/2019 be dismissed for want of prosecution.

(3). The Registrar list the Appeal before a Judge in chamber for dismissal for want of prosecution.

(4) Costs of the Application and of the entire suit be awarded to the Respondent in the Appeal.

The Respondents application is based on the following grounds:-

(1). That the Appellant has refused, neglected and/or otherwise failed to take steps to prosecute the Appeal for a period of over one year.

(2). That the delay is intentional, inordinate and/or inexcusable on the part of the Appellant as they have not shown any reason for the delay.

(3). That the appeal is therefore an abuse of the court process.

(4). That the Respondent/Applicant continues to suffer unnecessarily due to the delay in the prosecution of this Appeal case which has also delayed the execution of the award given by the Honourable magistrates court.

The Respondents/Applicants Notice of Motion is supported by the affidavit sworn on 24/8/2020 by Musili Mbiti, advocate for the Respondents. The Respondents advocate contends that the appellant is out to frustrate the respondent from enjoying the fruits of the judgement and further that the Appellants have failed to take steps to prosecute the Appeal for over a period of one year. It was averred that the respondents should be paid half the decretal amount and the balance be deposited in a joint interest earning account.

In response to the Respondents application, the Appellants insurer's legal officer, Ruth Mbalelo swore an affidavit on 9/11/2020 wherein she averred that she has been advised by the Appellants advocates that typed and certified copies of the proceedings were yet to be availed by the Chief Magistrates court at Kangundo since typing was ongoing. She stated that the Respondent's application is bad in law since no directions under Order 42 Rule 13 of the Civil Procedure Rules have been issued by the court. She further claimed that the application is defective for failure to satisfy Rule 8 of the Advocates (Practice) Rules hence it should be struck out. She contended that the Appellants or their advocates have tried to fix a hearing date for the Notice of Motion dated 20/11/2019. She finally added that the Respondents failed to disclose to the court that they had filed a declaratory suit against the Respondents vide Milimani CMCC No.8305 of 2019 which is pending ruling.

Parties took directions to the effect that the two applications be canvassed by way of written submissions. The Appellants counsel submitted that there has been no undue delay to file the stay of execution application as it was filed on 21/11/2019 while judgment was delivered on 25.6.2019. Counsel submitted that the Appellants have shown sufficient cause by demonstrating that the appeal is arguable and if stay is not granted, the appeal will be rendered nugatory by placing reliance on ***Kenindia Assurance Co. Ltd vs Samuel [2004]eKLR.*** Counsel submitted that the Appellants Insurer's Legal Manager has averred that the insurer is willing to deposit the decretal sum in a joint interest earning account. It was also submitted that if stay is not granted, the Appellants will suffer substantial loss since the Respondents have no known assets or income to refund in the event the appeal succeeds. It was finally submitted that the Respondent will not suffer any prejudice since the Appellants insurer has offered security for the orders sought.

In respect of the Respondents application seeking dismissal of the appeal, the Appellants submit that Order 42 Rule 35(2) requires that directions under Order 42 Rule 13 to have been taken before a party moves to court for dismissal of the appeal for want of prosecution. Reliance was placed on ***Morris Njagi & Anor vs Mary Wanjiku Kiura[2017]eKLR, NBK vs Alfred Owino Bala[2017]eKLR*** and ***Njai Stepehn vs Christine Khatiala Andika[2019]eKLR.*** The Appellants counsel submitted that paragraph 5, 6 and 7 of the insurer's legal officer establish the efforts undertaken to obtain the typed and certified court proceedings hence the delay was beyond the control of the Appellants. Further, the Appellants counsel submitted that the contents of paragraph 5,6 and 7 of the Respondents supporting affidavit raise contentious issues and the supporting affidavit being sworn by the Respondent's advocate offends Rule 8 of the Advocates(Practice) Rules. Reliance was placed on ***Abdalla Ibrahim Abdi vs Ibrahim Noor Hillowly [2017] eKLR*** at paragraph 19. The Appellants seek dismissal of the Notice of Motion dated 24/8/2020.

The Respondents counsel submits that the supporting affidavit of Judith Onyango is incurably defective and incompetent and the same should be struck out. Counsel submits that Judith Onyango failed to name the insurer or produce any document that granted her the authority to swear the affidavit. Reliance was placed on ***P.M.M Private Safaris vs Kevin Ijatia[2006]eKLR ,Misc. Appli 232 of 2006, KPLC vs Julius Wambale & Ano[2019]eKLR, Moijo Matanya Ole Keiwua vs Chief Justice of Kenya & 6 Ors.[2008]eKLR*** and ***Halsbury Laws of England 4th Edn.2003 Reissue Vol.25 at paragraph 490***. The Respondents counsel submits that the Notice of Motion dated 20/11/2019 cannot stand on its own having found that the supporting affidavit is defective.

Respondents counsel submits that the Appellant's Notice of Motion seeking stay of execution was filed in court 4 months after lapse of 30 days stay of execution hence an afterthought. Counsel submitted that the Appellants had not demonstrated how they will suffer substantial loss if stay of execution is not granted. Counsel submitted that despite the Appellants insurer indicating its readiness to furnish security for the performance of the decree, the Respondents are also entitled to equal treatment before the law noting the challenges they are facing in life. In the alternative the court was urged to direct payment of half the decretal amount and the balance to be deposited in a fixed joint interest account.

3. I have considered the two application and the written submissions by the learned counsels. In a nutshell, the Appellants are seeking stay of executions of the lower court judgement and decree pending the hearing and determination of the application and appeal while the Respondents have sought for dismissal of the appeal for want of prosecution. I therefore find the following issues necessary for determination: -

a. Do the affidavits sworn by advocates herein offend Rule 9 of the Advocates (Practice) Rules?

b. Whether the appeal should be dismissed for want of prosecution.

c. Whether the court should grant an order for stay of execution of the judgement and decree pending the hearing and determination of the appeal.

d. What orders may the court make?

On the first issue, the Respondents assert at paragraph 3 of their replying affidavit that Judith Onyango's supporting affidavit was fatally defective and incompetent for being sworn by the insurer's legal manager who failed to produce or attach any document authorizing her to swear the affidavit. Ruth Mbalelo also swore a replying affidavit on 9/11/2020 to oppose the Respondents application that sought for dismissal of the appeal. Similarly, the Respondents advocate Musili Mbiti swore the supporting affidavit dated 24/8/2020. The Appellants and Respondents advocates have attacked each other's affidavits and now asking court to strike out the affidavits. However, I note that neither the Appellants nor the Respondents have submitted on whether their affidavits conform to the best evidence rule under Order 19 Rule 3 (1) of the Civil Procedure Rules, 2010. This rule provides that:

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."

The Appellants have invoked Rule 8 of the Advocates (Practice) Rules although the correct Rule should be Rule 9 while the Respondents assert that the Appellants insurer's legal manager lacked authority to swear the affidavit hence a stranger to the lower court suit and appeal. Rule 9 of the Advocates (Practice) Rules provides:-

"No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration of Affidavit, and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration on affidavit, he shall not continue to appear

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.."

The above rule was echoed in ***Simon Isaac Ngui – Vs – Overseas Courier Services Ltd [1998] eKLR***:-

"..The applicant's counsel has deponed to contested maters of fact and said that the same are true and within his own knowledge, information and belief. It is not competent for a party's advocate to depone to evidential facts at any stage of the suit."

In **PMM Private Safaris (Supra)** an authority relied on by the Respondent ***Mutungi J.*** held that:-

"…the insurer is not a party to the proceedings…hence the Affidavit is sworn by a stranger to the proceedings…..The insurance sector clearly misleads the insured to believe that he/it, the insured is represented by a counsel which counsel is not answerable to the insured…"

This court should not, and must not, grant such an application. It would be bad in law; and wrong in both policy and principle. A grant of such an application is tantamount to encouragement of exploitation of the insured sector of the society by the insurance industry. As already alluded to, it would encourage the wrong invocation of the principle of subrogation where the insurer steps into the shoes of the insured prior to his/its full payment by the insurer. Secondly, it encourages the untenable position where the counsel for a third party/stranger to the litigation is seen as counsel for the insured – the Defendant in in the suit at the subordinate court level.

The Respondent contend that the insurer's right under the law of subrogation has not yet accrued as it has not paid out any money on behalf of the insured. Reliance was placed on the case of ***Kenya Power & Lighting Company Limited vs Julius Wambale & Anor [2019] eKLR*** where **Githua J.** struck out the supporting affidavit that had been sworn by a legal officer from CIC General Insurance Company who was a stranger to the suit in the lower court and the intended appeal. ***Githua J*** held that:-

"The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party. The action must however be instituted in the name of the insured with his consent and must relate to the subject of the contract of insurance.

However, I note that ***Aburili J*** in ***Factory Guards Limited v Factory Guards Limited [2014] eKLR*** stated that each case has to be considered on its own circumstances and merit. The parties therein had heavily engaged in procedural technicalities to attack each other's pleadings/affidavits before the court. ***Aburili J*** in detail held as follows:-

"..I have considered the said replying affidavit and the rival submissions on its tenability on record. I find absolutely nothing irregular with that affidavit of Erick J. Mutemi advocate that would persuade me to strike it out. The objection to the said affidavit, in my view is an uncalled for venture by the applicant's counsel and must be dismissed for the following reasons:

1) That the applicant has not pointed out which of the 13 paragraphs of the said replying affidavit offends the law or rules of procedure. An affidavit cannot be unsustainable by mere allegations. He who alleges bears the burden of proving the fact alleged as espoused in Section 107 of the Evidence Act.

2) There is no law that bars an advocate from swearing an affidavit in a client's cause, on matters which he as an advocate has personal knowledge of.

3) Order 19 rule 3 of the Civil Procedure Rules provide that: "3 (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. It has not been shown that the said affidavit of Erick J. Mutemi offends the best rule evidence as per Order 19 rule 3(1) above.

4) In addition, it has not been shown which of the matters contained in the said affidavit would require the deponent to be cross examined on under Order 19 rule 2 of the Civil Procedure Rules (and not Order 18 rule 2 as submitted) thereby offending Rule 9 of the Advocates (Practice Rules) and or which of the matters deposed qualify as being scandalous, irrelevant or oppressive to warrant being struck off under Order 19 rule 6 of the Civil Procedure Rules.

5) Neither has it been alleged that the affidavit contains arguments thereby being technically unsound. The mere fact that the affidavit was sworn by an advocate does not render it incurably defective.

6) This being an application in an appeal, the advocate in my view, is competent enough to swear an affidavit in support of his client's cause as matters pertaining to an application for leave to file an appeal out of time under

Section 79G of the Civil Procedure Act are matters of law and supported by facts which are within the advocate's personal knowledge, to rebut the grounds or depositions contained in the applicant's propositions, having handled his client's cause from its inception to date.

7) The same applies to the prayer for stay of execution, which is governed by Order 42 rule 6 of the Civil Procedure Rules.

In **Tahmeed Coach Limited & 2 others v Salim Mae Peku (Legal Representative of Sadiki Salim Peke (Deceased)) [2014] eKLR Chitembwe J** held that:-

> **"It is clear that this is a matter arising from a road accident. Ordinarily it is the insurance company that would be called upon to satisfy the decretal sum. The insurers of the accident vehicle were served with a statutory notice and although the "insurance company is not a party to the suit, it is interested in the outcome of the dispute. It is therefore, in order for one of the officers of the insurance company to swear an affidavit in support of the application. The legal officer of the insurance company cannot be held to be a stranger to the dispute."**

Similarly in ***Obonyo Walter Oneya & Another vs Jackline Anyango Ogude(Suing as the Adminstrator of the Estate of Fredrick Odhiambo Sewe (Deceased) [2018]eKLR*** the court dealt with the issue of whether the supporting affidavit was defective and incompetent for want of capacity by the deponent. The Respondent argued that Betty Isoe who swore the supporting affidavit describing herself as a Legal Officer of ICEA Lion Insurance Ltd was not a party to the primary suit and appeal. The court noted that under Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act Cap.405 the insurance is under a mandatory legal duty to satisfy any judgment entered in favour of a 3rd party against the owner of the motor vehicle. Further Section 10(2) of the same Act provides that the insurer will only be liable to satisfy the judgement entered against its insured if it was notified of the proceedings in which the judgment was delivered before or within 14 days of the commencement of the proceedings. ***Githua J*** at paragraph 11 held that:-

> **"The fact that an insurer is required to be notified of the proceedings giving rise to the judgement and to satisfy the judgement obtained against its insured leave no doubt that the insurer has an interest in the proceedings leading to the judgement and in any appeal against that judgement and consequently, it is my view that a legal officer or any authorized officer of the insurer would be seized of information pertaining to the proceedings in the primary suit and any appeal lodged against the decision or decree arising therefrom and has capacity to swear an affidavit in either the suit or the appeal. In any case there is no law that provides that only co-litigants can swear affidavits in a matter. In my view, any person with information relevant to an action and who is duly authorized can swear an affidavit in the action.."**

According to ***Aburili J*** in ***Factory Guards Limited (supra***) the burden of proof lay on the party attacking the averments of the affidavit to point out the averments that offend the law or rules of procedure. I note that Judith Onyango and Ruth Mbalelo introduced themselves in their affidavits as employees of the Appellants insurer despite not stating the name of the insurer hence an indication that they were acting on behalf of the Appellants insurer. The Respondents submission that the insurer is not enjoined in these proceedings is misconceived noting the position under Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act Cap.405. This is an appeal not a declaratory suit where the insurer is sued for failure to satisfy the judgment award. I note that Ruth Mbalelo at paragraph 11 of her replying affidavit avers that the Respondents failed to disclose to court that the Respondents have already filed declaratory suit namely Milimani CMCC No.8305 of 2019 hence an indication that the Respondents are aware of who has insured the Appellants. I find that Judith Onyango and Ruth Mbalelo affidavits to be competent and properly before the court.

Further I note that the Appellants have submitted that paragraph 5, 6 and 7 of the Respondents counsel supporting affidavit raise facts that are contentious hence offends Rule 9 of the Advocates (Practice) Rules. I find that these are matters within the Appellants counsel knowledge having been appointed by the Appellants insurer to conduct the defence in the suit namely Civil suit No.118 of 2018 where this appeal arose. I also find the supporting affidavit of Musili Mbiti does not offend Rule 9 of Advocates (Practice) Rules hence competent before court as he deponed to matters within his knowledge as obtained from his client regarding the matter.

I associate myself with **Aburili J** findings that the court must do substantive justice to all parties in a suit. ***Aburili J*** held that:-

> **"..And if I was wrong in holding as above, this court is enjoined to do substantive justice for the parties and as was held in *Kenya Commercial Finance Co. Ltd – Vs – Richard Akuesera Onditi (A) 329/2009***, the Court of Appeal was emphatic that:-
>
> > **"In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out. In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court provisions of Sections 3A and 3B of the Appellate Jurisdiction Act. The court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the court has wide powers and will not automatically strike out proceedings. The court, before striking out, will look at the available alternatives."**
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> **Aburili J** further relied on the Court of Appeal holding in **Stephen Boro Gitiha – Vs – Family Finance Building Society & 3 Others CA 363/2009**, where court held inter alia that:-
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> > **"The overriding objective overshadows all technicalities precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full**

hearing if possible."

From the foregoing I find the affidavits sworn by advocates to be competent and properly before the court and do not offend the provisions of Rule 9 of the Advocates (Practice and Procedure) Rules.

4. Having found that the affidavits are competent I now proceed to consider the merit of the two applications. As regards the second issue, the Respondents are asking the court to dismiss this appeal for want of prosecution vide the Notice of Motion dated 24/8/2020. The Respondents advocate in his supporting affidavit to the application asserts that the Appellants have not taken steps to prosecute the Appeal for a period of over one year. The Respondents Notice of Motion dated 24/8/2020 is premised on Order 42 Rule 35(2) of the Civil Procedure Rule, 2010 that stipulates: -

> **"If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal."**

I note that the Respondents have not submitted on the issue of dismissal of the appeal for want of prosecution while the Appellants submits that the Notice of Motion dated 24/8/2020 seeking dismissal of the appeal is bad in law since directions are yet to be issued under Order 42 Rule 13 of the Civil Procedure Rules. Order 42 Rule 13 provides as follows:-

> **1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.**
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> **2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.**
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> **3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.**
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> **4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—**
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> **a) the memorandum of appeal;**
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> **b) the pleadings;**
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> **c) the notes of the trial magistrate made at the hearing;**
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> **d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**
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> **e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;**
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> **f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:**
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> **Provided that—**
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> **i. a translation into English shall be provided of any document not in that language;**
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> **ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).**

The court in ***Pinpoint Solutions Limited & another v Lucy Waithegeni Wanderi (as the Legal Administrator of the Estate of James Nyanga Muchangi) [2020] eKLR*** held at paragraph 20 that:-

> **"..The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010".**

I find that the appeal is not ripe for dismissal for want of prosecution since no directions have been issued by the court under Order 42 Rule 13. In any case, the Respondents chose not to substantiate its claim for dismissal of the appeal despite filing the Notice of Motion dated 24/8/2020. Section 107 of the Evidence Act requires that he who alleges some facts must prove them.

5. On issue three, the Appellants have sought stay of execution orders against the judgment and decree herein pending the hearing and determination of the appeal. The Respondents have submitted that the Appellants Notice of Motions dated 20/11/2019 is not meritorious. ***Order 42 Rule 6(2) (b)*** of the Civil Procedure Rules, 2010 provides that-

> **(2) No order for stay of execution shall be made under subrule (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.

What is ***substantial loss***? In the case of **Antoine Ndiaye vs African Virtual University[2015]eKLR, Gikonyo J.** relied on the High Court of Uganda case of ***Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005*** where Substantial loss was defined as follows:-

> **"…substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal……".**

The Applicant has to demonstrate that he/she will suffer loss and in the case of ***Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR, John M. Mativo J*** relied on the case of ***Equity Bank Ltd vs Taiga Adams Company Ltd, [2006] eKLR*** to explain the onus of the Applicant where the court stated a follows: -

> **"……The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant."**

Judith Onyango has asserted at paragraph 10 of her supporting affidavit that Kshs. 3,607,173.42/- is a substantial amount that cannot easily be refunded by the Respondents in case the Appellants appeal succeeds. She asserted that the Respondents have no known income. I note that the Respondents are the administrators of the late Michael Makau Nzioka. Further I note in the Respondents in their supporting affidavit have not provided any evidence on their source of income. Paragraph 5, 6 and 7 of the Respondents supporting affidavit clearly establish their inability to pay. ***Stanley Karanja Wainaina & another vs Ridon Anyangu Mutubwa [2016] eKLR*** where ***Njuguna J.*** relied on the Court of Appeal decision in ***Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited Vs Aquinas Francis Wasike & Another (UR)*** where the court dealt with the shifting of evidential burden to the Respondent and the Court stated:-

> **"…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 that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge." In my view, the Respondent was unable to discharge his burden.**

I find that the Appellants will suffer substantial loss if I don't grant stay of execution of the judgement and decree herein. The Appellants submit that there is no undue delay to file Notice of Motion dated 20/11/2019 seeking stay of execution orders. The judgement herein was delivered on 25/6/2019 while the stay of execution application was filed on 21/11/2019. The Respondents submit that the filing of the stay of execution application was an afterthought for being filed 4 months after the lapse of the 30 days stay of execution orders. For guidance I place reliance on the case of ***Geoffery Muriungi & another vs John Rukunga M'imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR*** the court held as follows with respect to the timeous filing of an application: -

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

It therefore means that undue delays will the one that goes beyond acceptable limits. In ***Directline Assurance Company Limited vs Michael Njima Muchiri & Anor [2020] eKLR Njuguna J*** found 3 months not to be unreasonable delay in filing the stay of execution application by taking judicial notice of the global impact of the Covid-19 pandemic. I therefore find that the delay of four months not to be unreasonable.

I am therefore left to deal with the provision of security by the applicant seeking stay of execution orders. Judith Onyango avers at paragraph 15 of her supporting affidavit that the Appellants insurer is prepared to deposit the decretal amount in a joint interest earning account in the names of the advocates on record. In ***Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another [2018] eKLR***, it was 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. The Applicant has offered to provide security and has therefore satisfied this ground for stay…"**

The Respondents have submitted that they are entitled to equal treatment which the court is supposed to take into account in balancing the rights of parties in such application. The Respondents are entitled to the fruits of the judgement while the Appellants appeal must be safeguarded to avoid it being rendered nugatory. The appeal herein is against the whole judgement of the lower court. The court in ***Simba Coach Limited vs Kiriiyu Merchants Auctioneers [2019] eKLR*** placed reliance on the case of **Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates**, where the court stated that:-

> **'The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent.**

That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.'

Having noted the Respondents inability to refund the monies in the event of success of the appeal, I find this is not a good case where the court should order payment of half the decretal sum to the Respondents.

6. In the result, the following orders are hereby made:

a. The Respondents Notice of Motion dated 24/8/2019 lacks merit and is dismissed with no order as to costs.

b. The Appellant's application dated 20.11.2019 has merit and is allowed to the extent that an order of stay of execution of the judgement and decree in Kangundo SPMCC No. 118 of 2018 is granted upon the Appellants herein depositing the entire decretal sums into a joint interest earning account in the names of both advocates for the parties within (30) days from the date of this ruling failing which the stay shall lapse.

c. For expeditious disposal of the appeal, the Appellants are hereby directed to file and serve their Record of Appeal within sixty (60) days from the date of this ruling failing which the Respondents will be at liberty to take such appropriate steps to safeguard their interests.

e. The costs of the Appellant's application dated 20.11.2019 shall abide in the appeal.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 11TH DAY OF MARCH, 2021.

D. K. KEMEI

JUDGE