REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

MISCELLANEOUS APPL. NO. E0016 OF 2020

JOHN MBUTHIA NDUNG'U.....1ST APPLICANT

MOHAMMED KASHEM ABDUL.....2ND APPLICANT

VERSUS

JOSEPH MUTUA MUSANGO.....RESPONDENT

RULING

1. The trial court at Kithimani in SRMCC No.407 of 2018, delivered a judgement on 28/08/2020 in favour of the Respondent for a sum of Kshs. 2,287,500/- plus costs and interests of suit against the Applicants and held them 75% liable in damages. The Applicants did not file an appeal within 30 days from the date of the judgement that has now precipitated the filing of the present application dated 14/10/2020.

2. The Notice of Motion dated 14/10/2020, was filed on 15/10/2020 under certificate of urgency seeking the following orders:-

> ***1. Spent***
>
> ***2. THAT the Honourable Court grant leave to the***
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> ***Applicants to appeal out of time against the judgement of the Honourable Magistrate Gilbert Shikwe in Kithimani Senior Resident Magistrate Court Civil Suit No.407 of 2018 and judgement delivered on 28/08/2020.***
>
> ***3. THAT the Honourable Court be pleased to stay execution of the said judgement and decree in Kithimani Senior Resident Magistrate Court Civil Suit No.407 of 2018 pending the hearing and determination of this application herein.***
>
> ***4. THAT the Honourable court be pleased to stay the execution of the said judgement and decree in Kithimani Senior Resident Magistrate Court Civil Suit No.407 of 2018 pending the hearing and determination of the intended appeal herein.***
>
> ***5. THAT the costs of this application be in the cause.***

3. The application is based inter alia on grounds that the Applicants did not file the intended appeal within 30 days from the date of the judgement. That the Applicants will suffer substantial and irreparable loss and damage since there is a likelihood that they will be unable to recover the decretal sum from the Respondent and that the intended appeal will be rendered nugatory. Further that the Applicants have a good and arguable appeal which has high chances of success.

4. The application is supported by the affidavit of Pauline Waruhiu, the deputy manager claims at Directline Assurance Company Limited who are the insurers of motor vehicle registration number KBD 849K, the suit motor vehicle herein. According to her, she was informed by his advocate on record that the advocate who had been handling SRMCC No.407 of 2018 at Kithimani courts left the firm without a proper hand over leading to the delay in discovering the judgement after the time prescribed for appealing had lapsed. She averred that the Respondent sent to them a letter stating that judgement had been delivered. However, she has not attached the same to her affidavit.

5. According to the Applicants, the intended appeal is merited, arguable and raises pertinent points of law thus overwhelming chances of success. The deponent further avers that the Respondent has not furnished the court with any documentary evidence to prove financial standing and that the Respondents means are unknown hence the Applicants are apprehensive that they will not recover the decretal amount that is substantial from the Respondent if the same is paid and the appeal is successful in the end. She also averred that this will cause irreparable substantial loss to the Applicants. According to her the delay to file the application herein was not inordinate and the mistake of

their advocate should not be penalized on them. Finally, she averred that the Respondent will not suffer any prejudice that cannot be compensated by way of costs in the event this application is allowed.

6. The Respondent swore an affidavit on 16/11/2020 in opposition to the application. The Respondent asserts that the Applicants were aware of the judgement since the court delivered it on 28/8/2020. He avers that Pauline Waruhiu was aware of the judgement and that his advocates informed the Applicants advocates vide the letter dated 1/9/2020 marked as *'JMM1'*. The Respondent maintains that the grounds of appeal are not plausible and conceivably persuasive of facts and law to overturn the decision of the trial court. According to the Respondent, the applicants have not demonstrated the substantial loss they will suffer since mere assumptions that the Respondent's financial capability is unknown cannot suffice as justification for possible substantial loss. The Respondent averred that it has not commenced execution process hence there is no need to warrant granting an extension of stay of execution of the judgement and that the interim orders should be revoked forthwith. As regards the intent of the Applicant to file an appeal, the Respondent avers that the Applicants have not demonstrated so since no attempt has been shown by the Applicant that they have applied for copies of the proceedings to commence the process of filing the appeal hence the application is an afterthought.

7. It was further averred that Pauline Waruhiu does not deny that the Applicants were aware of the judgement and that the Applicants were responsible to issue instructions to their insurer to file the appeal before the lapse of 30 days. The Respondent maintains that the Applicants are guilty of indolence in filing this application and the court should compel the Applicants to pay the full decretal amount plus costs and interest of the suit to him or alternatively, if the court allows the application, then it should order half of the decretal amount in the sum of Kshs.1,143,750.00/- be paid to the Respondent and the balance be deposited in a joint interest earning account in the names of their firm of advocates on record pending the determination of the appeal. The Respondent prays that the application be dismissed with costs.

8. Parties agreed to canvass the application by way of written submissions. However, it is only the applicants who filed submissions while the respondent opted to rely on his replying affidavit. Vide submissions dated 9/2/2021 the applicants submitted that the advocate who had been in conduct of the matter left office without properly handing over and hence the matter of the delivery of the judgement was realized late and thus the applicants pray that the mistakes of the advocate should not be visited on them. It was submitted that the applicants are willing to offer a bank guarantee for the entire decretal sums. It was also submitted that the appeal has high chances of success. Finally, it was submitted that the applicants merit an order for stay of execution pending the appeal as it is necessary to preserve the subject of the appeal and that the applicants stand to suffer loss and damage if the respondent is allowed to execute the decree which will render the intended appeal nugatory.

8. I have considered the application together with the rival affidavits and submissions. I now proceed to determine the twin prayer sought by the applicants namely leave to file appeal out of time and stay of execution of the judgement and decree.

9. On the issue of leave to extend time to file the appeal, the Applicants have attached a draft Memorandum of Appeal to their application where they are asking the court to extend time and grant them leave to lodge an appeal and file the same out of time. Pauline Waruhiu from the insurer asserts that the delay was caused as stated in paragraph 3 of her supporting affidavit. The Respondent contends that the Applicants waited for more than two weeks to file application despite the fact that they were aware of the judgement which was delivered and sent to respective parties via email.

10. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

> ***"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***
>
> > ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.***

11. It follows therefore that the court can allow appeal to be filed out of time if a party shows sufficient cause despite the 30 days limit to file appeals. Indeed, the court in ***Patrick Kiruja Kithinji vs. Victor Mugira Marete [2015] eKLR*** held that:-

> ***"In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159."***

12. The use of the word *'may'* connotes discretionary power of the court. What is *'good and sufficient cause'* is as was held in ***Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633***, there is no difference between the words "sufficient cause" and "good cause". In ***Daphne Parry vs. Murray Alexander Carson [1963] EA 546*** that:-

> ***"…though the provision for extension of time requiring 'sufficient reason' should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."***

13. Further in ***Wachira Karani v Bildad Wachira [2016] eKLR, Mativo J.*** held that:-

> ***"Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."***

The Supreme Court of India in Civil Appeal 1467 of 2011 Parimal vs Veena Bharti (2011) observed that:

> ***"Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently …"***

14. The power to enlarge time or not by the court being discretionary, the courts have suggested guiding principles on what will be considered as good and sufficient cause for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The Court of Appeal in ***Mwangi v Kenya Airways Ltd [2003] KLR*** listed them as follows:-

> ***a. The period of delay***
>
> ***b. The reason for the delay;***
>
> ***c. The arguability of the appeal;***
>
> ***d. The degree of prejudice which could be suffered by the Respondent is the extension is granted;***
>
> ***e. The importance of compliance with time limits to the particular litigation or issue; and***
>
> ***f. The effect if any on the administration of justice or public interest if any is involved.***

15. Again under the provisions of Order 50, Rule 6 of the Civil Procedure Rules upon which the Applicants application is premised, the courts have power to enlarge the time required for the performance of any acts stipulated in the Rules notwithstanding the fact that such time has expired. ***Njuguna J.*** in ***Equity Bank Limited v Richard Kerochi Ayiera [2020] eKLR*** at paragraph 16 stated that the discretionary power of the courts was reaffirmed by the Court of Appeal in the case of ***Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231***, where the court held that:

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

16. In ***First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65*** the court set out the factors to be considered in deciding whether or not to grant such an application and these are:-

> ***(i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.***

17. However, it is imperative to note that the court in ***Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR*** held that the principles are not exhaustive in the following words:

> ***"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path…….. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor."***

18. I shall now proceed to consider the Applicants applications for extension of time against the above principles. On the first principle, the Applicants filed the application before court on 15/10/2020 which was one month and 18 days after the judgement had been delivered on 28/8/2020. Iam guided by the decision of *Asike-Makhandia* ***JA*** in ***Gerald Kithu Muchanje vs Catherine Muthoni Ngare & another [2020] eKLR*** where the learned Judge stated that:-

> ***"There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR this Court stated:***

> ***"The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."***

19. I am guided by the decision in ***Amal Hauliers Ltd vs Abdulnasir Abukar Hassan [2017] eKLR*** submitted by the Applicant where ***Korir J.*** held that two months is not an inordinate delay hence I find the one-month delay to file the instant application is not inordinate.

20. The Claims Manager avers that the advocate handling the subordinate court suit left the firm without proper handing over hence the judgement was discovered after the prescribed period for filing the appeal had lapsed. It is submitted on behalf of the insurer that the Applicants should not be penalized for the mistake of the advocate. In ***Alfred Iduvagwa Savatia vs Nandi Tea Estate & another [2018] eKLR J. Mohammed JA.*** cited ***Aganyanya, JA*** in ***Monica Malel & Another V. R, Eldoret Civil Application No. Nai 246 of 2008*** where the Learned Judge stated;-

> ***"When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ….. the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay."***

21. I associate myself with the decision of the Supreme Court of Kenya ***(M.K. Ibrahim & S.C. Wanjala SCJJ)*** *in* ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014]eKLR*** where the Learned Judges held as follows:-

> ***"(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.***
>
> ***(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.***
>
> ***(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.***
>
> ***(4) Whether there is reasonable reason for the delay. <u>The delay should be explained to the satisfaction of the court</u>.***

22. In ***George Kimotho Ilewe vs Annastacia Wanza Muthuka & Another (Suing as the Legal Representative of the Estate of Judy Kioo Wanza)[2021]eKLR, Odunga J.*** was of the view that the reason given by the Applicant that the counsel handling the matter left the firm without handing over was a justified reason for extension of time to file the appeal. Similarly, in ***Evans Mwangangi & another vs Agnes Kanini [2021] eKLR, Paul Ndungu & another vs Stella Ndungwa Musau & 2 others [2018] eKLR.*** In ***Mbithi Daniel & another v Selly Chepkirui (Suing as The Legal Representative of the Estate of Robert Kibet Rono (Deceased) [2020] eKLR***, where the explanation advanced by the applicant for the delay was that the advocate who was dealing with the matter left the firm in disarray and it was after his departure that they learned that no appeal had been filed. ***Bwonwong'a J.*** held that the delay of over slightly two months has been adequately explained hence sufficient cause to warrant the Applicant being allowed to file his appeal out of time and that the filing of the instant application was not intended to deny the respondent from enjoying the fruits of her judgement. In my view the length and reason for the delay stated by the insurer's deputy claims manager is reasonable and plausible.

23. On the second principle, the insurer's claims manager avers that the intended appeal has overwhelming chances of success. The draft Memorandum of Appeal is against liability and quantum. The Respondent on the other hand maintains that the appeal does not raise weighty issues against the trial court judgement. ***Nambuye J.*** in ***Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR*** stated that the principles to be distilled from the case of ***Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 23, Fakir Mohammed v Joseph Mugambi & 2 Others*** **[2005] eKLR** and others may be enumerated inter alia as follows:-

> ***"(x) <u>An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court</u>"***

The learned Judge held that:

> ***"In my view, that in itself is arguable notwithstanding that it may not succeed as in law <u>an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court</u> . In my view, the issue of whether the applicant's claim was meritorious or otherwise is arguable notwithstanding that it may not succeed."***

24. In ***Divya J. Patel v Guardian Bank Limited [2020] eKLR, J.Mohammed JA.*** held that an arguable appeal is not one that must succeed but one which is not frivolous and merits consideration by the court. In my view the grounds of appeal raise arguable triable issues that warrant the appeal being heard by court.

25. The Respondent has submitted that he is being curtailed from enjoying the fruits of the judgement. The Applicants on the other hand maintain that they will suffer prejudice and irreparable loss if the decretal sum is paid to the Respondent and the Respondent is unable to pay when the appeal is successful. Pauline Waruhiu asserts on behalf of the Applicants that the loss suffered by the Respondent can be compensated by costs hence no prejudice will be suffered by him. The claims manager's assertions have not been controverted hence I find no prejudice will befall the Respondent.

26. From the foregoing, the reasons given by the Applicants are in my view reasonable and plausible to warrant extension of time to file the appeal. Accordingly, I grant leave to the Applicants to file the appeal out of time.

27. As regards the stay of execution, it has been submitted by Pauline Waruhiu on behalf of the Applicants that the insurer will suffer substantial loss as there is a likelihood that it will not recover the decretal amount from the Respondent whose means are unknown as no documentary evidence has been attached to prove his financial standing. To rebut the Applicant's assertion, the Respondent avers that his financial incapability alluded by the Applicant has no justification since the Applicants have not placed any evidence to prove substantial loss

and further that the execution process has not been put in motion.

28. Applicant application is premised on Order 42 Rules 6 of the Civil Procedure Rules, 2010 which stipulates as follows:-

> ***"No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the Court Appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.***
>
> ***(2) No order for stay of execution shall be made under sub rule (1) unless—***
>
> > ***(a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and***
> >
> > ***(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.***

29. On the first condition, the court in ***Tropical Commodities Suppliers Ltd and Others vs International Credit Bank Limited (in liquidation) (2004) E.A. LR 331***, defined substantial loss in the sense of Order 42 rule 6 as follows:-

> ***"…Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal…"***

30. In ***Kenya Shell Limited vs. Kibiru [1986] KLR 410,*** at page 416 it was held as follows:-

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

31. In ***Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto*** it was stated that:-

> ***"The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.''***

32. The insurer's claims manager avers at paragraph 6 of her affidavit that the decretal sum is a substantial sum hence the applicants are apprehensive that if the Respondent is paid and the appeal is successful then it will not be able to recover the amount from the Respondent whose means are unknown. She goes on to state at paragraph 7 that the Respondent has not furnished the court with any documentary evidence to prove their financial standing. In response, the Respondent has in his affidavit at paragraph 7 averred that the Applicants assertions are mere assumptions that do not justify the possibility of substantial loss. The Respondent contends that the Applicants have not placed any material evidence of substantial loss that they will suffer in the event stay is not granted. I note that in ***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."***

33. However ***Odunga J.*** in ***George Kimotho Ilewe Annastacia Wanza Muthuka & Joseph Mutuku Ngewa (suing as legal representatives of the estate of Judy Kioo Wanza – deceased)*** stated that***:-***

> ***"It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant's business."***

34. Again the court in ***James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR*** held that:-

> ***"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***

35. The above decisions place the burden of proof on the Applicant to show that it will suffer substantial loss. However, the evidential burden shifted to the Respondent once the Applicant raised their reasonable fears of the Respondent's inability to recover the decretal sum paid from the Respondent if the appeal is successful. In ***National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR*** Court of Appeal held thus:

> ***"Once an applicant expresses a reasonable fear 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…"***

36. I note in that the Respondents in his replying affidavit has not provided any evidence on his source of income despite the claims manager claiming that they are apprehensive of the Respondents inability to pay back if the appeal is successful. In ***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. 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."***

37. On the other hand, noting that it is the insurance that will satisfy the decretal sum by dint of the law of subrogation, it was incumbent upon the claims manager to show what business loss the insurer will suffer or whether by paying the decretal sum of Kshs. 2,287,500.00/- the insurer's business operation will be affected negatively. The claims manager failed this test as she only averred that the Applicants are apprehensive to recover the decretal sum if paid to the Respondent and the appeal succeeds.

38. However, I note that the decretal sum is a colossal sum by any standards and that the Respondent has not demonstrated to the court whether he will be able to pay back the Applicants if the appeal is successful. In my view, the Applicants and Respondent have made averments without substantiating hence the court is left to decide. The court has to balance the interest of both sides where information is unclear. Both the Applicants and Respondent are individuals. The Applicants want to exercise their right of appeal while the Respondent has a judgment in his favour to enjoy the fruits thereof.

39. On the second condition, the delay of one month 18 days in my view is not unreasonable as analyzed hereinabove. On the third condition, Pauline Waruhiu on behalf of the Applicants avers at paragraph 8 of her affidavit that the Applicants are willing to furnish a reasonable security by depositing the whole decretal amount in court or a joint interest earning account. The Respondent at paragraph 14 of his affidavit seems to agree with the Applicants in terms of depositing the entire amount in a joint earning interest earning account or alternatively half of the decretal amount in the sum of Kshs. 1,143,750.00/- be paid to him while the balance be put in a joint interest earning account in the name of the firms of advocates herein.

40. The court in ***Absalom Dova vs Tarbo Transporters [2013] eKLR,*** stated:-

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

41. 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."***

42. It was a mistake of counsel that the appeal was not filed in time. The delay to file the same was not unreasonable. The Respondent has consented at paragraph 14 that the decretal amount can be deposited in a joint interest earning account. In my view the appropriate order to make is for the whole decretal sum be deposited in a joint earning interest account and this is borne out of the fact that the applicants are challenging both liability and quantum. There are no special circumstances adduced by the Respondent to order that half the decretal sum be paid to him. I shall allow a conditional stay.

43. In light of the foregoing reasons, I find the Notice of Motion dated 14/10/2020 has merit and is allowed in the following terms-

> ***a. The Applicants are granted leave to file and serve their Memorandum of Appeal within 14 days from the date of this ruling.***
>
> ***b. An order of stay of execution of the judgement and decree in Kithimani Senior Resident Magistrate's Court Civil Suit No.407 of 2018 is hereby granted pending the hearing and determination of the intended appeal on condition that the decretal sum of Kshs. 2,287,500.00/- is deposited in a joint interest earning account in the name of the respective parties' advocates within 30 days from the date of this ruling and in default thereof the stay shall lapse.***
>
> ***d. The costs shall abide in the appeal.***

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 2ND DAY OF JUNE, 2021.

D. K. Kemei

Judge