



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E036 OF 2020

DESBRO (KENYA) LIMITED.....PLANTIFF/APPLICANT

VERSUS

GENERAL PRINTERS LIMITED.....DEFENDANT/1ST RESPONDENT

AND

I&M BANK LIMITED.....OBJECTOR/2ND RESPONDENT

NCBA BANK KENYA PLC.....OBJECTOR/3RD RESPONDENT

RULING

1. The application for consideration is the Plaintiff's Notice of Motion dated 25th May 2021 brought pursuant to **Section 561 (4) (F)** of the **Insolvency Act, 2015**, **Sections 1A, 1B & 3A** of the **Civil Procedure Act, Order 22 Rule 22**, as well as **Order 42 Rule 6 Civil Procedure Rules, 2010** and all other enabling provisions of the law. The Application seeks the following Orders:

1. **THAT** this Honorable Court be and is hereby pleased to grant the Applicant/Plaintiff leave to continue with the proceedings herein and the intended appeal against the 1st Respondent which has been placed under administration.
2. **THAT** the Honorable Court be and is hereby pleased to issue an Order of injunction and/or stay against execution in respect of the whole or any of the Orders as reposed in the impugned Ruling dated and delivered on 6th May, 2021 pending Hearing and Determination of the appeal.
3. **THAT** the Honorable court be and is hereby pleased to issue any further directions or orders as may be appropriate to give effect to the Orders sought herein; and
4. **THAT** the costs of this Application be provided for.

2. The application is based on the grounds on the face of it and supported by an Affidavit sworn on even date by **SUMAN KUMAR SENNIK**, a director of the Plaintiff. He deposed that the Plaintiff instituted the suit herein sometime in 2020 and subsequently obtained judgment in default on 5th June, 2020 as the Defendant failed to defend the suit, following which it proceeded to extract a decree for purposes of execution. Upon extraction of the decree the Plaintiff proceeded to execute against the Defendant by proclaiming various motor vehicles and other movable assets owned by the Defendant. The 1st and 2nd Objectors however challenged the said execution vide applications dated 17th March, 2021 and 18th March, 2021 respectively and sought the lifting of the said proclamation on the ground that they were holders of floating debentures and therefore their rights over the proclaimed goods ranked first to those of the Plaintiff.

3. Vide a Ruling delivered on 6th May, 2021, this court allowed the Objectors' Applications. Displeased by the said decision, the Plaintiff instructed its advocates to lodge a Notice of Appeal and make a request for a certified copy of typed proceedings. That the 1st Objector has since appointed an administrator over the Defendant's company who is empowered under **Section 584** of the **Insolvency Act, 2015** (hereinafter "the Act") to assume control of all the property to which he believes the company is entitled and deal with it as he deems fit for the benefit of the company including selling or otherwise disposing of the said property by public auction or private contract as more specifically set out under the fourth schedule of the Act.

4. He averred that the impugned ruling having lifted the proclamation on the goods, the Administrator shall be at liberty to sell and/or otherwise dispose of the goods thus rendering the appeal nugatory and defeating the purpose which the appeal intends to serve. He contended that the Objectors are keen on enforcing the ruling herein which is evidenced by the appointment of the administrator while the applications were still pending in court; which actions clearly compromise the pending Appeal and the Plaintiff's appeal if successful will be no more than an academic exercise since in the event of succeeding, the Plaintiff shall not be in a position to enforce any orders so granted if the goods the subject of proclamation are disposed of by the Administrator.

5. Further, he stated that the Plaintiff's Appeal is not only arguable but meritorious, with an overwhelming chance of success as evidenced in the grounds set out in the Memorandum of Appeal inter-alia that:

a. The learned judge erred in law and in fact in finding that the act of proclaiming the charged property had the immediate effect of crystallizing the floating charges notwithstanding the fact that an administrator/receiver had not been appointed.

b. The learned judge erred in law and misdirected herself when she failed to find that a floating charge can only crystallize through appointment of a receiver and/or administrator and the Appellant having proclaimed the 1st Respondents goods before such appointment its rights over the proclaimed goods ranked in priority to those of the 2nd and 3rd Respondents irrespective of whether or not the proclaimed goods have been attached and sold.

c. The learned judge erred in law and misdirected herself when she allowed the 2nd and 3rd Respondents applications dated 17th March, 2021 and 18th March, 2021 respectively seeking to stay the ongoing execution of the decree issued in favor of the Appellant and lift the proclamation done by the Appellant on various goods owned by the 1st Respondent in execution of the aforementioned decree on the ground that the Appellant having not sold the attached goods, the execution process had not been completed and thus the rights of the 2nd and 3rd Respondents over the proclaimed goods ranked first to those of the Appellant herein.

6. He further averred that the Plaintiff is exposed to grave irreparable harm and losses that would render the appeal nugatory should the injunctive Orders sought herein not be granted, as there is a high risk that the Objectors through the administrator might proceed to dispose of the said goods as the Defendant has already been put under administration which is evidence of its inability to pay debts. That the sale of the proclaimed goods will leave the Plaintiff without any other way to recover the outstanding amounts herein and an award for damages shall not be sufficient in the circumstances

7. He also noted that the Plaintiff has acted promptly in filing the instant application and if the order of stay sought is not granted, it shall be at the mercy of the Objectors. That absolutely no prejudice can be suffered by the Objectors in granting the Orders sought and in any event, should the appeal fail, the Objectors shall be at liberty of dealing with the goods as appropriate through the administrator. Conversely, the Plaintiff stands to suffer irreparable loss and damage if the orders of stay are not granted as sought. Further, that the application has been brought with sufficient promptitude and without unreasonable delay hence, it is in the interests of justice that the same be allowed.

8. In response, the 1st Objector filed a Replying Affidavit sworn on 10th June, 2021 by **PERIS WAIRIMU CHEGE**, its Senior Legal Manager. She averred that in the interest of justice, this Honourable Court should *suo motto* set aside the ex-parte Order given on 6th May, 2021 and extended severally as the Plaintiff has not satisfied any of the conditions for grant of such an order. She noted that the Plaintiff has not demonstrated that it has an arguable appeal; the Court of Appeal has already rendered itself **Lochab Brothers v Kenya Furfural Co Ltd [1983] eKLR** and **Mackenzie (Kenya) Ltd v Pharmico Ltd [1975] eKLR** on the question of when the Objectors' interest over the Defendant's attached properties ranks higher than that of the Plaintiff; and, the Plaintiff has not demonstrated how refusing the injunction would render the appeal nugatory.

9. Further, she stated that she is apprehensive that if the said order is not vacated, it will inflict greater hardship on the 1st Objector than it would avoid in view of the fact that the outstanding amount of the loan owed to the 1st Objector is over 1 billion Kenya Shillings; despite the Judgment Debtor admitting that it owes the debt and promising to pay, it has completely refused to pay the debt; the more the 1st Objector is delayed in its recovery process through injunctions, the more the debt increases due to interest; if the trend continues unabated, the 1st Objector will be unable to recover the entire debt as the interest will outstrip the value of the charged assets thereby causing irreparable loss to the 1st Objector; the injunction shall also cause unnecessary delays in the recovery process through administration which has already commenced; the Administrator has only twelve (12) months under the law to complete the administration process and he has already lost substantial time due to these proceedings.

10. Additionally, she argued that the alleged disposal of the proclaimed goods by the Administrator will not in any way render the appeal nugatory because the Plaintiff's debt shall still be considered by the said Administrator as an unsecured creditor in the ongoing administration proceedings. She also contended that the Plaintiff will not suffer any irreparable damage because the Administrator is under a statutory duty to consider all the debts owed by all creditors whether secured or unsecured in strict compliance with the Insolvency Act. In her view therefore, the Plaintiff is not exposed to any insurmountable loss and damage as its unsecured debt shall be taken care of within the said Insolvency/Administration Proceedings in strict compliance with the Insolvency Act.

11. The 2nd Objector also responded vide Grounds of Opposition dated 15th June, 2021. It stated that the balance of convenience, in the circumstances, militates against grant of the order. That granting the order sought will impugn on the orderly resolution of all creditors of the Defendant, including the Plaintiff as is provided for in the Insolvency Act. That no security has been offered to atone for the disruption to the orderly resolution of creditors that a stay would occasion. Further, that grant of the application will inevitably cause delays in the execution of the administration of the Defendant. The costs and losses resulting from this must be secured by the Plaintiff if the application is to be granted. It also averred that the application was not made expeditiously and the intended Appeal is at any rate unarguable and fundamentally misconceived. Finally, it noted that the Plaintiff has failed to demonstrate that it shall suffer substantial and irreparable loss and damage if stay of execution is not granted, noting that the process of Administration is aimed at securing the best outcome for all creditors, secured and unsecured and the Plaintiff, as an unsecured creditor, is unlawfully attempting to jump the queue.

12. The application was canvassed by way of written submissions. The Plaintiff's written submissions are dated 23rd June, 2021 while the 1st Objector's written submissions are dated 10th July, 2021.

Analysis and Determination

13. I have carefully analyzed the application herein, the Objectors' respective responses thereto, the parties' submissions thereon and the authorities cited. I find that there are only two issues for determination namely:

1. Whether leave should be granted to the Plaintiff to continue with the proceedings herein and/or to appeal while the Defendant is under administration.

2. Whether the Plaintiff has satisfied the criteria for the grant of an Order of injunction and/or stay of execution pending appeal against the Ruling delivered on 6th May, 2021.

Whether leave should be granted to the Plaintiff to continue with the proceedings herein and/or to appeal while the Defendant is under administration.

14. On this, the Plaintiff submitted that under **Section 560(1)** of the **Insolvency Act**, leave of court is required to begin or continue legal proceedings (including execution and distress) against a company that is under administration. It submitted that **Section 560A** of the **Insolvency Act** sets out the considerations to be made by courts of law in deciding whether or not to grant such leave. The Plaintiff further relied on the case of **Owiti, Otieno and Ragot Advocates v Mumias Sugar Co. Limited (Under Administration) [2020] KLR** where the court set out factors for consideration when determining whether to grant approval under Section 560 of the Insolvency Act.

15. It was submitted that the Plaintiff has a legitimate interest as it is not in dispute that it is also a creditor owed millions of shillings by the Defendant. Additionally, the Plaintiff urged that since the proceedings herein begun before the appointment of an Administrator, it is in the interests of justice that the Plaintiff is allowed to prosecute the appeal herein to its final conclusion. It was argued that the Plaintiff reserves the right to be heard under **Article 50** of the **Constitution of Kenya** and in this regard, it relied on the case of **Bakery Confectionery Food Manufacturers & Allied Workers Union (K) v Tahir Sheikh Grain Millers Limited [2020] eKLR**.

16. On the part of the 1st Objector, it submitted that granting leave to the Plaintiff to continue with these proceedings will be counterproductive to the ongoing administration process. It stated that in fact, this court has no jurisdiction to grant the said leave as the court with jurisdiction to do so is the one handling the insolvency cause [hereinafter referred to as "**the Insolvency Court**"]. It submitted that under **Section 560** of the **Insolvency Act, 2015**, while a Company is under administration, a person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court.

17. Further, the 1st Objector submitted that under **Section 561** of the **Insolvency Act**, once an administrator is appointed, such as is the case herein, there ought to be a moratorium on all legal processes pending the completion of the administration process as enunciated by the Court in **Nakumatt Holdings Limited & another v Ideal Locations Limited [2019] eKLR**.

18. It submitted that the Plaintiff herein has not sought the approval of the Insolvency Court to continue the legal proceedings before this Court hence it is in the interest of justice that the proceedings be stayed pending the completion of the administration process. In this regard, it placed further reliance on the case of **John Munyao Musiku Claimant v Athi River Mining Limited [2020] eKLR**. The 1st Objector also relied on the case of **George Mureithi & Others v Kenatco Taxis Limited (In Receivership) [2016] eKLR** where the Court held that Section 228 of the Companies Act Cap 486 is couched in mandatory terms. The 1st Objector also supported its submission with the case of **Shee Hamisi Mashipa v Mare Nostrum Limited [2021] eKLR** where the Court stayed proceedings pending agreement between the parties or further orders from the insolvency court.

19. It is trite law that administration creates a moratorium on all other legal process while administration order has effect. This means that for any action to be undertaken against a company under administration such as to begin or continue legal proceedings against the Company, the consent of the administrator or approval from the court must be obtained first. This is provided for under **Section 560(1)** of the **Insolvency Act** which states that:

“560. (1) While a company is under administration-

(a) a person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the Court;

(b) a person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the Court; if the Court gives approval-subject to such conditions as the Court may impose;

(c) a landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and

(d) a person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court.”

20. Further, **Section 560A** of the **Insolvency Act** provides for the considerations that should be taken into account in applications for approval to lift moratorium. It states that:

“560A (1) When considering whether to grant its approval under section 560, the court or the administrator may in particular take into consideration where appropriate —

a. the statutory purpose of the administration;

b. the impact of the approval on the applicant particularly whether the applicant is likely to suffer significant loss;

c. the legitimate interests of the applicant and the legitimate interest of the creditors of the company, giving the right of priority to the proprietary interest of the applicant;

d. whether the value of the secured creditor's claim exceeds the value of the encumbered asset;

e. whether the secured creditor is not receiving protection for the diminution in the value of the encumbered asset;

f. whether the provision of protection may be feasible or overly burdensome to the estate;

g. whether the encumbered asset is not needed for the reorganization or sale of the company as a going concern;

h. whether relief is required to protect or preserve the value of assets such as perishable goods; or

i. whether in reorganisation, a plan is not approved within six months.

21. The Plaintiff seeks to file an appeal against a Ruling delivered by this Court on 6th May, 2021 that halted execution against the Defendant's assets. From the averments made by the Plaintiff and its submissions herein, I hold no doubt in my mind that it deserves to be granted leave to pursue the appeal particularly because it also has a legitimate interest in the assets of the Defendant. The 1st Objector's submission that granting leave to the Plaintiff will be counterproductive to the ongoing administration process does not hold because an Administrator's term may by law be extended by consent or on application to the court.

Whether the Plaintiff has satisfied the criteria for the grant of an Order of injunction and/or stay of execution pending appeal against the Ruling delivered on 6th May, 2021.

22. The Plaintiff submitted that it has satisfied the criteria under **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** for grant of a stay of execution.

23. On whether the Plaintiff shall suffer substantial loss if stay of execution is not granted, it submitted that the order for stay is intended to preserve and protect the subject matter of the dispute to avoid a situation where an appeal if successful, is rendered nugatory. In this regard, it relied on the case of **Rhoda Mukuma v John Abuoga (1988) eKLR** and **Antoine Ndiaye v African Virtual University [2015] eKLR** where the courts noted that substantial loss is the corner stone of stay of execution.

24. The Plaintiff further relied on the case of **Tropical Commodities Suppliers Ltd Vs International Credit Bank (in Liquidation) Kampala Miscellaneous Application No. 379 of 2003** cited with approval in the case of **Antoine Ndiaye v African Virtual University [2015] eKLR** where the court noted that substantial loss does not represent any particular mathematical formula, rather, it is a qualitative concept which 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.

25. Further, the Plaintiff relied on the case of **Nesco Services Limited v Cm Construction (Ea) Limited [2019] KLR** wherein the court cited with approval the case of **Daniel Chebutul Rotich & 2 Others v. Emirates Airlines Civic Case No. 368 of 2001** and held that substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted.

26. Relying on the above authorities, the Plaintiff reiterated that prior to the delivery of the impugned Ruling, the 1st Objector appointed an administrator over the Defendant company who is empowered under **Section 584** of the **Insolvency Act, 2015** to assume control of all the property to which he believes the company is entitled and deal with it as he deems fit for the benefit of the company. It also reiterated its earlier averments that the impugned ruling having lifted the proclamation on the goods, the Administrator shall be at liberty to sell and/or otherwise dispose of the goods as empowered under the Act rendering the appeal nugatory and defeating the purpose which the appeal intends to serve.

27. Further, the Plaintiff asserted that the fact that it shall rank as an unsecured creditor in the ongoing administration proceedings is proof that it stands to suffer irreparable loss and damage since under schedule 2 of the Insolvency Act, unsecured creditors rank last upon the debts of the secured creditors and preferential creditor being settled. In its view therefore, the grant of stay of execution will mitigate against the substantial loss that is likely to be visited on it.

28. As to whether the application has been brought without unreasonable delay, the Plaintiff submitted that the impugned Ruling was delivered on 6th May, 2019 and it filed the instant application on 25th May, 2019 which was 19 days from the date of delivery of the

impugned Ruling. In its view therefore, the application was brought without unreasonable delay. In support of its submissions on this aspect, it cited the following cases: **Kenya Nut Company Limited v Sarah Nanjala Wambogo [2017] eKLR**, **Christopher Murage Wahome v Cecilia Njoki Ngunjiri [2020] eKLR** and **William Isaboke Onsare v Benjamin Kakuti Kisilu [2021] KLR**.

29. On the third limb of security for due performance of the decree, the Plaintiff submitted that the same is discretionary and it is upon the court to determine it depending on the circumstance of each case. In this regard, it relied on the case of **HGE v SM [2020] eKLR**.

30. The Plaintiff further stated that courts have variously held that in certain circumstances, stay of execution can be granted without demanding that an applicant furnishes the Court with security for the due performance of the orders. To support this, it cited the case of **RWW v EKW [2019] eKLR** where the court granted stay of execution of its orders without demanding that the Applicant furnish the Court with security for the due performance of the orders since it was a matrimonial cause.

31. The Plaintiff further submitted that the circumstances of this case are such that no security ought to be required from it since its appeal does not arise from a ruling entered against it that would otherwise require security for the performance of the orders therein. Additionally, that the issue of security does not arise since the ruling is non-monetary in nature and in this regard, it relied on the cases of **Sarah N. Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & another [2017] eKLR** and **Praxades Okutoyi v Medical Practitioners and Dentists Board (2008) eKLR**.

32. Further to the foregoing, the Plaintiff submitted that the decision of whether or not to grant a stay of execution is discretionary nature but such discretion should be exercised in such a way as not to prevent an appeal. In support of this, it relied on the case of **Butt v Rent Restriction Tribunal (1979) eKLR** wherein the court stated, *inter alia*, that if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. Reliance was also placed on several other cases being **Kariuki Njuri v Francis Kimaru Rwara (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased) [2020] eKLR**; **Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd [2019] KLR**; **Stephen Kiarie Chege v Pamela Amoiya Obonde [2020] eKLR** and **Awale Transporters Ltd v Kelvin Perminus Kimanzi [2020] eKLR**.

33. On the part of the 1st Objector, it submitted the Plaintiff's prayer for injunction pending appeal is not merited because the Plaintiff has not met the threshold necessary for the grant of such an order which was set out in the English case of **Erinford Properties Limited v Cheshire County Council [1974] 2 ALL ER 448** and has been reiterated by Kenyan courts in several cases including **Patricia Njeri & 3 Others v. National Museum of Kenya [2004] eKLR**.

34. The Objector submitted that from the above case law, it is now settled that the power of the court to grant an injunction pending an appeal is discretionary and such discretion should be exercised judicially and not in whimsical or arbitrary fashion by following laid down principles namely: that the discretion will be exercised against an Plaintiff whose appeal is frivolous; the discretion should be refused where it would inflict greater hardship against the Respondent than it would avoid; the Plaintiff must show that to refuse the injunction would render its appeal nugatory; and the Court should be guided by the principles in **Giella v Cassman Brown & Company [1973] E.A. 358**.

35. The 1st Objector further submitted that this court should not grant the injunction sought as the appeal or intended appeal is frivolous. It reiterated its earlier averments on why it holds the view that the Plaintiff has not demonstrated that it has an arguable appeal whilst relying on the case of **Vivian Muia v Mzoori Limited [2017] eKLR** where the court explained what a frivolous pleading is. It argued that the intended appeal lacks any legal basis or legal merit. In its view, the only one question to be answered in the said intended appeal namely: when does the Objectors interest over the Judgment Debtor's attached properties ranks higher than that of the Plaintiff's and that that question has been answered satisfactorily by the very Court of Appeal in **Lochab Brothers v Kenya Furfural Co Ltd [1983] eKLR**; and **Mackenzie (Kenya) Ltd v Pharmico Ltd [1976] eKLR**.

36. Further, the 1st Objector stated that in any event, this court has no jurisdiction to determine whether the intended appeal is arguable or frivolous because such jurisdiction is vested in the Court of Appeal. It was also the 1st Objector's submission that granting an injunction will inflict greater hardship to it than it would avoid. It reiterated the reasons enumerated for the same in its response. The 1st Objector cited the cases of **Madhupaper International Limited v Kerr [1985] eKLR** and **Equip Agencies Limited v I&M Bank Limited [2017] eKLR**.

37. In addition, it submitted that the Defendant has already demonstrated its inability to pay hence the appointment of the Administrator herein by the Objectors. It argued that if the injunction is granted, the 1st Objector will suffer irreparable loss as it will be unable to recover the entire debt which is dependent on the successful administration process to revive the Defendant Company which is now insolvent. Additionally, it was submitted that the 1st Objector continues to suffer other irreparable losses in terms of litigation costs including the costs it will incur in the intended appeal in the Court of Appeal.

38. The 1st Objector further submitted that the Plaintiff's intended appeal will not be rendered nugatory if the prayers sought are not granted since it has not placed any material evidence before this court to demonstrate that in the event of the appeal succeeding, it will amount to a mere pyrrhic victory. It submitted that in any event, if the Plaintiff succeeds on appeal, an award of damages will be an adequate remedy as the decree in question is a money decree. In support of this submission, it relied on the cases of **Julius Musili Kyunga v Kenya Commercial Bank Ltd & 2 Others [2016] eKLR** and **Tahir Sheikh Said Investment Limited v Bank of Africa Limited; Abdulmajid Mohamed Adam (Interested Party) [2021] eKLR**. In addition, it was stated that the Plaintiff has not demonstrated that the 1st Objector is incapable of paying such damages.

39. On this issue, the Plaintiff sought the order pursuant to the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** which states as follows:

“6 (1) 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, 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

(3) Notwithstanding anything contained in sub-rule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) for the purposes of this rule an appeal to the Court of appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with.”

40. From the above provision and particularly **Rule 6(6)**, this Court is only empowered to grant an injunction pending appeal when exercising its appellate jurisdiction which is not the case in the instant application. The court does not have the jurisdiction to entertain a prayer for injunction in the circumstances. However, since the Plaintiff sought either that or stay of execution and proceeded to submit on stay only, I will proceed to consider whether the Plaintiff has satisfied the conditions for stay of execution under **Rule 6(2)** above.

41. The power to grant orders for stay of execution pending appeal is discretionary and such discretion must be exercised judiciously. It is doubtless that the application was made timeously. The Ruling was delivered on 6th May, 2021 and the application was filed 19 days later on 25th May, 2021.

42. As regards substantial loss, it is generally considered as the corner stone for granting stay of execution. The court is obligated to strike a balance between two competing interests, that is, the successful party's right to the fruits of a favourable decision of the court on the one hand and the aggrieved party's right to have its right of appeal protected on the other by avoiding a situation where its appeal may be rendered nugatory in case it succeeds. An applicant must therefore satisfactorily demonstrate the substantial loss that he stands to suffer in the event that stay is not granted.

43. In **Machira t/a Machira & Co. Advocates v East African Standard [2002] eKLR**, the court stated thus:

“The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage....In attempting to convince a court that substantial loss is likely to be suffered so that whatever he intends to achieve by his intended recourse to some other authority will be nugatory if ultimately he prevails, the applicant is under a duty to do more than merely repeating to the court words of the relevant statutory rule or general words used in some judgment or ruling of a court in a decided case cited as a judicial precedent to guide. It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business (e.g. appeal or intended appeal).”

44. In the instant case, I find that the Plaintiff has satisfactorily demonstrated the substantial loss it is bound to suffer if the stay sought is not granted. The Plaintiff noted that the administrator appointed herein may proceed to dispose of the previously proclaimed goods in the exercise of his statutory powers so as to settle the secured creditors' debts and it will be left without any other way to recover the decretal sum due to it from the Defendant. Notably, the 1st Objector claims that the Plaintiff will not suffer substantial loss since an award of damages may suffice to compensate it in case the appeal succeeds. However, damages payable is not a factor for consideration when determining whether or not to grant a stay of execution under Order 42 Rule 6 of the Civil Procedure Rules and neither is the arguability of the intended appeal.

45. On the question of the security for due performance of the decree, I am alive to the fact that the same is discretionary and it is upon the court to determine what suffices as such, if at all. Looking at the circumstances of the present case and the fact that the Ruling that the Plaintiff seeks to appeal against is non-monetary, I find that it would not be in the interest of justice to demand that the Plaintiff deposits any security.

Deposition

46. In the upshot, I find that the Plaintiff's application dated 25th May, 2021 is meritorious. I hereby allow the same with no orders as to costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH JULY, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Gisemba h/b for Waigwa for the Plaintiff/Applicant.
2. No appearance for the Defendant/1st Respondent.
3. No appearance for I & M Bank Objector/2nd Respondent.
4. No appearance for NCBA Bank(Objector)/3rd Respondent.