REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. E028 OF 2021

JIMNA KALOKI MUTHUSI.....1ST APPLICANT

PENINNAH NDUNGWA MWEU.....2ND APPLICANT

VERSUS

GLADYS NDANU NDINDA.....RESPONDENT

RULING

1. By a Motion on Notice dated 22nd March, 2021, the applicants herein substantially seek stay of execution of the judgement and decree in Machakos Chief Magistrate's Court Civil Suit No. 532 of 2018 pending the hearing and determination of this appeal.

2. The said application is supported by the affidavit sworn by **Peninnah Ndungwa Mweu**, the 2nd Applicant herein. According to the deponent, on 25th February, 2021, judgement was delivered against the Applicants in the sum of Kshs 300,000/- general damages and Kshs 4,150/- special damages plus costs and interests. In the Applicants' view the said award was excessive in terms of the quantum awarded hence this appeal has high chances of success.

3. It was deposed that the Respondent is a person of unknown means hence the apprehension that if the decretal sum is paid out the appeal would be rendered nugatory and an academic exercise, yet the appeal raises pertinent issues with high chances of success. The Applicants averred that unless the stay is granted, they stand to suffer irreparable loss and damage yet their insurer is ready and willing to provide a Bank Guarantee as security for stay of execution during the pendency of tis appeal.

4. In opposing the application, the Respondent swore an affidavit in which she deposed that upon the institution of the suit, the advocates for the parties recorded a consent on liability in the ratio of 90:10 in her favour and subsequently judgement was delivered in which she was awarded Kshs 304,150/- plus costs and interests and the Applicants were granted a stay of execution for 30 days.

5. It was averred by the Respondent that this application is made in bad faith and is calculated to further delay the conclusion of this matter and deny her of her fruits of her regularly obtained judgement. She lamented that she stood to suffer great prejudice were the application to be allowed and that there ought to be an end to litigation in the interest of justice. In her view the award of Kshs 350,000.00 cannot be considered such a high amount in light of the injuries she sustained hence the appeal has no chances of success.

6. The Respondent however urged that in the event that this court is inclined to allow the application, the court should direct that the Applicants release to her half the decretal sum and deposit the other half in a joint interest earning account in the names of the respective advocates.

7. The Applicants in their submissions relied on **Bake 'N' Bite (Nrb) Limited vs. Daniel Mutisya Mwalonzi [2015] eKLR** for the position that in such application, the Applicant is not required to prove that he has an arguable appeal. They also relied on **Esther Wamaitha Njuhia & 2 Others vs. Safaricom Limited [2014] eKLR** as regards the principles applicable in applications requiring the exercise of discretion. As for principles guiding stay of execution pending appeal, they relied on **Tabro Transporters Ltd vs. Absalom Dova Lumbasi [2012] eKLR**.

8. On the issue of substantial loss, it was reiterated that the Applicants were ready and willing to issue a banker's guarantee and that the Respondent's means were unknown hence is unlikely to refund the decretal sum in the event that the appeal is successful. Based on **Edward Kamau & Another vs. Hannah Mukui Gichuki & Another [2015] eKLR**, it was submitted that the Respondent is the only one who can

specifically show that she has the means to repay the decretal sum if the appeal succeeds. According to the Applicant the amount awarded is substantial and in the event that the Respondent is unable to refund the same and the appeal succeeds the said success would be rendered nugatory and the Applicants would be exposed to irreparable damage.

9. It was submitted that there was no inordinate delay in making the application and that the Applicants were willing to furnish security. It was therefore submitted that the Applicants had fulfilled all the necessary conditions for the grant of the orders sought hence the same ought to be granted.

10. On behalf of the Respondent it was submitted, while reiterating the contents of the replying affidavit, that the Applicants have failed to raise any such reasons that would sway the Court to rule in their favor. Citing the provisions of Order 42 rule 6 of the ***Civil Procedure Rules 2010*****.** It was submitted that the power to grant a stay of execution is discretionary and rests with the Court depending on the strength of the case presented. However, the Applicant has failed to raise substantial reasons to warrant the Court's discretion to grant the stay orders sought since the reasons provided are not sufficient to warrant such orders of stay and thus the application must fail. In support of this position the Respondent relied on the case of **Jeny Luesby vs Standard Group Ltd (2014) eKLR** cited with authority in **Medula Academy vs. Jacklyne Atieno Otieno & Another [2018] eKLR.**

11. While appreciating that an order of stay of execution is a discretionary, it was contended that that discretion is fettered by the conditions or pre-requisites encapsulated in Order 42 Rule 6(2) of the ***Civil Procedure Rules***. Accordingly, the prerequisites for granting a stay of execution as outlined under Order 42 rule 6 must be proved simultaneously which the Appellant herein has failed to proof and show such cause for granting the same. Reliance for this position was placed on the case **Magnate Ventures v Simon Mutua Muatha & Another [2018] eKLR**.

12. The Applicants, it was contended, failed to demonstrate how they will suffer substantial loss. They equally failed to demonstrate other factors that would occasion loss and damage, should execution ensue. Moreover, the applicant deposed that the respondent is a person of unknown means and if the decretal sum is paid out then the appeal will be rendered nugatory. This clearly points out to unknown fears of the applicant to have the decretal sum paid out to the respondent as opposed to her ability and/ or her inability to do so that would occasion irreparable loss and damage. In this regard the Respondent placed reliance on Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto.

13. In the present case, it was submitted, an order of stay of execution cannot ensue where the alleged substantial loss herein is self-implicated and has not been proved especially because the Applicants consented on liability. To the Respondent, the Applicants herein only seek to frustrate the Respondent through unnecessary Court processes.

14. It was further submitted that **t**he judgment sought to be challenged was delivered on 3rd December, 2020 and not on 25th February 2021 as the applicants purport. This application was filed on 25th March 2021, approximately 3 months and 3 weeks from the date of the judgment. The applicants, it was noted, have not given an explanation for the delay thus the delay was inordinate, inexcusable and that the same has prejudiced the respondent in that the respondent has been denied her right to enjoy the fruits of her regularly obtained judgment. This position was based on the decision of the court in **Congress Rental South Africa vs. Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & Another (Garnishee) [2019] eKLR** where the court, in finding a delay for 1 month inordinate held as follows:

> **"The ruling of this Court was made on 19th July 2018. This application is made under Order 22 of Civil Procedure Rules and on the material date no application for stay of execution was informally made following the delivery of this Court's ruling. The formal applicant before Court was made on 17th August 2018; almost a month from the date of Court's ruling. The Notice of Appeal was filed on 30th July 2018. The delay for 1 month in filing the application has not been explained. I find that the applicant's application is inordinately delayed and no explanation has been offered for the inordinate delay."**

15. It was therefore submitted that this application is inordinately delayed.

16. As regards the security, it was submitted that the security offered by the applicant should not just be sufficient to satisfy the decretal sum as well as costs and interests at the time of determination of the appeal and should be ultimately binding on the Applicant. The Applicants herein have attached a bank guarantee executed between their Insurer and Diamond Trust Bank for a sum of Kshs 30,000,000/= valid for 12 months with effect from 6.11.2020. The said guarantee is however not with respect to the payment of the decretal sum herein and the same is not ultimately binding on the applicant. Though it is well settled that an insurer is entitled to settle the claims covered under the insurance policy, it was contended that this does not bar a person who is injured from executing the decree issued in his favour against the insured directly. Thus, it was submitted, the security offered herein does not suffice. This position was based on the holding in ***Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others*** **[2015] eKLR** and **G*ianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd*** **[2019] eKLR**.

17. From the foregoing, the court was urged find that the security is not given with regard to the instant case and the same is not ultimately binding on the applicants having been executed by the insurer and the bank and deny the same. The Court was therefore urged to order the applicant to release half of the decretal amount to the respondent and the remaining half to be deposited in a joint interest earning account in the names of the advocates on record for the parties.

18. It was further noted that while flaunting the law and the Court rules, the Applicants come before this Court to seek an equitable remedy. It was submitted that judgement having been entered on 3rd December 2020, the Applicants, without leave of Court for inordinate delay irregularly filed their Memorandum of Appeal 12th March 2021, in blatant disregard of the Rule of Law and the procedures put in place and can be equated to abuse of the Court process. They are therefore undeserving of this Court's favour.

19. The Court was urged to exercise its inherent powers to do justice to the Respondent and prevent abuse of the court process by the

Applicants and strike out or dismiss the application with costs.

Determination

20. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.

21. Order 42 rule 6(1) and (2) of the ***Civil Procedure Rules*** provides as follows:

> ***"(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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."***

22. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. According to section 1A(2) of the ***Civil Procedure Act:***

> ***"the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective."***

23. Under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

24. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA** on 20/11/09 held *inter alia* that 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.

25. The same Judge in **Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** held that:

> **"where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case."**

26. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.** This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

> **"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court…The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special**

circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant…For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss… Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation…At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

27. On the first principle, **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself 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".

28. On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

29. Dealing with the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, **Hancox, JA** (as he then was) in the above cited case when he expressed himself as follows:

"I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age."

30. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

31. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

32. The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, *upon reasonable grounds*, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to

show that he would be in a position to refund the decretal sum. **See Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

33. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success. Suffice to say as was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991,** financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.

34. In an application for stay the Court must consider the overriding objective and balance the interest of the parties to the suit since the court is enjoined place the parties on equal footing. Since the overriding objective aims, *inter alia*, to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, the balancing of the parties' interest is paramount in an application for stay of execution pending appeal. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100.**

35. I therefore agree with the opinion expressed in **Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto** 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.''**

36. Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes a crucial issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal to ensure that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words, the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of her judgement. See **Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Kenya Shell Ltd vs. Kibiru & Another** (supra)**; Mukuma vs. Abuoga [1988] KLR 645.**

37. As was stated by **Kuloba, J** in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:**

> **"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."**

38. It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be the case if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another** (supra).

39. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

40. In this case apart from a bare allegation, the Applicants have not laid any basis for believing that the Respondent will not be able to refund the decretal sum in question. Where the sum involved is colossal the Court may well take notice of the fact that the payment of such large amount may cripple the activities of the Applicant and may well discourage it from pursuing its appeal. In this case the amount involved is not more than Kshs 350,000.00. It has not been alleged that the payment of the said sum may adversely affect the financial position of the Applicants or their insurers. Accordingly, I am unable to find that the Applicants have proved that substantial loss may result to the applicants unless the order is made.

41. As regards the issue of the delay, the judgement in question was delivered on 25th February, 2021. The Respondent on the other hand contends that it was in fact delivered on 3rd December, 2020 and not on 25th February 2021 as the applicants' purport. None of the parties has exhibited a copy of the judgement. In those circumstances, I am unable to find that the application was made after inordinate delay.

42. The next issue for consideration is the issue of security. It is true that under Order 42 rule 6 aforesaid, the applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in

deciding an application thereunder. I agree with the position in ***Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others*** **[2015] eKLR,** where it was held that:

> ***"… the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick."***

43. I also associate myself with the holding in ***Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd*** **[2019] eKLR,** where the court observed:

> ***"… the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.***
>
> ***Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal … This the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.'***

44. The law is that where the applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. The issue of adequacy of security was dealt with by the Court of Appeal in **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100** where the Court of Appeal expressed itself as follows:

> **"The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so…The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".**

45. I agree that the Bank Guarantee given by Diamond Trust Bank may not specifically cover the Respondent. However, the Court in fashioning the security is not necessarily bound by what is offered by the Applicants. In this case, the appeal is directed at the quantum of damages only. Since liability is not in dispute it must be appreciated that at the end of the day the Respondent will be entitled to some amount.

46. Accordingly, while appreciating that the Applicants did not disclose their basis for believing that the Respondents would not refund the decretal sum, I also note that the Respondent did not even attempt to dislodge that contention, speculator as it was. One would have expected the Respondent to aver that she can pay the same even if paid over to her in the event that the appeal succeeds. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff I grant a stay of execution of the decree herein on condition that the Applicants pay to the Respondent half of the decretal sum and gives a bankers guarantee to pay the remaining half together with costs and accruing interests from a reputable financial institution specific to this appeal for the whole duration of the appeal. The said conditions to be met within 30 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.

47. The costs of the application are awarded to the Respondent as the Applicants did not comply with the directions of this Court to furnish soft copies of their documents in word format.

48. It is so ordered.

Read, signed and delivered virtually at Machakos this 8th day of July, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ouko for Miss Wanjiru for the Applicant

Miss Musyoka for the Respondent

CA Geoffrey