



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO.182 OF 2019

JOLIFEE CHOKE MURUNGA.....1ST APPELLANT/APPLICANT

MAXIMILLAH CHEPKOECH KAIBEL.....2ND APPELLANT/APPLICANT

VERSUS

SILAS KIGEN KATWA.....1ST RESPONDENT

NELLY JEPCHIRCHIR KIMUTAI.....2ND RESPONDENT

RULING

1. This is the notice of motion dated 14th June 2021 brought under Article 159 of the Constitution of Kenya, Order 42 rule 6 and 51 Rule 1 and Section 1A,1B,3A and 63 (e) of the Civil Procedure Rules, 2010. The application seeks the following orders:

i & ii Spent

iii. That this honourable court be pleased to grant stay of execution of the judgment of the trial court delivered on 8th June 2018 against the appellant /applicant pending the hearing and determination of the appeal herein Nairobi Hcca No.182 Of 2019, Joliffee Kipkoech Murunga & Maximillah Chepkoech Kaibei v Silas Kigen Katwa & Nelly Jepchichir Kimutai.

iv. That costs be in cause.

2. The application is supported by the grounds on its face plus the sworn affidavit of Joliffe Kipchoke Murunga the 1st appellant/applicant. He averred that judgment in this matter was delivered on 8th June 2018 against the applicants and without notice to both parties whereby they were condemned to refund the respondents a sum of Kshs. 639,386/50. That his advocates only came to learn about the delivery of the said judgment after frantic visits to the court registry.

3. He deponed that he was dissatisfied with the judgment and through his advocates he filed a Misc. Application No.482 of 2018 seeking enlargement of time to file the appeal against the whole judgment (annexture JKM-2). That he proceeded and filed the appeal being Nairobi High Court Civil Appeal No.182 Of 2019 through a memorandum of appeal dated 29th March 2019. (annexture JKM -3).

4. He further deponed that efforts to obtain typed proceedings were futile as they were informed by the registry officials that the file was missing only to be surprised by an application seeking the prayers for sale of property known as LR No. Ngong /Ngong 45002. That the court issued a notice for notification of sale of his property through auction. (annexture JKM-5).

5. He contends that he is a man of means working with a Kenya defence forces and in a senior position. That the property herein is worthy Kshs.15,000,000/= which can serve as security for the appeal and that he is willing to furnish security as the court will direct. That the application has not been delayed since the notification for sale was granted on 7/6/2021 hence the respondents will not suffer any prejudice in the circumstances.

6. It's his averment that the appeal has high chances of success and hence the need for stay of execution to forestall a situation whereby the appeal will be rendered nugatory in the event the respondent proceeds to execute.

7. A replying affidavit sworn by Mr. Silas Kigen Katwa the 1st respondent on 29th June 2021 was filed in opposition to the application. He averred that the instant application is res judicata on account of the matter having been directly and substantially canvassed in Misc.

Application 482 of 2018 before this honourable court which determined the applicant's application for stay of execution. That no review or appeal has ever been preferred against the ruling of Justice C. W Githua dismissing the appellants' application emanating from the said Misc. Application. Annexure **SKK-1** is a copy the ruling.

8. He deponed that this court is functus officio in regards to this matter and has no jurisdiction to determine the instant application. That the appellants intend to dispose of or deal with the property in issue in such a manner to frustrate the respondents' efforts in realizing the decretal sum. He further deponed that this application is incompetent and cannot sustain the orders being sought on account of non-disclosure of material facts.

9. He averred that there have been no attempts made by the appellants to have the appeal matter slated for mention for directions before this court with a view of addressing the purported challenges. He further avers that the appellants have not availed any evidence of their financial standing as no valuation report of the assets or pay slips have been presented to the court to show their financial standing in the event of conditional orders of stay being granted.

10. He averred that the appellants have not shown any substantial loss they will suffer in the event the application is dismissed and neither have they offered any material information nor demonstrated the loss they will suffer. That the respondents on the other hand stand to suffer prejudice as the appellants will have denied them a chance at what is rightfully theirs in the name of the deposit and the cost of improvement made on the property known as Ngong/Ngong 45002.

11. In the further affidavit sworn on 22nd July 2021 by Mr. Joliffe Kipchoke Murunga, avers that this application is not res judicata since the issues for determination dealt with in Misc. Application 482 of 2018 were substantially to enlarge time within which to file an appeal out of time and that the court did not deal with the issue of stay of execution since no substantive appeal had been filed. That his application is purely to safeguard the suit property in order to avoid a situation of rendering his appeal nugatory and that it is not possible for him to deal with the property in any manner since there is already a prohibition over the same.

12. He depones that there are no material facts that they have withheld as alleged hence the allegations that he not furnished the court with his financial standing is far fetched when the suit property has not been disposed of. That there is no prejudice which the 1st respondent will suffer since the subject property is sufficient security to meet the decretal sum in the event the appeal is not successful.

13. The application was disposed of by written submissions. Mr. Kitindio for the appellants gave a brief background of the matter and identified the issues for determination to be as follows:

i. Whether the present application is res- judicata.

ii. Whether the present application is an abuse of the court's process.

iii. Whether the present application merits the condition for grant of orders of stay of execution pending hearing and determination of the appeal.

iv. Whether substantial loss is likely to result to the applicants/appellants if stay is not granted.

v. Security and probability of success of the appeal.

vi. Which party should bear costs of the present application.

14. On the first issue, counsel cited Section 7 of the Civil Procedure Act which provides that:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

15. He further referred to the case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others, Nairobi CA Civil Appeal No.105 of 2017** the Court of Appeal held that:

"Thus, for the bar of res- judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the

issue is raised.”

16. He submitted that the present application is not res judicata since issues for determination in the present application have never been dealt with as alleged since Miscellaneous Application No.482 of 2018 was substantially to enlarge time within which to file an appeal out of time and the court didn't deal with stay of execution since there was no substantive appeal that had been filed.

17. On the second issue, counsel referred to the case of **Chairman Co-operative Tribunal & 8 Others ex-parte Management Committee Konza Ranching & Farming Co-operative Society Ltd (2014) eKLR**, Justice Odunga referred to the words of the Justice Kimaru in the precedent setting case of **Stephen Somek Takwenyi & Another v David Mbutia Githare & 2 Others Nairobi HCC NO.363 of 2009** where it was stated as follows:

“The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.

18. Counsel submitted that the appellant/applicants have not abused the court process but are exercising their constitutional right of challenging the decision of the trial court before the appellate court. On the third issue, he urged the court to exercise its discretion in favour of the applicant as per the decision of the Court of Appeal in **Butt v Butt Restriction Tribunal (1982) KLR 417** where the court held that discretion ought to be exercised in a manner that would not prevent an appeal.

19. Counsel further relied on the following authorities:

a) Nairobi Civil Application No.238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another (UR) as cited by the High Court in Stanley Karanja Wainana & Another v Ridon Anyangau Mutubwa (2016) eKLR

b) Kenya Hotel Properties Limited v Willesden Properties Limited Civil Application Nairobi No.322 of 2006 reiterated by the Court of Appeal decision in House Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another (2015)eKLR

20. On the fourth issue, he submitted that the appellant/applicants are ready and willing to furnish the suit property herein as the security for this appeal. Counsel further submitted that the thrust of the appellant/applicants appeal as captured in the memorandum of appeal is that the learned magistrate erred in law by failing to consider 10% penalty for the breach of contract by the respondent which translates to KShs.270,000/= of the total consideration as stipulated in their contract of sale.

21. On the sixth issue, counsel submitted that the respondent has not considerably demonstrated that he is a person of means capable of refunding money if the appeal is to succeed. On this counsel relied on the case of **Feisal Amin Janmohammed T/A Dunya Forwarders v Shami Trading Co.Ltd Mombasa High Court Civil Appeal No.65 of 2013 (2014) eKLR** where it was held that:

“It is trite law, therefore, that a stay of execution order is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made, that the application was made without unreasonable delay and that the applicant has offered proper security.”

22. Learned counsel Mr. Nyawara for the respondents in his written submissions gave brief facts of the case and identified four issues for determination to be as follows:

1) *Whether the instant application is res- judicata and amounts to an abuse of court process*

2) *Whether the applicants as framed in substance and form would enable this honourable court to grant stay of execution under 42 Rule 6 of the Civil Procedure Rules 2010*

3) *Whether the appellants conduct before this honourable Court and the trial Court befits the grant of the Orders sought.*

4) *Whether the appellants should be condemned to pay cost of this application.*

23. On the first issue, counsel cited the **Halbury's Laws of England (1956) Vol.15 at page 18-185** which define res judicata as follows:

“... It amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as finding of fact...The doctrine of res judicata is not a technical doctrine applicable only to records: it is a fundamental doctrine of all courts that there must be an end to litigation...in order that a defence of res judicata may succeed, it is necessary to show not only that the cause of action was the same, but also that the plaintiff has had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res- judicata must show either an actual merger, or that the same point has been actually

decided between the same parties.”

24. Counsel contends that both applications were fundamentally premised on Order 42 (6) of the Civil Procedure Rules, 2010. That the appellant/applicants would want to suggest by so arguing that the present application is so merited and not res-judicata because now there is a filed substantive appeal. On this argument counsel relied on the following cases:

a) *Civil Appeal No.39 of 1998 Trade Bank Limited (liquidation) v L.Z Engineering Construction Limited & Others*

b) *Civil Appeal No.25 of 1977 Mburu Kinyua v Gachini Tuti*

25. Counsel further contends that this application is an abuse of the court process and cited the case of **M.N.N v M.N.N (2016) eKLR** to support his argument. In the said case the court held that:

“The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.”

26. On the second issue, he urged the court to determine that the instant application is overtaken by events and that the respondents while instituting the execution proceedings have incurred costs hence it will be unjust to allow the instant application. On this counsel relied on the case of **Teresiah Wairimu v Wanjiku Mwangi (2018) eKLR** in which it was held that:

*“The Applicant must satisfy the Court that the application was made without unreasonable delay. The Court noted that the Memorandum of Appeal was filed on 27th August 2015, and an application for stay was filed on 3rd September 2015. However, the said application was withdrawn and the instant application was filed on 4th October 2016. By then, the Respondent had already applied for execution of the same. The execution sought to be stayed was initiated by the Respondent before the instant application was filed. Therefore the Court finds that there was unreasonable delay in filing this application and the stay of execution has been overtaken by events. See the case of **Jane Jeptoo Sawe...Vs...Estate of Sylvester Kimagut Sang Represented by Jennifer Chebet Sang, Civil App No.49 of 2015**, where the Court of Appeal held that:-*

“The order of stay of execution that the Applicant seeks has been overtaken by events and cannot in the present circumstances be granted as it would serve no useful purpose”.

27. On proof of substantial loss, he submitted that execution is a lawful process and based on section 44 (1) of the Civil Procedure Act the sale of the suit property shall not in any way amount to substantial loss.

28. He cited the following cases in support of this submission:

a) *Misc. Civil Application No.400 of 2002 Glencore Grain Limited v Kabansora Millers Limited*

b) *Civil Appeal No.322 of 2006 Kenya Hotel Properties Limited v Willesden Properties Ltd*

c) *Justus Kyalo Musyoka v John Kivungo (2019)eKLR in ELCA Case No. 4 of 2019 County Government of Nyeri v Benson Warui & Another (2020) eKLR*

29. On the issue of security, he submitted that on a without prejudice basis and if the court shall be inclined to grant the stay of execution, they beseech the court to direct the appellants to deposit the decretal sum in a joint interest earning account within 21 days from the date of the ruling by this honourable court. He therefore urges the court to be guided by the decision of the Court of Appeal in **Civil Application No. Nai 15 of 1990 Halai another Thortone & Turpin 1963** in which it was held that:

“It is equally important to remember that a successful litigant is entitled to the enjoyment of the fruits of his judgment, which he can be deprived only for a just cause”

30. On the third issue, counsel submitted that the respondents in the present application have established that the appellant/applicants while before the learned magistrate, filed a replying affidavit and led evidence bordering on perjury that this court had granted orders of stay unconditionally. He submits that such conduct amounts to contempt and does not befit the grant of the Orders being sought. On this submission he relied on the Court of Appeal case of **Meis Industries Ltd v Mohammed Enterprises (T) Ltd and others (2012) EA 217** where it was held that:

“Deliberate misleading statements to the court resulting in the court pronouncing a decision which would not have been so if the whole truth was known should be condemned .Counsel for the objector did not have a good reason in law for misdirecting the court”

31. On the fourth issue, he submitted that had the appellant/applicants acted diligently no costs would have been incurred as the application which they (respondents) contend is res –judicata is an abuse of the court process and has been overtaken by events. To support this counsel relied on the case of **Re Estate of Kiptoo Lagat (deceased) (2021) eKLR**.

32. He therefore urges the court to dismiss the instant application with costs to the respondents.

Analysis and Determination

33. I have duly considered the application, grounds, affidavits, both submissions and authorities cited. The issues I find falling for determination are:

i) Whether this application is res-judicata.

ii) Whether the appellant/applicants have met the requirements for grant of stay of execution.

34. The Ruling delivered by Justice C.W Githua in High court misc. application No. 482 of 2018 was annexed by the respondent as (annexture **SKK1**). The honourable Judge indicated that prayer No. 3 for stay of execution was incompetent and incapable of being granted. The reason being that there was no appeal filed to warrant the application of the provisions of Order 42 Rule 6 of the Civil Procedure Rules, which empowered the court to grant orders of stay of execution pending the hearing and determination of appeals.

35. Since the said prayer was not considered nor determined on merit one cannot argue that this court is barred from hearing the present application. Yes, it was dismissed but it was not considered on merit. I find the issue to be without merit. The application is not res-judicata.

36. The principles guiding the grant of stay of execution Order 42 Rule 6(2) of the Civil Procedure Rules provides:

“(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.”

37. In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court stated that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.

38. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

39. As to what substantial loss is, it was observed in **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR**, 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 Civil Procedure Rules. 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.”

40. In the instant case the appellant/applicants argue that the respondents have not demonstrated to the court that they are men of means capable of refunding money if the appeal is to succeed. On the other hand the respondents have stated that it is not true that they have not furnished the court with evidence of being capable of refunding the decretal sum. They go further and point out in their replying affidavit dated 12th October 2018 that the 1st respondent had availed evidence of employment and a bank statement which has not changed.

41. Therefore, they argue that the mere fact that the decree holder is not a man of means does not necessarily justify his being barred from benefiting from the fruits of his judgement. The general rule they argue 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 a higher Court.

42. 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.”

43. As to 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. I am of the view that 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 since lack of means per se is not necessarily a ground for granting stay of execution.

44. 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. Suffice to state that the respondent, at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicants to prove that he is unlikely to make good whatever sum he may have received in the meantime.

45. On the issue of security of costs the appellant/applicants say they are ready and willing to offer the suit property as security for this appeal which according to them is worth over Kshs. 15,000,000/=. The respondents on the other hand aver that this is a matter of a money decree and that they have not taken ownership of the said property but are interested in an immediate enjoyment of the fruits of their judgment. The appellant/applicants have stated they are ready to deposit security which in my opinion is a sign of good will and the fact that the 1st appellant/applicants has offered the suit property as security is a clear indication that if the appeal fails then they will be able to pay the respondents the decretal sum.

46. In **Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 others [2015] eKLR**, it was said:

“... 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.”

47. 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.”

48. In my view the fact that the applicants are willing to offer the suit property as security, is a sign of good faith. That in the event the appeal fails the appellants will be able to pay the respondents their money. At the same time they are willing to deposit any form of security the court may deem fit. In his submissions their counsel contended that the learned Magistrate erred in law by failing to consider the 10% penalty for the breach of contract by the respondents which translated to Kshs.270,000/= as it was stipulated in the contract of sale. This if proved might also change a lot in the final determination.

49. 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."

50. After considering all the facts, arguments and the Law, I find that the appellant/applicants have made out a case for grant of the prayer for stay of execution of the Judgement dated 8th June 2018. I therefore allow the application dated 14th June 2021 and issue stay of execution on the following conditions:

- i.** The appellant/applicants to pay to the respondents (through their advocates) Kshs. 250,000/= within 30 days.
- ii.** The balance of the decretal sum amounting to Kshs389,386/50 to be secured by way of a bank guarantee from a reputable bank within 30 days.
 - b)** Failure to comply with any of the above conditions will automatically vacate the order of stay of execution.
 - c)** Costs of this application will be in cause.

DELIVERED ONLINE, SIGNED AND DATED THIS 8TH DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE