REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. 9 OF 2019

JULIAH WAMBUI NGARUYIA (Suing as the Administrator of

the Estate of the deceased SAMUEL MBUGUA MUNGAI)...PLAINTIFF/RESPONDENT

VERSUS

KASSAM HAULIERS LIMITED.....DEFENDANT/APPLICANT

RULING

1. On 6th February, 2020, this Court delivered a judgement in this suit in which the Plaintiff/Respondent herein, **Juliah Wambui Ngaruyia**, was awarded a net award of Kshs 38,775,682.50 with costs and interests.

2. The suit arose from a road traffic accident which occurred on or about the 17th December 2018 around 9.30 PM at Mwamba Hills along the Nairobi-Mombasa Road. The said award was as a result of an assessment of damages since on 17th July, 2019, the parties herein recorded a consent on liability by which judgement was entered for the plaintiff against the Defendant in the ration of 90:10 and the matter proceeded to formal proof.

3. By a Notice of Motion dated 25th September, 2020, the Applicant herein seeks the following orders:

a) THAT this application be certified as urgent;

b) THAT notice of this application to the Plaintiff be dispensed with in the first instance and there be a stay of execution of the decree herein pending the determination of this application;

c) THAT there be a stay of execution of the decree herein pending the determination of the intended appeal filed by the Defendant against the judgment delivered herein on 6th February 2020 on such terms as appear just and proper; and

d) THAT the costs of this application be costs in the cause.

4. According to the Applicant, it is aggrieved by the decision by this Court to award the Respondent KShs46,400,000.00 for loss of dependency and intends to appeal to the Court of Appeal and has filed a Notice of Appeal. To enable it lodge the appeal, the Applicant has through its advocates requested to be supplied with copies of the proceedings and judgment delivered herein on 6th February 2020 as well as a certificate relating to the time taken by the court for the preparation and delivery of the said copies in terms of the proviso to rule 82(1) of the ***Court of Appeal Rules, 2010***.

5. Based on legal advice, the Applicant believed that the intended Appeal has good prospects of success hence it is necessary, in the interests of justice, that there should be a stay of execution of the said judgment otherwise the Defendant will suffer irreparable loss and damage and also the appeal will be rendered nugatory. It was deposed that the Defendant is carrying on the business of general transporters and all its motor vehicles and trailers have been attached in execution of the decree passed in this case and if the same are seized in terms of the proclamation of attachment of movable property served on it by Galaxy Auctioneers on 21st September 2020, it will be forced to shut down its business.

6. The Applicant disclosed that it is prepared to give appropriate security for the entire decretal amount herein by depositing with this Court the originals of all the log books in respect of all its proclaimed motor vehicles and trailers and also by claiming an indemnity against its insurers, Takaful in respect of the entire decretal amount on the following grounds:-

(a) by a Policy of Insurance No. P/MSA/2017/102/103865 issued by Takaful, Takaful insured the Defendant's motor vehicle registration No. KBU 868R (a Mercedes Benz Prime Mover) against third party risks for the period commencing 4th October 2018 to 3rd October 2019.

(b) the accident, which forms the subject matter of this action, occurred on 17th December 2018 during the currency of the said policy;

(c) on 19th December 2018 the Defendant wrote to its insurance brokers, Azhar Insurance Agency (Azhar) regarding the said accident.

(d) on 8th January 2019 the Defendant again wrote to Azhar enclosing the duly filled claim form and its statement of its driver's disappearance for their necessary action.

(e) on 28th January 2019 the Defendant again wrote to Azhar enclosing the Vehicle Inspection Report for their necessary action.

(f) on 19th February 2019 the Defendant wrote to Azhar enclosing an original police abstract for their necessary action.

(g) on 8th April 2019 the Defendant wrote to Azhar forwarding the Summons in this suit (together with a copy of the Plaint and copies of the documents accompanying it) served on it for their necessary action.

7. The Applicant averred that Takaful thereafter appointed their advocates Messrs Macharia Murugu & Company to enter an appearance and file a defence which they did and thereafter on 27th June 2019 Takaful wrote to the Defendant on a without prejudice basis stating that in their assessment on the nature of the claim, the claim amount payable to the deceased's estate was likely to exceed KShs3,000,000/- which amount was in excess of the policy the Applicant had with Takaful Insurance of Africa, and also as per the Amended Insurance Motor Vehicle Third Party Risks CAP 405, the maximum amount payable per claim by the insurance company is KShs3,000,000/-. The Applicant was therefore advised to arrange and organize on how to address any excess amount that might result from the claim. Immediately after receipt of the said letter the Applicant requested the said Insurance Company for a copy of the policy document to enable it consider whether Takaful's liability in respect of the claim made by the Plaintiff in this case was limited to Kshs3,000,000.00 and was promised the same. However, on 7th July 2019 when this case came up for pre-trial hearing a consent judgment on liability was entered between the Plaintiff's advocates and the said Macharia Murugu & Company at 90:10 in favour of the Plaintiff against the Defendant and this case was thereafter stood over for formal proof on 26th September 2019. The Applicant complains that all this was done by Takaful's said advocates without any reference or consent of the Applicant.

8. It was deposed that sometime after this consent was entered, Takaful paid the Plaintiff KShs3,000,000.00, being their alleged maximum policy limit and advised the Defendant to appoint its own advocates to take over the further defence of this case on its behalf. With a view to safeguard the interests of the Defendant, the Defendant appointed to its said advocates to take over the further defence of this case from Macharia Murugu & Company.

9. Upon receipt of the said policy document, from Takaful and forwarded the same to the Defendant's said advocates with a view to advise the Defendant on whether or not Takaful's liability in respect of the decretal amount herein was limited to KShs3,000,000.00 and was advised by its advocates that it is clear from the said policy that Takaful's liability to indemnify the Defendant in respect of the claim made by the Plaintiff in this case is unlimited and that by virtue of the said policy Takaful is liable to indemnify in full the Defendant in respect of the said claim and that Takaful had wrongfully withdrawn from further defending this case. Accordingly, the Applicant's position is that it is entitled to claim indemnity against Takaful in respect of the entire decretal amount in this case and has accordingly instructed its said advocates to file appropriate legal proceedings against Takaful to make them pay the entire decretal amount to the Plaintiff in this case.

10. It was the Applicant's view, based on legal advise that what Section 5(b)(iv) of ***The Insurance (Motor Vehicles Third Party Risks) Act*** (Cap. 405, Laws of Kenya) provides is that the policy of insurance under the Act need not be a policy in which liability is in excess of the sum of KShs3,000,000.00, arising out of a claim by one person and therefore when a policy of insurance under the Act in which liability is unlimited, arising out of a third party claim like in our case, then the insurer's obligations under the Act is to pay the third party his claim in full failing which the third party is entitled to file a suit against the insurer in terms of Section 10 of the Act.

11. The Applicant asserted that there was no delay on its side but rather the same was attributed to the closure of courts due to the Covid 19 pandemic. It further averred that the Ruling for the Plaintiff's Advocates bill of cost was delivered on 3rd September 2020 and thereafter the Plaintiff extracted warrants of attachment after the said ruling and thus the Applicant could only file this Application for stay upon being threatened with execution. While appreciating the loss of life of the Plaintiff's husband, the Applicant averred that it has employed 120 employees who have families and/or dependents that wholly depend on them and that should the Defendant be ordered to deposit the decretal sum, then it would mean that it will be forced to shut down its business because it is not possible to deposit that money and at the same time continue with its operations. That eventuality, it averred would render almost thousands of people destitute as the source of income (salary) will no longer be there.

12. The Applicant therefore prayed that this application be allowed by directing that the Applicant deposits the logbooks of the proclaimed motor vehicles and trailers pending the hearing and determination of its Appeal. Accordingly, the Court was urged to balance the interest of both parties by not punishing the Defendant through ordering the deposit of the decretal sum as it will be forced to close shop and also by securing the Plaintiff's interest through ordering the deposit of the original logbooks as security pending the hearing and determination of the Appeal.

13. In support of the Application, it was submitted that the Defendant's application was filed without unreasonable delay and that the closure

of courts due to the Covid 19 pandemic and then later re-opening of courts caused this Application to be filed on 1st October 2020. It was further submitted that the Defendant's appeal is not frivolous or otherwise an abuse of the process of this Court but that it is based on good arguable grounds.

14. It was urged that the Court should allow this application otherwise the Defendant will suffer irreparable loss and damage and the appeal will be rendered nugatory since the Defendant is carrying on the business of general transporters in Mombasa and all its motor vehicle (16) and trailers (11) have been attached in execution of the decree passed in this case and if the same are seized in terms of the proclamation of attachment of movable property served on it by Galaxy Auctioneers on 21st September 2020, the Defendant will be forced to shut down its business. The Defendant Company has an approximately 150 employees who have at least 4 people each that depend on them. In the event the stay is not granted, around 600 people will suffer as the company will be forced to shut down its business. Furthermore, should the court order that the Defendant deposit even quarter of the decretal sum, it will be forced to shut down its business because it will not be able to raise that money. The Defendant is prepared to deposit with the court the original logbooks for all its proclaimed motor vehicles and trailers which motor vehicles and trailers are still in good condition which are sufficient to stand as security. According to the Applicant, the said motor vehicles and trailers are readily available and should the Court desire to see the same for verification or any other purposes, then the Defendant undertakes to avail them in court as and when ordered to do so.

15. It was submitted that the Plaintiff at the hearing testified in court that she is a housewife with no income and who depended on her late husband. In the event this Court directs that the decretal sum be paid to her (which the Defendant is not able to do due to financial constraints) and the appeal succeeds then the Defendant will not be able to recover the same from the Plaintiff. It was noted that since the Plaintiff has been paid Kshs.3,000,000.00 by the Defendant's insurers, she will suffer no prejudice if this Court allows the Defendant to deposit the logbooks as security.

16. The Applicant reiterated that its insurers, after paying Kshs.3,000,000.00 to the Plaintiff, withdrew representing the Defendant in this case thus exposing it to ruin when the policy of insurance that the Defendant had with its insurers had no limit in terms of liability to indemnify the Defendant in respect of the claim made by the Plaintiff in this case. In other words, it was submitted that by virtue of the policy of insurance the Defendant's insurers are liable to indemnify in full the Defendant in respect of the Plaintiff's claim and they have wrongfully withdrawn from further defending this case. The Defendant therefore revealed that it was taking steps against its insurers to file appropriate legal proceedings to make them pay the entire decretal amount in this case. Indeed, the Plaintiff herself is entitled to institute declaratory suit against the Defendant's insurer for the recovery of the entire decretal sum herein in terms of section 10 of ***The Insurance (Motor vehicle Third party risks) Act***, Cap 405 Laws of Kenya. In this connection, it was submitted that Section 5(b)(iv) of the said Act provides is that the policy of insurance under the said Act need not be a policy in which liability is in excess of the sum of KShs3,000,000.00, arising out of a claim by one person and therefore when a policy of insurance under the said Act in which liability is unlimited, arising out of a third party claim like in this case, then the insurer's obligations under the said Act is to pay the third party its claim in full failing which the third party is entitled to file a suit against the insurer in terms of Section 10 of the said Act. The Defendant is expressed its readiness and willingness to pay the Plaintiff's advocate's their costs in the event the Plaintiff wishes to file such a declaratory suit.

17. In urging the Court to allow the application, it was submitted that this Court should exercise its discretion judiciously in a manner that is not to punish the Defendant based on the holding in **Butt vs. Rent Restriction Tribunal [1982] KLR 417**.

Plaintiff/Respondent's Case

18. The Application was however opposed by the Respondent. She relied on her replying affidavit in which she deposed that there has however been a delay of 7 months in bringing this application which has not been brought by the dissatisfaction of the judgement herein but upon the plaintiff commencing execution.

19. It was deposed that this Court is bound by its decision, the fact that the defendant does not agree with it does not amount to an error, and if at all it does that is not for this Court to adjudicate on but rather the Court of Appeal. According to the Respondent, dissatisfaction with a judgement does not amount to irreparable loss as irreparable loss amounts to the decree holder's inability to pay back the decretal amount in the very unlikely event that the decree is set aside or reversed. As such the applicant's application is incompetent on this ground.

20. The Respondent averred that she lost her husband and father of her 3 children who are all below the age of majority in the hands of the defendant (liability having been agreed by consent at 90%:10%). In as much as the defendant is worried about the possible loss of their business, her husband will never come back. By the court awarding damages of Kshs 46,400,000/= it only sought to put right the defendant wrongs by appreciating that the defendant was a person of means and was taking care of his family hence our loss of dependency.

21. It was deposed that courts have in the recent past departed from the then jurisprudence that logbooks are security as the defendant can always mis-use the vehicles, ground them, sell them as salvage or at a loss due to the inability to transfer them to a third party. So as not to belittle her loss and considering that judgement was entered on liability by consent, it was the Applicant's view that it is only fair that the defendant be ordered to pay half the decretal amount to her and thereafter issue her with a bank guarantee for the balance of the decretal amount which can easily be obtained by use of the logbooks the defendant wished to offer to this Court as security. Alternatively, if the Court were of the view that she should not be paid even a cent before the defendant's appeal is heard and determined then the defendant can be ordered to deposit the entire decretal amount in the joint names of the advocates.

22. The Respondent averred that the recent amendment introduced by the ***Insurance Act and the Insurance (Motor Vehicle Third party Risk) Amendment Act*** No. 50 of 2013 particularly Section 5(b) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 which sets the Insurance limit at Kshs 3,000,000/= hence she does not want to be dragged into the defendant's dispute with its insurers as the defendant can independently file a declaratory suit as against their insurers without involving me. Should that case be determined in favour of the defendant before the Respondent finalizes execution, then the defendant insurers will be under an obligation to settle the decree herein and should that case be determined after she has executed the decree the Respondent will have no problem testifying for the defendant and help it recover whatever it will have paid over to her.

Determination

23. I have carefully considered the application, the affidavits filed, submissions made as well as authorities cited by counsel for both parties. **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.***
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> ***(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."***

24. 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 nolonger 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" while 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.

25. 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.

26. 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".**

27. 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."

28. 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".

29. 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."

30. 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."

31. 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".

32. 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.**

33. 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.**

34. 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.

35. In this case, however, the decree sum is over Kshs 38 million. While the general rule is that poverty of the judgement creditor is not necessarily a ground for granting stay of execution, where the award is on the face of it high, that is a factor which this Court may take into account.

36. 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.**

37. Still on the issue of the overriding objective, the principle of proportionality requires the Court to take into account the amount of money involved; the importance of the case; the complexity of the issues; and the financial position of each party. See **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63.**

38. It is with this in mind that the Court of Appeal in **Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005** while citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. Therefore, where there is a large sum of money involved the Court may take that in consideration in an application for stay of execution. 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 central 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 so 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 his judgement. **See Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410; Mukuma vs. Abuoga [1988] KLR 645.** In the latter case the amount in question was Kshs. 4,000,000.00. Therefore, if the applicant were to prove that if compelled to settle the decretal sum it may well fold up hence be disabled in pursuing his otherwise merited appeal, the Court may, while also taking into account the prospects of the Respondent being able to be paid if the appeal were to fail, grant the stay sought.

39. With respect to the issue whether or not the applicant stands to suffer substantial loss in **Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005** the Court of Appeal citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. In the said case the amount in question was Kshs. 4,000,000.00. However, in this case it is not contended that the applicant is not in a position to pay the said sum or that if made to pay the same it is likely to find itself in some financial embarrassment. To the contrary it is contended that it is the respondent's financial position that is disturbing since there is evidence that the respondent has been unable to meet its financial obligations. That the amount involved is by no means smallish is not in doubt.

40. The law however is not that in monetary decrees a stay of execution is not to be granted. What the Court stated in ***Kenya Shell Case*** was that **normally** in such decrees the appeal is unlikely to be rendered nugatory. However, Order 42 rule 6 recognises that there may exist **sufficient cause** even in such decrees. 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.**

41. 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".**

42. 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).

43. 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.**

44. 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 be aware of. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then 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.**

45. 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.

46. 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. However, as already stated above the Court must similarly consider the overriding objective and balance the interest of the parties to the suit. 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".**

47. In my view, the chances of success of the intended appeal ought not to take centre stage in an application for stay of execution by the High Court of a decision of the same Court pending an intended appeal to the Court of Appeal. To ask the court to determine an application for stay of its orders based on the chances of success of an intended appeal would amount to asking the same court to interrogate its decision an action which in my view is not contemplated under Order 42 rule 6 of the ***Civil Procedure Rules***. The Court of Appeal, however, being a Court of superior jurisdiction is perfectly entitled, in an application for stay of execution of a decision of the High Court pending an appeal to that court to consider the chances of success of the intended appeal. Similarly, it is my view that where the High Court is hearing an application for stay of execution of a decision of a subordinate court pending an appeal to the High Court, the latter is perfectly entitled to consider the chances of success of the intended appeal.

48. While I appreciate that in an application for stay pending appeal, it is permitted for the applicant to disclose the nature of his intended appeal so that the Court satisfies itself that in determining whether or not to exercise its discretion in favour of the applicant, it is not doing so on frivolous grounds, under Order 42 rule 6 of the ***Civil Procedure Rules***, it is not a condition for grant of stay that the applicant satisfies the Court that his appeal or intended appeal has overwhelming chances of success. In my view the omission to include such a condition is for good cause. It is in my view meant to insulate the Court from which an appeal is preferred from the embarrassment of holding a mini-appeal as it were. Accordingly, whereas the Court of Appeal is in a better position to gauge the chances of success of an appeal or intended appeal, this Court in an application seeking stay of execution of its decision pending an appeal to the Court of Appeal is not enjoined to consider such condition. In fact it would be highly undesirable to do so, though it may superficially make reference to the grounds of the intended appeal. This was the position adopted in **Universal Petroleum Services Limited vs. B P Tanzania Limited [2006] 1 EA 486** where the Court held that:

> **"The granting or otherwise of an order of stay of execution under rule 9(2)(b) is at the discretion of the court and in the exercise of that judicial discretion the court as and where is relevant considers a number of factors, notably, whether the refusal to grant stay is likely to cause substantial and irreparable injury or loss to an applicant, whether the injury or loss cannot be atoned by damages, balance of convenience, and whether prima facie the intended appeal has likelihood of success. Above all, further to considering the above factors the court takes into account the individual circumstances and merits of the case in question…At this stage one has to be careful not to pre-empt the pending appeal and for that reason, the court has to discourage a detailed discussion of the weaknesses or otherwise of the decision intended to be impugned on appeal… There is also a danger in saying or making a finding that an appeal has an overwhelming chances of success."**

49. **In Mangungu vs. National Bank of Commerce Ltd [2007] 2 EA 285**, the Court expressed itself on the issue as follows:

> **"Generally the merits of a party's case in a stay application is not a particularly relevant matter for consideration at this stage. Although it is true that the Court under rule 9(2)(b) has discretion to stay execution, but only on grounds which are relevant to a stay order. Whether or not the appeal has good chances of success is a matter, which should be raised in the appeal itself. The correctness of the judgement should not be impugned in an application for stay of execution save in very obvious cases such as lack of jurisdiction."**

50. Accordingly, I do not intend to make any finding with respect to the chances of success of the intended appeal.

51. In this case, the Defendants did not adduce any evidence at the trial. In fact, liability was agreed. Without the same being set aside, the Applicant cannot, in an application seeking stay pending appeal, be heard to take issue with the said consent. Therefore, the only issue which the Applicant can be heard on is the award of damages.

52. In this case, it is true that from the proceedings the Respondent testified that she is a housewife with no income and who depended on her late husband. Apart from that, the decree holder is an estate of the deceased. The Respondent has disclosed in the replying affidavit certain financial challenges facing the family. In effect the Respondent is saying that the estate requires the funds in question for its upkeep. Clearly therefore in the event that the Applicants succeed in the appeal, recovery of the sum paid may be difficult particularly as the Respondent has not disclosed the estate's source of income.

53. However, the security offered by the Applicant may well be illusory since no one can tell the state in which the vehicles whose log books are being offered will be by the time the intended appeal is heard and disposed of. If the Applicant cannot give a sufficient security it only means that if the intended appeal fails, the Respondent may be left baby-sitting a barren decree.

54. 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 Applicant deposits half of the decretal sum in joint interest earning account(s) in the names of the advocates for the parties herein in Kenya Commercial Bank, Machakos 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.

55. The costs of the application are awarded to the Respondent.

56. It is so ordered.

Read, signed and delivered in open Court at Machakos this 1st day of December, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Wanjiku for Mr Mathare for the Applicant

Mr Makumi for the Respondent

CA Geoffrey