REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 78 OF 2017

NEW WIDE GARMENTS EPZ (K) LTD.....APPELLANT

-VERSUS-

RUTH KANINI KIOKO.....RESPONDENT

RULING

1. By a Motion on Notice dated 15th February, 2019, the applicant herein seeks stay of execution of the judgement, decree and warrants of attachment issued to M/s Vintage Auctioneers in Machakos CMCC No. 448 of 2013 pending the hearing and determination of this appeal. They also seek an order for provision of costs.

2. According to the applicant, the trial court in its judgement in the said case on 18th may, 2017 awarded the plaintiff Kshs 307,500/= plus costs and interests and being aggrieved by the said decision it has filed this appeal.

3. The gist of the applicant's case was that on 3rd August, 2017, the parties herein agree to compromise a similar application before the trial court on the terms that the application would be allowed subject to the decretal sum being deposited in an interest earning account to be opened in the joint names of the two advocates. Accordingly, the agreed sum was Kshs 392,500/=. However, despite the efforts made by the applicant's advocates to facilitate the said process, the Respondents frustrated the same till the cheque which was drawn by the applicant expired, after which the Respondents threatened to execute for the judgement.

4. It was averred that the applicant's efforts to have the account opened after having a new cheque drawn were rebuffed by the Respondent who declined the opening of the said account. The applicants' attempts to have the trial court extend the period for compliance were also fruitless as the Court declined to do so stating that it could not do so unless the same was consented to. Thereafter, the Respondent instructed M/s Vintage Auctioneers to proclaim the appellant's moveable items in execution of the decree.

5. The applicant contended that it has done what is inhumanely possible to secure the parties 'compliance with the trial court's order of 3rd August, 2017 as it has always been ready and willing to comply with the same yet the Respondent has been hesitant to co-operate with the appellant in the opening of the joint account. The applicant contended that it is willing and ready to finalise with the opening of the joint account so that the decretal sum can be deposited in the said account. The appellant disclosed that it has already prepared, field and served the record of appeal which appeal is fixed for directions on 9th May, 2019. To the applicant, its appeal has high chances of success and unless this application is granted the appellant will suffer substantial loss if it settles the decree and thereafter the appeal succeeds as the Respondent will not be in a position to refund the money paid.

6. The application was however opposed by the Respondents who averred that this application is a mere camouflage of an Appeal against the Orders of the trial Court issued on 11th October, 2018 dismissing their Application in the trial Court for enlargement of time to comply with orders previously issued by the court. It was deposed that although said Application was dismissed as far back as 11th October, 2018, the Appellant sat on its laurels for a period of over **five (5) months,** until threatened with execution, then rushed to court with the instant Application seeking stay of Execution, instead of having immediately exercised their right of Appeal and/or setting aside of the lower court's orders hence the instant Application is improperly before the Court and an attempt to hoodwink the court.

7. The Respondent disclosed that this is the third Application filed by the Appellant herein seeking stay of execution against the trial court's judgment of Kshs. 307,500.00 plus costs and interests delivered on in her favour. According to the Respondent, the Appellant herein has been quite indolent, clever and mischievous in taking these the courts of law round in circles on the same issue as evidenced by the several allegedly urgent Applications and yet failing to comply with the orders therefrom.

8. The Respondent explained that in regards to the Application dated 5.07.2017 seeking stay of execution of the judgment pending hearing and determination of the Appeal, the parties Consented to compromise the said Application under the following terms:-

a) The entire decretal amount of Kshs. 307,500.00 together with costs and interests (as agreed by the parties or upon failure of agreement to be assessed by court) be deposited in a joint interest earning Account to be opened within thirty (30) days of today; and

b) Upon failure of the deposit of the entire decretal amount and the costs and interests as agreed the Plaintiff be at liberty to execute.

9. According to the Respondent, the above Consent was recorded by parties on 3rd August, 2017 and adopted as an Order of the Court and thus the effect of the said Consent was that the Bank Account ought to have been opened and the entire decretal amount together with the costs and interests as agreed by parties deposited therein within thirty (30) days of the recording of the Consent, that is, by 30th September, 2017. It was the Respondent's position that it was the responsibility of the Appellant herein, as the Applicant in the above mentioned Application, to extract the said Order and Decree for purposes of establishing costs and interests to enable them satisfy the terms of the recorded Consent in facilitation of opening of the bank Account and deposit of the decretal sum since they were the Appellant and the conditions therein were binding on them. However, the Appellant herein slept on its laurels and made no move whatsoever to extract the Order, open the Account or deposit the said funds agreed upon, despite numerous reminders by my advocates on record and continued to enjoy stay of execution orders to her disadvantage.

10. The Respondent therefore averred that consequent to the Appellant's indolence and contempt of the court orders, the Court Orders of Stay of Execution lapsed and she was then at liberty to execute for the entire decretal amount and therefore the attempts made by her advocates in realization of the decretal amount was proper and due.

11. The Respondent disclosed that in attempting to realize the benefits of the judgment in execution, the Appellant once again rushed to court vide the Application dated 27th September, 2018**,** seeking enlargement of time to enable them comply with the Court Order of 3rd August, 2017, an application which was filed a year after the court Orders had been granted and ought to have been complied with and only after threatened execution by my advocates, clearly indicating that the Appellant had lost interest in the Appeal and would have continued to enjoy the stay of execution orders had her advocates not threatened execution. The said application was however dismissed. In the Respondent's view, the Appellant in failing to comply with the consent Order in effect vitiated the contract and I she is thus at liberty to execute against the judgment since it is now one and a half years since the said consent Order of and the Appellant has never complied with the Court Orders.

12. It was averred that the Appellant has now once again rushed to court in yet another attempt at circumventing justice hiding behind half-truths, utter falsehoods and lies as identified in the instant Application and the Supporting Affidavit therein as follows:-

a) The Stay of Execution Orders were issued in August 2017, the Record of Appeal was filed on 17.09.2018 and the orders of 3.08.2017 extracted on 18.01.2019.

b) Under Paragraph 4 of the Supporting Affidavit, the Appellant conveniently avoids mentioning that there was a default clause in the Court Order giving the Respondent herein liberty to execute against the Appellant upon failure of deposit of the award within the limited thirty (30) day period.

c) Under Paragraph 5 of the Supporting Affidavit, the Appellant does not inform the Court that although the cheque issued was dated 24.08.2017, the Appellant sat on it for a period of five (5) months until 24.01.2018, which is when they forwarded the same to her advocates, with only one month remaining to its expiration.

d) Under paragraph 6 of the Supporting Affidavit, the Appellant incompetently attempts to shift the blame of the delay in acquiring the court Order upon the Respondent and yet as the Appellant, the stay of execution orders were binding upon them and thus it was their responsibility to obtain the said court order to enable them comply with the Order. It is incompetent, inconceivable and astounding for an advocate to simply indicate that he required opposing counsel to do him a favour because of proximity to court.

e) That in any event, upon facing the purported resistance by the Respondent and/or their advocates as claimed in the paragraph, the Appellant was duty bound to go back to court before or shortly after the expiry of the orders of 3.08.2017 to seek for an extension of the same but instead they waited for a period of more than one year, and once again, only upon threat of execution to rush to court to file the Application dated 27.09.2018 seeking enlargement of time to comply with the court orders, which is the same situation with the instant Application.

f) The allegations from paragraph 7 through to paragraph 20 of the Supporting Affidavit are half truths and cleverly construed to blame the Respondent and yet the delay in the opening of the bank account was once again occasioned by the Appellant as despite numerous demands and reminders, the Appellant never forwarded the full details required in opening of the Account, specifically passport sized photographs and most importantly, never extracted the Order allowing the opening of the Bank Account; details of which were indicated in the Appellant's forwarding letter.

g) Further, the Appellant has not exhibited proof of the issuance of the Kshs. 1,000.00 referred to enable a search by the bank of the existence and registration of the Appellant's Law Firm.

h) The contents of paragraphs 21, 22 and 23 of the Supporting Affidavit are quite informative of the Appellant's behaviour in the conduct of the matter. The Honourable Court will note that by the Appellant's own admission, it was not until 15.10.2018, one year and two months after issuance of the court orders that the Appellant sought extraction of the Order.

i) That due to the Appellant's indolence, and only upon the Respondent's insistence and attempt at execution, the Order was finally extracted on 18.01.2019, two years after the Orders had been issued and had since lapsed, necessitating the Respondent's actions in executing the judgment.

j) That it is noteworthy that the Appellant of the cheque is of Kshs. 392,500.00 whilst the Decree issued on 23.11.2018 was for Kshs. 448,175.00 and thus there is a deficit of Kshs. 55,675.00 and yet there is no explanation offered for the deficit.

13. It was therefore averred that the execution process is proper since the 2nd Appellant sat on its laurels for a period of over two and a half years without making any move towards satisfying the terms of the Consent Orders and extracting the Court Order and their laziness cannot be encouraged and awarded by granting them the prayers sought. The Respondent contended that the reasons advanced by the Appellant as to why they have not complied with the Consent Orders or extracted the Court Order in time to enable opening of the Bank Account except, specifically, to indicate under paragraph 6 of the Supporting Affidavit that it was easier for my advocates to carry out the same because they are based in Machakos only shows lack of due diligence, laziness, ignorance of the law and Contempt of Court Orders on the part of the Appellant.

14. It was the Respondent's case that from all of the above, it is quite clear that the Appellant had no intention whatsoever to satisfy the terms of the Consent Orders and instead opted to sit on its laurels until the very last minutes, thrice as evidenced by their constant Applications, when the Respondent initiated the execution proceedings only to rush to court in an effort to further delay me justice. It was averred that equity cannot be seen to aid the indolent and therefore pray that the instant Application be dismissed since although given ample opportunity to comply with the court orders, the Appellant has completely refused, evaded and/or ignored complying with the court orders for a period of over one and a half years, which in itself, is an act of injustice to myself.

15. The Respondent therefore took the view that this application was made in bad faith and therefore the Appellant cannot be granted more time to comply with the Court Orders as my advocates have been lenient enough in granting them one and a half years to do so.

Determination

16. I have considered the application, the affidavits both in support of and in opposition to the application.

17. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the ***Civil Procedure Rules*** which provides as follows:

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.

18. This is a case where a stay of execution was granted by consent but the conditions were not complied with. In Order 42 rule 6(1) of the ***Civil Procedure Rules*** provides as follows:

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

19. In **Stanley Karanja Wainaina & Another vs. Ridon Anyangu Mutubwa [2016] eKLR,** I was held that:

"Counsel for the Respondent submitted on the provision of Order 42 Rule 6 (1) of the Civil Procedure Rules and argued that the Appellants had been granted a stay of execution by the trial court and in bringing the present application it was an abuse of the court process. In my view, Order 42 Rule 6(1) allows a party to file another application for stay of execution in the High Court whether the application for such stay shall have been granted or refused by the court appealed from. I appreciate the argument by the learned counsel and this court shares the same sentiment in that once an application has been dealt with by a court of competent jurisdiction and between the same parties, a similar application cannot be filed before another court as that would be an abuse of the court process or at best, *res judicata.* Unfortunately, that legal provision is part of our laws and until the same has been amended, we have no choice but to live with it as it is."

20. Similarly, in **Patrick Kalava Kulamba & Another vs. Philip Kamosu and Roda Ndanu Philip (Suing as the Legal Representative of the Estate of Jackline Ndinda Philip (Deceased) [2016] eKLR** it was held by **Meoli, J** that:

"12. For the purposes of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court "shall be at liberty…to consider" an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed "original jurisdiction". And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof…

[17. So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6 (1) of the Civil Procedure Rules can be entertained afresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the Githunguri Case concerning the court's original jurisdiction, vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2) b (as it is now). The foregoing has a bearing on the interpretation of Order 42 Rule 6 (6) of the Civil Procedure Rules and in particular the highlighted phrased therein.

18. Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6 (1) however does not preclude the Applicant from approaching this court as it has done.

19. I would venture to add that the wording of Order 42 Rule 6 (1) of the Civil Procedure Rules effectively grants the same jurisdiction to this court as an appellate court as Rule 5 (2) (b) does to the Court of Appeal: to entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6 (1).

20. It suffices, in my opinion, in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment of the lower court. To insist in this case that the Applicant must first file a separate appeal on the ruling of the lower court, apart from the judgment would in my view not only lead to confusing duplication of proceedings in respect of the same matter but also cause delay. . The provisions however must be applied under the guiding principles of Article 15 9 (2) d) of the Constitution.

21. In the circumstances of this case, I consider that driving the Applicant from the seat of justice when there exists a substantive appeal, and in disregard of the full import of Order 42 Rule (6) (1) would amount to raising a technicality, namely, the filing of an appeal on a supplemental matter that actually touches on the appeal where a substantive appeal already exists, above purpose and substance. There may arise in certain cases allegations of abuse of procedure but that must be established."

21. In arriving at its decision the Court relied on **Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR,** where it was held by **Githinji, JA** that:

"[13] It is trite law that in dealing with (Rule 5 (2) (b) applications the court exercise discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6 (1) of Order 42 of the Civil Procedure Rules and refused, the court in dealing with a fresh application still exercises original independent discretion as opposed to appellate jurisdiction (Githunguri –Versus- Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838."

22. In his judgment **Musinga, JA** observed on the same question that:

"The court is said to be exercising special independent original jurisdiction because on considering whether to grant or refuse an application for stay, it is not hearing an appeal from the High Court decision. It can grant orders of stay, irrespective of whether or not such an application had been made in the High Court. (See Stanley Munga Githunguri –Vs- Jimba Credit Corporation Ltd (Supra)."

23. **Kiage, JA** in his judgment quoted a passage from the judgment of the Court of Appeal in **Gurbux Singh Suiri & Anor. –vs- Royal Credit Ltd. Civil Application NAI 281 of 1995** expounding the court's reflection in its dictum in the **Githunguri** case as follows:-

"In ordinary circumstances the court has only appellate jurisdiction and in the absence of Rule 5 (2) (b) a party who has been refused a stay of execution or an injunction by the High Court would have been obliged to apply to the Court of Appeal to set aside the refusal and then, having done so, to grant the stay or injunction…But because of the existence of Rule 5 2 (b) one does not have to apply to the court to first set aside the refusal by the High Court and then having set aside the High Court order, to grant one itself. That is clearly the sense in which the expression 'independent original jurisdiction' is to be understood and that was made abundantly clear in the Githunguri case, supra, by use of the expressions such as "we have to apply our minds *de novo* or it is not an appeal from the learned Judge's discretion to ours."

24. It is therefore clear that under the said provision, whether the application for stay was granted or refused by the trial court, this court is at liberty to consider such application and to make such order thereon as it deems just. Where an order of stay is grated but any person feels aggrieved by such an order of stay he may apply to this court to have the same set aside. Therefore, in principle, the applicant is properly before this Court.

25. 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.

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. Therefore, 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.

35. However, in this case it is not contended that the applicant will not in a position to pay the said sum and there are no facts adduced to support that averment or even grounds for such belief. The amount in question is less than 500,000.00 a far cry from the Kshs 4,000,000.00 that was in issue in the above case. There is no contention that if the applicant pays the said sum it is likely to fold up its operations or find itself in some financial embarrassment. In fact, the supporting affidavit did not make any averment as to what would constitute substantial loss to the applicant in this case. In my view substantial loss is a factual issue which must be raised in the supporting affidavit.

36. In the circumstances of this case the conduct of the applicant in not moving with alacrity does not lend itself to favourable exercise of discretion in his favour. Further, the applicant has failed to place before me by way of satisfactory evidential means, material on the basis of which I can find that the applicant stands to suffer substantial loss unless this application is granted.

37. In the premises this application has failed to meet the threshold for grant of stay of execution pending appeal. The same is hereby dismissed.

38. As regards costs, although this Court directed the parties to furnish it with soft copies of the pleadings and submissions in word format, none of the parties complied. Section 1A(3) of the ***Civil Procedure Act*** provides as hereunder:

> ***A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.***

39. One of the overriding objectives of the ***Civil Procedure Act*** is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. Accordingly, the applicant will bear the costs of this application.

40. It is so ordered.

Read, signed and delivered in open Court at Machakos this 4th day of April, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Opiyo for Mr Kiprono for the applicant

Mr Nthiwa for the Respondent

CA Geoffrey