REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 107 OF 2016

TRANSLAKES LIMITED …………………............……..APPELLANT

VERSUS

MELLECH ENGINEERING &

CONSTRUCTION LIMITED …………………….....….RESPONDENT

KENYA COMMERCIAL BANK………………….…..………GARNISHEE

RULING

1. By a Notice of Motion dated 11th March 2016 the applicant Translakes Limited seeks from this court two main orders namely: Leave of court to enlarge time within which a memorandum of appeal should have been filed and secondly, stay of execution pending appeal. The application which was brought under certificate of urgency on 14th March 2016 was brought under the provisions of Sections 1A, 1B 63(e) and 75(h) of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.
2. The grounds upon which the application is predicated on are, more importantly: that the applicant was not aware of the judgment which was delivered on 23rd February 2016 by Honourable Usui until 8th March 2016 when the applicant attended court for hearing of the plaintiff's application dated 3rd March 2016; that the applicant had drafted and filed grounds of opposition to the aforesaid application based on the grounds that it had only been served on 7th March 2016 at 4.00pm yet it was to be heard the following day ; that the applicant was denied a fair hearing after its application was rejected and the respondent's application allowed; that unless stay is granted, the orders of 23rd February 2016 and those of 8th March 2016 by Honourable Usui will be executed adversely to the applicant and that the applicant shall suffer substantial loss resulting from payment of kshs 3,000,000 thus occasioning the applicant a hard time in resuming back to a stable running of its operations; that the applicant has an arguable appeal with probability of success since it was denied the right to a fair trial as the applicant's advocates did not know about the judgment as they were not served and were being punished for mistakes of the plaintiff's counsel; that the plaintiff is unlikely to suffer any prejudice if the application herein is allowed; and, finally, that the delay in filing this application is not so inordinate or so great as to be inexcusable.
3. The application by the applicant is supported by the affidavit of Jacktone V Hongo sworn on 14th March 2016 and a further affidavit sworn by Daniel Ochieng Mwaya on 31st March 2016 and filed on the same day.

4. In the supporting affidavit of Jacktone V Hongo, it is deposed that he is the director of the applicant company. That he learnt of the judgment delivered on 23rd February 2016 allowing the release of shs 3,000,000 held by the Garnishee to the plaintiff's advocates pending commencement of execution proceedings to recover the balance; that upon learning of the same, he instructed their advocates to file an application for enlargement of time and seek stay of the entire judgment; that they shall suffer substantial loss if stay is not granted and that the applicant is ready to comply with any order that the court may make as provided for under Order 42 Rule 6 of the Civil Procedure Rules; that the applicant offers a bank guarantee as security for the due performance of decree pending the hearing and determination of the intended appeal; that the applicants were denied the right of fair trial as its advocates were not aware of the judgment; that the application was filed without undue delay; that the respondent shall not suffer any prejudice if this application is allowed. The applicant annexed to the application a copy of memorandum of appeal as intended.
5. The applicant filed a further affidavit sworn on 31st March 2016 by Daniel Ochieng Mwaya a director of the applicant company contending that on 16th July 2015 the trial magistrate Mr Usui failed to exercise judicial discretion and administer fair trial when she denied the defendant/applicant's advocates an adjournment on the basis that the advocate handling the matter and possessed of the intricate knowledge of the matter had an official appointment with the President of the Court of Appeal in **CA 65 of 2015 Grace Wairimu Soroka V Chaka Limited & 5 Others** as shown by the attached cause list marked "DO1; that despite those compelling reasons, the trial magistrate refused to grant an adjournment and proceeded with the hearing of the matter exparte; that the trial magistrate instead of exercising judicial fairness went ahead and struck from the record the applicant's advocate who was holding brief at the time. He attached copy of defence claiming that they were denied fair administration of justice; that thereafter counsel for the applicant filed an application dated 27th July 2015 seeking a stay of the proceedings/execution of the orders of 16th July 2015 pending the hearing and determination of the application (as attached); that the applicant believes that it has suffered great injustice in light of execution of the judgment made on 23rd February 2016 as it was not served with notice of judgment yet the respondent proceeded to extract decree without following the proper laid down procedure under Order 21 Rule 7(2) and Rule 8(2) of the Civil Procedure Rules which require approval of a decree by the adverse party; that the applicant has suffered prejudice as all its money held in the bank account was hoarded and that it was denied access; that the matter was settled two years ago hence there is no reasonable cause of action; that the respondent had frozen and withdrawn money from the applicant's account No. 1103280619 and 1119341175 held by the Garnishee Kenya Commercial Bank at its Milimani and Salama Branches respectively; and that the respondent had taken full and unfair advantage of the situation and obtained court orders to freeze the applicant's accounts as shown by stay orders at Kisumu Law Courts.
6. The respondent filed a replying affidavit on 5th April 2016 sworn by Gerald Wamalwa the Managing Director of the Respondent company contending that the applicant's application dated 11th March 2016 is misplaced, is an abuse of the court process and that the applicant had not come to court with clean hands as it is being economical with the truth; that the orders sought are incapable of being granted. That the judgment by the Honourable magistrate Usiu subject of the intended appeal was rescheduled and was to be delivered on notice by the court which notice by the court was duly done on the court's notice board; that it was not the duty of the respondent's advocates to serve the applicant with a notice of judgment but that the court; and that the allegations in paragraph 7 of the affidavit are therefore misplaced; that shs 3,000,000 was attached pursuant to an order of the subordinate court and with the knowledge of the applicant on 4th September 2012 and the order was never appealed against; shs 3,000,000 has already been released to the respondent by the Garnishee; that the respondent will suffer prejudice if the orders sought are granted; that the further affidavit sworn by Daniel Ochieng Mwaya on 31st March 2016 introduces new matters that were not before the subordinate court hence those are extraneous matters to the intended appeal; that the applicant and Garnishee's advocates were invited to fix a hearing date but they declined hence the respondent took a date and gave a 2 months notice for the hearing and that there was no protest

or indication of previous commitment indicated on the hearing notice; that it was the applicant's advocate holding brief on 16th July 2015 who sought leave to withdraw from acting in the matter and that it is not true that the court initiated her withdrawal and that the court only recorded the wishes of the applicant's advocate and properly proceeded with the hearing of the matter; that the application dated 3rd March 2015 was the respondent's application seeking for release of the shs 3,000,000; that the application dated 27th July 2015 was dismissed; that the decree has not been extracted and that the provisions of Order 21 Rule 8 of the Civil Procedure Rules 2010 are not coached in mandatory terms; that the attachment for the money was made pursuant to a court order which was not appealed against hence allegations of hoarding are made in bad faith and preposterous; that paragraphs 11 to 13 of the affidavit by the applicant are meant to spoil the good name of the respondent's advocate hence they should be struck out as they are unsupported by facts; that the applicant has not satisfied conditions for granting of stay pending appeal and that the application for stay is baseless and brought without a shadow of an excuse; that there is no evidence that the intended appeal is not frivolous and or that if stay is not granted, then the appeal, if successful would be rendered nugatory. That the information supplied to this court is scanty and distorted and incapable of assisting this court to determine whether there is any merit in the application otherwise the court would be exercising its discretion in the dark.

7. The parties' advocates urged the application dated 11th March 2015 orally before me on 5th April 2016 with Mr Langat appearing for the applicant whereas Miss Mathenge represented the respondent.
8. In his submissions, Mr Langat stated that the judgment in the lower court was delivered in their absence on 23rd February 2016 without any notice being served on them and they only learnt of the judgment on 8th March 2016 when they were served with a certificate of urgency application seeking to have the shs 3 million earlier attached released to them by the Garnishees. Mr Langat lamented that application dated 3rd March 2016 was allowed without according them an opportunity to be heard in that although they filed grounds of opposition thereto, they were not granted leave to file their replying affidavit and that the court did not consider their grounds. It was submitted that the release of shs 3 million to the respondent occasioned the applicant undue hardship. He also lamented that they filed a defence which was never considered by the trial court. That as the advocate in conduct of the applicant's defence, he was engaged in a highly contentious matter before the Court of Appeal. He therefore send his colleague Ms Tessie Marienga who gave reasons for Mr Langat's absence since the date was not taken by consent but the trial magistrate refused her a chance to cross examine the witness. That he then filed an application to set aside the proceedings of 16th July 2015 but that the said application is still pending.
9. Mr Langat further submitted that the decree was never send to him for approval contrary to Order 21 Rule 8 of the Civil Procedure Rules. That the release of shs 3 million by the Garnishee to the respondent has occasioned substantial loss to the applicant who is a developer and who has obligations of paying workers' salaries and stamp duty hence if stay is denied, it stands to suffer irreparably. Further, that they wish to bring to the attention of the appellate court circumstances under which their defence was not considered by the trial court. Mr Langat relied on the case of **Edward Kamau & Another Vs Hannah Mukui Gichuki [2015] eKLR** wherein this court is said to have made it very clear on the application of Order 21 Rule 8 of the Civil Procedure Rules and laid a basis for extension of time to appeal. Further reliance was placed on **Sameer Africa Ltd V Aggraval & Sons Ltd [2013] e KLR** and the Ugandan case of **Sinnabulya V Sekibaala CA 6/2003 [2013] UG HC LD 23.**
10. Referring to the affidavit of Gerald Wamalwa , Mr Langat maintained that his firm had no knowledge of the date of judgment and that therefore the respondent had stolen a match on the applicant and that the integrity of the proceedings of 16th July 2015 is in question since the advocate who held Mr Langat's brief was never allowed to withdraw her appearance. He maintained that the intended appeal is not frivolous and that they have fulfilled conditions for stay under Order 42 Rule 6 of the Civil Procedure Rules in that the 3 million withdrawn from his client's account can be converted into security for the due performance of decree.
11. In a serious contest, Mr Mathenge counsel for the respondent opposed the application relying on

the replying affidavit sworn by Gerald Wamalwa on 4th April 2016. He conceded that indeed there was no notice of delivery of judgment which was delivered on 23rd February 2016 and that the respondent's clerks only found a notice on the court's doors. That the respondents, after judgment was delivered, filed an application for release of shs 3 million and served the application on the applicant's counsel but that the latter had not disclosed to this court why they never argued their grounds of opposition which they filed. Mr Mathenge also submitted that the lower court record was not here for this court to appreciate what went on in the lower court. He vehemently denied that the lower court ever denied the applicant a chance to be heard. He also submitted that the draft memorandum of appeal does not mention any ground on the applicant's defence and that indeed, the applicant proceeded with the case yet they had no defence on record. That the respondent's counsel invited the applicant's counsel to attend a hearing of the suit 2 months prior to 16th July 2015 and there was no protest. Further, that there was no evidence that proceedings of 16th July 2015 were unconscionable. That counsel for the applicant applied to withdraw from appearance.

12. Further, Mr Mathenge submitted that the applicant's application dated 27th July 2015 was dismissed by the trial court. Mr Mathenge maintained that there was no decree appealed against and that the applicant had not substantively explained what they were appealing against. He stated that there was an attachment before judgment so the shs 3 million was procedurally released as it had been frozen since 2012 hence the alleged substantial loss had not been demonstrated by the applicant herein. Further, that the form of security alleged had not been demonstrated.
13. On leave to appeal out of time, Mr Mathenge left it to the discretion of the court but maintained that conditions for stay pending appeal had not been fulfilled hence that prayer should be dismissed.
14. In a brief rejoinder, Mr Langat submitted, clarifying that their client's application dated 27th July 2015 has been set for hearing on 6th August 2015 and that it has not been heard and determined. He also stated that the Court of Appeal imposes dates on litigants hence on 16th July 2015 he was engaged before the Court of Appeal. He also stated that even after release of shs 3 million there was a balance since the judgment of 23rd February 2016 was for shs 4,313,325.20 hence there was still the danger of further execution for the balance thereof. He also clarified that their grounds of opposition to the respondent's application in the lower court were only on points of law and that they applied for leave to file a replying affidavit which leave was declined by the trial court.
15. After hearing both parties' advocates on the application dated 11th March 2016, I directed that the lower court file Milimani CMCC 5157/2012 be availed to this court to enable me peruse and appreciate the proceedings that took place subject matter of the intended appeal and stay of execution of decree pending the intended appeal. I set the mention date for 19th April 2016 by which time the lower court file had not been availed. The matter was further slated for 26th April 2016. Again on the latter date the file had not been submitted to this court. I set the mention date for 28th April 2016 and directed Honourable Mrs Wangila the Deputy Registrar to personally take up the issue of the lower court with the lower court judicial staff and report progress on 28th April 2016. On the latter date, the lower court file was availed and I gave ruling date for 5th July 2016 at 2.30 pm. I also directed the applicant's counsel present to serve the respondent's counsel as the latter were absent.
16. I have carefully considered the application dated 11th March 2016 the grounds thereof, the supporting and further affidavit, the replying affidavit and both parties' advocates rival oral submissions together with the cited cases. I have also perused the lower court record Milimani CMCC 5157/2012 albeit with difficulty since the proceedings and judgment are not yet typed and reading the trial magistrate's handwriting is not without challenges.
17. What I gather from the lower court trial record is that both parties to the dispute are limited liability companies incorporated under the Companies Act (Cap 486) Laws of Kenya. The plaint dated 4th September 2012 avers that the two entered into a construction/development agreement wherein the plaintiff was to construct housing units for the defendant at an agreed consideration of shs 10,857,147.30. Later, the parties did on 17th April 2012 agree to terminate

the contract and the defendant was to settle any monies due and owing to the plaintiff by 23rd July 2012. The defendant is then alleged to have been supplied with a list of all the suppliers of building materials but the defendant refused to honour terms of the agreement by failing to pay monies due to the suppliers hence exposing the plaintiff to multiple suits by those suppliers. The amount due was shs 4,313,325.20 which the plaintiff claimed from the defendant together with interest at 25% from 23rd July 2012 until payment in full, costs of the suit and any other relief the court may deem just and fit to grant.

18. Before prosecuting the suit in the court below, the plaintiff sought and obtained orders of attachment before judgment vide Notice of Motion dated 4th September 2012. The defendant was said to have closed shop in Nairobi to an unknown location and its only known asset was its KCB Milimani Branch Account No. 1103280619 hence the urgency of the matter. The trial court granted orders freezing the said named defendant's account on 4th September 2012 on an exparte basis.

19. On 7th September 2012 the defendant entered an appearance through the law firm of Lumumba and Lumumba advocates whereas Kale Maina & Bundotich advocates filed notice of appointment of advocates for the Garnishee KCB. In the intervening period, the plaintiff learnt that the defendant held another KCB Salama House Nairobi account No.1119341175 with funds hence it sought for another freezing order on that account vide an application dated 19th September 2012 under certificate of urgency and that application was allowed on 19th September 2012.

20. On 18th September 2012, the defendant's counsel filed notice of preliminary objection to the entire suit on the ground that there was no written authority for the filing of suit on behalf of the defendant by Ondabu and Company advocates and that the supporting affidavit of Gerald Wamalwa was defective hence the entire suit should be struck out. The record shows that the preliminary objection was heard on merit and dismissed by the trial court on 23rd May 2013 by Andayi W. Francis Senior Principal Magistrate.

21. On 21st August 2012 the defendant filed an application seeking to discharge the orders which froze its bank account No. 1103280619 on the ground that the defendant had made full payments to the plaintiff's suppliers as per the further agreement of 28th May 2012 where a sum of shs 5,594,649.10 had been paid. The court also notes that on 26th September 2012 the earlier two freezing orders were varied by consent whereby only shs 3,000,000/- in the KCB Salama Branch was frozen temporarily until 8th October 2012.

22. On the latter date, parties' advocates informed the court that they were negotiating out of court and sought for another date 12th October 2012 on which date parties' advocates informed the court that they were still negotiating. As at19th October 2012 no settlement was forthcoming that is when the preliminary objection was argued and a ruling delivered on 23rd May 2013 dismissing it with costs.

23. On 4th November 2013 the applicant's counsel reported that he had instructions that the matter had been settled and so requested that a consent be recorded. Mr Kimeria holding brief for Mr Odhiambo for the plaintiff/respondent sought for a further mention which was given as 18th January 2013 on which date Mr Ondabu for the plaintiff stated that they had agreed that the matter proceeds.

24. This court further notes that there is no order dispensing with interpartes hearing of the applications wherein interim orders of freezing of the applicant's bank accounts were issued. In addition, the application by the applicant seeking for discharging of the freezing orders was never heard interpartes though it was certified as urgent. The court further notes that the defendant's defence was never filed on record. Only a Memorandum of Appearance was filed. Also, I note that the plaintiff/respondent never applied for judgment against the defendant/applicant in default of defence. Nonetheless on 16th July 2015, the suit proceeded to hearing when PW1 Gerald Reuben Wamalwa testified and the plaintiff's case closed . On that date, Miss Marienga held brief for Mr Langat and was recorded as saying the parties are negotiating to settle the matter. Mr Odongo for plaintiff responded that parties had been negotiating since 2013 but no offer by the defendant for consideration hence negotiations

broke down. The court then directed the matter to proceed for hearing at 11.00 am the same day. At 11.00 am after PW1 had been sworn, Ms Marienga for Mr Langat informed the court that she had no further instructions to proceed in the matter as Mt Langat was held up at the Court of Appeal. The court remarked that the parties were informed earlier that the matter would be proceeding; hence the application to adjourn was rejected early. Matter to proceed. The hearing then proceeded with the court noting that the defendant was not present. Submissions were reserved for 24th July 2015.

25. On 27th July 2015 the court certified an application dated 27th July 2015 which sought for stay of proceedings as urgent for interpartes hearing on 6th August 2015. That application was canvassed by way of written submissions and vide a ruling delivered on 7th October 2015 the trial magistrate dismissed it had proceeded to set the suit for judgment on 19th November 2015. However, judgment was delivered on 23rd February 2016 on which date only the respondent/plaintiff's advocate was present. There was no appearance by the defendant's counsel.
26. The court record does not show when that date of 23rd February 2016 was given and neither is there any evidence of notice to the parties' advocates notifying them of the judgment date.
27. Soon after the judgment date, the plaintiff's counsel filed an application under certificate of urgency seeking for release of the shs 3,000,000 which had been frozen in the defendant/applicant's KCB account at Milimani Branch and that application was allowed on 8th March 2016. There are grounds of opposition filed on the same date of 8th March 2016 bur Mrs Mathenge for the defendant sought for indulgence on the ground that judgment had been delivered without notice to them and that their earlier application had never been prosecuted as parties were still negotiating. They were to seek instructions to put in documents. The trial magistrate proceeded to grant orders for release of shs 3,000,000.
28. This court also notes that there is a draft decree on record applied for by the plaintiff/respondent's counsel on 26th February 2016 but is not signed. On that draft decree is a certificate of stated costs. That is the long and short history of this matter. With the above in mind, the question is whether this court should;-

1. Grant to the applicant leave to appeal out of time; and
2. Whether I should grant a stay of execution of judgment of 23rd February 2016 pending the filing, hearing and determination of the intended appeal.

29. On the first question of leave to appeal out of time, I note that the respondent did not put up any opposition to that prayer for leave to file an appeal out of time and left it to court to decide in its own discretion. The power to grant leave to appeal out of time is a discretionary power donated to this court by Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which enacts that:

> ***" Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.***
>
> ***Provided that an appeal may be admitted out of time if the appellant satisfied the court that he had a good and sufficient cause for not filing the appeal in time."***

30. In the instant case, judgment was delivered on 23rd February 2016 and this application was lodged on 14th March 2016 just about 17 days from the date when judgment was delivered. That being the case, and as the appeal is challenging judgment of 23rd February 2016, in the view of this court, that prayer is superfluous since the appeal No. 107 of 2016 filed on 14th March 2016 was filed within 30 days of the date of judgment in the lower court which is the period stipulated in Section 79G of the Civil Procedure Act. The only thing that I can do is to order that the appellant herein do pay court fees for filing of the said Memorandum of Appeal dated 11th March 2016 in the event that such fees was not collected by the registry when the

Memorandum of Appeal was filed on 14th March 2016. I must however mention that even if the above situation was not prevailing, I would, in the circumstances of this case have granted such leave to appeal out of time for reasons that my meticulous perusal of the lower court shows that there are several irregularities in the manner in which that case was handled by the trial court from the beginning to the end, which, in my humble view, deprived the appellant an opportunity for a fair hearing contrary to the provisions of Article 50(1) of the Constitution. Some of those irregularities are: **i.** The two applications for freezing of the appellant's bank accounts with KCB were never heard and determined interpartes; **ii.** There is no order on record confirming the exparte/temporary orders freezing the two accounts pending hearing and determination of the said suit; **iii**. The appellant's application to set aside/discharge the freezing orders was never heard and determined**;** **iv.** Although there was no defence filed by the defendant/applicant herein, there was no application by the plaintiff for judgment in default of defence. The suit proceeded to hearing as if there was a defence on record. **v.** After the hearing of the suit on 16th July 2015, judgment was set for 19th November 2015 after dismissal of the application for stay of proceedings of 16th July 2015 on 14th September 2015. However, judgment was never delivered on 19th November 2015. It was delivered on 23rd February 2016. No notice of judgment was ever served on any of the parties' advocates. As to whether the notice was found by the plaintiff's clerks on the court door is not in my view, notice to the parties since no such notice was exhibited in court. One can only appeal if they know or are made aware of a judgment which they can then make an informed choice as to whether to appeal or not.

31. Consequently, I would find that there is sufficient reason why the appeal could not have been filed within 30 days of the date of judgment and I would, without hesitation grant leave and enlarge such period to a further 21 days from date of this ruling to enable the appellant file and serve the respondent with a Memorandum of Appeal.
32. On the second question of whether I should grant to the appellant herein stay of execution of the judgment of 23rd February 2016 pending hearing and determination of this appeal, the applicable law is Order 42 Rule 6 of the Civil Procedure Rules which sets out three conditions that should be fulfilled by the applicant before stay is granted. These are:

1. That substantial loss will be suffered by the applicant if stay is denied.
2. That the application was filed without unreasonable delay; and
3. That such security as the court may order for the due performance of such decree or order as may ultimately be binding upon the applicant has been given by the applicant.

33. Starting with the second condition of whether the application for stay was filed timeously, I find that in view of my discovery and finding that there was indeed no notice of judgment to the parties; there is no way the applicant could have known of the judgment in order to seek for stay. Nonetheless, the application for stay was lodged within 30 days of the date of delivery of judgment. The application was filed on 14th March 2016 which was within 19 days of the date of judgment. That, in my view, was within reasonable time considering that the applicant was only made aware of the judgment when its advocates were served with the application for release of the shs 3,000,000 which had earlier been frozen by the court.
34. On the 1st condition to be fulfilled, the applicant is required to satisfy the court that substantial loss may result to the applicant unless the order of stay is made; the applicant contended that it is a developer and that unless the stay is granted and the unfreezing of its accounts is made, then it will suffer irreparably as it will not pay stamp duty and workers. On the other hand, the respondent contended that the shs 3,000,000 had been frozen in 2012 and that there had been no challenge by the applicant. It is also contended that the appeal has no merit since the Memorandum of Appeal does not mention anything to do with the applicant's defence which the trial magistrate had found was non existent. Further, that there was no merit in the stay application since it had been overtaken by events when the trial court ordered for the release of the frozen sums.
35. The applicant nonetheless countered those arguments of the respondent's counsel with the submission that the respondent had not drawn any decree for approval and that according to the

judgment of 23rd February 2016, there was still an outstanding sum of money to be settled which would necessitate further execution.

36. Having considered the above rival positions, in line with the record which I have taken substantial judicial time to peruse, I find that indeed the claim exceeded 3,000,000/- hence payment of the above sum from the frozen accounts would not settle the decree. Secondly, the issue of whether or not the appeal has any merit is not for this court at this stage to determine since it would in my view prejudice the outcome of the appeal. However, this is not to say that this court cannot examine the record and comment on the manner in which the matter was handled by the trial court, on the face of it as I have already stated above. There are so many irregularities on record which may have occasioned lapses that may have prejudiced the applicant and which the court on appeal, may have to determine as stipulated in Section 78 of the Civil Procedure Act. On that basis alone, I would find that the appeal herein is not frivolous.

37. There was also an argument that no decree was drawn and or sent to the applicant's counsel for approval before execution. The record speaks for itself that there is a draft decree but not signed or sealed. It was never shown by the respondent that it sent that draft 'decree' to the applicant's counsels for approval as espoused in Order 21 Rule 8 of the Civil Procedure Rules.

38. In my view, although the respondent contended that the above provisions are not mandatory, failure to comply with the provisions thereof would lead to execution by ambush and a party can execute a decree which contains orders which do not agree with the judgment and get away with it. If that were not the case, there would be no need for the Rules Committees to make Order 21 Rule 8 of the Civil Procedure Rule and there would be no need for notice of judgment before execution of decree even to a party who did not enter appearance and or file defence in cases where exparte judgment is entered. My exposition in the case of **Edward Kamau Vs Hannah Mukui Gichuki & Another [2016] e KLR** is a useful guide to this argument.

39. In my humble view, a party who is not given an opportunity to examine a draft decree before execution is ousted from accessing justice. Further, it is my humble view that the release of shs 3 million was, in my view, in execution of the judgment of part of decree for the sum awarded in the judgment since the freezing order was a temporary move to preserve the subject matter of the suit until the suit was heard and determined . It was therefore necessary that the application for release of shs 3 million be made only after decree is approved and sealed. The shs 3 million was not and could not have been outside the decretal sum. As was stipulated in **Branco Arabe Aspanol V Bank of Uganda [1999] 2 EA 22, T**he administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes should be fostered rather than hindered.

40. I must however clarify that the issue of failure to draw decree can be rectified and necessary processes followed . Failure to comply with procedures in drawing of a decree cannot nullify a judgment or render an appeal nugatory. The applicant complains that if stay is not granted, it will suffer substantial loss as a developer and that it will be unable to pay its workers and stamp duty. However, there is absolutely no evidence before the court that since 2012 when the shs 3,000,000 which is only part of the judgment sum was frozen, four years later, the appellant had been grounded from operating. If that were so, then the appellant, in my view, would have been vigilant and proactive in prosecuting its application for discharge/setting aside of the freezing orders which was only issued on a temporary basis and which was never heard and or determined interpartes. In addition, it has not been demonstrated that if stay is not granted and the appeal is successful, it shall be rendered nugatory or that the respondent is not possessed of sufficient means to recompense the appellant. In the end, I find that the applicant has not demonstrated what substantial loss it will suffer if stay is not granted.

41. On security for due performance of decree, the applicant submitted that the shs 3 million released to the respondent can act as security. However, in paragraph 6 of the supporting affidavit by Jacktone V. Hongo, it is deposed that the applicant is ready to offer a bank guarantee as security

for the performance of the decree pending hearing and determination of the intended appeal. On the other hand, the applicant's counsel's affidavit in support of certificate of urgency sworn on 11th March 2016 by K.H. Langat at paragraph 6 states that the applicant would be willing to abide by any conditions of the court as and when the same applies or is required of them.

42. From the above differing positions, it is left to the court to exercise its discretion on what would be suitable security for the due performance of decree if it grants stay of executions of judgment pending appeal.

43. Having assessed the conditions for grant of stay of execution pending appeal, I note that although the applicant has not demonstrated that it will suffer substantial loss if stay is not granted, the circumstances of this case compel this court to exercise its discretion in favour of the applicant and grant stay of execution of decree/judgment made on 23rd February 2016 pending hearing and determination of this appeal for the following reasons:-

1. That the applicant has all along maintained that it paid and settled all the outstanding sums due to the plaintiff/respondent and its suppliers which is a triable issue.
2. That the proceedings in the lower court were riddled with irregularities which I have pointed out above and which could have prejudiced the appellant's right to a fair hearing.

44. Consequently, I grant stay of execution of judgment delivered on 23rd February 2016 pending hearing and determination of this appeal conditional upon:

a. the applicant providing a bank guarantee for a sum of kshs 3.5 million from a reputable Kenya Commercial Bank within 21 days from the date hereof. As there is no evidence that should the appeal succeed, the respondent would not be in a position to recompense shs 3,000,000 already released to it from the frozen funds, I decline to order for return of the same.
b. Upon condition (a) above being fulfilled, any order in force that froze the applicant's accounts shall stand discharged/vacated.

Costs of this application shall be in the main appeal.

Dated, signed and delivered in open court at Nairobi this 18th day of July 2016.

R.E. ABURILI

JUDGE

In the presence of:

Mr Kariuki for the applicant

Ms Mathenge for Garnishee and holding brief for Ondabu for Respondent

CA: Adline