REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

MISCELLANEOUS APPLICATION NO. 78 OF 2015

EDWARD KAMAU…….1ST APPELLANT/ APPLICANT

JAMES KARANJA ……2ND APPELLANT/APPLICANT

VERSUS

HANNAH MUKUI GICHUKI ……..1STRESPONDENT

GESTETNER LIMITED……..2NDRESPONDENT

RULING

Before this court for determination is the appellant/applicant's application by way of Notice of Motion dated 12th February 2015 brought under the provisions of Section 79G and 95 of the Civil Procedure Rules and all other enabling provisions of the law.

The application seeks for two main prayers namely: leave of court to lodge an appeal from judgment and decree in Milimani CMCC No. 2724 of 2012 delivered on 20th November 2014 out of time and secondly, stay of execution of decree in Milimani CM CC 2724/2012 pending hearing and determination of the intended appeal.

The prayer for stay pending delivery of this ruling was granted a exparte in the first instance under certificate of urgency on 13th February 2015 conditional upon the applicant depositing the entire decretal sum in court .

The grounds upon which the application is predicated are, material to this ruling: That the intended appeal is arguable; that no notice was ever issued to the applicants herein as per the directions of the lower court; that the applicants only became aware of the judgment vide a letter dated 6th February 2015 informing them that judgment had been entered on 20th November 2014; That failure to file memorandum of appeal in time was inadvertent: That the orders sought will not prejudice the respondent in any event; and that it is in the interest of justice.

The application is further supported by the affidavit sworn by Kinyanjui Theuri advocate on 12th February 2015 who deposes that his firm represented the applicants in Milimani CM CC 2724/2012 but that when the suit came up for confirmation of filing of submissions, the respondent's advocates

misdirected the court that the applicants had filed submissions, which submissions were only filed on 5th November 2014. Further, that no judgment notice was issued for 20th November 2014 yet on 4th November 2014 when the matter came up for mention, the applicants were absent and were only made aware of the judgment when the respondents counsel notified them by letter dated 6th February 2015 and that no notice of entry of judgment was ever given prior thereto.

The applicant's counsel further deposes that the respondents proceeded to obtain decree without following the laid down process of sending a draft copy of decree to the applicant/defendant's counsel for approval and that the judgment was erroneous. The applicant's counsel maintains that the applicants have a good appeal on merit and that the respondent/decree holder is a person of unknown means and the applicants are therefore apprehensive that if the decretal sum is paid out then the appeal would be rendered academic in nature. The applicants are also ready and willing to give security for the due performance of decree as a condition for a stay order and that no prejudice will be suffered by the respondent if the orders sought are granted.

The application by the applicants was opposed. Mr Kaburu advocate for the respondent swore an affidavit in reply on 25th February 2015 contending that the court herein has no jurisdiction to order for stay of execution pending appeal when there is no appeal filed.

Mr Kaburu contended that paragraph 3 of the supporting affidavit by the applicant's counsel was misleading as Mr Kinyanjui Njuguna for the applicants is the one who told the lower court that both parties had filed submissions and asked for a judgment date which the court set for 20th November 2014 and that on 20th November 2014 when the judgment was read, none of the parties were present in court and the trial magistrate noted **" despite notice in court on 4th November 2014"** hence it was a lie for counsel for the applicant to allege that the court was misled by the plaintiff's counsel, and that it is the applicants who are misleading this court to get discretionary orders. Mr Kaburu deposes that since the date for judgment was given in open court in the presence of both counsels for the parties, it was not necessary for anybody to issue notice of entry of judgment. Further,that when the applicants filed their submissions in court on 5th November 2014 they must have been made aware that judgment was scheduled for 20th November 2014, which submissions were taken into account by the trial magistrate in her judgment.

In Mr Kaburu's view, the applicants were not vigilant and that the letter for approval of decree vanished from his office file and from the court file leaving only the one to court dated 19th January 2015 and urged the court to take judicial notice that courts do not issue decree without evidence of service of the draft upon the opposition.

In addition, that no error has been pointed out concerning the awarded decretal sum and that the appeal on liability can only be academic, the defendant's driver having been convicted for reckless driving and fined kshs 10,000. Further, it is contended that the said applicant's driver admitted at the hearing that he was overtaking when he caused the accident, and that the respondent herein was only a passenger.

On the issue of the plaintiff's means, Mr Kaburu deposed that the respondent had pleaded in her plaint that she was a business lady and that the lower court even awarded her loss of earnings and that she offers to give security by way of a bank guarantee for full restitution within 14 days. Mr Kaburu concludes that there is no jurisdiction for granting the reliefs sought as the applicants have not shown sufficient cause for grant of the orders sought or what form of substantial loss they will suffer if the orders sought are not granted.

The 2nd applicant James Karanja filed a supplementary affidavit on 16th March 2015 in response to the respondent's advocate's affidavit maintaining that this court has the jurisdiction to grant orders sought as an appeal would automatically arise once leave to file the appeal is allowed.

The applicants also maintain that there was appearance by their advocates on 4th November 2014 when

judgment date was given and that the court records only show name of law firm not an advocate. Further that on 4th November 2014 the court was not sitting and the matter was put for mention on the next day that is why they filed submissions on 5th November 2014 when the court clerk intimated to the applicant's advocate's clerk that a notice of judgment would issue but that no such notice of judgment date, or judgment upon entry and copy of decree for approval were served before filing decree in court as per the law required.

The applicants averred that the appeal has good chances of success in that the plaintiff /respondent was a motor rider who substantially contributed to the accident; that the court made an award of special damages in case where the medical costs were met by an insurer that was not a party to these proceedings; the award on general damages for pain and suffering is inordinately high; and that there was no foundation for award of loss of business, future earnings and that the amount involved is enormous and the respondent has not shown her individual capacity to safeguard the award if executed, which will render the appeal nugatory.

The application was argued orally after the applicant failed to meet the timeless given for filing of written submissions, and filing of submissions that were illegible (faded) which were expunged from the court record on 29th April 2015.

Mr Bose advocate for the applicants submitted that this court has the discretion to grant leave for filing of an appeal out of time as the applicant's failure to file an appeal in time was due to the facts as deposed in their supporting and supplementary affidavit that they never got notice of date of judgment and notice of entry of judgment or even copy of decree and only became aware of judgment on 6th February 2015 when they received letter from the respondents.

On whether sufficient ground had been made for stay of execution pending appeal, Mr Bose submitted that order 42 Rule 6(2) of the Civil Procedure Rules had been fulfilled in that on substantial loss being shown, the amount of damages awarded exceeds One million which is colossal and that the respondent is a retired civil servant who has not filed any affidavit of means and that there is a risk that there may be no recompense if the appeal is successful.

On whether the application was filed without unreasonable delay, the applicants counsel submitted that the application for stay was filed within 7 days of notification of the judgment.

On security for due performance of decree, the applicants submitted that they had already deposited the entire decretal sum in court. They also submitted that the intended appeal raises triable issues on liability. On quantum and special damages, it was submitted that special damages were especially never incurred by the respondent. In counsel's view, the applicant shall suffer substantial loss if stay is not granted.

In opposition to the application by the applicants, Mr Kaburu advocate for the respondent relied on his sworn replying affidavit on 25th February 2015. Responding to the issue of leave, he relied on Section 79G of the Civil Procedure Act to the effect that the applicants must show good and sufficient cause for the delay. Further, that the record in the lower court shows that the applicants' advocate attended court on 4th November 2014 yet they allege that they were not aware of the judgment date until 6th February 2015 which cannot be true since the lower court itself noted on 20th November 2014 that the parties were absent although they had notice on 4th November 2014 hence the accusation that the respondent did not give notice of judgment cannot be true. In addition, Mr. Kaburu submitted that the supplementary affidavit is misleading to the court as there is no such record and that the applicants attended court on 5th November 2014 and if they had attended court, then they must have known the judgment date which had been given on 4th November, 2014. Further, that the applicant does not state when the advocate for the applicants received instructions to file the appeal. In Mr Kaburu's view, the applicants had were before this court with unclean hands hence they did not deserve the discretion of the court in their favour.

In addition, Mr Kaburu submitted that was surprising that the applicants now allege that the

respondent was a motor cycle rider when her status was established to be a pillion passenger and the 2nd applicant was convicted and fined for careless driving hence the appeal has no merit.

On the prayer for stay of execution, Mr Kaburu contended that the applicant must satisfy the court that there is good and sufficient cause to warrant leave to file an appeal before stay can be considered. He submitted that his client is willing to deposit a bank guarantee and that she should not be denied the full amount of the judgment. That the court can even pay her half of the said decretal sum to enable her attend treatment to remove implants from her fractured leg. He urged the court to dismiss the application as several pages of the judgment in the lower court were omitted in the copies filed in this court.

In a brief rejoinder, Mr Bose advocate for the applicants submitted that there was no deposition on bank guarantee and that if there were any missing pages of the record of the judgment as filed then it must be a mistake.

I have carefully considered the application by the applicant and the submissions by their respective advocates. None of the parties relied on any precedent to advance their respective positions. The issue that emerge from the pleadings and submissions are whether the applicant has satisfied the court on the conditions for granting leave to appeal out of time and secondly if so, whether the applicant has satisfied the conditions necessary for granting of stay of execution of decree pending appeal.

On whether this court should grant extension of time for filing an appeal, the applicable law is Section 79G of the Civil Procedure Act. The section provides:-

" ***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 of order."***

Under the **proviso** to the said Section 79G of the Civil Procedure Act***, an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.***

The Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others, SC Appl 16/2014** laid down the following as the underlying principles that a court should consider in the exercise of discretion to extend time:-

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case bass;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
5. Whether there will be any prejudice to be suffered by the respondents if the extension is granted.
6. The application should have been brought without undue delay; and
7. In certain cases, like election petitions, public interest should be a consideration for extending time.

Applying the above principles, the question therefore is whether the applicant has shown good and sufficient cause for not filing the appeal in time.

According to the applicants they were not aware of the date for judgment as they did not attend court on 4th November 2014 when the matter came up for mention to confirm whether parties had complied with the order for filing of submissions for the court to give a date for judgment. They

also allege that they were not served with a notice of judgment date and notice of entry of judgment as well as a draft decree for their approval and that they only learnt of the judgment on 6th February 2015 when the respondents counsel wrote to their advocates.

The respondent seriously contests those averments by the applicants and states that both parties were in court on 4th November 2014 when the court set judgment date for 20th November 2014 and that therefore there was no requirement of the notices to issue to the applicants. Further, that the applicant having filed their submissions on 5th November 2014 ought to have known the judgment date from the file.

The above rival positions notwithstanding, neither of the parties representatives attended court ton 20th November 2014 when judgment was delivered and the trial court noted "***despite notice in court on 4th November 2014.***"

None of the parties attached copies of proceedings for 4th November 2014 in the lower court for this court to appreciate the record as it is. Nevertheless, the applicant having filed their submissions on 5th November 2014, they were under a duty to inquire the date for judgment and if they did not, only to be awakened on 6th February 2015 by a letter from the respondent's counsel, then it was their own fault.

In my view, the respondent or even the court, in the circumstances of this case which proceeded to hearing interpartes with each party ably represented by advocates, there is absolutely no justification for requiring that notice for judgment date be given, especially when the only evidence annexed to this application is that which shows that both parties had notice of date of judgment on 4th November 2014, implying that the parties were in court when the date for judgment was given. Secondly, the matter having been fully defended, the issue of notice of entry of judgment is a farfetched one since such notice is only required under the provisions of Order 21 Rule 6 of the Civil Procedure Rules proviso where there has been exparte judgment against a party who neither entered appearance nor filed defence, which notice must be served before execution of decree in the suit. The provision enacts:-

" where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than 10 days notice of the entry of judgment has been given to him either at his address for service or served on him personally and a copy of the notice shall be filed with the first application for execution."

In this case, the affidavit evidence show that the suit was fully defended and submissions filed by the defendants/applicants on 5th November 2014 and that the lower court set a date for judgment on 4th November 2014 for 20th November 2014 in the presence of both parties.

Out of courtesy, I must emphasize, the respondent's advocate did write to the applicants' advocates on 6th February 2015 asking them to advise their clients to pay or settle the attached decree within 14 days in default, the respondent would sue for an enforcement (declaratory suit).

It is that notice and decree that awakened the applicants from their slumber, 2 months later after the judgment. To that extend, this court does not fathom how the respondent's counsel could have misled the lower court on filing of submissions on 4th November 2014 or be blamed for failure to issue notices of date of judgment or entry of judgment.

I have also examined the copy of decree attached to the letter dated 6th February 2015. It was issued on 30th January 2015 for Kshs 1,668,386.37. However, the certificate of costs cites date of decree as being 30th May 2013 which I find grossly erroneous as judgment was delivered on 20th November 2014 and therefore there is no way decree could be dated the previous year. Further, there is no evidence that the party and party costs were agreed upon and or that they were taxed whether

exparte or interpartes at kshs 154,252/-. It is therefore not clear where the respondent's counsel found the certificate of costs appended to the decree issued on 30th January 2015.

Nonetheless, that is an irregularity which can be cured by an order for a fresh decree being issued and costs being reassessed or agreed upon and a fresh certificate thereof being issued.

I however must mention that there is also no evidence that the decree of the lower court was drafted and sent for approval by the opposite party to the suit before it could be issued and or executed.

Order 21 Rule 8 of the Civil Procedure Rule provides that:

1. ***"8 (1) a decree shall bear the date of the day on which the judgment was delivered.***
2. ***Any party in a suit in the High Court may prepare a draft decree and submit it or the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.***
3. ***If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.***
4. ***On any disagreement with the draft decree any party may file the draft decree marked as " for settlement" and the registrar shall there upon list the same in chambers before the judge who heard the case of if he is not available, before any other judge and shall give notice thereof to the parries.***
5. ***The provisions of sub-rules 2,3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the Sub Rules shall refer to Magistrate***
6. ***Any order, whether in the High Court or in the subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.***
7. ***Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order."***

In other words, even decrees and orders in the lower court must be prepared in compliance with Sub Rules 1, 2, 3 and 4 of the Order 21 Rule 8 of the Civil Procedure Rules. This was not done in this case which was an irregularity as the applicants were not given an opportunity to approve the decree. There is also no evidence from the annexed handwritten judgment that the trial magistrate approved a draft decree at the time of her decision on accordance with Sub rule 7 of Order 21 Rule 8 above. In my view, there is no room for circumvention of the Rules as reproduced herein as that can be interpreted to mean that the respondent was driven by bad faith or had the intention of stealing a march on the applicants.

The power to grant leave to file an appeal out of time is a discretionary one and the party seeking such discretionary orders which are only given on a case to case basis, not as a matter of right, must satisfy the court by placing some material before the court upon which such discretion may be exercised.

In this case, as I have stated in my analysis above, there is absolutely no reason why the appellants were not aware of the judgment until 6th February 2015 and this court can only infer that the applicants advocates were not vigilant in the manner in which they handled this matter at the very tail end. Such casual handling of a party's matter by counsel, in my view can lead to the party suffering prejudice and in this case the prejudice likely to be suffered by the applicants is that they are likely to be ousted from the judgment seat of exercising their statutory right of knowing the outcome of the case and deciding whether or not to appeal against the decision of the lower court.

Albeit both parties have attempted to demonstrate from the opposing sides on the one hand, the applicants claiming that they have an arguable appeal with chances of success and the respondent on the

other hand arguing that the appeal as intended is not arguable, it would be unfair at this stage for this court to engage in a mini trial of the intended appeal if I was to delve into its merits and or demerits thereof. This is not to say that this court cannot examine the intended appeal as per the draft memorandum of appeal to find out whether the appeal as intended raises any triable issues. In doing so, the court will not be determining the merits of the appeal, since a triable or arguable issue on appeal is necessarily one that must succeed.

Nonetheless the applicants intend to challenge judgment both on liability and quantum of damages awarded by the lower court.

The right of appeal, it has been held time and again, is a Constitutional right which is the cornerstone of the rule of law. To deny a party that right, would in essence be denying them access to justice which is guaranteed under Article 48 of the Constitution and also a denial of a right to a fair hearing guaranteed under Article 50 (1) of the Constitution which latter right cannot be limited under Article 25 of the said Constitution.

In my view, it has not been shown that the intended appeal is frivolous or a sham and therefore it is only fair and just that the applicants be accorded an opportunity to ventilate their grievances where they are aggrieved by a decision of the lower court, to challenge it before a superior court.

By so doing, in my view, this court will be exercising its discretion judiciously to ensure that the applicants are not driven from the judgment seat even if there was some indolence leading to delay of two months.

In my view, that delay from 20th November 2014 to the time this application was filed, just 7 days after discovery of the judgment, though not sufficiently explained, is not inordinate. In addition, the delay can be compensated by an award of costs.

The Supreme Court in the **Nicholas Kiptoo** case (Supra) did not command that all the 7 principles laid down for extension of time for filing of an appeal must be satisfied. That being the case, this court can still exercise its discretion in the interest of justice, and where it is clear like in this case that no prejudice that cannot be compensated by an award of costs is likely to be suffered by the respondent if such leave is granted allowing the applicant to file an appeal out of time, then such leave should not be denied.

This court has already found that the advocates for the applicant have not been candid, upon discovery that it was their fault that they did not attend court on 20th November 2014 when judgment was delivered as that is a fact they ought to have known at the time of filing of submissions on 5th November 2014 assuming they did not attend court on 4th November 2014. Their attack on the respondent, in my view is unjustified. There is no evidence that the applicants have even, upon discovery of that judgment, applied for certified copies of proceedings and judgment for appeal purposes, which I consider to be another blunder made by the applicant's advocates on record.

In **Branco Arabe Epanol vs Bank of Uganda (1999) 2 EA 22** it was held:

" ***The 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 necessary 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."***

In **Phillip Keipto Chemwolo & another vs Augustine Kubende (1986) KLR 495** the Court of Appeal held that:

> ***" Blunders will continue to be made from time to time and it does not follow that because a***

mistake has been made a party should suffer the penalty of having his case determined in its merits."

It is for the above reasons that I shall exercise my discretion to allow the prayer for leave to be granted to the applicants to file their intended appeal out of time. The said appeal shall be lodged within 14 days from the date hereof and in default, the leave hereby granted lapses automatically.

Having granted leave to the applicant to lodge an appeal out of time, I now venture into the territory of the motion's prayer for stay of execution pending the filing of the intended appeal and upon such filing of the intended appeal within the stipulated period, until the appeal is heard and determined. That determination leads me to answer the second issue of whether the applicants have satisfied the conditions for the granting of stay of execution pending appeal.

The circumstances under which the court will grant stay of execution pending appeal are clearly set out in Order 42 Rule 6 of the Civil Procedure Rules which enact:

1. ***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.***
2. ***No order of stay of execution shall be made under Sub Rule (1) unless –***

a. ***The court is satisfied that substantial loss may result to the applicant unless the order is made and that***
b. ***The application has been made without unreasonable delay; and***
c. ***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.***

On the first condition of substantial loss likely to be suffered by the applicant if stay is not granted, the applicants have submitted and contended that the decretal sum awarded amounting to over One million is colossal and that the respondent being a retired civil servant who has not sworn and affidavit of means has no means of raising the said sums of money should it be paid to her and the appeal is successful, which would render the appeal nugatory.

On the other hand, the respondent contends that she is a business lady and she was even awarded damages for loss of earnings and that she would be willing to give an undertaking by way of a bank guarantee to be fulfilled within 14 days should she be paid the money and the appeal succeeds. She also submitted that the court should consider even paying her half the money to enable her seek medical attention for the removal of metal implants in her fractured site.

I have examined the hand written judgment of the lower court and what I can only describe as a draft decree annexed to the affidavit by the applicants. The award is monetary and the total sum deposited in court is kshs 1,822,639 inclusive of the estimated costs of kshs 154,252/- and kshs 1,668,386.37 as per the judgment and interest for 2 months. Albeit an affidavit of means was not sworn by the respondent, it is not denied that she was a retired civil servant who was also engaged in business hence the claim and award for loss of earnings in the sum of kshs 168,000/-. There is no evidence that the respondent is so impecunious that if paid the money and the appeal succeeds, she will be unable to repay the money and or that the appeal shall be rendered nugatory. I say so with conviction bearing in mind that this was a road traffic accident as was correctly pointed out by the respondents counsel, the record is clear that she was not a motor cycle rider but a pillion passenger and unless the applicants enjoined the motor cyclist as a third party or sought indemnity from him, there is no way the respondent can be held to have contributed to the occurrence of the accident on the material available.

With regard to whether the application was made without, unreasonable delay, the record clearly shows that upon the applicants being made aware of the judgment on 6th February 2015, they acted speedily and even before or without applying to the lower court to be supplied with certified copies s of

proceedings and judgment, filed this application on 13th February 2015 under certificate of urgency wherein this court granted them an exparte interim stay of execution . That was within 7 days from 6th February 2015 to 13th February 2015. In my view, albeit the decree as extracted is problematic there was nonetheless real threat of execution within 14 days hence the application herein was filed without undue delay.

On whether the applicants are ready, able and willing to deposit security for the due performance of such decree as may ultimately be binding on them, the applicants have deposed that they are willing to comply with that condition and have deposited in court the said whole decretal sum.

It therefore follows that whereas the applicants have fully satisfied the court on the two conditions for granting of stay pending appeal, they have not satisfied the court that if the decretal sum is fully paid out to the respondent and the appeal as intended succeeds, she will not be in a position to refund the money and that therefore they will suffer substantial loss and that the appeal shall be rendered nugatory.

The respondent has even offered a bank guarantee redeemable within 14 days of call.

In **Machira vs East African Standard No. 2 (2002) KLR 63** it was held thus:-

> ***" To be obsessed with the protection of an appellant or intending appellant in total disregard or mention of the so far successful party is to flirt with one party as crocodile tears are shed for the other, contrary to said principle for the exercise of a juridical discretion. The courts must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in court, which is to do justice in accordance with the law and to prevent abuse of the court process.***

The commanding preamble provisions of Order 42 Rule 2. No order for stay of execution shall be made under Sub Rule (1) unless…imply that the three conditions are inextricable. They must all be met for an applicant to be granted the order of stay of execution pending appeal. However, those conditions are guidelines which the courts follow in the exercise of the discretion to grant o refuse to grant orders of stay of execution pending appeal.

In making any orders under the said provisions, this court is enjoined to consider the justice of the case for both parties. Having found that the right of appeal is intrinsically linked to a right to fair hearing and a right to access justice, while appreciating that the respondent should not be denied the enjoyment of the fruits of her lawfully obtained judgment, under Article 159 of the Constitution, justice shall be done to all irrespective of status, which right has to be balanced out against the right of the appellant not to be ousted from the seat of justice by denying them a stay since justice is a two way traffic.

This court appreciates that the applicants being a party seeking favourable exercise of the court's discretion is under a legal duty to place some material before the court upon which such discretion should be exercised. In other words they should prove that the respondent is so impecunious that if the decretal sum is paid then they will not recoup should the appeal succeed, thereby rendering it nugatory. They have also argued that although the respondent is offering a bank guarantee, that is not deposed on her affidavit of means.

I am in agreement with the applicants that in the absence of an affidavit of means, it may be construed that the respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed. I am enjoined by the holding of the Court of Appeal in the case of **NATIONAL INDUSTRIAL CREDIT BANK LTD VS AQUINANS FRANCIS WASIKE COURT OF APPEAL CIVIL APPLICATION NO. 238/2005**, the Court of Appeal held:-

> ***" This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is un reasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them.***

Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge."

Therefore, to ensure that the parties to the suit fight it out on a level ground on equal footing, stay can be granted on terms, since there is no absolute guarantee that the appeal as filed shall be successful on all fours, while appreciating the respondent has a lawful judgment whose execution is being suspended.

In the end, I employ a balancing act between two rights- that of appeal by the applicants and of enjoyment of a lawful judgment and not being discriminated for being of unknown financial means, for the Constitution commands that justice shall be done to all irrespective of status.

Accordingly, I grant to the applicants stay of execution of judgment of the lower court conditional upon the applicants paying to the respondent as sum of kshs 900,000/- out of the monies deposited in court on 25th March 2015 as security for the due performance of decree. The rest of the decretal sum to be released to be deposited in a joint interest earning account to be opened and held by both advocates for the parties hereto. The money shall be held in a reputable financial institution until the intended appeal if filed is heard and determined or until the court gives appropriate green light as to its disposal on application by either party.

The said monies shall be disbursed as ordered within 21 days from the date hereof. In default, the orders of stay shall lapse unless otherwise enlarged by the court.

The respondent shall have costs of this application.

Dated, signed and delivered in open court at Nairobi this 8th day of July 2015.

R.E. ABURILI

JUDGE

8/7/2015