R.M. Patel & Partners Limited v Rift Valley Agricultural Contractors Limited (Civil Case E228 of 2001) [2025] KEHC 14930 (KLR) (23 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14930 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE E228 OF 2001

RN NYAKUNDI, J

OCTOBER 23, 2025

BETWEEN

R.M. PATEL & PARTNERS LIMITED ..... APPLICANT

AND

RIFT VALLEY AGRICULTURAL CONTRACTORS LIMITED ... RESPONDENT

RULING

1. Before this court for determination is the Judgment debtor's application dated 28th July, 2025 expressed under the provisions of Order 42 Rule 6(1) & (2), Order 51 Rule of the Civil Procedure Rules and Sections 1A, 1B, 3A & 63(e) of the *Civil Procedure Act*. The applicant seeks orders as follows:

    a. Spent

    b. That pending the hearing and determination of this application inter partes, the warrants of attachment and sale dated 21st July, 2025 and the subsequent proclamation dated 21st July, 2025 by Direct "O" Auctioneers in execution of the decree given herein on 13th March, 2025 be and is hereby stayed.

    c. That pending the hearing and determination of this application inter partes, an order be and is hereby issued staying execution of the judgment delivered on 25th November, 2024 and the decree thereto given on 13th March, 2025, the warrants of attachment and sale dated 21st July, 2025 and all other proceedings emanating therefrom and/or any other consequential orders arising from the said judgment.

    d. That pending the filing, hearing and determination of the applicant's intended appeal, an order be and is hereby issued staying execution of the judgment delivered on 25th November, 2024 and the decree thereto given on 13th March, 2025, the warrants of attachment and sale dated

21st July, 2025 and all other proceedings emanating therefrom and/or any other consequential orders arising from the said judgment.

e. That this Honourable court do issue any such further and appropriate orders as it deems fit in the circumstances of this matter.

f. That the costs of this application be provided for.

2 The application is based on grounds that:

a. That on 25th November, 2024, this Honourable court delivered judgment against the applicant for inter-alia, a sum of Kshs. 22,745,709/= with interests at court rates from 24th March, 2000 until payment in full.

b. That being aggrieved by the said judgment, the applicant has filed and served a Notice of Appeal and requested for typed proceedings in order to lodge its appeal of the Court of Appeal.

c. That the Respondent is already executing the judgment and has obtained Warrants of Attachment and sale given on 21st July, 2025 for a total sum of Kshs. 104,214,757/= and has instructed Direct "O" Auctioneers who have proclaimed the applicant's assets all of which comprise the applicant's tools and machines of trade.

d. That the Respondent is a company which is in receivership and has impliedly admitted that it is financially distressed by virtue of the receivership. Further, it does not own any known or tangible assets that may be applied to recover the judgment amount herein if paid out and the appeal succeeds.

e. That the applicant is therefore unlikely to recover the colossal sum of Kshs. 104,214,757/= from the Respondent should the applicant make payment and its intended appeal succeeds. The amount involved are colossal and chances of recovery are minimal.

f. That unless the orders sought herein are granted, the Respondent who has already taken steps to execute the decree given on 13th March, 2023 will proceed and complete execution thereof to the detriment of the applicant before this applicant and the intended appeal are heard and determined.

g. That the applicant is apprehensive that unless this Honourable court intervenes, the Respondent will proceed with the attachment and sale of the proclaimed assets, thereby subjecting the applicant to substantial and irreparable financial loss and damage. The attachment and sale will also cause serious disruption to the applicant's operations particularly in the prevailing hard economic times in the country. It will also render the intended appeal nugatory by extinguishing the substratum thereof before the appeal is heard and determined.

h. That it is in the interest of justice that this application is heard expeditiously and the orders sought herein granted in order to avert the substantial loss that the applicant stands to suffer in light of all the foregoing.

i. That the applicant is ready and willing to furnish security as may be ordered by this Honourable court pending the hearing and determination of the intended appeal.

j. That this application has been brought without unreasonable delay.

k. That it is in the interest of justice that this matter be heard expeditiously and orders sought herein be granted.

l. That no loss or prejudice will be occasioned to the Respondent if the orders sought herein are granted.

m. That this Honourable court has the requisite jurisdiction and discretion to grant the orders sought herein taking into consideration all the above matters.

3. In response to the applicant, the Respondent through its director filed a replying affidavit in which he made averments as follows:

a. That in a suit that spanned close to a quarter of a century and after various instances of delay, deliberate or otherwise, caused by or attributable to the Plaintiff, on 25th November, 2024, the Honourable court delivered judgment in favour of the defendant against the Plaintiff for, inter alia, a sum of Kshs. 22,745,709/= with interests thereon from 24th March, 2000 till payment in full.

b. That in addition to the foregoing award, the court enjoined the Plaintiff to provide a full account of equipment sales made on behalf of the defendant within sixty (60) days of the date of the judgment.

c. That I am well aware of the Judgment and the terms thereof as evidenced by the filing of the Notice of Appeal dated 9th December, 2024, to-date, over eight (8) months later, the Plaintiff is yet to comply with any of the terms of the Judgment, notably the order directing it to provide a full account of equipment sales made on behalf of the Defendant within sixty (60) days of the date of the judgment.

d. That I am informed by the Defendant's Counsel on record, which information I consider accurate, that following the Plaintiff's refusal to comply with the judgment, they took steps towards realization of the Judgment and in that regard, obtained the Decree and Warrant of Attachment, copies whereof were filed on behalf of the plaintiff alongside the subject application.

e. That I am further informed by the Defendant's Counsel on record, which information I have since verified, that they entrusted Direct "O" Auctioneers with the execution of the said Decree and warrant and that acting on the said instructions, the said Auctioneers duly served a Notice of Attachment upon the plaintiff.

f. That I am now aware that, over eight (8) months from the date of delivery of the Judgment, and only upon commencement of execution, did the plaintiff, in a feigned rush to this Honourable Court, seek stay of execution of the Judgment herein, apparently pending determination of an appeal, notice whereof the plaintiff had given eight (8) months earlier.

g. That I am well advised by the said Counsel that in view of the foregoing, the subject application has been made after inordinate delay.

h. That I have received counsel from the Defendant's Advocates, which counsel I consider sound, that the argument made by the Plaintiff that without a stay of execution its appeal will be rendered nugatory or the subject matter thereof extinguished is flawed given that what we have here is a money decree.

i. That moreover, I am advised that the Plaintiff's allegation that if execution is not stayed there will be a disruption of its business is not a consideration to be made by the Honourable Court in determination of an application for stay of execution. After all, even payment in settlement

of Court decrees, let alone lawful execution thereof, invariably results in disruption of some kind.

j. That it is not true that the Plaintiff would be unable to recover the decretal sum from the Defendant in the unlikely event the Plaintiff's intended appeal succeeds. The Defendant is a reputable company that is in operation and has been in operation for over fifty (50) years during which time it has amassed and held substantial assets and transacted, on aggregate, in the billions. The Defendant would be willing, ready and able to make a refund to the Plaintiff should it be required to do so by the appellate court.

k. That the Defendant holds numerous other substantial properties, comprising mostly of real properties, which continue to appreciate with time.

l. That the allegation by the Plaintiff that the Defendant is under receivership is not only an overstretched lie, it is also hypocritical and laughable. Upon being duly advised by the Defendant's Counsel, I am constrained to ask, if the Defendant was under receivership on 6th October, 2000, that is, on the date of the Ruling adduced by the plaintiff as evidence of the alleged receivership, why didn't the Plaintiff first obtain leave of the Court before suing the Defendant herein as required in law?

m. That contrary to the Plaintiff's allegation and/or wish, the Defendant's legal status as a company duly incorporated, is intact.

n. That on the advice of Counsel for the Defendant, I am persuaded that the Plaintiff has utterly failed to meet the conditions for grant of an order of stay of execution pending appeal and that the subject application is a ploy to deny the Defendant its fruits of judgment.

o. That I urge the Honourable Court to curtail the Plaintiff's attempt to defeat justice, disguised as an application for stay of execution, by dismissing the subject application.

The applicant's written submissions.

4. Learned counsel Mr. Nyachoti started by submitting that the Respondent, being a company in receivership, has impliedly admitted financial distress and does not own tangible assets that could be applied to recover the judgment amount if the Appeal succeeds.

5. On the first prerequisite for stay of execution being substantial loss, Mr. Nyachoti submitted that the net effect of executing the judgment would be far-reaching and would occasion substantial and irreparable financial loss to the Applicant. He relied on the principles established in Butt v Rent Restriction Tribunal [1979] eKLR, where the Court of Appeal emphasized that if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory.

6. Counsel further cited HGE v SM [2020] eKLR and James Wangala & Another vs Agnes Naliaka Cheseto [2012] eKLR, which established that the right of appeal is constitutional and actualizes the right to access justice, and that anything rendering the appeal nugatory impinges on the very right to appeal. He argued that the Applicant is unlikely to recover the colossal sum of Kshs. 104,214,757/= should payment be made and the Appeal succeed, particularly given that the Respondent is in receivership and lacks tangible assets.

7. Counsel submitted that unless the Court intervenes, the Respondent will proceed with the attachment and sale of the proclaimed assets, subjecting the Applicant to substantial and irreparable financial loss and damage. The attachment would also cause serious disruption to the Applicant's operations, as the assets comprise the Applicant's tools and machines of trade. Moreover, the sale would render

the intended appeal nugatory by extinguishing the substratum of the Appeal before it is heard and determined.

8. On the element of unreasonable delay, learned counsel submitted the Applicant's Notice of Appeal and letter requesting typed proceedings were filed on 9th December 2024, shortly after the judgment of 25th November 2024. The Application was made timeously and without undue delay. Counsel explained that the Applicant has been constrained to file the present Application to seek redress in light of developments, specifically that the Respondent has commenced execution and obtained Warrants of Attachment and Sale on 21st July 2025. He argued that the Application for stay has been filed timeously, having due regard to the sequence of events.

9. Finally, on security counsel relied on Focin Motocycle Co. Limited V Ann Wambui Wangui & Another [2018] eKLR, which held that where the applicant proposes to provide security, it is a mark of good faith that the application for stay is not meant to deny the respondent the fruits of judgment. Counsel submitted that it is sufficient for the applicant to state readiness to provide security, but it is the discretion of the Court to determine the security.

10. Similarly, he cited Arun C Sharma -V- Ashana Raikundalia T/A Raikundalia & Co. Advocates, where the Court stated that the purpose of security under Order 42 is to guarantee due performance of the decree or order as may ultimately be binding on the applicant, and that civil process differs from punitive measures as the judgment creates a debt relationship. The Applicant has deponed at paragraph 10 of the Supporting Affidavit of Himesh R. Patel sworn on 28th July 2025 that the Applicant is ready and willing to furnish security as may be ordered by the Court pending hearing and determination of the intended Appeal, thereby satisfying the ground for stay.

Respondent's written submissions

11. Learned Counsel Mr. Gatonye submitted that the subject application is incompetent on two fundamental grounds. First, the application was prepared and filed by Nyachoti & Company Advocates, a firm that is not properly on record. Counsel drew attention to Order 9 Rule 9 of the Civil Procedure Rules, which requires that when there is a change of advocate after judgment, such change cannot be effected without an order of the Court. This order may be made either upon an application with notice to all parties or upon a consent filed between the outgoing and incoming advocates.

12. Counsel submitted that although Nyachoti & Company Advocates filed a consent with the Plaintiff's erstwhile advocates, no order was issued by the Court endorsing the said consent, meaning the firm is improperly on record. Counsel relied on James Ndonyu Njogu vs Muriuki Macharia, where an application filed by advocates who were not properly on record was struck out. In view of this mandatory requirement and the persuasive authority cited, counsel urged Your Lordship to find the application incompetent and strike it out with costs.

13. That the second aspect rendering the application incompetent is that the supporting affidavit was sworn by Himesh R. Patel, who is not shown to be a director of the Plaintiff. Counsel submitted that the evidence on record does not reveal this person as a director of the Plaintiff, and it was incumbent upon the Plaintiff to avail evidence of his directorship or the authority given to him to swear on behalf of the Plaintiff.

14. Counsel submitted that Order 42 Rule 6 of the Civil Procedure Rules, 2010 sets out the necessary conditions for grant of stay: the application must be made without unreasonable delay, the Applicant must show that substantial loss will result if stay is not granted, and the Applicant must give security ordered by the Court.

15. Counsel emphasized that the subject application was made over 240 days from the date of delivery of judgment. Albeit the Plaintiff demonstrated its intention to appeal as early as 6th December 2024 through filing a Notice of Appeal, counsel questioned why the Plaintiff waited eight months before making an application for stay of execution pending that intended appeal.

16. Mr. Gatonye further submitted that per the Judgment, the Plaintiff was ordered to provide a full account of equipment sales within sixty days. Well aware of the terms of the Judgment as demonstrated by filing a Notice of Appeal within 14 days of delivery, counsel questioned why the Plaintiff did not make an application for stay within that 60-day period. Counsel submitted that simply put, the unreasonable delay was unjustified.

17. Counsel relied on Jaber Mohsen Ali vs Priscilah Boit & Another [2014] eKLR, where the Learned Judge observed that in cases where a party has been given a particular timeframe within which to comply with a judgment, the party ought to apply to stay that judgment before that timeframe lapses. An application coming after the stated days for compliance will constitute unreasonable delay unless a good explanation is offered. The court in that case held that an application for stay coming after the period given for compliance constitutes a violation of the judgment.

18. Mr. Gatonye submitted that frail attempt by the Plaintiff to submit on delay in its submissions connotes a misapprehension of the delay relevant herein. Counsel submitted that the delay alluded to under Order 42 Rule 6 is the delay concerning the filing of an application for stay of execution, not filing of a Notice of Appeal or bespeaking typed proceedings. Counsel urged the court to find that the application was made after unreasonable delay which was unexplained and unjustified.

19. On substantial loss, Counsel submitted that the Plaintiff's allegation that the decretal amount is substantial and if paid out will lead to stalling of many projects is made without proof of the nature and specific projects involved. Therefore, the Court has no basis to assess the risk and loss, if any, that the Plaintiff may suffer if stay is not granted.

20. Learned counsel submitted that in any event, mere financial burden occasioned by a judgment does not constitute substantial loss for purposes of grant of stay. Counsel relied on Machira t/a Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63, which held that it is not enough for an applicant to merely state that substantial loss will result; specific details and particulars must be proved.

21. It is submitted for the applicant that in the unlikely event the Court is inclined to allow the application, counsel urged the Court to order that at least half the decretal sum be released to the Respondent.

Analysis and determination

22. I have considered the instant application together with the response therein and the main issue that distils itself for determination is whether the applicant has met the elements prerequisite for grant of stay of execution pending the intended appeal.

23. The granting of stay of execution pending appeal by the High Court is governed by Under Order 42 Rule 6 of the Civil Procedure Rules. It is grantable at the discretion of the court on sufficient cause being established by the applicant. The incidence of the legal burden of proof on matters which the applicant must prove lies with the Applicant. See the Halsbury's Law of England, vol.17, paragraph 14:

> " 14. Incidence of the legal burden ..... in respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is an essential of his case."

24. The relief of stay of execution pending appeal is discretionary although, as has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant.

25. Order 42 Rule 6(1) provides that no appeal shall operate as a stay of execution except in so far as the court appealed from may order. The court may for sufficient cause order stay of execution. Rule 6(1) provides that no order for stay of execution shall be made 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 the applicant has been given by the applicant."

26. In determining whether sufficient cause has been shown, the court should be guided by these three prerequisites. All the prerequisites are important and must be considered in an inextricable manner. The Court of Appeal in Mukuma v Abuoga (1988) KLR 645 reinforced this position that the conditions share an inextricable bond such that the absence of one will affect the exercise of the discretion of the court in granting stay of execution.

27. On the competence of the application, the Respondent contends that the application is incompetent on two fundamental grounds. First, that Nyachoti & Company Advocates are not properly on record as they filed a consent with the Applicant's erstwhile advocates but no order was issued by the Court endorsing the said consent. The Respondent relies on Order 9 Rule 9 of the Civil Procedure Rules which requires that when there is a change of advocate after judgment, such change cannot be effected without an order of the Court, and cites James Ndonyu Njogu vs Muriuki Macharia in support.

28. I have considered this objection. Order 9 Rule 9 of the Civil Procedure Rules provides that where a party changes advocates after judgment, the change shall not be effective until an order of court is obtained or a consent by both advocates. However, I note from the record that a consent was filed between the outgoing and incoming advocates. While it is true that no formal order was issued, the purpose of the rule has been substantially complied with as both the court and the opposing party were notified of the change through the filing of the consent. Moreover, the Respondent has not demonstrated any prejudice occasioned by this procedural irregularity.

29. In light of Article 159(2)(d) of *the Constitution* which provides that justice shall be administered without undue regard to procedural technicalities, and Sections 1A and 1B of the *Civil Procedure Act* which urge the court to strive for substantial justice, I find that this defect is not fatal to the application. The defect is curable and I proceed to regularize the position by deeming Nyachoti & Company Advocates as properly on record from the date of filing of the consent. I shall proceed to consider the three elements in turn.

30. On the element of unreasonable delay, the Applicant submits that the application has been made timeously, having regard to the sequence of events. The Notice of Appeal and letter requesting typed proceedings were filed on 9th December, 2024, shortly after the judgment of 25th November, 2024. The application was filed on 28th July, 2025 following the issuance of Warrants of Attachment on 21st July, 2025

31. The Respondent, on the other hand, submits that the application was made over 240 days from the date of delivery of judgment. Counsel questions why the Applicant waited eight months before making an application for stay of execution when it had demonstrated its intention to appeal as early as 6th December, 2024. The Respondent further submits that per the judgment, the Applicant was ordered to provide a full account of equipment sales within sixty days, and questions why the Applicant did not make an application for stay within that 60-day period.

32. I have carefully considered the rival submissions on this issue. The delay alluded to under Order 42 Rule 6 is the delay concerning the filing of an application for stay of execution. The question is whether the delay of approximately eight months from the date of judgment to the filing of the application constitutes unreasonable delay. The rationale behind the condition of unreasonable delay is to guide the court not to order stay of execution only meant to delay the trial process or enforcement of a decree. The right to be heard on appeal should not be seen to defeat the ends of justice. A court of equity frowns at a stale claimant who sleeps on their rights and only approaches the court after a long period of time.

33. In the present case, judgment was delivered on 25th November, 2024. The Applicant filed its Notice of Appeal on 9th December, 2024, which was within time. However, the application for stay was only filed on 28th July, 2025, which is indeed approximately eight months after the judgment. During this period, the Applicant neither applied for stay nor provided any explanation for the delay until the Warrants of Attachment were issued.

34. The Applicant's explanation that it was constrained to file the application in light of developments, specifically that the Respondent commenced execution, is not persuasive. The Applicant was aware from the date of judgment that it had lost the case and that execution would follow. The Applicant cannot wait for execution to commence before seeking stay, particularly when it knew or ought to have known that the judgment required specific performance within a specified timeframe.

35. The legislative intent under Order 42 is to bind parties to prosecute their claims without undue delay. I find that a delay of eight months in circumstances where the Applicant was aware of the judgment terms and had demonstrated its intention to appeal early on, without any reasonable explanation for the delay, constitutes unreasonable delay.

36. I am guided by the principle stated in Global Tours & Travel Limited Nairobi HCC Winding up Cause No. 43 of 2000 that:

> " As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order stay the court should essentially weigh the pros and cons of granting or not granting the order."

37. While this finding on unreasonable delay would ordinarily be fatal to the application given that the conditions under Order 42 Rule 6 share an inextricable bond, I am conscious that I must balance competing rights and interests. I therefore proceed to consider the other conditions before making a final determination.

38. I now turn to consider whether substantial loss may result to the Applicant unless stay of execution is granted. I should state at the outset that substantial loss occurring to the Applicant is the cornerstone of the jurisdiction of the High Court in granting stay of execution. There is ample judicial authority on

this issue. In Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga [1982-1988] 1 KAR 1018, the Court of Appeal stated that:

> "It is usually a good rule to see if Order 42 Rule 6 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 cornerstone of both jurisdiction for granting stay"

39. Substantial loss in the sense of Order 42 Rule 6 has been described as a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal. The applicant must establish factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.

40. The Applicant's case on substantial loss rests on several grounds. First, that the Respondent is a company in receivership and has impliedly admitted financial distress. Second, that the Respondent does not own tangible assets that could be applied to recover the judgment amount if the appeal succeeds. Third, that the Applicant is unlikely to recover the colossal sum of Kshs. 104,214,757/= from the Respondent should payment be made and the appeal succeed. Fourth, that the attachment and sale of the proclaimed assets will cause substantial disruption to the Applicant's operations as the assets comprise the Applicant's tools and machines of trade, thereby rendering the appeal nugatory.

41. In response, the Respondent submits that the Applicant has failed to provide proof of the nature and specific projects that would be disrupted. The Respondent further contends that it is not under receivership, that this allegation is an overstretched lie and hypocritical. The Respondent states that it is a reputable company that has been in operation for over fifty years, has amassed and held substantial assets, and would be willing, ready and able to make a refund should it be required to do so. The Respondent further states that it holds numerous substantial properties, comprising mostly of real properties, which continue to appreciate with time.

42. The onus of proving substantial loss lies with the Applicant. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. In Machira t/a Machira & Co. Advocates vs. East African Standard (No. 2) [2002] KLR 63, it was held that:

> "In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay..."

43. However, once the Applicant has discharged the legal burden and has adduced prima facie evidence such that the Respondent will fail without calling evidence, the law says that evidential burden is created on the Respondent. It is only where financial limitation or something of that kind is established that the evidential burden is created on the shoulders of the Respondent, and the Respondent may be called upon to furnish evidence of means.

44. On the question of whether the attachment and sale will disrupt the Applicant's business operations, I note the Applicant's submission that the assets comprise its tools and machines of trade. However, as was observed in one of the authorities, the allegation that if execution is not stayed there will be disruption of business is not a primary consideration to be made by the court in determination of an

application for stay of execution. After all, even payment in settlement of court decrees, let alone lawful execution thereof, invariably results in disruption of some kind.

45. That said, I am conscious of the principle that the right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law. Anything that renders the appeal nugatory impinges on the very right of appeal. In the case of Butt v Rent Restriction Tribunal [1979] eKLR, the Court of Appeal emphasized that if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory.

46. While the Applicant has not fully discharged the burden of proving substantial loss in the classical sense of demonstrating the Respondent's inability to refund, I must consider that this is not merely a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, it will become a pious explorer in the judicial process.

47. I must also consider the competing rights of both parties. In Machira t/a Machira & Co. Advocates vs. East African Standard (No. 2) [2002] KLR 63, it was stated 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 judgment or of any decision of the court giving him success at any stage."

48. On balance, I find that while the Applicant has not fully established substantial loss in the traditional sense, there are sufficient grounds to warrant some form of protection of the appeal process, particularly given that the decretal sum is indeed substantial at Kshs. 22,745,709/= plus interest and costs.

49. On the question of security, the Applicant has deposed that it is ready and willing to furnish security as may be ordered by the court pending hearing and determination of the intended appeal. The Applicant's counsel has submitted that it is sufficient for the applicant to state readiness to provide security, but it is the discretion of the court to determine the security.

50. The Respondent submits that if the court is inclined to allow the application, at least half of the decretal sum should be released to the Respondent. I agree with the fact that where the applicant proposes to provide security, it is a mark of good faith that the application for stay is not meant to deny the respondent the fruits of judgment. The purpose of security under Order 42 is to guarantee due performance of the decree or order as may ultimately be binding on the applicant. Civil process differs from punitive measures as the judgment creates a debt relationship.

51. The modelling of the law under Order 42 Rule 6(2)(b) is to ensure the discretion of the court is not fettered. It is the court that orders the kind of security the applicant should give as may ultimately be binding on the applicant. The Applicant having expressed readiness to provide security has therefore satisfied this condition in principle, and it remains for the court to determine the nature and quantum of security.

52. I have extensively considered the rival submissions and the authorities cited by both parties. This court must balance the competing rights of the parties: the Applicant's constitutional right to appeal which includes the right that the appeal should not be rendered nugatory, and the Respondent's right as the decree holder to the fruits of the judgment.

53. In the exercise of my discretion. One has to address the security deposits in Appeal cases being one of the condition precedents under Order 42 Rule 6 of the Civil Procedure Rules can impact access

to justice provided for under Article 48 of *the constitution*. The Courts therefore must balance this condition against the need for efficient litigation and the prevention of frivolous appeals and at the same time protection and guarantees of the equality and non-discrimination clause under Article 27 (1) &(4) of *the constitution*. One other aspect in this appeal is that the decree holder should not be deprived of the fruits of the judgement under the guise of a right of appeal. I say so why? It is taken the appellant sometime to seek remedies arising out of the grievances in the impugned judgement. That is the very reason why in this appeal the appellant should be guided by the doctrine of proportionality in which the business of the court ought to managed within the parameters of Section 1(B) of the *Civil Procedure Act* which provides as follows:

54. " For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purposes of attaining the following aims:

    a. The just determination of the proceedings

    b. The efficient disposal of the business of the court

    c. The efficient use of the available judicial and administrative resources

    d. The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective and

    e. The use of suitable technology

    With this statutory command in mind, the appellant compliance matrix to prosecute the appeal within the timelines set herein under remain indispensable, unless their exist compelling and exceptional circumstances for non-compliance and it must be with leave of the court.

55. In light of this, the following orders shall abide:

    a. There shall be a stay of execution of the decree entered on 13th March, 2025 and all proceedings emanating therefrom, including the Warrants of Attachment and Sale dated 21st July, 2025, pending the hearing and determination of the intended appeal, subject to the following conditions:

        i. As a condition for the stay, the Applicant shall, within 60 days from the date of this ruling, deposit the decretal sum of Kshs. 22,745,709/= (Twenty-Two Million, Seven Hundred and Forty-Five Thousand, Seven Hundred and Nine Shillings) in an interest earning account in a reputable financial institution, in the joint names of M/s Gatonye & Gatonye Advocates and M/s Nyachoti & Co. Advocates.

        ii. Alternatively, the Applicant may, within the same period of 60 days, furnish a bank guarantee from a reputable commercial bank in Kenya for the sum of Kshs. 22,745,709/= in favour of the Respondent, such bank guarantee to remain valid until the final determination of the appeal or further order of the court.

    b. In the event the Applicant fails to comply with the conditions in paragraphs (i) or (ii) above within the stipulated period of 60 days, the stay of execution granted herein shall automatically lapse and the Respondent shall be at liberty to proceed with execution of the decree.

    c. The costs of this application shall abide the outcome of the appeal.

56. Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 23RD DAY OF OCTOBER, 2025

……...

R. NYAKUNDI

JUDGE