



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 552 OF 2013
FORMERLY CIVIL CASE NO. 617 OF 1995

**NISHITH YOGENDRA PATEL (The Legal Representative of
Yogendra Purshottam Patel Deceased)].....PLAINTIFF**

VERSUS

PASCALE MIREILLE BAKSH (nee Patel).....1ST DEFENDANT

NILESH PRAHLADBHAI PATEL.....2ND DEFENDANT

CHANCHALBHEN PURSHOTTAM PATEL.....3RD DEFENDANT

RULING

Both parties filed applications which this court deemed it fit to render its decision at once. The Plaintiff prays for an order of Stay of execution whereas the Defendants pray that the Court does appoint a receiver to manage the properties, subject matter of the suit.

The application dated 4/4/2006 is brought under Order XLI Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Plaintiff prays for an order that the court does order a stay of execution of the Decree/Order granted by Justice Githinji on 13/3/2006 pending the hearing and final determination of the intended appeal. This application is premised on grounds that the Plaintiff will suffer substantial loss and that the Appeal will be rendered nugatory if the prayers sought is not granted. Further that the Defendants reside abroad thus outside the jurisdiction of the Court.

The application is supported by an affidavit sworn by the Plaintiff on 4/4/2006. He deposed that the court entered Judgment and allowed the counterclaims with costs in favour of the Defendants on 13/3/2006. That being aggrieved by the said decision, he lodged a Notice of Appeal on 20/3/2006, and also requested for certified copies of typed judgment and proceedings which run into thousands of pages. The Plaintiff deposed that he was apprehensive that the Defendants could start the process of execution whereas the intended appeal has overwhelming chances of success. He deposed further that the value of the properties awarded to the Defendants is substantial and therefore the deceased Plaintiff's estate would suffer irreparable loss if the money is paid to the Defendants. The Plaintiff deposed that both Defendants resided abroad and out of the jurisdiction of the court and thus it would be virtually impossible to get the money

back in the event the appeal succeeded.

It was the Plaintiff's deposition that he had been funding the Kigwa coffee operations as well as purchasing milk at a rate of Ksh. 25/- per litre whereas the market price which is dependent on the quantity of milk and consistency of supply ranges between Ksh. 16/- to 21/- and thus Kigwa farm owed him a lot of money. Consequently, that it would be impossible for the Defendants to refund the decretal amount in the event that the intended appeal is successful and as a result, the appeal would have been rendered nugatory. The Plaintiff deposed that in the circumstances, it was just, fair and proper that a stay of execution be granted, and also that he was willing and able to abide by terms and conditions as the court may order.

In response to the application, the Defendants filed Grounds of Opposition dated 26/4/2006 wherein they averred that they were entitled to enjoy the fruits of the Judgment which is likely to be lost if the orders sought are granted, and therefore that it would be unjust and inconvenient to grant the prayers sought. It was their averment that the Plaintiff had not offered any security and neither had he shown that he will suffer substantial loss if the orders sought are not granted. In respect to their residing out of the country, the Defendants averred that there had been no security sought from them throughout the proceedings and it was therefore unfounded for the Plaintiff to claim that his appeal would be rendered nugatory on this ground. Further that the nature of the judgment was such that it would not be rendered nugatory.

The Defendants averred further that the Plaintiff had not been candid about the dealings of the suit property, in that, he continues to solely enjoy the income and failing to furnish information about the estate. Further that no proper reason has been given for not carrying out an inquiry into accounts as required by the decree. The Defendants also averred that the Plaintiff had not met the test for the grant of orders and that the application was premature as taxation of costs had not taken place.

A.B. Shah for M.G. Sharma Advocate for the Plaintiff filed submissions dated 29/4/2013 wherein counsel submitted that the Learned Judge in his Judgment directed that the properties be sold giving the Plaintiff the first priority to purchase and therefore that in the event the properties were sold, the Plaintiff would suffer irreparable loss. As regards the Defendants' claim that it was unjust that the properties were under the control of the Plaintiff who is a party to the suit, Counsel submitted that the claim is unsubstantiated as the Plaintiff could not deal with the properties to the detriment of the Defendants. Counsel submitted that despite the issue of the appeal being rendered nugatory is a province of the Court of Appeal, it was a matter of prudence that the court could invoke the O2 principles under Sections 3A, 1A & 1B of the Civil Procedure Act.

Hamilton Harrison and Mathews Advocates for the Defendants filed submissions dated 14/2/2013. Counsel submitted that the Court (Githinji J.) in its judgment ordered the Plaintiff to provide accounts of Kigwa Estate since 1991 but that the Plaintiff had failed to do so and in that regard, he could not have audience in court until he had purged his contempt by furnishing the said accounts. In support of this submission, counsel cited the case of Mawani v Mawani (1976 – 80) 1 KLR 607 wherein the court quoting Hadkinson Vs Hadkinson (1952) 2 All ER 567 held that:

The fact that a party to a cause has disobeyed a court order...then the court may in its own discretion refuse to hear him until the impediment is removed or a good reason is shown why it should not be removed.

Counsel also submitted that the order given by the Court was not capable of being stayed for reasons that the properties have always been and continue to be registered in the names of the three brothers and therefore there is nothing for the court to stay. It was submitted that the decree of the court was a negative decree and granting an order for stay of execution would amount to reviving the Plaintiff's suit. Counsel further submitted that as a pre-requisite for granting stay of execution, the applicant provides security for due performance of the decree or order, which the Plaintiff has failed to do. It was submitted that the Plaintiff had failed to comply with the court order which directed him to provide accounts and pay the 1st and 2nd Defendants any sums found due to the estate of the two deceased brothers and is therefore underserving of the court's assistance. It was submitted for the Defendants that there is no substantial loss

to be suffered by the Plaintiff to warrant an order for stay. Further that the said order if granted would serve to deprive the Defendants of the fruits of litigation. The court was referred to the case of **Halai & Another v Thornton & Turpin (1990) KLR 365** where the Court held:

“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

On whether the appeal will be rendered nugatory, Counsel submitted that the test is of the Court of Appeal as provided under Rule 5 of the Court of Appeal Rules and not the superior court. Counsel submitted that Order XLI Rule 4(2) of the Civil Procedure Rules provides for conditions of granting stay of execution in the Superior Court which does not include this condition and therefore that the court should not consider this ground. Counsel further submitted that since the Court found that properties were held as tenancy in common, the Plaintiff was simply ordered to follow the law and therefore that the appeal would not be rendered nugatory. In support of the this submission counsel cited the case of **Kenya Revenue Authority v De La Rue Currency and Security Print Ltd & 2 Others (2009) eKLR** where the Court held:

On the second point of whether the appeal will be rendered nugatory unless stay is granted, we are satisfied that the same will not be rendered nugatory, because all that the applicant is required to do is to follow the law. We do not see how doing just that will render the appeal nugatory.

In regards to the residence of the Defendants, counsel submitted that their residing abroad and out of the jurisdiction of the court is irrelevant as the subject property is largely immovable property. Further that the allegation that the Plaintiff will not recover the monies paid to the Defendants upon the execution of the decree, in the event of a successful appeal is unsubstantiated. To support this submission, counsel cited the case of **Caneland Ltd and Others v Delphis Bank Ltd Civil Misc. Appl. No. 344 of 1999 [2000] eKLR** where the Court held:

We now turn to apply these principles to the facts of the present case. Let us say at once that it was nowhere alleged by the applicants in the supporting affidavits or otherwise that the respondent will be unable to refund to the defendants any sums of money paid in satisfaction of the decree. The onus was on the applicants to satisfy the court on this issue. Upon a careful consideration of all the material available to us we are unfortunately not satisfied that this onus has been discharged. There is nothing to show that the appeal will be rendered nugatory if a stay is not granted. On the contrary, it appears to us that the respondent is not a bank of straw and can meet or refund any sums of money paid to it. That being the case and our view of the matter, we are satisfied, on a balance of probabilities, that if a stay is not granted the appeal will not be rendered nugatory.

The second application is the one dated 20/12/2006 brought under Order 41 Rule 1 of the Civil Procedure Rules. The Defendants pray that a receiver be appointed of all that property known as L.R. No. 12826 and L.R. No. 12442 known as Kigwa and all that property known as L.R. No. 37/243/2 Nairobi West (the properties) pending the determination of the appeal against the Judgment in this case. The application is premised on grounds that it is just and convenient to appoint a receiver to manage the suit property and necessary to protect the income derived from the properties as well as the properties from wastage. The Defendants aver that a party to the litigation cannot be expected to act in the interest of his opponents and more so where he has failed to provide accounts regularly. Further that the properties have been in the exclusive control of the deceased Plaintiff prior to the institution of the suit and later under the control of his legal representatives who has posted huge losses on the business run on the properties. Consequently, that there is a considerable risk that the properties will be wasted. The Defendants contend that no prejudice will be occasioned to the Plaintiff if the receiver is appointed.

The application is supported by an affidavit by the 2nd Defendant sworn on 22/12/2006, the administrator of the estate of P. P. Patel wherein he deposes that the Plaintiff took over the management of the properties after the demise of his father who had been managing them on his behalf and that of his deceased brothers. The 2nd Defendant indicated that he had previously made an application for appointment of receiver but that the ruling had not been delivered on the same. It was his deposition that in view of the contents of the affidavit sworn by the Plaintiff on 30/5/2006 and 4/4/2006 that he is heavily indebted by Kigwa farm and that coffee has not been sold for a number of years, it would be just and convenient for a receiver to be appointed pending the determination of the appeal.

The 2nd Defendant deposed that upon request the Plaintiff furnished an inventory of assets lying at Kigwa Farm but failed to furnish a statement setting out the financial position of the properties. It was deposed that the properties are owed in equal shares by the three brothers and it would be unjust to leave the management of the properties to the Plaintiff alone to the detriment of the estates of the deceased brothers. It is their deposition that they are willing to cooperate with the receiver to ensure that the property is well managed and protected.

The Plaintiff filed a Replying Affidavit sworn on 9/5/2007 in response to the Defendants' application where he deposed that the application is frivolous, vexatious, and untenable and an abuse of the court process as it has been made in defiance of the consent order made on 3/4/2001 and furthermore barred by the stay of execution order filed on 21/6/2006. The Plaintiff deposed that there was no basis for the Defendant's claim for the appointment of Receivers and also that a Receiver is one of the harshest remedies that the law provides for the enforcement of rights and cannot be made against a person who has been in exclusive, continuous uninterrupted and lawful possession of the immovable property for over 40 years.

The Plaintiff refuted the claim that coffee was not grown on the farm, deposing that coffee farming was flourishing and the Nairobi West house had been let out. He deposed further that he invited the 2nd Defendant after the judgment was delivered to come and stay and participate in the management of the farm. It was the Plaintiff's deposition that he requested the Defendants to contribute toward the payment of rates for the year 2006 and when their contribution was not forthcoming, he was forced to pay off the rates with the help of his friends. The Plaintiff deposed that he was prepared to wait for the settlement of his claim of money spent on the construction of the house at Kigwa Farm and renovations done in the Nairobi West House as well as that which funded the coffee operations and Dairy farm since 1996. However that he was willing to open an interest earning account in the joint names of the parties' advocates and commence depositing the rental income of the house in Nairobi West and the two houses in Kigwa farm for purposes of paying rates. The Plaintiff deposed that it is in his own interest to run the farm efficient and profitably in view of the likely fact that the farm would ultimately be part of his father's estate.

Hamilton Harrison and Mathews Advocates for the Defendants filed submissions dated 15/2/2013 wherein counsel reiterated the contents of the application that it was just and convenient to appoint a receiver. Counsel referred the Court to Order 41 Rule 1 of the Civil Procedure Rules submitting that the same provided for appointment of receiver of any property where it appears to the court to be just and convenient. Counsel also referred to **Mulla on the Code of Civil Procedure 13th edition Vol. 2 Pg. 1535** submitting that the phrase "just and convenient" means the court should appoint a receiver for the protection of the rights or for the prevention of injury according to legal principles. In that regard, that the object of appointment of the receiver is preserving the subject matter pending the determination of the rights of the parties. Counsel submitted that it would be in the interest of justice to appoint a receiver to oversee the running of the suit properties pending the determination of the dispute. Further that a party to the litigation could not be expected to act in the interests of his opponents considering that he had failed to provide accounts on regularly despite being told to do so. Counsel relied on several authorities in support of this submission including the case of **Ali & Others v Pattni & Another (1999) 2 EA** wherein the Court quoted ***Mulla Civil Procedure, 12th (ed.) Pg. 1165 observes that:***

The object and purpose of the appointment of a receiver may generally be stated to be the

preservation of the subject-matter of the litigation pending a judicial determination of the rights of the parties thereto". "The receiver is appointed for the benefit of all concerned: he is the representative of the Court and of all parties interested in the litigation, wherein he is appointed. The appointment of a receiver is the act of the Court and made in the interest of justice..."

Counsel urged the court to allow the application and appoint a receiver submitting that there would be no prejudice occasioned to the Plaintiff if orders sought are granted. Further that a receiver is an impartial agent of the court brought in to manage the properties and collect the profits for the benefit of the Plaintiff and Defendants. Further that the Plaintiff would not be dispossessed of any property.

A.B. Shah for M.G. Sharma Advocate for the Plaintiff filed submissions dated 29/4/2013 wherein counsel submitted that the Defendants' application had been overtaken by events. The Court was referred to Pg. 64 of the Judgment wherein the Court stated, "*There will be no order as to costs of the application for appointment of receivers which have been overtaken by events.*" Further that when the Court declined to rule on the appointment of receiver, counsel submitted that it is deemed that the application was refused. Counsel also submitted that it was improper for the Defendants to file another application for appointment of receiver during the pendency of a similar application filed on 2/4/2002. It was submitted for the Plaintiff that the Court became *functus officio* for appointment of receivers as the matter is now in the jurisdiction of the Court of Appeal. Without prejudice to this submission, counsel stated that the Plaintiff's contention was that there is no wastage on the farm, subject matter of the suit and that accounts are kept. Further that the receivers were appointed in exceptional and grave circumstances where the property was being wasted or alienated. It was further submitted for the Plaintiff that an application for appointment of a receiver is an exercise in futility since Judgment had already been entered and therefore the suit had been determined. Counsel distinguished the case of **Ali & Others v Pattni & Another (1999) 2 EA** stating that the receiver therein was appointed during the pendency of the suit.

The dispute relates to the ownership of a house situate on L.R. No. 37/243/2 Nairobi West and a farm on L.R. No. 12826 and L.R. No. 12442, commonly referred to in this record as "Kigwa Estate". The Plaintiff and the 1st and 2nd Defendants are administrators of the estates of deceased brothers Y.P. Patel, R.P. Patel and P.P Patel whereas the 3rd Defendant, who is also deceased, is the mother of the deceased brothers. The deceased Plaintiff prayed for orders, *inter-alia*, that he be declared the sole proprietor of Kigwa Estate and that his late brothers (the 1st and 2nd Defendants) be declared to have been holding the said properties in trust for him. The Defendants filed separate defences and counter-claims. The court, Githinji J. (now JA.) in a Judgment delivered on 13/3/2006 dismissed the Plaintiff's suit and allowed the Defendants' counter-claim as follows:

- i. ***I grant the declaration in prayer 2 of the counter-claim***
- ii. ***An order for accounts since 1991***
- iii. ***An order that the Plaintiff do pay any sum found due to the estate of R.P. Patel with interest at court rates.***
- iv. ***An order that the first Defendant has the liberty to sell her 1/3 undivided share of LR. Nos. 12862 and 12442 and LR. No. 37/243/2 first to both or one of the co-owners as first priority and if that fails to any close family member and if that fails then to any interested person on terms and conditions mutually agreed.***
- v. ***Liberty to apply on Order No. IV above.***
- vi. ***Costs of the counter-claim to 1st Defendant***

Similarly I allow the 2nd Defendant's counter-claim in terms of prayers No. 2, 3, 4 and 5 of the counter-claim with costs. In respect of Prayer No. 4 of the counter-claim, Plaintiff will provide

accounts from 1991

The court did find that the three brothers did own Kigwa Estate in equal share and entitled to the income and proceeds accruing out of their partnership, as captured in Prayer No. 2 of the Defendants' counter-claims:

A declaration that the Estate of Rajnikant Purshottam Patel (and Prahladbhai Purshottam Patel) is entitled to the income and proceeds accruing out of the partnership of Kigwa Estate (being L.R. Nos. 12826 and 12442) and Nairobi West property (being L.R. No. 37/243/2).

It is the aforementioned orders that the Plaintiff prays that the court does issue an order for stay pending appeal. The Plaintiff bases his application on grounds that: he stands to suffer substantial loss; his appeal will be rendered nugatory; and the fact that the Defendants reside abroad, it would be difficult to recovery any monies from them in the event the appeal succeeds. These grounds have been contested by the Defendants who contend that the Plaintiff has not demonstrated the substantial loss he is likely to incur. Secondly, that the properties, subject matter of the suit, are immovable and therefore it matters not that the Defendants reside out of the country. Lastly, the Defendants submit that whether an appeal will be rendered nugatory is not an issue the superior court can adjudicate.

Order XLI Rule 4 (now Order 42 Rule 6) of the Civil Procedure Rules provides the Court with guiding principles in determining an application of this nature. In **Tarbo Transporters Ltd v Absalom Dova Lumbasi [2013] eKLR** the court held that:

The granting of stay of execution pending appeal by the High Court is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is granted at the discretion of the court when sufficient cause has been established by the Applicant that:

- a. ***Substantial loss may result to the Applicant unless the order is made;***
- b. ***The application has been made without unreasonable delay; and***
- c. ***Such security as the court orders for the due performance of the decree has been given by the Applicant.***

Whether the appeal would be rendered nugatory is an aspect was debated by counsels of both parties. Counsel for the Defendant submitted that whether an appeal would be rendered nugatory is not a condition specified under Order 42 Rule 6 but in the realm of the Court of Appeal under Rule 5 of the Court of Appeal Rules. Counsel for the Plaintiff, on the other hand, submitted that even if so, this court is now guided by the oxygen principles under Sections 1A, 1B & 3A of the Civil Procedure Act to ensure that justice does prevail. To this debate, I share in the view of my brother, Gikonyo J. as expressed in the case of **Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Limited HCCC NO 288 OF 2011 [2014] eKLR**

Even though many say that the test in the High court is not that of "the appeal will be rendered nugatory", the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process. That is why I stated in Bungoma HC MISC APPL. NO. 42 OF 2011 James Wangalwa & Another v Agnes Naliaka Cheseto that:

"The applicant must establish other 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..."

Substantial loss

What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma V Abuoga (1988) KLR 645** where their Lordships stated, “**Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.**” It is only prudent to examine the orders granted in the Judgment in order to determine whether their execution would render the Plaintiff a pious explorer in the judicial process. Prayer 1 was a declaration that the 1st and 2nd Defendants are entitled to income and proceeds accruing from Kigwa Estate. It was submitted for the Defendants that properties have always been and continue to be registered in the names of the three brothers and thus, this order is incapable of being stayed. Indeed titles of the two parcels of Kigwa Farm indicate that the three brothers own the same as tenants in common. This is also the case for the Nairobi West House wherein the Transfer dated 11/6/1960 transferred the plot to the three brothers as tenants in common in equal shares. In view of Prayer No. 3, it is my view that the Prayer 1 is a pronouncement of the legal position as indicated in the titles. In the circumstances, I opine that there will be no loss occasioned to the Plaintiff in the absence of an order of stay.

Prayer No. 2 is that of furnishing statements of accounts from the year 1991. These are documents prepared at the end of each financial year which provides a true and fair view of a company’s financial position, and its income and expenditure for the year. Even in the absence of the Court Order, the general assumption is that Kigwa Estate continues to prepare balance sheets and income statements for as long as it is in operation. Consequently I do not see how furnishing the 1st and 2nd Defendants with these statements will occasion the Plaintiff substantial loss in the event that stay is not granted.

The Plaintiff’s case is that he solely acquired the properties comprising Kigwa Estate and that his brothers are merely registered as his trustees and Benamidars. The Plaintiff therefore seeks to reverse the court’s finding that the three brothers are owners of the property as tenants in common and the consequential orders thereto. In that regard, execution of Prayers No. 3, 4 & 6 may occasion the Plaintiff substantial loss. This court keeps in mind that it must balance the rights of both parties when it is called to determine an application for stay. This was well stated in the case **M/S Portreitz Maternity -v- James Karanga Kabia Civil Appeal No. 63 OF 1997** where the Court stated, “**That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.**” The just cause in my view is that the Plaintiff’s appeal could be in futility, in the event that either of the administrators of the Plaintiff’s brother’s wishes to exercise the liberty to dispose of 1/3 undivided share of Kigwa Estate.

The second condition is that of security. This is a requirement that the Plaintiff herein should meet in seeking an order for stay. As submitted for the Defendants Plaintiff has failed to provide security for due performance of the decree or order. Nevertheless, in Paragraph 16 of his Supporting Affidavit, the Plaintiff deposed that he is ready, willing and able to abide by such conditions and terms as the Court may order for the granting of the order sought. Often, the security offered by the Applicant is the decretal sum. This scenario in this Judgment is that there is no value has been attached on either the properties nor the proceeds derived therefrom. There was also an order that Plaintiff does pay any sum found due to the estate of the Defendants. None of the parties have tabled before court statements to show the financial position or that which would be due to the Defendants. Even where the court has not been furnished with accounts to ascertain what belongs to the Defendants thus far does not mean that the same has not been computed. The Plaintiff however did depose that preparation of final accounts may not be in the offing until the question of the coffee and ownership of cattle is determined by the Court of Appeal.

There is no obvious figure to guide the court in granting an order for security. But as stated hereinabove, this court is called upon to strike a balance the interest of both parties. The inevitable is that the Defendants’ interest must be considered. In the circumstances, a conditional order of stay shall suffice. The issue of the coffee and cattle was discussed by the court in its judgment on 13/3/2006 and found to be part of Kigwa Estate. The words of Githinji J. were as follows:

“I believe the evidence that the cattle were purchased from income from the farm and belong to the three brothers equally.”

On the foregoing, it is my finding, and I do so direct that the Plaintiff does prepare the financial statements, and compute any amount due to the Defendants. Further that, until the order of the court is reversed by the Court of Appeal such computation shall include the coffee and cattle on the farm. I hereby enter a conditional order of stay as follows:

1. ***An order of stay of execution in respect of Orders No. 3, 4, 5 & 6 granted by this court in its Judgment delivered on 13/3/2006.***
2. ***The Plaintiff to prepare the accounts since 1991 to-date and compute any sums due to the Defendants within 60 days from the date hereof. The preparation of the accounts to include the coffee and cattle on the farm.***
3. ***Whatever sums found to be due to the 1st and 2nd Defendants shall be deposited in a joint earning interest account to be open in the names of the Advocates for the parties within 60 days of the date hereof.***
4. ***In default of the conditions hereinabove, the order of stay automatically lapses.***
5. ***Each party to bear their own costs of this application.***

Before I delve on to the merits of the application, I think it is important to address the Plaintiff's objections thereto, part of which raises technical issues. The Plaintiff deposed that this application is an abuse of the court process as it has been made in defiance of the consent order made on 3/4/2001 and furthermore barred by the stay of execution order filed on 21/6/2006. The Plaintiff's counsel made reference to the Judgment of the Court (at Pg.64) and submitted that the application had been overtaken by events. It was further for the Plaintiff that it was improper for the Defendants to file another application during the pendency of a similar application filed on 2/4/2002.

I have skimmed through the voluminous court record on the related dates. The record shows that the consent referred to by the Plaintiff entered on 3/4/2001 is in reference to P&A No. 424/86 which was consolidated with this suit. A further consent made was that the suit be heard on an urgent basis due to the deceased Plaintiff's ill-health at the time. I do not see, neither does the Plaintiff expound, how this application is in defiance of the said consent order. The other two points is a pull on different directions. On the one hand, the Plaintiff deposes that application has been overtaken by events, and essentially, a further application is barred by his application for stay of execution. On the other hand, the Plaintiff deposes that the Defendants have filed an application for appointment of receiver during the pendency of another application and therefore abusing the court process. The Defendants did disclose that they filed a similar application dated 2/4/2002, but that a decision has never been made on it. The court record shows that the Defendant's application dated 2/4/2002 was argued extensively over a number of days commencing on 15/5/2002 until 24/6/2002 when the court directed that the ruling would be delivered on notice. A ruling was however never delivered but the application was in some way or other determined when the court stated in its Judgment that it had been overtaken by events.

From the foregoing, it is my view that the application dated 2/4/2002 was determined albeit not on its merits and therefore it cannot be stated that the same is to still pending. Order 41 Rule 1 of the Civil Procedure enables this court to appoint a receiver for any property **where it appears to be just and convenient**, and **before or after the decree** (Emphasis mine). It is evident that an application for appointment of receiver may very well be made after Judgment has already been entered. One can also discern that such applications are dependent on the peculiar circumstances of each case thus the broad discretion given to the court to make such order where it deems to be just and convenient. An applicant is also at liberty to make subsequent applications when the need arises. This was the clearly expressed by Kasango J. in **Unispan Limited v African Gas & Oil Limited Civil Case No. 13 OF 2014 [2014] eKLR** where the Judge directed,

However, should circumstances arise as to warrant the appointment of a receiver during the pendency of this case, the Plaintiff is given liberty to so apply.

I am also of the view that since such applications are dependent on the unique circumstances of each case, it would be unjust to state that such applications cannot be entertained where there is an application for Stay of Execution.

I need not buttress that appointment of a receiver is a discretionary remedy. However, courts have established guiding principles to be considered in determining an application of this nature. ***To avoid imminent danger and dissipation of assets*** See **Nasir Ibrahim Ali & 2 Others v Kamlesh Mansukhalal Damji & Another, Nairobi Civil Appeal No. 72 of 1998.** ***At the end of it all, the picture that comes out is that of a profile of mismanagement, incompetence and sheer plunder. If that is not arrested, irreparable loss shall surely result. In view of the foregoing, I consider it my duty to appoint a receiver/ manager to save the situation*** See **Uhuru Highway Development Limited v Central Bank of Kenya & 3 Others [1998] eKLR.** ***The power to appoint a Receiver/Manager is not to be exercised as a matter of course or for the reason that it can do no harm to appoint one.*** See **Samson Ngugi Ichung'wa T/A Grenair v National Industrial Credit Bank Ltd & 2 Others Civil Case 86 of 2010 [2013] eKLR.**

The question is whether the Defendants have laid sufficient basis to warrant this Court to appoint a Receiver. The Defendants are apprehensive that the properties will be wasted as up to the filing of this application, the business was posting huge losses. They rely on the depositions of the Plaintiff who, in his affidavit claimed to be heavily indebted by the farm. Their apprehension is exacerbated by the fact that the Plaintiff is solely running the operations of the farm thus the Defendants aver that he will not cater to their interest. The Plaintiff refutes these averments by deposing that it is for his own good that he runs the operation of the farm efficiently. He states further that though he is indebted by the farm, as at filing his response in 2007 coffee farming was flourishing and the Nairobi West House had been let out.

From the foregoing, I am not satisfied that the Defendants have provided sufficient basis for the grant of the orders sought. There is no cogent evidence of mismanagement neither has it been demonstrated that there is imminent danger and dissipation of the properties. Businesses do post losses as a result of various reasons, but that on its own is not, in my view, sufficient reason to warrant the court to appoint a receiver. In the circumstances, the Defendants' application is denied. Each party shall bear their own costs.

Dated, signed and delivered this **20th** day of **February, 2015**

L.N. GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff/Counsel could not be traced on the address given.

Mrs Oketch for the 1st & 2nd and 3rd Defendants

Kamau: Court Clerk

M/s Oketch : I pray for leave to appeal.

L. GACHERU

JUDGE

Court:

Leave to appeal granted and **Mrs. Oketch** undertakes to serve **Mr. A B Shah** with Notice of Ruling since the office of **M.G Shama & Co. Advocates** could not be located for delivery of the **Ruling Notice**.

L. GACHERU

JUDGE

20/2/2015