



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT ELDORET**

**E&L COURT CASE NO . 691 OF 2012**

**KIPLAGAT KOTUT.....PLAINTIFF/APPLICANT**

**VERSUS**

**ROSE JEBOR KIPNGOK...DEFENDANT/RESPONDENT**

**RULING**

The Notice of Motion now before the honourable court is dated 20<sup>th</sup> Day of January 2015 and brought pursuant to Order 46 Rule 6, Order 51 of the Civil Procedure Rules 2010 and Section 3 of the Civil Procedure Act, Cap 21 Laws of Kenya. The said application is seeking substantive orders, that the honourable court be pleased to stay execution of judgment delivered on 27/11/2014 and decree issued on 6 /1/2015 in this matter pending the hearing and determination of an intended appeal.

The foregoing application is supported by the Affidavit sworn on the 20<sup>th</sup> Day of January 2015 by Kiplagat Kotut, the Defendant/Applicant. On the other hand the instant application is opposed by the Defendant/Respondent vide the Replying Affidavit sworn on the 17<sup>th</sup> day of February 2015 by Rose Jebor Kipngok.

The application is premised on the grounds that the applicant intends to file an appeal against the decision of honourable Justice S.Munyao delivered on 27/11/2014 and has lodged and served notice of appeal. However the applicant is apprehensive that the respondent may sell, transfer, charge, lease or alienate the suit property and therefore unless execution of the judgment, orders and or decree are stayed, the applicant is bound to suffer and or occasioned substantial loss, and that the application has been made without unreasonable delay.

In his supporting affidavit sworn on 20<sup>th</sup> Day of January 2015, the applicant has deponed that immediately after the delivery of the judgment herein the stay of execution of 30 days was granted and that pursuant to Order 50 Rule 4 of the Civil Procedure Rules the 30 days stay of execution lapsed on 21<sup>st</sup> January 2015 given that the dates between 21/12/2014 and 13/1/2015 are excluded from computation.

The applicant has deposed that he is dissatisfied with the decision of the Honourable judge and thus intends to appeal to the Court of Appeal and that he has since filed and served the Notice of Appeal against the respondents. It is deponed further that the applicant is apprehensive that the Respondent may proceed to execute the decree issued on not only transferring, charging or alienating the suit property which action would not only render this application but also the intended appeal nugatory.

The applicant swears that he has been in occupation of the suit property for the last 14 years and have extensively invested in the suit property which investments are valued for over 20 million and that unless the order for stay is granted, the execution of the decree shall occasion him extreme and substantial loss.

The application is opposed vide the Replying Affidavit dated 17<sup>th</sup> February 2015 sworn by Rose Jebor Kipngok, the Defendant/Respondent herein. It is deposed that she is the registered owner of the suit property herein. The Respondent swears further that the Plaintiff/Applicant instituted this suit seeking for specific performance and vesting order over the suit land and whereby after the hearing of the suit the judgment was delivered in his favour.

It is deposed that the applicant was given 30 days stay of execution and that he has blatantly refused and disobeyed to vacate from the suit despite being served with the judgment and final decree of the court. It is deposed further that instead of vacating the land as per the judgment of the Honourable Court, the applicant filed the present application after the lapse of almost 24 days which period is inordinate, unreasonable and violates the provisions of order 46 rule 2 of the Civil Procedure Rules.

The Respondent swears that as a result of the refusal to vacate the suit land, he has not been able to enjoy the fruits of his judgment. It is deposed that the applicant has deprived him of the right of utilizing the judgment property for many years and that the instant application is calculated at frustrating him from enjoying the fruits of his judgment.

It is deposed further by the Respondent that he desires to utilize his suit land for agricultural production and the turn-over of the yield thereof is estimated at Ksh. 1,680,000/= and that the applicant has not offered any security for due performance of the decree as required by the law. The Respondent swears that the applicant will not suffer any loss in case he reposes suit property nor will the intended appeal be rendered nugatory as the structures in the suit land have already been quantified in the valuation report. It is deposed further that the applicant has not demonstrated any hardship or injury that he can incur on execution of the judgment that cannot be compensated by damages and costs and that the applicant has not demonstrated any just cause for the grant of an order of stay of execution.

Advocates for the parties submitted orally in court. Both counsel for the parties herein relied on the affidavits of their respective deponents. Applicant's counsel in support of the instant application referred the Honourable Court to the case of Antoine Ndiaye vs. African Virtual University [2015]eKLR, High Court at Nairobi, Civil Suit No. 422 of 2006. In the foregoing case the learned judge Gikonyo J. held inter alia that **stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules.**

The Respondent's advocate on the other hand in his submissions opposed the instant application and relied on the case of, one Kilindini Warehouse (K) Ltd & Another vs. Omar Saleh Said & Another [2014]eKLR, Mombasa HCCC No. 5 of 2010 where the honourable court, Kasango J. while relying on the holding by the Court of Appeal in the case of Exclusive Estate vs. Kenya Posts & Telkom Corp & Another [2005]1EA, 53-56 reiterated that the order which dismissed the suit was a negative order which is not capable of execution. And two, the Respondent's counsel relied on the case of Joackim Ngugi vs. G.Z Ulyate & 6 Others [2014] Nairobi HCCC No. 1029 of 1982, where the learned judge Mutungi J. held that an applicant for stay of execution under order 42 Rule 6 of the Civil Procedure Rules must:-

- (i). Satisfy the court that substantial loss may result unless the order is made;
- (ii). The application must have been made without unreasonable delay and
- (iii). The Applicant has to be prepared to offer security for the due performance of the decree.

The application is brought pursuant to the provisions of Order 42 Rule 6 which states as follows;

**“6.(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, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the**

appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.

In view of the foregoing provisions of the law, it is important to note that stay of execution of decree pending appeal is conditional. In the case of *Antoine Ndiaye vs. African Virtual University [2015]eKLR, High Court at Nairobi, Civil Suit No. 422 of 2006* the learned judge Gikonyo J. opined as follows;

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it 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. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

a) The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; 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”.

In *Prilscot Company Limited v Monica Heho [2015] eKLR, H.C at Nairobi, Civil Appeal No. 482 OF 2014* the learned judge Serگون J. while relying on the case of *Halai & Anor v. Thornton Turpin (1963) Ltd (1990) KLR 365* opined that Order 42 Rule 6 (2) of the Civil Procedure Rules lay down the conditions which must be satisfied by an applicant to grant the orders for stay of execution pending an appeal. The learned judge observed further that the applicant must establish that; he/she stands to suffer substantial loss if the orders are not granted; the application must be filed timeously and the applicant must offer security for due performance of the decree or order.

In the case of *Socfinac Company Limited V Nelphat Kimotho Muturi [2013]eKLR, H.C at Nairobi (Milimani), 542 of 2012,* the learned judge Odunga J. observed as follows;

**“The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and that 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. In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.**

**It therefore follows that all the pre-overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the Civil Procedure Act are attained. In this instance the court must strive to achieve the twin principles of equality of arms and proportionality”.**

While in the case of Halai & Anor. v Thornton & Turpin (1963) Ltd (1990) KLR 365 it was held that on granting of stay of execution, the High Court’s discretion 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.”**

In view of the foregoing holdings by the learned judges, it follows therefore that for the applicant to succeed for stay of execution pending appeal must satisfy the above three conditions as envisaged under order 42 Rule 6; these are one the application being brought without undue delay, two, the applicant must satisfy the court that substantial loss may result to the unless stay of execution is ordered and three, the applicant is required to furnish the security for the due performance of the decree. All the prerequisites in Order 42 Rule 6 of the Civil Procedure Rules are as important and must be considered in an inextricable manner.

And therefore the salient issues for determination herein may entail and not limited to the following;

- 1. *Whether there is undue delay on part of the Applicant?***
- 2. *Whether there is imminent substantial Loss if stay of Execution is denied?***
- 3. *Whether the applicant should furnish security as a condition for stay?***
- 4. *Whether the judgment/Decree herein is capable of being executed? (Whether seeking for stay of Execution is justified?)***

On the issue of *undue* delay, Initially, on delivery of the judgment herein, the honourable court ordered

the plaintiff to vacate the suit land within 30 days. The said judgment was delivered on the **27<sup>th</sup> Day of November 2014** and the instant application seeking stay of execution herein was filed on **21<sup>st</sup> January 2015**. In his supporting affidavit, at para 6, the applicant has deponed as follows;

**“That I am informed by my advocate which information I belief to be true that pursuant to Order 50 Rule 4 of the Civil Procedure Rules, the 30 days stay of execution lapses on 21<sup>st</sup> /1/2015 given that the dates between 21<sup>st</sup>/12/2014 and 13<sup>th</sup>/01/2015 are excluded from computation”.**

On the other hand the Respondent at para 8 of the Replying Affidavit has deponed as follows;

**“That instead of vacating the land as per the judgment of the honourable court, the applicant filed the present application after the lapse of almost 24 days which period my counsel advises me is inordinate and unreasonable and violates provisions of Order 46 Rule 2 of the Civil Procedure Rules.”**

In his judgment delivered on 27<sup>th</sup> Day of November 2014, the honourable judge Munyao J. directed that the Plaintiff/Applicant vacates the land in question within 30 days. This means that at the end of 30 days the Defendant/Respondent was at liberty to follow the necessary steps so as to evict the Plaintiff/Applicant. Be that as it may on **21<sup>st</sup> January 2015**, the Plaintiff/Respondent filed the instant application seeking stay of execution of the judgment/decreed herein. It has been submitted by the Respondent’s counsel that there is inordinate delay on part of the Plaintiff/Applicant.

The question that follows therefore is ***how inordinate has the Applicant delayed?*** Computation of time is governed by the provisions of **section 57 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya and Oder 50 Rules 1,2,3 and 4 of the Civil Procedure Rules,2010.**

Section 57, paras (a),(b),(c) and (d) of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya provides as follows;

**“57. Computation of time**

**In computing time for the purposes of a written law, unless the contrary intention appears—**

**(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;**

**(b) if the last day of the period is Sunday or a public holidays or all (which days are in this section referred to**

**as excluded days), the period shall include the next following day, not being an excluded day;**

**(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;**

**(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”**

While Order 50 Rules 1,2,3 and 4 states as follows;

**“1. Where by these Rules or by any judgment or order given or made, time for doing any act or taking any proceedings is limited by months, and where the word “month” occurs in any document which is part of any legal procedure under these Rules, such time shall be computed by calendar months unless otherwise expressed.**

**2. Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day and Good Friday, and any other day appointed as a public holiday shall not be reckoned in the computation of such limited time.**

**3. Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.**

**4. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:**

**Provided that this rule shall not apply to any application in respect of a temporary injunction. ”**

Bearing in mind that the instant application for stay is brought pursuant to the provisions of the Civil Procedure Rules 2010, it is therefore apparently clear that the provisions of Order 50 are applicable with regard to the computation of time. Order 50 Rule 4 states as follows;

**“4. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:**

**Provided that this rule shall not apply to any application in respect of a temporary injunction. ” (Emphasis added)**

In line with the above provisions of the law, it is apparently clear that the days between **21<sup>st</sup> December in any year and 13<sup>th</sup> January in the year next following, being 24 days** are excluded from computation of time. It follows therefore that the days running from **27<sup>th</sup> November 2014** when the informal stay was granted to **21<sup>st</sup> January 2015** when the instant application was filed are 32 days. In view of the foregoing it is apparently clear that the applicant filed this application **2 days** after the lapse of the informal stay of execution that was granted herein. Since the applicant was already enjoying the application seeking formal stay of execution immediately on delivery of the judgment.

On substantial loss, the applicant in his supporting affidavit at para 11 has deponed that he has been in occupation of the suit property for the last 14 years and have extensively invested in the suit property which investment are valued for over 20 Million. To this end the applicant annexed a copy of the valuation report and marked the same KK 3. The question to be answered is therefore *what amounts to substantial loss?*

In **Prilscot Company Limited v Monica Heho [2015] eKLR, H.C at Nairobi, Civil Appea No. 482 OF 2014, supra**, the learned judge Serгон J. cited the holding by Musinga J. in **Daniel Chebutul Rotich & 2 Others v. Emirates Airlines Civic Case No. 368 of 2001** where it was stated that **substantial loss is a**

relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.

In *Antoine Ndiaye v African Virtual University [2015] eKLR*, supra, the learned judge Gikonyo J. cited the holding in the case of *Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005* where it was held that;

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts”.

In *Kenya Shell Limited vs. Kibiru [1986] KLR 410*, Platt, Ag.JA (as he then was) at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”.

On the part of Gachuhi, Ag.JA (as he then was) at 417:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.” (See also the holding by Odunga J. in *Socfinac Company Limited V Nelphat Kimotho Muturi*, supra.)

In *Anne Njeri Mwangi v Muzaffer Musafee Essajee & another [2014] eKLR, H.C at Nairobi (Milimani), Civil Case No 49 of 2011*, the learned judge Havelock J. delivered himself as follows;

“As regards determination of what amounts to substantial loss, Musinga, J (as he then was) in *Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001* held that:

“...substantial loss’ is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

Platt Ag JA again in the *Kenya Shell* case (supra) gave his observations as to the meaning of ‘substantial loss’ when he detailed:

“The application for the stay made before the High Court failed because the first of the conditions set out in order XLI rule 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents be unable to repay the decretal sum plus costs in two courts. The learned judge later went on to say: “It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered

nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

In *Feisal Amin Janmohammed T/A Dunya Forwarders v Shami Trading Co. Ltd [2014] eKLR, H.C at Mombasa Civil Appeal No 62 of 2013*, the learned judge Kasango J. while relying on the holding in *Civil Application No. Nai 15 of 2002 ABN Amro Bank, N. V –V- Le Mond Foods Limited* reiterated as follows;

“...The Court of Appeal in that case had this to say-

“We agree with Mr. Regeru for the Respondent that the burden was upon the bank to show that its appeal would be rendered nugatory if a stay is not granted. But in requiring an applicant to discharge that burden, the Court must also be alive to certain limitations which an Applicant such as the bank, must of necessity suffer from. The bank in this case is required to pay over to the Respondent over Kshs. 30 million. An officer of the bank has sworn that they are not aware of any assets owned by the Respondent. They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns. They, of course, cannot be expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. So all an Applicant in the position of the bank can reasonably be expected to do is, to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

23.The Court proceeds in that judgment to state that it was only the Respondent who could counter the submission that it would be unable to refund the judgment amount if the appeal was successful.”

In *Peter Rugu Gikanga & another v Weston Gitonga & 10 others [2014] eKLR, H.C at Nakuru Civil Case No. 148 of 2010* the learned judge Enyara Emukule reiterated as follows;

“10. It is clear from the Replying Affidavit of the Peter Rugu Gikanga, that some of the Defendants/Applicants have moved out of the suit land in obedience to the order of court. The majority do not live on the land, but are said to have structures thereon. Only the 3rd and 10<sup>th</sup> Defendants/Applicants persist on living on the land, allegedly because they have no alternative land. This, with respect, is no ground for granting a stay of execution. In CHARLES WAHOME GETHI VS. ANGELA WAIRIMU GETHI (*Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007*), the Court of Appeal held –

“... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them.”

11. Indeed as it was held in the said case (Charles Wahome Gethi vs. Angela Wairimu Gethi) the Applicant have not shown or suggested that they would suffer substantial loss rendering the appeal nugatory if the land were sold before the appeal were determined. On the balance there is no evidence that the Applicants would suffer substantial loss if a stay was not granted”.

In the instant case, as pointed out earlier, the applicant at para 11 has deposed that he has been in

occupation of the suit property for the last 14 years and has extensively invested in the suit property which investments are valued for over 20 million. In view of the foregoing holdings it is my considered view that the applicant has been able to demonstrate that in case the stay is not granted and eventually vacates the suit land as ordered by the court he may lose his investments on the suit land. In the contested judgment herein, the honourable trial judge found that the suit land belongs to the Defendant Respondent.

In the case of *Antoine Ndiaye v African Virtual University [2015] eKLR, supra*, the learned judge Gikonyo J. cited the holding in *Andrew Kuria Njuguna vs. Rose Kuria (Nairobi Civil Case 224 of 2001*, (unreported) where it was held as follows;

**“Coming to the substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court such material and information that should lead this court to conclude that surely she stood a risk of suffering substantial loss moneywise or other, and therefore grant the stay”.**

In the case of *Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63*, it was held as follows;

**“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...”**(See also *Gikonyo J, In Antoine Case, supra.*)

According to the valuation report, supplied to the honourable court by the Plaintiff/Applicant, the value of the land is Ksh. 14,000,000/= while the investments thereon are valued at Ksh.6,000,000/=. It follows therefore as much as the Plaintiff/Applicant has failed to prove to the trial court that the suitland belongs to him and being ordered to vacate the same, it is not in dispute that for the last 14 years he has invested on the said land to the tune of Ksh. 6,000,000/= and given the fact that he has preferred an appeal against the judgment herein, it is very clear beyond peradventure that unless stay is granted he will suffer substantial loss of worthy Ksh. 6,000,000/=.

### **Security**

In his Replying affidavit at para 11 the Defendant/Respondent has deposed that he desires to utilize the judgment property for agricultural production and the turnover of the yield expected per year is Kshs. 1,680,000/=. To this end the Defendant/Respondent has annexed valuation and marked it RJK 2a and b. It is deposed further at para 12 that the applicant has not offered any security for due performance of the decree as required by law.

It is trite law that a litigant must enjoy the fruits of his/her judgment. In *Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63* it was held that:

**“...to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.**(Underlining mine)

The foregoing notwithstanding, it is important to note that a litigant that has lost his case is entitled to appeal against the same. It follows therefore that a matter is deemed concluded after going through its due

course all the way to the apex court if need be. But also it must be also understood that until and unless the Judgment/Decree has been set aside by the superior court, remains in force capable of being executed. The courts, therefore must balance the two competing interest of the decree holder and that of the appellant. In the case of Anne Njeri Mwangi v Muzaffer Musafee Essajee & another, supra, the learned judge Havelock j. rendered himself as follows;

“...As regards **Rule 6(2)(b)** in relation to security for costs, the Court in Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR Mabeya, J held as follows;

**“As I stated in the case of KENYA COMMERCIAL BANK LIMITED Vs SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR “in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case.”**

In the instant case the Defendant/Respondent has deponed that he intends to utilize the suit land on Agricultural Production and that as per the Valuation Report Annexed and marked RJK 2, he intends to get a turn over of Ksh.1,680,000/= on yearly basis. The foregoing has not been rebutted by the Plaintiff/Applicant. It is my considered opinion therefore that since the stay under the provisions of Order 42 Rule 6 is conditional, and one of the conditions is that the Applicant must be prepared to furnish the security for the due performance of the decree, the applicant ought to furnish the same, at least Ksh. 1,600,000/=, to the court. On whether the Instant Order/Judgment/Decree is capable of being stayed, The Defendant's/Respondent's counsel has relied on the case of Kilindini Warehouse (K) Ltd & Another vs. Omar Saleh Said & Another [2014]eKLR, Mombasa HCCC No. 5 of 2010 where the honourable court, Kasango J. while relying on the holding by the Court of Appeal in the case of Exclusive Estate vs. Kenya Posts & Telcom Corp & Another [2005]1EA, 53-56 reiterated that the order which dismissed the suit was a negative order which is not capable of execution. On relying on the foregoing holding, the Defendant/Respondent's counsel was implying that the judgment herein was not capable of being stayed as it is a negative judgment(order).

In the instant case it is important to note that the Defendant filed both defence and counter-claim. In his counterclaim the Defendant/Respondent prayed that;

- 1. The sale transaction be declared a nullity and the plaintiff be refunded his deposit.**
- 2. An execution order evicting the plaintiff from the property in question.**

While the plaintiff/Applicant in her plaint had sought an order of specific performance compelling the defendant to execute transfer, P.I.N Certificate, copy of identity card and thereby released to the plaintiff for registration to effect transfer **and or** in the alternative, the Deputy registrar to execute the transfer of Plateau/Plateau Block 2 (Uasin Gishu) 63 in favour of the Plaintiff.

In his judgment the trial Judge held inter alia that the defendant is entitled to vacate possession of the land parcel Plateau/Plateau Block 2 (Uasin Gishu) 63 and that the Plaintiff to vacate the suit land within 30 days from the date hereof.

In view of the foregoing order it is apparently clear that the same is not negative but it is capable of being executed. The court did not only dismiss the plaintiff case but also allowed the Defendant's Counter-Claim and more so directed the Plaintiff to vacate the suit land within 30 days. In the case of Kanwal Sarjit Singh Dhiman –Vs- Keshavji Jivraj Shah [2008] eKLR, the Court of Appeal, while dealing with stay of a negative order, held as follows:

**“The 2nd prayer in the application is for stay (of execution) of the order of the superior**

**court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).**” (emphasis mine)”

In conclusion, the court is inclined to grant, and hereby grants an order of **stay execution of judgment and decree of the honourable court delivered on 27/11/2014 and decree issued on 6/1/2015 in this matter pending the hearing and determination of the intended appeal** on condition that the applicant furnishes in court security whose value is at least Ksh. 1,600,000/=.

**DATED AND DELIVERED AT ELDORET THIS 20<sup>th</sup> DAY OF NOVEMBER, 2015.**

**ANTONY OMBWAYO**

**JUDGE**