



**Njenga & 2 others v Kipngetch (Civil Appeal 258 of 2023)
[2024] KEHC 3160 (KLR) (26 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 258 OF 2023
SM MOHOCHI, J
MARCH 26, 2024**

BETWEEN

ANNE NYAMBURA NJENGA 1ST APPELLANT

WESTWAY SCHOOL 2ND APPELLANT

CHARLES NJENGA KIMANI 3RD APPELLANT

AND

HILLARY KIPNGETCH RESPONDENT

RULING

1. Before me is a Notice of Motion filed pursuant to Section 1 A, 1B and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 42 Rule 6 and Order 31 Rule1) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law for the following Orders;
 - i. Spent.
 - ii. Spent.
 - iii. That, this honorable Court be pleased to issue an order of stay of execution of the judgment/ Decree issued in Nakuru CMCC No. E342 of 2022 on 24/08/2023 pending the hearing and determination of the instant appeal.
 - iv. That, costs of this application be costs in the cause.
2. The Application is premised on the following nine (9) grounds is further supported by the annexed affidavit of Anne Nyambura Njenga: -
 - i. That, judgment was delivered in the primary suit, Nakuru CMCC No. E342 OF 2022, on the 24th day of August 2023 against the Applicants herein wherein the Respondent was awarded



damages totaling Kshs. 973,132,36 plus interest and costs of the suit. No stay of execution orders have been issued therein and therefore the Respondent is free to execute at any time.

- ii. That, the Applicants herein being aggrieved with the judgment therein have exercised their inalienable right of Appeal and have lodged the instant arguable and meritorious Appeal.
 - iii. That, the decretal sum is colossal and if the matter is not heard on a priority basis and orders for stay of execution granted, the Appeal will be rendered nugatory and the Applicants stand to suffer substantial and irreparable loss.
 - iv. That, the Respondent is currently in the process of certifying costs in the primary requested the same at Nakuru Law Courts on 25th day of August That, this Application has been brought without unreasonable delay.
 - v. That, the Applicants are willing to provide such security as the Honorable Court orders for due performance of such decree or order as may be ultimately binding on them.
 - vi. That, no prejudice or difficulty will be suffered by the Respondent herein that cannot be compensated by costs if this Application is allowed.
 - vii. That, the Applicants herein sought for stay pending appeal in the primary suit, however, the same was not granted and as such the Applicants herein still stand exposed to execution process that may commence at any time now.
 - viii. That, this Honorable Court is clothed with wide discretionary powers to grant the orders sought.
 - ix. That, it is in the interest of justice that this Honorable Court grants the orders sought to enable the Applicants herein proceed with his Appeal.
3. Applicants and the Respondents filed written submissions on the 24th November 2023 pursuant to directions issued 31st October 2023.

Applicants Submissions

4. As to whether the Applicants are entitled to the orders sought? stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure- Rules, 2010 which provides as follows: -
- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 sub rule (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 sub rule (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."

5. That, the power of a Court to grant stay of execution is discretionary and this discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial Court's decision. The above provisions operate as principles to guide the Court. This was so held by C.W. Githua.

6. In Civil Appeal No. 135 Of 2014 Alhyder Trading Company Limited v Lucy Jepngetich Mibei [2016] eKLR where the learned judge opined,

"I must state at this juncture that the decision whether or not to grant stay of execution pending hearing of an appeal is at the discretion of the Court. The conditions set out under Order 42 Rule 6 of the Civil Procedure Rules are only meant to be guidelines to assist the Court in the exercise of its discretion."

7. Similarly, Madan JA (as he then was) in Civil Application No Nai. 6 of 1979 Butt v Rent Restriction Tribunal, in allowing an application for stay of execution, cited the passage of Brett LJ in Wilson v Church (No. 2) 12 Ch D [1879] 454 where the learned judge opined,

"It is in the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory"

The Court went further to elaborate,

"1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.



5. The Court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."
8. Further, the Court of Appeal in *RWW v EKW* (2019) eKLR addressed itself on this as hereunder: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
9. Having guidance of the aforementioned principles/case laws, as to whether substantial loss may result if stay is not granted? The Applicants posit that, the first condition required of an Applicant seeking an order of stay of execution is to satisfy the Court that substantial loss would occur if the order of stay is not granted. Reliance is placed on the case of *Good News Church of Africa v Board of Management Eldoret Secondary School* [2021] eKLR where the Court stated:

“Substantial loss is a key consideration in an application for stay of execution and stay of proceedings. The applicant must establish the loss which he/she will suffer if such orders are not granted.”
10. That, it is the Applicants submission that, the Applicants herein will suffer substantial loss should stay orders be declined consequently giving way to the Plaintiff to execute the judgement/decreed delivered on 24th August, 2023. In this case the decretal award is a money decree which the Applicants are apprehensive that, if execution of the decree is levied, the appeal if successful would not only be rendered nugatory but also the Applicants will suffer substantial loss as it will not be possible for them to recover the decretal sum not knowing the Plaintiff/Respondent's financial status.
11. In addition to the aforesaid, the appeal by the Applicant seeks to set aside the award of this Court. Should the High Court find that, the award given by the trial Court was inordinately high in the circumstances and not commensurate with the awards for comparable injuries and assuming the Plaintiff herein is given half the decretal sum as set out in the replying affidavit, the Applicants will be unable to recover the excess amount and will suffer financial loss.
12. *Platt Ag JA in Civil Application No. Nai 97 of 1986 Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR held that:

“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.”



13. The Court of Appeal sitting in Nairobi in Civil Application No Nai 95 Of 1987 Rhoda Mukuma - Vs- John Abuoga [1988] eKLR reiterated its earlier decision in the case of Kenya Shell Limited (supra) when it held that:

“Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being - (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2) (b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore, it is necessary to preserve the status quo.”

14. It is the Applicants submission that, no evidence has been tendered to indicate that the Plaintiff/ Respondent is capable of refunding the decretal sum herein should the appeal succeed as seen in the replying affidavit. During hearing, the Plaintiff testified that he was not in employment.
15. Thus, in the very likely event that the appeal succeeds, the Applicants will suffer great loss if execution will have been already been carried out. The Applicants herein are more than capable of paying the decretal sum in full in the unlikely event that the appeal fails as they are people of means insured by one of the top insurance companies in Kenya, CIC Insurance Ltd. Therefore, the onus is on the Plaintiff to demonstrate to this Court his financial muscle to refund the decretal sum.
16. In *Bonface Kariuki Wahome v Peter Nziki Nyamai & another* [2019] eKLR J. R. Nyakundi held that: -

“ . the evidential burden resides with the Respondents to prove that he is not a man of straw as alleged. None of the two Respondents in the instant case has made any attempt to discharge this burden. It is expected that a respondent would depone and show the means she has to refund the decretal sum. It is enough for the applicant to depone that they are not able to refund. He cannot be expected to dig deep into the financial standing of the respondents, which is for the respondent to produce and prove.”

17. That it is therefore clear from the foregoing that, the Respondent has not discharged his evidential burden of proof proving that he can refund the decretal sum herein should the appeal succeed. As much as the Respondent is entitled to the fruits of the judgment, the Applicant’s humbly submit that this Court should as well ensure that the Applicant’s interests are secured such that in the event the Applicant’s appeal succeeds, the decretal amount would be available to them. In addition to the aforesaid, it is clear that the Plaintiff has not indicated in his replying affidavit what loss he will incur should the Court grant stay orders pending appeal and it is only fair and just that the orders sought in the instant application be granted to preserve the subject matter pending the outcome of the appeal.
18. That, from the replying affidavit, the Respondent deposes that he is an electrical wireman and has attached a letter which he alleges to be an appointment letter yet the same can clearly be seen is a recommendation letter hence it is impossible for the Court to ascertain if at all the Plaintiff was and or is in any form of employment capable of refunding monies should the appeal succeed.
19. That the second condition required of an Applicant seeking an order of stay of execution is to make the application without unreasonable delay. Reference is made to, the Court of Appeal sitting in Meru in Civil Appeal No. 45 of 2015 *M’ndaka Mbiuki v James Mbaabu Mugwiria* [2016] EKLR held that,

“ This ground is normally easy to determine and is usually straight forward. Although there is no exact measure as to what amounts to unreasonable delay, it will not be difficult to discern



inordinate delay when it occurs. It must be such delay that goes beyond acceptable limits given the nature of the act to be performed."

20. That, the instant application has been brought without unreasonable delay. The judgment was delivered on 24th August, 2023 herein wherein the Defendants were granted 30 days stay of execution of the judgment/decre. Immediately before the stay period lapsed, the Defendant filed an application for stay in the Lower Court on 22nd September, 2023 however the trial Court declined granting interim orders of stay prompting the Defendants to file the instant application.
21. It is therefore the Applicants submission that this application has been filed in Court in good time and meets the second threshold required for grant of stay of execution.
22. That, the third condition required of an Applicant seeking an order of stay of execution is to provide such security as the Court orders for the due performance of such decree or order as may ultimately be binding upon an Applicant.
23. That the Applicants are willing and ready to provide security as the Court may direct for the due performance of the decree as may ultimately be binding to them. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, the Court stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.....”.
24. It is the Applicant’s submission that this Honorable Court has the unfettered discretion to issue any orders to preserve the subject matter pending the hearing and determination of the appeal and the Applicants herein are ready and willing to provide such security as the Court may direct. The Applicants propose that the said security be deposited in an interest joint account in the name of both advocates.
25. The Applicants Submit that, this Court has discretion which should be exercised in such a way as not to prevent an appeal. There is no other overwhelming hindrance, therefore stay must be granted so that an appeal may not be rendered nugatory should the Appeal Court reverse the trial Court's decision. A Court should not refuse a stay if there are good grounds for granting it as elaborated in these submissions. The Applicants have indeed tabled valid grounds for grant of orders sought herein having met all the conditions for grant of stay pending appeal. The Court in order to grant stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case are that the Applicants risks execution and may not be in a position to recover the amount from the Plaintiff should the appeal succeed and that the Applicant has an undoubted right of appeal.
26. The Applicants urge the Court to find that the criteria enumerated by the case of *Butt -Vs- Rent Restriction Tribunal* (Supra) has herein been met by the Applicants and it is the Defendants prayer that the orders for stay of execution pending appeal do issue. That, it is in light of the foregoing submissions and in the interest of justice that the orders sought in the instant application are granted. Moreover, the Applicants have filed an appeal with high chances of success and therefore do pray that this Honorable Court do grant stay of execution pending the hearing and determination of the appeal.
27. It is the Applicants submissions in conclusion that, where such as in the instant case, an appeal that is not frivolous and that has high chances of success is pending before Court then it is desirable that substratum of that appeal is preserved. It must always be borne in mind that the right of appeal is a



constitutional right that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal a position held in the case of BBM HC Msc Appl No. 42 of 2001 James Wangalwa & Another v Agnes Naliaka Cheseto.

Respondent's Case

28. The Application is opposed vide Respondent's replying affidavit sworn on 6th October, 2023. The only issue the Respondent contests in the application is security i.e. conditions for stay pending the hearing and determination of the appeal and hence his submissions filed on 24th November 2023 shall be restricted to the same.

29. Firstly, that the appropriateness of security pending appeal is a matter purely at the discretion of the Court and it is not bound by any security proposed by a party. (See the case of Nyamwaya v Ondera (Civil Appeal E071 of 2021) [2022] KEHC 619 (KLR) (9 May 2022) (Ruling).

30. Secondly, that the Court's discretion has to be exercised within the requisite parameters while taking into consideration the overriding objective in civil litigation as was held in the case of Samuel Ndungu Mukunya v Nation Media Group Limited & another [2016] eKLR:-

“A stay pending appeal is a discretionary remedy and in dealing with an application like the one before the Court, its discretion is wide but at the same time such discretion should be exercised judiciously. With the overriding objective in civil litigation, the Court is now enjoined to take into account substantive and proportionate justice, act fairly and balance the relative interests of all the parties... Some of the principal aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the Courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing.”

31. Thirdly, that security ordered by the Court must accord with the principle of proportionality and the need to create a level playing ground for all the parties by reconciling and striking a balance between their respective and competing interests and rights as was held in the case of Mutiso & another v Ngoma (Civil Appeal E109 of 2021) [2021] KEHC 344 (KLR)(14 December 2021) (Ruling): -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation.”

32. Further reliance is placed on the case of Machira t/a Machira & Co Advocates v EastAfrican Standard [2002] eKLR:-

“In the exercise of the Court's discretion in a judicial fashion, the Court cannot legitimately look at a matter on one assumption alone, favoring one party and ignoring the other party. In applications of this nature there is no rule of law or practice or sound principle requiring a Court to start and proceed on initial presumption that the appeal or intended appeal shall succeed and so prima facie the applicant is the preferred party. There would be no



sound principle to back up such a presumption. The matter must remain in the discretion of the Court always exercised judicially, i.e. circumspectly and considering all the material circumstances of the case and excluding everything that is extraneous, and never shutting one's eyes to the interests of any party. As the appellant or intended appellant exercises his right of appeal nothing ought to be done which will jeopardize his interests in case his appeal is successful, or which may be a futile endeavor trying to take further steps; but on the reverse side of things, from the point of view of the party who is, at least for the time being, successful to a point, nothing should be done to unduly delay or deny expeditious justice to him in the event that the appeal or intended appeal in question fails. In bleak economic times, a weakened currency might change the matrix in hours or overnight, so that delayed further proceedings as appeal or intended appeal is awaited (which may well be unsuccessful) may have adverse effects so that assessment of damages after a failed appeal may likewise be an exercise in futility and costs a poor solace. 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.”

33. And the case of Peter Osoro Omagwa & another v Bathseba Mwangi Maikini [2021] eKLR): -

“As a principle a successful party is entitled to the fruits of his judgement. That must however be balanced against the applicant's right to appeal...no party should be worse off by virtue of an order of stay of execution given the rights of the parties on the one hand to pursue their appeal and on the other hand to benefit from the fruits of their judgment.”

34. Fourthly, the Court when considering the appropriateness of security must also consider special circumstances obtaining in the matter at hand as was held in the case of Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR): -

“The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.”

35. The special circumstances and unique requirements that a Court considers are among others the subject matter of the Appeal. Where the subject matter is Monetary Decree like in this case, the security must be one which shall achieve due performance of the decree and be binding on the Appellant in the sense that if the Appellant fails to succeed on appeal, the Respondent should just have the decretal sum availed to him without being subjected to further Court proceedings be it execution, enforcement/ realization of Security or otherwise as was held in the case of Safaricom Limited & another [Civil Appeal E174 of 2021] 2022] KEHC 3141 (KLR) (5 May 2022) (Ruling):

“The security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words "ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost.”

36. That it is the presumption of law here. Therefore, the ultimate decree envisaged under Order 42 Rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom... In this regard and in relation to the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it should be seen from the point of view that a debt is already owed and due for payment to the successful litigant and the security must therefore be such that if the Appellant fails to succeed on appeal, there could be no



return to status quo on the part of the plaintiff that will necessitate him to initiate further recovery proceedings where the judgement involves a money decree. In such cases, the security offered must be that which the Court will just order to be released to the Respondent.

37. That, the other special circumstances that a Court should consider is the likeliness or unlikeliness of the Respondent getting any award following the Appeal. Where it is likely that the Respondent will get some award after the Appeal, the Court will order some money be paid to him notwithstanding the fact that the Appeal is on both liability and quantum as was held in the case of Harrison Mbaabu Marete v Janet Nkirote Muthomi [2021] eKLR :-

“The Memorandum of Appeal annexed to the Applicant’s supporting affidavit reveals that the intended appeal seeks to challenge both quantum and liability. The Applicant has indicated his willingness to offer security for the due performance of the decree, only that the same should be reasonable so as not to stifle access to justice. The Respondent has asked that half of the amount be released to her and to have the other half be deposited in a joint interest earning account. This Court considers that despite the likelihood of suffering substantial loss, it is unlikely that the Respondent may not get any award following the appeal. It would thus be fair to order for some amount to be paid and the rest to be deposited in a joint interest earning account...The Applicant shall within Thirty (30) days’ pay to the Respondent the sum of Ksh 380, 600/= being 1/3 of the decretal sum within the said thirty (30) days in ii) above, the Applicant shall deposit the balance of the decretal Sum being Ksh.761,200/ in a joint interest earning account in names of the respective Advocates for the parties.”

38. See also the case of Silpak Industries Limited v Nicholas Muthoka Musyoka [2017] eKLR:-

“On substantial loss that may occur if the stay is not granted, it must be considered that just as the appellant wishes to challenge both liability and quantum, as set out in the memorandum of appeal, there is legitimate expectation that the respondent should enjoy the fruits of his judgment. The fear of the respondent not being able to refund the decretal sum if the appeal succeeds may be well founded but at the same time, it must be considered that the entire judgement may not be set aside by the appellate Court. Indeed. in earlier submissions, the appellant had argued that an award of Kshs. 500.000/- would adequately compensate the respondent for the injuries sustained. The appellant is ready to comply with any conditions that may be set by the Court. Balancing the interests of both parties, I allow the application on the following terms; the appellant will pay the respondent a sum of Kshs. 500,000/= out of decretal sum and the balance thereof shall be deposited in an interest earning account in the joint names of the advocates on record. The said payment to the respondent and deposit shall be done within 30 days from the date of this ruling.”

39. Lastly, the other special circumstances that a Court should consider is the nature and extent of the Appeal. Therefore, and where the Appeal is on quantum only, Courts have generally held that it will not be prejudicial to the Appellant if the Respondent is paid some money irrespective of the Respondent’s financial capability as was held in the case of Julius Thuraira Muriungi v Grace Kathure [2021] eKLR): -

This Court observes that;

“the intended appeal being one on quantum following a fatal accident, the Appellant will inevitably have to pay the Respondent some amount of money and payment to the



Respondent of some amount of money will not entirely be prejudicial. Accordingly, this Court...grants an order for stay of execution ...The Applicant shall within Thirty (30) days' pay to the Respondent the sum of Kshs.1,063, 000/= being a half of the decretal sum”.

40. See also the case of Leon Ojiambo Oiiian & another v Lilian Mushele Wafula & another [2018] eKLR:-

“In this case, the applicants have not disclosed their grounds for believing that the Respondents would not be able to refund the decretal sum herein. In my view it is not sufficient to simply make a bare averment that the Respondent will not be able to refund. As far as the Court is concerned the Respondent is the successful party and has a right to enjoy the fruits of his judgement unless the circumstances dictate otherwise...In this case however, the decree holder is an estate of the deceased. The Respondent have disclosed in the replying affidavit that the refusal to grant the stay will leave the estate of the deceased in a precarious situation as the same comprise a young family with school going children which family lost a breadwinner. In effect the Respondents are saying that the estate requires to funds in question for its upkeep. Clearly therefore in the event that the Applicants succeed in the appeal, recovery of the sum paid may be difficult particularly as the Respondents have not disclosed the estate's source of income. I have however perused the intended grounds of appeal and it would seem that the applicants are more aggrieved by the extent of liability and quantum of damages as opposed to the entire liability. In the premises and subject to the appeal being filed and served within the aforesaid 10 days, there will be a stay of execution pending the said appeal on condition that the Applicants remit to the Respondent half of the decretal sum and deposits the other half in a joint interest earning account in the names of the advocates for the parties herein within 30 days from the date hereof”.

41. It is the Respondent's humble view that, the Applicants' proposed security by way of depositing the entire Decretal sum in a joint account in the name of advocates for both parties is not appropriate/ sufficient for the following reasons among others: -

42. Firstly, depositing the entire Decretal sum in a joint account in the name of advocates for both parties herein does not in any way balance interests of both parties herein hence does not accord with the principle of proportionality nor create a level playing field for all the parties as it will just leave the Respondent herein in the same condition and position that he was in during the hearing of this case and does not in any way recognize the fact that he now has a judgment in his favour being the successful party herein which makes it unsuitable as submitted herein-above.

43. Secondly, the Applicants have failed to prove that the Respondent is not a person of any means more so in view of the Lower Court's finding that the Respondent is an electrician and therefore a person of means as a result of which he was awarded damages for loss of earnings/income as deposed to at Paragraphs 5 & 6 of the Replying Affidavit. In our humble view, the Appellants have just made the aforesaid bare allegations in their supporting affidavit without providing any evidence/materials in support of their contention that the Respondent is of unknown financial means and hence they have not established a prima facie case to warrant shifting of burden to the Respondent to prove otherwise as was held in the case of Antoine Ndiaye v African Virtual University [2015] eKLR:-

“The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must proof...It is not, therefore, enough for a party to just allege as is the case here ... He must prove specific details and particulars. This legal burden does not shift to the Respondent to prove he is possessed of means to make a refund except,



however, once the Applicant has discharged his legal burden and has adduced such prima facie evidence such that the Respondent will fail without calling evidence, the law says that evidential burden has been created on the Respondent. And it is only where financial limitation or something of sort is established that the evidential burden is created on the shoulders of the Respondent, and he may be called upon to furnish an affidavit of means.”

44. See also the case of *Delina General Enterprises Limited v Monica Kilonzo Nzuki (Suing as the legal representative of the estate of Elizabeth Mutheu Paul (Deceased))* [2018] :

“In my view it is not sufficient to simply make a bare averment that the Respondent will not be able to refund. As far as the Court is concerned the Respondent is the successful party and has a right to enjoy the fruits of his judgment unless the circumstances dictat otherwise. It is upon the party seeking to deprive the successful party from enjoying his fruits of judgment that ought to prove that those circumstances do exist. That threshold cannot be said to have been attained by mere bare allegations devoid of sources of information or grounds of belief...What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man of lesser means. that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success.”

45. And lastly the case of *James Wanganga v Wilberforce Situma Mulati* [2021] eKLR where the Court held that;

“in all fairness and unless a Respondent has been adjudged a pauper, the Court must ensure the security balances rights. of both parties in that the filed Appeal is not rendered nugatory and the successful party enjoys the fruits of the judgment.”

46. In the Respondent's humble view, the failure by the Applicants to prove that the Respondent is not a person of any means deals a fatal blow to their proposal for security by way of depositing the entire Decretal sum in a joint account in the name of advocates for both parties herein or any other form that will keep away the entire decretal sum herein away from the Respondent herein as was held in case of *Joseph Mwinzi Mututa v Jane Wanza Mwangangi* [2008] eKLR: -

“A party seeking a stay of execution must prove what substantial loss it may suffer if the order is not granted. That is the cornerstone of any such application and in the instant case, the only issue raised in that regard is that the Respondent may be unable to pay the decretal sum... The Applicant has clearly failed that test because the basis for the statement that the Respondents is unable to repay the decretal sum is completely lacking... It is not for her to prove her means in any event, but for the Applicant to prove her lack of means and having failed to do so, his Application crumbles. It matters not that he filed it timeously and he is willing to deposit security. Once the cornerstone is removed, the domino effect sets in.”

47. The Respondent urges the Court to note that, the Appeal herein is on Quantum only as Court's determination on Liability has not been appealed against as deposed at Paragraph 5 of the Replying Affidavit and also in the memorandum of appearance herein. As such and given that it is not in doubt that the Respondent will get some compensation either way even as can be gleaned from the Lower Court's judgement and both parties submissions annexed to the Replying affidavit as HKK -2, it is only fair and in the interest of justice that the Respondent be paid some amount pending the hearing of this Appeal which makes the Applicants proposal by way of depositing the entire Decretal sum in



a joint account in the name of advocates for both parties herein or any other form that will keep away the entire decretal sum herein away from the Respondent herein unsuitable.

48. Most importantly, we urge the Court to note that the averments at Paragraph 5, 6 &7 of the Respondent's replying affidavit that the Appeal herein has minimal/nil chances of Success and he is a person of means remains largely uncontroverted in absence of a further affidavit by the Applicant controverting the same as was held in the case of *Peris Nkuene & 2 Others v County Council Of Meru Central* [2011] eKLR:-

“The applicants did not file nor did they seek leave to file a supplementary affidavit to controvert what was stated in that replying affidavit. That being so, the statements that are made in that replying affidavit can be taken to be the correct position.”

49. As such, the Respondent urges the Court to disallow security by way of depositing the entire Decretal Sum in a joint account in the name of advocates for both parties herein and direct that half decretal sum be paid to the Respondent and the remaining half be deposited in a joint interest earning account in the name of advocates for both parties herein. This form of security in our humble view balances interest and rights of all parties herein and hence it is the most appropriate and rely on the case of *Peter Ndirangu Waweru v Dismas Odoyo Otundoh* [2021] eKLR:

“It would not be in the interests of justice also to keep the successful respondent away from the fruits of his judgment. He sustained injuries and was a successful litigant as far as liability is concerned, and while the applicant may contest the quantum, they still retain liability and that in my view is a good reason for part of the award to be released to the respondent through his counsel...”

50. The case of *Nancy Nduta Kiarie & another v Roseline Kimursoi* [2019] eKLR:-

“I also take into consideration the fact that the appeal is not against liability but quantum that is alleged to be excessive. Therefore, I grant stay of execution on condition that the Applicants pay the respondent Kshs. 200, 000/= being part half of the decretal sum and the outstanding balance shall be deposited in a joint earning account to be held by both advocates of the parties...”

51. The case of *Nyamwaya v Ondera* (Civil Appeal E071 of 2021) [2022] KEHC 619 (KLR) (9 May 2022) (Ruling):-

“In my considered view, one factor which the Court is obliged to take into account when it is called upon to grant an order for stay of execution pending the determination of an appeal, is whether the Appellant was challenging only the quantum or also the findings on liability. Where the appeal was only in relation to the quantum of damages awarded, I find that it would ordinarily be in the interest of justice, (to both the parties), to have the Appellant pay to the Respondent a fair percentage of the decretal amount.”

52. And lastly the afore cited case of *Samuel Ndungu Mukunya v Nation Media Group Limited & another* [2016] eKLR:-

“The only quarrel the Applicants have, with the judgment is on quantum of damages which it submits is inordinately high. It has not been submitted the Applicants have a problem with liability...This Court is alive to the fact that, a stay pending appeal is a discretionary



remedy and in dealing with an application like the one before the Court, its discretion is wide but at the same time such discretion should be exercised judiciously.

With the overriding objective in civil litigation, the Court is now enjoined to take into account substantive and proportionate justice, act fairly and balance the relative interests of all the parties... The approach taken by the Court is the recognition that both parties have rights; and, neither the right of the respondent to his judgment nor the Applicant's to its appeal is the lesser. However, the appeal relates to reversal of the judgment of the Court and the Court should strike a balance that will hold the parties at almost a symmetrical bound. In balancing these rights, the Court is minded of the role of security required under Order 42 Rule 6 of the Civil Procedure Rules. Accordingly, in the light of my finding above, I will grant a stay of execution pending appeal on condition that; the Applicant pays one half of the decretal sum to the respondents and deposit the other half in an interest earning account in the names of counsels for the parties....”

53. Courts shall always presume validity of the Trial Court Judgment and as such pending hearing and determination of the Appeal, the Respondent judgment cannot be impeached under the guise of seeking stay against execution orders.
54. I have considered this Appeal is a quantum only Appeal and thus in exercise of my discretion having in mind all principles for grant of stay of execution of judgment and decree pending hearing of the Appeal to find the Application to be of Merit and allow the same on the following terms;
 - a. That, the Appellants shall pay the Respondent, 50% of Decretal sum, within thirty (30) Days from today.
 - b. That, the Appellants shall deposit, 50% of the Decretal sum, in an interest-earning bank account in the joint names of the Advocate for the Appellants and Advocate for the Respondent, within thirty (30) Days from today.
 - c. An Order of Stay of execution of the judgment/Decree issued in Nakuru CMCC No. E342 of 2022 on 24th August 2023 pending the hearing and determination of this Appeal.
 - d. The Appellant shall set down the Appeal for directions within the next sixty (60) Days from today;
 - e. Default and/or failure to comply with a) and b) above by the Appellant shall automatically result to the vacation of the stay against execution of Judgment/Decree Order(s);
 - f. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIA TEAMS PLATFORM AT NAKURU

ON THIS DAY OF 26TH DAY OF MARCH, 2024.

S. MOHOCHI

JUDGE

