REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 226 of 2003

FIROZE NURALI HIRJI (Suing through his duly authorized

Attorney Sharok Kher Mohamed Ali Hirji)…….…....……PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED…....…1ST DEFENDANT

WATTS ENTERPRISES LIMITED……..…2ND DEFENDANT

RULING

Before me is a Notice of Motion dated 12th January 2011 expressed to be brought under the provisions of Order 42 rule 6(1),(2),(3) and (4), Order 51 rule 1 of the Civil Procedure Rules, section 1A,1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all enabling provisions of the law seeking *inter alia* the following orders:

1. **The Application herein be certified urgent and be heard *ex parte* hearing in the first instance.**

2. **There be a stay the execution of the decision of this Honourable court delivered on the 29th November 2010 and any consequential orders that may be issued including any warrants of attachment pending the hearing and determination of this application.**

3. **There be a stay the execution of the decision of this Honourable court delivered on the 29th November 2010 and any consequential orders that may be issued including any warrants of attachment pending the hearing and determination of the intended appeal from High Court civil suit No. 226 of 2003.**

3. **The costs of this application be provided for**

The application is premised on the following grounds:

1. The defendants have given notice of their intention to appeal from the judgement delivered on 29th November 2010 in this suit and

2. The amount awarded in the judgement is colossal and or substantial and there is very imminent risk that the plaintiff will execute for the said sum which is in excess of Kshs. 60,000,000.00/= (sixty million shillings) yet it is highly unlikely that the plaintiff has the ability to refund the amount in the event that the appeal succeeds.

3. If the defendant's appeal is successful the money would be out of the reach of the court and the defendants since the plaintiff has neither known assets that can be attached nor source of income capable of repaying the money thus rendering the appeal nugatory and merely academic.

4. The plaintiff has had the sale of the suit property declared null and void and at the same time has been awarded a colossal sum in damages for a wrongful sale which is contrary to the established law and practice in our judicial system.

5. In view of the huge sum awarded the defendants will suffer substantial loss if the money is paid out to the plaintiff as the said sums is depositors' funds.

6. The application has been presented by the defendants to court without unreasonable delay and no prejudice will be suffered by the plaintiff if the application is granted as prayed.

7. The defendants are ready and willing to provide such security for the due performance of the decree as the court may order.

The application is supported by the affidavit of **Joseph Kania,** the 1st defendant's company secretary and head of legal on 12th January 2011. According to the deponent, on 29th November 2010 after hearing the parties, the Court delivered a judgement in which it awarded the plaintiff Kshs. 20,434,226.54 with interest at the rate of 26% per annum from 19th January 2000. At the date of the delivery thereof the defendants applied for and were granted stay of execution for 45 days. Being aggrieved with the said decision the defendants instructed their advocates to appeal against the same and a Notice of Appeal was duly filed and served and copies of the proceedings requested. Since the plaintiff is in the process of obtaining the decree if the execution thereof which is imminent is not stayed pending the hearing of the appeal, the latter if successful will be rendered nugatory and an academic exercise. The defendants hence stand to suffer substantial loss as the award is colossal and is likely to be out of reach of the court since the plaintiff proceeded by way of power of attorney and is likely to pay out the money while at the same time the plaintiff was unable to meet its financial obligations to the 1st defendant for a lesser sum, a sign that if the money is paid over to him he will be unable to repay the same if the appeal succeeds. Further the plaintiff has no known assets that can be sold to recover the decretal sum if the appeal succeeds. It is the deponent's contention that in the circumstances of this case, the application has not been brought with inordinate delay. It is further deposed that the defendants are ready and willing to offer security as may be ordered by the Court as the defendant is a reputable bank with sound financial base capable of paying the decretal amount if the appeal is not successful hence it is just, fair and equitable that the execution and judgement be stayed.

In opposition to the application, **Sharok Kher Mohamed Ali Hirji**, the plaintiff's attorney swore an affidavit on 25th January 2011 in which she deposed that the court in considering the application ought to take into account the fact that this suit was filed 8 years ago and that the cause of action was the unlawful sale by the defendants of a property valued for over Kshs. 20 million at approximately Kshs. 6 million. Since this application and the suit is a dispute governed by the Civil Procedure Act, it is deposed that the overriding objective of the Civil Procedure Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of disputes governed thereby. As a result of the deprivation of the plaintiff of his property which was attracting monthly rent in the sum of Kshs 150,000.00 the plaintiff has remained out of his property which was his critical source of income for the last decade. As a result of the sale of the suit property the plaintiff, it is deposed, suffered High Blood pressure which deteriorated his health hence requires the fruits of the judgement to enable him recover from the said shock and secure medication. The justice of this case, it is deposed, demands that the plaintiff should not be kept at bay from his judgement any longer. Having taken the trial process by not filing submissions, the deponent contends the defendants should not be heard to complain about the outcome thereof. Having found that the sale was unlawful, and since the property had changed hands the court instead of restoring the property to the plaintiff awarded compensation instead. In the deponent's view the intended appeal stands no chance of success on the merits. As the plaintiff has been kept out of the fruits of his house for the last decade, it is deposed that to contend that the plaintiff will not suffer

from any prejudice is presumptuous and insensitive. It is however deposed that should the Court be minded to grant he application, it should be on condition that the defendants settle a substantial fraction of the decretal amount, being the principle sum and attendant interest so far within a limited set period. Despite the consideration of the defendants' financial ability to pay the decretal sum the court is urged to consider the prejudice likely to be occasioned to the plaintiff by the delay, the hopelessness of the intended appeal as well as the insensitivity of the defendants' conduct in considering the application.

The defendants filed a supplementary affidavit sworn by **Joseph Kania** on 15th February 2011 in which the deponent averred that on being served with the replying affidavit he sought confirmation of the authenticity of the medical report annexed to the replying affidavit from the medical facility from which it purportedly emanated and the said facility denied that it was the source thereof and stated that **Dr B W Wankya** passed away on 15th July 2010 hence could not have signed the said report on 17th December 2010. The 1st defendant thereafter lodged a complaint with the Criminal Investigations Department for the investigation of the same. In the deponent's view, the plaintiff who is employing all means whether illegal or not is unlikely to repay the decretal sum. Further, it has not been demonstrated in the replying affidavit that the respondent is capable of refunding the said decretal sum in the event of success of the appeal and thus it would be detrimental to the interest of the applicant to pay the any money to the respondent. While doubting the authenticity of the power of attorney it is deposed that in a similar matter in which the a similar power of attorney was held the done of the power of attorney herein was unable to repay the loan advanced to her by Southern Credit Corporation Limited. Since the whereabouts of the donor of the power of attorney herein is unknown and is clearly incapable of refunding the decretal sum herein, in the event that the appeal succeeds the funds will not be returned to the applicant. From the foregoing it is deposed that the respondent is neither honest neither does she possess the ability to repay the decretal sum. Since the Court declared the public auction unlawful, invalid, null and void and proceed to nullify the sale and award damages in the sum of Kshs. 20 million, the plaintiff was in effect compensated twice for the same cause of action. There was a supplementary affidavit sworn by **P M Gichuru**, the plaintiff's advocate on 23rd February 201 whose effect was majorly limited to annexing a copy of the draft memorandum of appeal.

By a ruling dated 19th October 2011, I allowed the cross-examination of the deponent of the replying affidavit on the contents of the said affidavit which cross-examination eventually took place on 31st January 2012. On being cross-examined by **Mr Muchiri**, learned counsel for the defendants, **Sharok Kher Mohamed** admitted that this is not her first matter in court. She stated that **Firoze Hirji**, the plaintiff, is her former husband but though they went their separate ways they have been in touch since they have properties in their joint names. She said that she is authorized to file this suit and that she received the medical report in her postal address but that no-one requested for the same. She said that the plaintiff has never attended **Barbeton Hospital** although there was a **Doctor Wankya** who was attending to him. She, however, was unaware that the said doctor had died. According to her the plaintiff is in Tanzania and is very sick and was last in the country in 2007. Had she known that the doctor had died she would not have brought the letter to the court. She, however, accepted to present herself to the Criminal Investigations Department. In cross-examination by **Mr Khalwale**, her learned counsel, she stated that the documents was not addressed to her and that this was not the first document that received from the said institution. She stated that at the trial this was not an issue and said that she has never been asked to go and see the Criminal Investigation Officers.

The application was prosecuted by way of written submissions which were highlighted by counsel. In the defendants' view they have satisfied the provisions of Order 42 rule 6 of the Civil Procedure Rules. With respect to substantial loss, they submit that the decretal sum is in excess of Kshs. 20 million. In fact in his oral highlights, **Mr Muchiri** informed the Court that according to the defendant the decretal sum is now in the region of Kshs. 60 million while the plaintiff claims Kshs. 400 million. In the present economic terms, this is a colossal amount and if lumped on the 1st defendant would cripple it since it would have to pay the same from the depositors' funds. In the defendants' opinion if the said sum is paid over, it would most likely be unable to recover the same in the event that their appeal which they contend has high chances of success succeeds. It is further submitted that the plaintiff, who it is contended is sickly has not shown that he is in a position to refund the said sum hence the defendants may be subjected to another

long battle in an attempt to recover the same and reliance is placed on **Nation Media Group vs. Ali Chirau Mwakwere Civil Application No. Nai. 353 of 2009**. To support their contention that the plaintiff will be unable to refund the sum, the court is referred to the allegation that the plaintiff was unable to pay the loan advanced to him by Southern Credit Bank as well as the loan the subject of this suit. It is further submitted that the judgement was delivered on 29th November 2010, the formal application was filed on 18th January 2011 less than two months and in between there was December vacation hence there was no inordinate delay in filing the application. With respect to security, the defendants submit that they are willing to furnish a Bank Guarantee. The contention that the plaintiff requires the money to meet his medical expenses, it is contended, is a red herring in light of the fact that the authenticity of the medical report is in doubt. Relying on **Gitahi & Another Warugongo [1988] KLR 621**, it is submitted that the form of security is irrelevant as long as it is adequate.

On behalf of the plaintiff, it was submitted that the decretal sum is now in excess of Kshs. 400 million. Further the defendants have not todate more than 1 year and 5 months filed the appeal. The plaintiff and his family have in the meantime remained without their house or any compensation as a result of the illegal, unlawful and immoral actions of the defendants and continue to wallow in great suffering, deprivation and untold misery while the defendants continue to engage them in costly and time-consuming litigation while blocking them from the fruits of their judgement. While narrating what in the plaintiff's view are the said illegal and cruel acts, the court is invited to consider the manner in which the defendants have acted and conducted themselves. Relying on **Equatorial Commercial Bank Limited & 2 Others vs. Retreat Villas Limited [2006] eKLR**, it is submitted that if the superior court is minded to grant an order for stay of execution, the Court must order the successful applicants to provide security since the jurisdiction of the High Court, unlike that of the Court of Appeal is fettered. Citing **Andrew Leteipa Sunkuli & Another vs. Southern Credit Banking Corporation [2006] eKLR**, it is submitted that a litigant, if successful should not be deprived of the fruits of the judgement in his favour without just cause. The right of appeal, it is submitted based on **Port Reitz Maternity vs. James Karanga Kabi HCCA No. 63 of 1997**, must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgement delivered in his favour and that there must be just cause for depriving him of that right. In the plaintiff's submissions, for an applicant to succeed he must satisfy 5 and not 3 conditions as alleged by the applicants and these are: (1) show sufficient cause; (2) show that substantial loss may result unless the order for stay is made; (3) make the application without unreasonable delay; (4) give such security as the Court orders; and (5) show existence of a just cause sufficient enough to warrant depriving a successful litigant of the fruits of his judgement. On sufficient cause, it is submitted that no such cause has been shown in light of the fact that the defendant have deprived the plaintiff of his home and property for close to 10 years. With respect to substantial loss, the plaintiff relies on **Kenya Shell Limited vs. Kibiru & Another [1986] KLR 410** and states that in an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. On delay it is submitted that the application was made after 2 months and over two years later no appeal has been filed. On security the plaintiff contend that since the security the applicants intend to give is a Bank Guarantee issued by themselves, that does not amount to tangible security. On the authority of **Carter & Sons Ltd vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997**, it is submitted that the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay since a party is expected to prefer an appeal only when there are strong reasons for doing so. In conclusion, it is the plaintiff's view that if the Court is inclined to grant the stay it should do so on condition that the defendant settles and pays a substantial fraction of at least Kshs. 50,000,000.00 and interest thereon within 30 days. In highlighting the submissions, however, **Mr Taib**, learned counsel for the plaintiff submitted that if the court is minded to grant the stay sought, it should be on condition that the total decretal amount plus interest is deposited in a joint fixed interest earning account in the names of counsel for the defendant and the plaintiff and that the decree holder be permitted to access at least 25% of the amount immediately to defray legal costs and expenses as a second option.

Having carefully considered the application, the affidavits filed, submissions made as well as authorities cited by counsel for both parties this is the view I form of the matter. **Order 42 rule 6(1) and (2)** of the Civil Procedure Rules provides as follows:

"6.(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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."

From the foregoing I generally agree with the respondent that the conditions for the grant of stay of execution pending appeal are as enumerated by the respondent. I am however not convinced that the chances of success of the intended appeal ought to take centre stage in an application for stay of execution by the High Court of a decision of the same Court pending an intended appeal to the Court of Appeal. Whereas a Court is perfectly entitled to grant an injunction pending an intended appeal to the Court of appeal against a decision of the same court dismissing an application for injunction, in recognition of the fact that the appellate court do overturn such decisions, the same cannot be true when it comes to the issue of the prospects of success of an intended appeal where a matter has been heard on merits. To ask the court to determine an application for stay of its orders based on the chances of success of an intended appeal would amount to asking the same court to interrogate its decision an action which in my view is not contemplated under Order 42 rule 6 of the Civil Procedure Rules. The Court of Appeal, however, being a Court of superior jurisdiction is perfectly entitled, in an application for stay of execution of a decision of the High Court pending an appeal to that court to consider the chances of success of the intended appeal. Similarly, it is my view that where the High Court is hearing an application for stay of execution of a decision of a subordinate court pending an appeal to the High Court, the latter is perfectly entitled to consider the chances of success of the intended appeal.

However, in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is nolonger 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. Since the enactment of the said provisions the Court of Appeal has made pronouncements on the same. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA** on 20/11/09 held *inter alia* that:

"the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.".

Where, therefore, there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail and although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case. See **Kenya Commercial Bank Limited Vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010.**

As was stated by the Court of Appeal in **Kenya Commercial Finance Company Limited vs. Richard**

Akwesera Onditi Civil Application No. Nai. 329 of 2009, the advantage of the CPR over the previous rules is that the court's powers are much broader than they were and i*n applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances.*

In **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 Of 2010, Githinji, Visram & Nyamu, JJA** on 24/03/10)held *inter alia* that:

"All provisions and rules in the relevant Acts must be "O2" compliant because they exists for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. If improperly invoked, the "O2 principle" could easily become an unruly horse and therefore while the enactment of the "double O" principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained".

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.

The first issue for determination is whether the applicant stands to suffer substantial loss if the Court declines to grant the stay sought. According to the defendants the amount in issue is colossal. In their estimation, the sum now stands at Kshs 60 million. According to the plaintiff, the sum now stands at Kshs. 400 million. In **Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005** the Court of Appeal citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. In the said case the amount in question was Kshs. 4,000,000.00.

Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of his judgement. **See Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410; Mukuma vs. Abuoga [1988] KLR 645.**

As was stated by **Kuloba, J** in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:**

"**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".

It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* should remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another** (supra).

Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant 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 is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. 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. **See Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

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 this case it is contended that the respondent's whereabouts are unknown; that in at least one matter he was unable to repay his loan. In the replying affidavit, this issue that is so central to an application of this nature has not been controverted at all. Whereas, the law is not that where a poor man is given a high award, a stay of execution ought to be granted as a matter of course, the *bona fides* of the parties before the court is an important factor to be taken into account and the court is entitled to consider what else a party to the proceedings has stated on oath which is not true. The law, as I understand it, is that it is not just to deny a successful party the benefit of judgement because he is poor since the Court does not make a practise of depriving a successful litigant of the fruits of his litigation and locking up funds to which *prima facie* he is entitled pending appeal. Financial ability of a decree holder, therefore, is solely not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income. See **Stephen Wanjohi vs. Central Glass Industries Ltd. NairobiHCCC No. 6726 of 1991.**

In this case, as evidence that the plaintiff is in dire need of financial assistance, the deponent to the replying affidavit relied on a medical document which on the face of it looks anything but genuine. Its source could not be vouchsafed even by the deponent herself. That, in my view, does not augur well for a party who expects the court to exercise its discretion in his favour. It in fact smacks of dishonesty and lack of candour.

Taking into account the amount involved even by the respondent's own version, the fact that the plaintiff

whereabouts cannot be ascertained with precision as well as the fact that the *donee* of the power of attorney to whom the money is likely to be paid has stated on oath that they are separated coupled with lack of a positive averment that the plaintiff is in apposition to repay the decretal sum if paid over to him and not least the respondent's conduct in exhibiting a document which on the face of it was executed by a person who at the time of the alleged execution was nolonger a resident of this world, I am satisfied that the defendants stand to suffer substantial loss unless the stay sought is granted.

With respect to the delay, I am satisfied that taking into account the fact that there was an intervening Christmas, I am not prepared that the delay was so inordinate as to deprive the applicants of the favourable exercise of discretion. On the delay in lodging the appeal, the respondent is not altogether without recourse if the applicants are lethargic in lodging the intended appeal within the prescribed period.

The next issue for consideration is the issue of security. It is true that under Order 42 rule 6 aforesaid, the applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. However, as already stated above the Court must similarly consider the overriding objective and balance the interest of the parties to the suit. The law is that where the applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. The issue of adequacy of security was dealt with by the Court of Appeal in **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100** where the Court of Appeal expressed itself as follows:

"The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so…The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

Although the respondent has contended that the nature of security the applicants have proposed is no security at all since the Bank Guarantee they intend to give is their own, I have not seen such suggestion at all. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff but not necessarily making the stay illusory, I grant a stay of execution of the decree herein on condition that the defendants secures an unconditional Bank Guarantee in the sum of Kshs. Thirty Million Only (Kshs. 30,000,000.00) with a reputable Bank other than the 1st defendant within forty five (45) days. In default of compliance this application shall be deemed to have been dismissed with costs and the plaintiff will be at liberty to execute.

The costs of the application are awarded to the plaintiff.

Dated at Nairobi this 20th day of November 2012

G.V ODUNGA

JUDGE

Delivered in the presence of

Mr Odipo for Mr Taib for Plaintiff

Mr Murithi for Mr Musyoki for the Defendants