



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Atieno v Opondo (Civil Appeal E157 of 2023)  
[2023] KEHC 25943 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25943 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E157 OF 2023  
DKN MAGARE, J  
NOVEMBER 21, 2023**

**BETWEEN**

**KENNETH WENWA ATIENO ..... APPELLANT**

**AND**

**PAVINCE ANYANGO OPONDO ..... RESPONDENT**

**RULING**

1. This is the ruling over the Respondent's/Applicant's Notice of Motion application dated 31/7/2023 seeking stay of execution pending appeal. It is supported by the affidavit of Nannungi Mariat, advocates for the Applicant who indicates that she is properly instructed on this.
2. The application sought the following order: -
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That this honorable court be pleased a stay of execution and proceedings of the judgment (sic) from Mombasa civil suit number 1092 of 2020 pending the hearing and determination of the Appeal.
  - e. Costs abide the outcome of the Appeal.
3. The grounds relied are that unless the judgment and all other consequential orders emanating therefrom are stayed pending the hearing and determination of Appeal, the Appeal will be rendered nugatory. Further that applicant stated that they were likely to suffer a substantial loss if the judgment and orders and orders emanating therefrom are not stayed. It is their contention that the application



has been made without undue delay and no prejudice for which an award of costs cannot compensate if at all.

4. The application indicates that judgment was rendered by the court below, though not described as the magistrate's court as against the Appellant as follows: -
  - a. General Damages Ksh. 3,000,000/=.
  - b. Special damages Ksh. 38,950/=
  - c. Future medical (expenses) Ksh. 470,000/=
  - d. Costs of the lower court
5. The same was opposed by a Replying affidavit of the respondent who stated that the application is unmerited. She stated that in any case, if the court is inclined to allow the application, the Applicant should deposit a sum of Ksh 5,024,037/= in a joint account interest earning account. Where she got the figure from only God knows. I have seen a semblance of the decree annexed to the replying affidavit but the same is otiose as it does not have congruence with the judgment given in the lower court.
6. The figures must have been arrived out of surmise, conjecture, hyperbole or voodoo economics. The parties must at all times ensure that the formal decree aligns with the judgment of the court. Under section 2 of the Civil Procedure Rules, a decree is expressed as doth: -

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

  - (a) any adjudication from which an appeal lies as an appeal from an order; or
  - (b) any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;..”
7. It is therefore imperative to note that the judgment and decree cannot be two different things. One subsumes the other. Interest on general damages as a rule attracts interest from the date of judgment. I shall deal with this aspect in the main appeal. I digress.

### **Respondent's response and submissions**

8. The Respondents is of the view that the Applicant fully should allow her to enjoy the fruits of their judgment. I missed the point they were raising since the Applicant is entitled as of right to Appeal the judgment of the court below to the court of Appeal.
9. They stated that the intrinsic test for stay of execution was laid out in the case of Republic v Kenya Anti-Corruption Commission & 2 others [2009] eKLR, where the court stated as follows: -

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court, first, that the appeal, or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the



results or the success could be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he fails to demonstrate the other limb – See this Court’s decisions in the cases of *Reliance Bank Ltd vs Norlake Investments Ltd*. (2002) IEA 227 and *Githunguri vs Jimba Credit Corporation Ltd. & Others (No.2)* [1988] KLR 838. In *Githunguri’s Case*, this Court held, inter alia, as follows: -

“The general principles on which the Court would base its unfettered discretion were first, that the appeal should not be frivolous or the applicant must show that he has an arguable appeal and, secondly, that the Court should ensure that the appeal, if successful, should not be rendered nugatory.”

10. She submitted that there was no possibility of the appeal being rendered nugatory. This is said to have been explained in the case of *Reliance Bank Limited V Norlake Investments Ltd* [2002] 1 E.A. 227, this Court held that:

“..... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law.

11. To then an explanation that is trifling was succinctly dealt with in the case of *Permanent Secretary Ministry of Roads & another v Fleur Investments Limited* [2014] eKLR, where the court stated as doth: -

“While we agree with the respondent that the applicants’ conduct has slowed down finalization of the High Court case, considering the issues that are intended to be argued in the pending appeal, the amount of money claimed and the importance of bringing finality to legal disputes, we are of the considered view that the applicants ought to be afforded an opportunity to prosecute the pending appeal before the High Court proceedings are finalized, lest the appeal be rendered nugatory.”

12. They urged restraint as reported stated in the case of *Mbogo and another v Shah* [1968] 1 EA 93, where the court of Appeal for Eastern Africa, Sir Clement De Lestang V-P, stated as doth:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view, it has failed to do.”

13. They relied the case of *Watu Credit v Geoffrey Mokaya Aboki & Karen Chepkurui* [2022] eKLR, where it was stated that: -

“27. In the Kenya Wildlife Case (Supra), Gikonyo J quoted Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis



of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases." It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case".

14. I got a distinct feeling that the Applicant was just dotting is and crossing test by dropping authorities in major case of stay without addressing the questions that are before this court.

### **Appellant's response and submissions**

15. The Appellant submitted that the stand to lose if stay is not granted. They take issue with the monstrous decree that the respondent extracted. They had the affidavit of Nannungi Mariat and the further affidavit of the Applicant.
16. They addressed order 22 rule 22, which was neither necessary nor desirable for the matter at hand. They state that they have met requirements for grant of stay.
17. Reliance was placed on the case of *Rboda Mukuma v John Abuoga* [1988] eKLR, where the court of Appeal, Platt, Gachuhi & Masime JJA, stated as doth: -

"It was laid down in *M M Butt v The Rent Restriction Tribunal*, Civil Application No Nai 6 of 1979, (following *Wilson v Church (No 2)* (1879) 12 Ch 454 at p 488) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.

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."

18. They state that proof of inability to refund is a linchpin for stay pending Appeal. He relied on the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR the court of appeal, Omolo, O'kubasu & Githinji, JJA. stated as doth: -

"This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what



resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”

19. The Appellant maintains that there is complete discretion on whether to award security or not. In this remained is placed on the case of *Westmont Holdings Sdn. BHD v Central Bank of Kenya* [2021] eKLR.

### **Analysis**

20. The application herein seeks stay pending appeal to the court of Appeal. It is not the duty of the court to deal with the animus of the Applicant. This is because a party has a right to exhaust the judicial system in pursuit of its right.
21. Once the Memorandum of appeal has been filed and it has neither been withdrawn nor struck out, then the court has jurisdiction to deal with stay. The effect of the foregoing is that this court has jurisdiction to deal with the order of stay pending appeal. The jurisdiction of the court to grant stay pending Appeal is circumscribed under order 42 rule 6., which provides as doth: -

- “ 6. Stay in case of appeal [Order 42, rule 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 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 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 sub rule (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.”

22. The filing of Memorandum of appeal thus grants the court jurisdiction to deal with stay pending appeal. Though stay is a discretionary order, it is a legal right and not an equitable remedy. In the circumstances, the court looks at compliance with requisite rules for grant of stay. It is not given whimsically or capriciously.
23. The Court, F. Muchemi in [\*Charles Mwangi Gitundu v Charles Wanjobi Wathuku\*](#) [2021] eKLR, while addressing the issue of stay stated as doth: -

“ 34. In Patrick Kalaya Kulamba & Another vs Philip Kamosu and Roda Ndanu Philip (Deceased) [2016] eKLR where Meoli J. held:-

“For the purpose of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court “shall be at liberty....to consider” an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed “original jurisdiction”. And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof....

So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6(1) of the Civil Procedure Rules can be entertained afresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the Githunguri Case concerning the court’s original jurisdiction vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2)(b) (as it is now). The foregoing has a bearing on the interpretation of order 42 Rule 6(6) of the Civil Procedure Rules and in particular the highlighted phrased therein.

Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6(1) however does not preclude the applicant from approaching this court as it has done.

I would venture to add that the wording of Order 42 Rule 6(1) of the Civil Procedure Rules effectively grants the same jurisdiction to this court as an appellate court as Rule 5 (2)(b) does to the Court of Appeal: to entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6(1).

It suffices, in my opinion, in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment in the lower court. To insist in this case that the applicant must first file a separate appeal on the ruling of the lower court, apart from the judgment would in my



view not only lead to confusing the duplication of proceedings in respect of the same matter but also cause delay. The provisions however must be applied under the guiding principles of Article 159(2)(d) of *the Constitution*.”

24. Essentially stay is granted to preserve the subject matter. Where there is no danger to the subject matter, like where a suit is dismissed, it serves no purpose to issue stay. Though there will be a danger of costs being pursued, they are not the subject matter of the case. They are a consequence of the case. In the case of *RWW v EKW* Civil Suit No. 25 of 2012 Nairobi [2019] eKLR, where my sister Justice Asenath Ongeru, LJ, considered the purpose of a stay of execution order pending appeal, in the following words:

“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.”

25. There is a delicate balance between the right of Appeal and the right to enjoy the property in the declared judgment, which we usually call fruits of the judgment. This was succinctly addressed by Justice F. Gikonyo, in the case of *James Wangalwa & Another Versus Agnes Naliaka Cheseto* Miscellaneous Application 42 of 2011 [2012] eKLR as follows: -

“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...

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

26. Stay application is based on three main principles two of which depend whether the application is in the court appealed to all the court Appealed from. These are: -

- a. There is an appeal that is not idle/with chances of success.
- b. There is a likelihood of substantial loss
- c. There is security for due performance of the decree.

27. The first twin principle is divided into two. The first part deals with application in the same court, otherwise known as the court Appealed from. The second part relates to the court appealed to or the Appellate court. Annexing a copy of the decision appealed from has a profound effect on the decision of the court. The same arises from order 42 rule (6) 1 of the civil procedure Rules as doth: -

“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.”

28. For the court appealed from the court must be satisfied that there is sufficient cause. This will include the filing of the memorandum of Appeal being filed. On the other hand, the court Appealed to must and to make such order thereon as may to it seem just. This will be consideration the nature of the appeal. The appeal should not be not frivolous or on mundane issues. In other words, there should be an arguable appeal.

### **The appeal**

29. This is not the case when considering the application in the court Appealed from. Considering the chances of success in the court appealed from will create a conundrum where the court has to second guess its own decision. It is a burden without a purpose.
30. The matter at hand case the appeal is in the court appealed to. In this case therefore, the court must be satisfied that it is just to issue the orders the amount in dispute is a substantive amount. It is not an idle Appeal as it raises issues capable of being dealt with, on a prima facie basis.

### **Substantial loss**

31. Substantial loss is encapsulated in the belief that once funds are paid out, they become irrecoverable due to supervening factors, mainly the impecuniousness of the Respondent. It is the duty of the respondent to dislodge issues of impecuniousness. In her bid to show that she can refund she attached a pay slip with net pay of about Ksh. 58,000/=.
32. To refund, the entire amount sing net pay on will require almost 8 years, interest not factored in and on an ambitious assumption that she will spend 100% of her salary to refund. In the case of *G.N. Muema P/A (Sic) Mt View Maternity & Nursing Home v Miriam Bisbar & Another* Civil Appeal No 20 of 2016 [2018] eKLR, where Justice J. Kamau, J considered the Respondent’s ability to repay the decretal sum in case the appeal succeeded as there was no affidavit evidence by the respondent on record on the means by holding thus:
- “As can be seen hereinabove, there was no affidavit evidence by the Respondents on the court record. This therefore left the court in a quagmire especially as regards the ability of the Respondents to pay back the decretal sum in the event the Appellant was successful in his Appeal herein. In the absence of proof of their ability to pay back the said sum, this court was satisfied that the Appellant would suffer substantial loss. He had thus satisfied the first condition of being granted a stay of execution pending appeal.”
33. On the aspect of being rendered nugatory, the same must be demonstrable by the applicant in the case of *National Transport and Safety Authority v Samper Tours Travel* [2022] eKLR, justice, C Meoli stated as doth: -

- “12. The decision of Platt Ag JA, in the Shell case, in my humble view sets out two different circumstances when substantial loss could arise, and therefore giving context to the 4<sup>th</sup> holding above. The Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An



intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in order XLI Rule 4 (now order 42 rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicants, either in the matter of paying the damages awarded which would cause difficulty to the Applicants itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts...”

34. This is buttressed by the decision of *Michael Ntouthi Mitheu V Abraham Kivondo Musau* Civil Appeal No. E052 of 2021 [2021] eKLR, Justice G V Odunga J, as then he was, posited as doth: -

“Accordingly, while appreciating that the Applicant did not sufficiently disclose his basis for believing that the Respondents would not refund the decretal sum, the Respondent did not even attempt to dislodge that contention, speculative as it was. One would have expected the Respondent to aver that he can pay the same even if paid over to her in the event that the appeal succeeds. 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 I grant a stay of execution of the decree herein...”

35. The Respondent is not in a position to refund if she is paid. I find that the Applicant has that substantial loss may result to unless the order of stay is made. However, the Appeal is on quantum only. It is not expected that the appeal will wipe away all the amount awarded. In that connection, I am satisfied, that an amount of Ksh 1,200,000/=-, even if paid out, the likelihood of the same being demanded is minimal. Even if a minimum part will be demanded, her salary can cover the same over a short period. It is the Respondent’s duty to demonstrate that she can refund. Since her means are within his special knowledge. Under Section 112, the Appellant had the burden of proof in respect to matters within their special knowledge. The said Section provides as doth: -

“112. Proof of special knowledge in civil proceedings in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

36. The respondent has not shown that he can refund. Consequently, I am satisfied that there is nothing to show that the respondent has an ability to refund the whole amount. She can however refund a manageable amount.

#### **Security for the due performance of the decree.**

37. Security is the counter part for the substantial loss. This is because the Respondent has a decree, he is entitled to her fruits of the judgment. However, in order not to fetter the right of appeal, the Appellant must demonstrate that they are in a position to pay the decree, that is eventually binding on them. This will alert the decree holder to start recovery proceedings early. In case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, Justice Reuben Nyakundi stated as doth: -

“Thirdly, the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the



opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

38. The due performance in this case is that the court would order for the release of the deposited decretal amount to the Respondent in the appeal, if the appeal is unsuccessful. The case of *Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR the court stated: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the *Civil Procedure Rules* acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

39. The amount due debt has crystalized in terms of the judgement sum. It is this amount that is to be secured. It is not a moving target that changes. The court has discretion in that respect on the type of security to be accepted, however, having considerations the views of the parties. In the case of *Ena Investment Limited v Benard Ochau Mose & 2 others* [2022] eKLR, Justice Lagat-Korir, held as doth: -

“While this Court appreciates that the subject of the appeal is whether the decretal amount was paid or not and hence the unwillingness of the Applicant to deposit security for the outstanding judgment debt, at this interim stage, it will only limit itself to the preconditions for granting stay of execution where there exists a judgment legally entered in favour of one party against the other. Thus, it matters not at this stage whether they had paid the full amount or not, that is a matter for consideration at the appeal stage. It must satisfy the requirement for security.

40. On the other hand, the reason security for due performance of the decree is given, is the same reason the Respondent must demonstrate the ability to refund.

41. Further, security must achieve due performance of the decree. It is not any other security. In the case of n *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, the court said as doth: -

“... 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. That 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. The security to be given is measured on that yardstick.”

42. Lastly, is the aspect of judicial discretion. This is a rider, in case the applicant has demonstrated that their conduct is not befitting the court’s discretion. This is where for example the application is made after undue delay or some other conducts, which is ordinarily frowned upon by a court of equity. Equity always follows the law. The instant application has been made without undue delay.
43. Before concluding with this Appeal, I need to note the practice where advocates swear affidavits on contentious matters. It should truly stop. It may embarrass and put an advocate in a position he will not be objective in the representation of the clients. In *Oriental Commercial Bank Ltd v Shreeji Contractors Ltd & 2 others* [2021] eKLR, the court, Prof Joel Ngugi J, as then he was stated: -

“

“26. As a general rule, a lawyer who appears as advocate shall not testify or submit their own affidavit evidence before the tribunal unless they are specifically permitted by law or the Court to do so or unless the matter is purely formal or uncontroverted.

27. In *Magnolia PVT Limited vs Synermed Pharmaceuticals (K) Ltd* (2018) eKLR, the Court dealing with similar issue states as follows:

Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted.”

28. This principle is grounded in the rules governing conflict of interest and the need for counsel as an officer of the Court to retain an appropriate level of professional objectivity. To protect the integrity of the legal process, the Court cannot countenance counsel for a party placing his or her own credibility in issue on an important point of evidence.”

44. The next effect is that the Application has merit. The appeal is arguable but from the submissions of the parties, the damages cannot come to below 1,000,000/=. There is no appeal on liability, even if the court is wrong, those are amounts the Respondent can easily refund. I allow the application. Costs to abide the outcome of the appeal.

### **Determination**

45. The upshot of the foregoing is that I make the following orders: -
- a. The application dated 31/7/2023 is merited and as such I allow the same and order as follows:



- b. There be stay of execution of the judgment and decree of the chief magistrate's court in Mombasa CMCC 1092 of 2020, pending hearing and determination of the Appeal herein, subject to the following conditions: -
- i. The Appellant to pay to the Respondent's advocates a good and lawful sum of Ksh 1,000,000/= within 30 days from the date hereof.
  - ii. The Appellant to provide security of a bank guarantee, a good and lawful sum of Ksh. 2,700,000/=, in the joint names of advocates a within 30 days from today.
  - iii. In default of either (i) or (ii) above, execution to issue.
  - iv. The Appeal be heard on 10/1/2024 during service week. The Appellant to file submissions within 10 days and the respondent within 10 days of service.
  - v. The Appellant to comply with order 42 rule 13 of the Civil Procedure Rules by 13/12/2024.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2023.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Miss Oketch for Respondent

No appearance for Appellant

Court Assistant - Brian

