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# **EASTERN AFRICA LAW REVIEW**

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# UNLOCKING JUSTICE: A COMPARATIVE ANALYSIS OF MANDATORY SECURITY FOR STAY OF EXECUTION IN THE APEX COURTS OF TANZANIA AND KENYA

*Noel Edward Tagagas Nkombe\**

## Abstract

This article assesses the mandatory furnishing of security for the due performance of the decree in the appellate courts of Tanzania and Kenya, focusing on its legal implications for access to justice and procedural fairness. Strict application of this rule often poses challenges and at times, acts as a stumbling block to access justice for those who cannot afford to furnish such security. This article invokes doctrinal and comparative methodologies to examine the statutory framework, judicial precedent, and practical implications of the rule in accessing justice in both countries. While Tanzania's approach rests on strict compliance with the requirement, Kenya's jurisprudence demonstrates a more flexible interpretation, allowing courts to exercise discretion based on the judgment debtor's financial capacity, depending on the situation of individual cases. The conclusion calls for legal reforms to harmonise procedural laws with the overarching objective of improving access to justice in both jurisdictions.

**Key Words:** *Justice, execution, stay of execution, security, Kenya and Tanzania*

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\* He is a lecturer of law at the Open University of Tanzania and a practising Advocate. The views expressed in this article are solely those of the author. He may be contacted at [noel.nkombe@out.ac.tz](mailto:noel.nkombe@out.ac.tz)

## 1. INTRODUCTION

Tanzania and Kenya inherited the common law legal system as a result of their shared history as former British Colonies. The two jurisdictions continue to uphold the fundamentals of common law, including its substantive and procedural law. The community has shown discontent with the procedures, which have not been favourable to marginalised litigants, and many have expressed concerns about the fact that they are essentially adversarial.<sup>1</sup>

A reliable system of justice necessitates that all citizens be provided a mechanism that is fair for dispute resolution regarding legal rights.<sup>2</sup> These rights are enforced in a court of law by following procedural laws that are in place in a particular dispute. Access to justice is one of the fundamental rights guaranteed by the Constitution.<sup>3</sup> According to Morris, the pillars of any modern state rest on the fundamental right of access to Justice.<sup>4</sup> Courts of law are relied upon by litigants as temples of justice. The legal profession, strictly speaking, plays an integral part in the justice administration system. Thus, lawyers have been figuratively considered priests in the temple when the administration of justice is in question.<sup>5</sup>

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<sup>1</sup> Twaib, F., *Legal Empowerment of the Poor: Access to Justice and Rule of Law*, The Open University of Tanzania, 2017, available at <http://repository.out.ac.tz/id/eprint/1643> (accessed 10 January 2025).

<sup>2</sup> Barak, A., *The Judge in a Democracy*, New Jersey: Princeton University Press, 2006, at p. 35.

<sup>3</sup> *Bremer Vulkan Schiffbau v. South India Shipping Corporation Ltd* [1981] All ER 289.

<sup>4</sup> Morris, C., “Peace through Law: The Role and Limits of Adjudication”, 109(3) *University of Pennsylvania Law Review*, 1960, p. 1057.

<sup>5</sup> Mate, M., “Priests in the Temple of Justice: The Indian Legal Complex and the Basic Structure Doctrine”, in Halliday, T.C.; Karpik, L.; and Feeley, M.M. (eds.), *Fates of Political Liberalism in the British Post-colony: The Politics of the Legal Complex*, Cambridge: Cambridge University Press, 2012, p. 112.

As stated earlier, enforcing some rights requires a litigant to follow the established procedures. Some procedures may facilitate or act as a stumbling block toward access to Justice. One of the significant hurdles is the mandatory requirement to furnish security for the due performance of the decree if ultimately an appeal is unsuccessful. While serving as a check and balance, it may pose a substantial obstacle for litigants who are unable to furnish such security. The requirement raises some legal questions about its impact on accessing justice and constitutional rights. This is especially critical for litigants without financial resources to meet the requirement of furnishing security as may be ordered by the court. Scholars contend that financial constraints limit access to justice in the justice system. Thus, the evolution of access to justice provides an important insight into the role of the legal profession, procedure, and the law in ensuring justice is accessible.<sup>6</sup> The general argument is that procedural requirements should always promote access to justice and not otherwise.

Stay of execution plays a vital role in ensuring litigants' opportunity to assert their rights in the appellate court for both civil and criminal cases.<sup>7</sup> From a legal perspective, a stay implies postponing or halting a proceeding, judgment, or similar action.<sup>8</sup> Takwan contends that execution is a judicial process of enforcing a decree by judicial process to enable the judgment creditor to

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<sup>6</sup> Cappelletti, M.; Garth, B.; and Trocker, N., "Access to Justice, Variations and Continuity of a Worldwide Movement", 46(4) *Journal of Comparative and International Private Law*, 1982, p. 664, available at <http://www.jstor.org/stable/27876704> (accessed 20 July 2025).

<sup>7</sup> Wasilczuk, W., "The Role of Stays of Execution in Access to Appellate Justice", forthcoming, 2024.

<sup>8</sup> Garner, B.A., *Black's Law Dictionary* (9th Edn.), Eagan: West Publishing Company, 2009, at p. 1548.

realise the remedy or decree granted by the court of law.<sup>9</sup> Draper argues that executing a decree vindicates the principle of justice, which demands that the decree-holder realise the remedy decreed by the court.<sup>10</sup> It is among the key aspects in the administration of justice that aims to attain justice in any modern legal system.<sup>11</sup> Mulla contends that execution implies the enforcement of a judgment or order given by the court. It ends when the decree holder fully obtains relief from the judgment debtor as ordered by the court. It refers to the enforcement of court decrees or orders through legal processes, enabling the successful party to obtain the relief granted by the court.

In Okene's view, administration of justice requires the execution of a decree, facilitating the realisation of the decree's benefits through a formal enforcement process.<sup>12</sup> Fabunmi and Akai argue that the state should prioritise enforcing court orders as a sign of respect for the rule of law.<sup>13</sup> For a party seeking a stay of execution, providing security is a mandatory condition that must be satisfied before the court grants the stay. To address the question posed in this article, two main aspects are considered: procedural and distributive aspects involved in balancing the interests of the decree-holder and judgment debtor, viewed

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<sup>9</sup> Takwani, C.K., *Civil Procedure* (6th Edn.), Lucknow: Eastern Book Company, 2011, at p. 607.

<sup>10</sup> Draper, A., "Corruptions in the Administration of Justice: Bentham's Critique of Civil Procedure", 7(3) *Journal of Bentham Studies*, 2004, p. 1.

<sup>11</sup> Mulla, D.F., *The Key to Indian Practice: A Summary of the Code of Civil Procedure* (11th Edn.), New York: Lexis Nexis, 2008, at p. 145.

<sup>12</sup> Okene, O., "Effective Administration of Justice", 1(1) *NJCJA Journal*, 1998, p. 46.

<sup>13</sup> Fabunmi, J.O. and Akai, O.O., "Execution of Judgments and Means of Enforcement Available to a Court in Nigeria", 32(2) *Journal of African Law*, 1988, p. 164.

through the lens of the constitutional right of access to justice.<sup>14</sup> The requirement to furnish security for costs helps protect the decree-holder against risk of prejudice arising from delayed enforcement, including the dissipation of assets or the frustration of recovery pending the determination of an appeal or application. Thus, the appeal and stay of execution process are mechanisms designed to achieve fairness and equity. However, the problem arises when the appellate court is unwilling to stay the execution because the security condition has not been furnished, especially where an applicant lacks the financial ability to fulfil the security condition.

Despite the important role that a stay of execution plays in protecting the right to appeal, the law allows the applicant to apply for a stay of execution in cases where a pending appeal or the appeal process has been initiated.<sup>15</sup> Studies that comprehensively assess the implications of mandatory security for a stay of execution on access to justice specifically in the context of apex courts in Tanzania and Kenya are scarce.

The reviewed literature, as replicated in the works of Okene,<sup>16</sup> Draper<sup>17</sup>, Takwan,<sup>18</sup> and Mulla<sup>19</sup> primarily highlights the necessity of execution in enabling the decree-holder to enjoy the outcome of the decree granted. These scholars maintain that executing a decree is a fundamental pillar of access to justice. Nevertheless,

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<sup>14</sup> Thibaut, J., *Equity and Law: A Comparative Historical Approach*, 1939, at p. 554.

<sup>15</sup> Thibaut, *Equity and Law*, above note 14, at p. 555.

<sup>16</sup> Okene, "Effective Administration of Justice", above note 12.

<sup>17</sup> Draper, "Corruptions in the Administration of Justice", above note 10.

<sup>18</sup> Takwani, *Civil Procedure*, above note 9.

<sup>19</sup> Mulla, *The Key to Indian Practice: A Summary of the Code of Civil Procedure*" above note 11.

their analysis predominantly focuses on one dimension, the right of the decree-holder, without shedding light on the potential adverse impact on the judgment debtor, especially those with financial inability to meet the imposed security requirements. Conversely, Fabunmi and Akai admit that security for a stay of execution is mandatory; however, they do not advance any critical argument on the possible impact on access to justice for judgment debtors with the limited financial capacity to furnish security.<sup>20</sup> Moreover, the authors above do not demonstrate a comparative perspective on how different jurisdictions, mainly Tanzania and Kenya, provide a balance between the execution of the decree and a judgment debtor with a limited financial ability to access justice. This oversight is noteworthy because rigid enforcement of mandatory security requirements may at times limit access to justice for indigent litigants.

This article intends to bridge this gap by applying both doctrinal and comparative approaches in the apex courts of Tanzania and Kenya. It highlights the importance of balancing the interests of the judgment debtor and decree-holder by examining procedural justice. Thus, the findings reveal whether the condition for a firm undertaking to furnish security currently in place supports the principles of fairness in the Court of Appeal Rule, hereinafter referred to as (CAT) and as applied by the Supreme Court of Kenya. This article sheds light on the understanding of the relationship between execution, appellate rights, and constitutional guarantees of access to justice.

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<sup>20</sup> Fabunmi, J.A. and Akai, K., "Security for Stay of Execution: Comparative Reflections," 15(3) *East African Law Review*, 1988, p. 21, at p. 25.

## **2. RESEARCH METHODOLOGY**

This article invoked a doctrinal approach complemented with a comparative research methodology. Doctrinal methodology primarily involves a critical analysis of principal and subsidiary legislation, the Constitution, and case laws from the apex courts of both Tanzania and Kenya. Also, laws from other jurisdictions that relate to stay of execution and access to justice were reviewed. The assessment is typically centred on how the apex courts of both Tanzania and Kenya treat the requirement of furnishing security as a commitment in due performance of a decree in case the appeal is not decided in favour of the applicant. It further assesses the legal implications of this requirement in the CAT and the Supreme Court of Kenya, hereinafter referred to as the apex courts. The approach is viewed in the parameters of the apex courts of Tanzania and Kenya to support the argument on the best approach of handling procedural requirements of furnishing while determining an application of stay of execution to enhance access to justice. The research relies on both primary sources from legislation in the named jurisdictions. Furthermore, the reviewed literature indicates the gap that ultimately laid a foundation for handling the security furnishing requirement to enhance access to justice for indigent litigants.

## **3. THE LEGAL FRAMEWORK FOR STAY OF EXECUTION IN TANZANIA AND KENYA**

Executing decrees in the apex courts of both jurisdictions plays a vital role in ensuring that the decree-holder reaps the fruit of the decree. Without the execution of the decree, the successful party

cannot realise the entitlement conferred by the court. Nonetheless, although execution may be stayed in different situations, the most common phenomenon is a pending process of the determination of the appeal. The constitutions of the United Republic of Tanzania<sup>21</sup> and Kenya<sup>22</sup> guarantee the right of access to justice. This right is enjoyed by all persons and, in the context of appeals, serves as a mechanism for correcting errors made by lower courts.<sup>23</sup> A trustworthy justice system ought to assure appeal for an aggrieved party, save where such a right is explicitly limited by law. Thus, courts of law as guardians of justice must uphold and safeguard the right to appeal.<sup>24</sup> However, having an appeal in place does not automatically act as a stay of execution, and in the absence of a stay of execution order, the decree holder may proceed with the execution process and the pending appeal may be rendered nugatory.<sup>25</sup>

At times, the right to appeal may be applied by the judgment debtor as a technique to frustrate the execution process. Thus, the execution process may be prolonged by the judgment debtor under the umbrella of the pending appeal. To cure this mischief, the law ought to balance the competing interests of decree-holders and judgment debtors.<sup>26</sup> In Kenya and Tanzania, apex courts allow a party to apply for an order of stay of execution

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<sup>21</sup> Constitution of the United Republic of Tanzania of 1977, as amended, art. 13(6)(a).

<sup>22</sup> Constitution of Kenya, 2010, art 48.

<sup>23</sup> *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd* [1981] 1 All ER 289.

<sup>24</sup> Shavell, S., "The Appeals Process as a Means of Error Correction", 24(2) *Journal of Legal Studies*, 1995, p. 379, at pp. 379–426.

<sup>25</sup> Morris, J., "Peace through Law: The Role and Limits of Adjudication," 109(3) *University of Pennsylvania Law Review*, 1960, p. 218.

<sup>26</sup> Cameron, M., "A Stay of Execution," 25(4) *Litigation Funding*, 2012, p. 17.

that is conditional on the applicant furnishing security for the due performance of the granted decree in case the appeal fails. However, this condition should be applied in a liberal approach while protecting the decree-holder's right to obtain the fruit of the decree, while at the same time protecting the right of the indigent judgment debtor to access justice.

### **3.1 Legal Framework for a Stay of Execution in the Court of Appeal of Tanzania**

Justice demands that a successful litigant be entitled to enjoy the decree granted by the court of law; conversely, a party is entitled to apply for execution. Thus, the court is required to assist the party in ripening the fruit of the decree by way of execution. The Constitution of the United Republic of Tanzania guarantees the right to appeal.<sup>27</sup> Every person has the right to a fair trial and the ability to challenge the decision of the court by way of appeal or seek another legal remedy against the decision rendered.

The collapse of the East African Community in 1977 led to the establishment of CAT as an apex court in the judicial hierarchy. The CAT is established by the Constitution.<sup>28</sup> The upright function of the CAT is to administer justice.<sup>29</sup> The Appellate Jurisdiction Act<sup>30</sup> and the Tanzania Court of Appeal Rules outline the procedures for appealing to the CAT.

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<sup>27</sup> Constitution of the United Republic of Tanzania, above note 21, art. 13(6)(a).

<sup>28</sup> Constitution of the United Republic of Tanzania, above note 21, art. 117.

<sup>29</sup> Mashamba, C.J., *Annotated Procedure and Practice in the Court of Appeal of Tanzania*, Dar es Salaam: Law Africa Publishing (I) Ltd, 2016, at p. 21.

<sup>30</sup> Appellate Jurisdiction Act, Cap. 141 [R.E. 2023].

Strictly speaking, the application of execution instigates a stay of execution. The Civil Procedure Code directs how execution can be made. However, the modes of execution are not the area of discussion in this article.<sup>31</sup> While execution against the government is governed by the Government Proceedings Act,<sup>32</sup> the case of *Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women S Christian Association of Tanzania*.<sup>33</sup> demonstrates that execution against the government is carried out. Upon application by the decree holder, a proper officer of the court (Registrar or Deputy Registrar) issues a certificate and directs the government to comply with the decree as directed by the Court.<sup>34</sup> While the decree-holder may prefer an application for execution, the judgment debtor may prefer an application for a stay of execution against such an application.

The provision regulating a stay of execution in the CAT has a checkered history. The Tanzania Court of Appeal Rules<sup>35</sup> provided that a stay of execution would be issued where the notice of appeal has been filed or an appeal has been preferred, and such an order would be granted on the conditions that the court deemed fit and just. However, this provision was reenacted in the Tanzania Court of Appeal Rules<sup>36</sup> replacing the former rules. The modification of the requirement for granting an order of stay of execution will be discussed in due course.

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<sup>31</sup> *Civil Procedure Code*, Cap. 33 [R.E. 2023], ss. 37–65.

<sup>32</sup> *Government Proceedings Act*, Cap. 5 [R.E. 2023].

<sup>33</sup> *Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women S Christian Association of Tanzania*, Civil Appeal No. 2 of 2010, Court of Appeal of Tanzania at Arusha, TanzLII 8.

<sup>34</sup> *Government Proceedings Act*, above note 32, s. 17.

<sup>35</sup> *Tanzania Court of Appeal Rules*, G.N. No. 102 of 1979, r. 9(2)(b).

<sup>36</sup> *Tanzania Court of Appeal Rules* (as amended), G.N. No. 368 of 2009, above note 36

The legal requirement for furnishing security in due performance of a decree is a fundamental condition for granting an order of stay of execution.<sup>37</sup> The rationale of this condition is to balance the interests of both litigants in civil suits. In Tanzania, the legal framework governing security requirements is primarily governed by the Tanzania Court of Appeal Rules.<sup>38</sup> In addition to the Tanzania Court of Appeal Rules,<sup>39</sup> the corresponding provision in the Constitution of the United Republic of Tanzania<sup>40</sup> is complemented by the provision in the Appellate Jurisdiction Act,<sup>41</sup> in which the CAT is mandated to grant an order of stay of execution after the judgment debtor has fulfilled the conditions for a stay of execution, including the furnishing of security for costs.

As a general rule, filing an appeal does not act as a stay of execution of a decree or order subject to appeal. However, it is one of the grounds the CAT considers before granting an order of stay of execution.<sup>42</sup> As a matter of law, the decree-holder has the right to apply for a stay of execution. Equally, the judgment debtor is entitled to apply for a stay of execution within 14 days from the date of service of notice of execution or the date they were made aware of the existence of an application for execution. The application for a stay of execution is made by using form “K”, as stipulated in the Schedule of CAT Rules.<sup>43</sup>

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<sup>37</sup> *Tanzania Court of Appeal Rules* (as amended), G.N. No. 368 of 2009, above note 36

<sup>38</sup> *Ibid* r. 11(2)–(7).

<sup>39</sup> *Ibid* r 11(5) (b).

<sup>40</sup> Constitution of the United Republic of Tanzania, above note 21, art. 107A(2).

<sup>41</sup> Appellate Jurisdiction Act, above note 30, s. 5(2)(d).

<sup>42</sup> Tanzania Court of Appeal Rules, above note 36, r. 11(3).

<sup>43</sup> *Ibid.*, r. 11(4) and 11(4A).

The CAT Rule stipulates the mandatory conditions that must be satisfied before it issues an order of stay of execution. The conditions are (1) that the applicant must demonstrate substantial losses that may occur to the party seeking a stay of execution, and (2) security has been furnished by the applicant on the performance of the decree.<sup>44</sup> It is also a mandatory requirement that any application for a stay of execution must include notice of appeal, decree, judgment, or ruling and order, as the case may be, that is subject to appeal.<sup>45</sup>

Reading between the lines of the provisions regulating the stay of execution in the CAT shows that the conditions set forth must be met by the judgment debtor cumulatively. One of the mandatory conditions discussed in this article is the requirement to furnish security by the applicant in the due performance of the decree if ultimately the appeal is unsuccessful. Precisely, in the case of *Ecobank Tanzania Limited v Double A Co. Limited 3 Others*,<sup>46</sup> the Court of Appeal stated that, according to the law, for the Court to grant a stay of execution, the checklist of the requirements stated under CAT Rules<sup>47</sup> should be met together. Thus, as discussed above, one of the imperative conditions is for an applicant to furnish security for the due performance of the decree.

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<sup>44</sup> Ibid r. 11(5)(a) and (b).

<sup>45</sup> Ibid., r. r 11(7) a) (b) (c) (d)).

<sup>46</sup> *Ecobank Tanzania Limited v. Double A Co. Limited 3 Others Civil Application No. 178 of 2021*, Court of Appeal of Tanzania, TanzLII.

<sup>47</sup> Tanzania Court of Appeal Rules, above note 36, r. 11(4), (5) and (7).

In terms of the CAT Rules.<sup>48</sup> The CAT has the mandate to determine the nature and sufficiency of the security to be furnished, depending on the case at hand. Although the court uses discretion to determine security, such discretion must be applied judiciously to prevent abuse of the court process.<sup>49</sup> Control must be in place in the exercise of discretion. The proper use of discretion power in determining when courts exercise their discretionary powers was discussed in the case *Tanzania Electric Supply Company Ltd v. Independent Power Tanzania Ltd and 3 Others*<sup>50</sup>, where the CAT stated that discretion in a court of justice refers to the proper use of courts' powers governed by the law, rules, not humour, it must be lawful and consistent rather than capricious.

The judicial precedents in CAT have underscored, several times, the importance of security in the application for a stay of execution, in *National Bank of Commerce Ltd v. Saoligo Holding Ltd and Another*<sup>51</sup> The court underscored security as a condition for the grant of an order of stay of execution, and to fulfil this requirement, the security need not be provided before the stay order is granted. The applicant's solid commitment to providing security could suffice to persuade the court to issue a stay order; however, the Court must set a reasonable time limit within which

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<sup>48</sup> Ibid., r. 11(5)(c).

<sup>49</sup> Craig, P., "Ultra Vires and the Foundations of Judicial Review," 63 *Cambridge Law Journal*, 1998, p. 63, available at <https://www.repository.law.indiana.edu/facpub/2756> (accessed 21 January 2025).

<sup>50</sup> *Tanzania Electric Supply Company Ltd v. Independent Power Tanzania Ltd and 3 Others, Civil Applications Nos. 19 of 1999 and 27 of 1999*, Court of Appeal of Tanzania, TanzLII.

<sup>51</sup> *National Bank of Commerce Ltd v. Saoligo Holding Ltd and Another Civil Application No. 137 of 2016*, Court of Appeal of Tanzania at Dar es Salaam, TanzLII 14.

the applicant should furnish the security pursuant to the court order.

The CAT Rules further empower the CAT, where necessary, to make an order that will ensure justice is met or prevent an abuse of the court process.<sup>52</sup> Under the umbrella of the new oxygen principle introduced, the CAT is required to strive to promote the overriding objective established by the oxygen principle. The principle intends to enable just, expeditious, proportionate, and affordable dispute resolution.<sup>53</sup> Legal scholars have weighed in on this debate several times regarding the rules of procedure. Kennedy<sup>54</sup> argues that excessive rigidity in procedural requirements can hinder access to justice. The authors advocate for a more pragmatic approach that ensures fairness without stringent legal requirements that may undermine access to justice. Additionally, authors highlight the importance of balancing procedural rigour with judicial discretion in appellate proceedings. Procedural law should not hinder access to justice.

In other words, furnishing security requirements in the stay of execution before the CAT act as a safe guide to ensure that the decree-holder obtains the fruit of the decree. They further ensure that an appeal is not used as an abuse in the court process. While the tool serves as a mechanism of enforcement of judgment, its strict application raises concerns about access to justice for indigent litigants in the CAT.

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<sup>52</sup> Tanzania Court of Appeal Rules, above note 36, r. 4(2)(b)–(c).

<sup>53</sup> Appellate Jurisdiction Act, above note 30, s. 3(3A)–(3B).

<sup>54</sup> Kennedy, G., “Access to Justice and Inevitable Reforms to the Civil Justice System: Reflections on Case Management and Legal Aid in Tanzania,” 1(1) *LST Law Review*, 2016, p. 1, at pp. 1–40.

As it has been discussed, in CAT, an applicant seeking a stay of execution is required to furnish security for the due performance of the decree if the appeal is ultimately not determined in his favour<sup>55</sup>. However, jurisprudence of the CAT establishes that this requirement is not strictly limited to the provision of cash security. A consistent position of CAT decisions has reiterated that an applicant may satisfy the security condition through alternative options, including a firm undertaking to provide security should the appeal be unsuccessful. This position has been affirmed in *Mantrac Tanzania Ltd v. Raymond Costa*,<sup>56</sup> ; *Gilbert Zebadayo Mrema v. Mohamed Issa Makongoro*<sup>57</sup>; and *David Mabende v. Salum Nassor Mattar and Another*,<sup>58</sup> and the case of *CF Builders Limited v. Rex Investment Limited*.<sup>59</sup>

In *Mantrac Tanzania Ltd v. Raymond Costa*<sup>60</sup>, a celebrated decision that has been cited with approval in subsequent cases, the CAT observed that the law does not strictly require security to be furnished before the grant of a stay of execution. The Court held that a firm undertaking by the applicant to provide security for the due performance of the decree may, in appropriate circumstances, suffice to justify the grant of a stay order, provided that the Court imposes a reasonable time limit within which the applicant must furnish such security.

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<sup>55</sup> Tanzania Court of Appeal Rules, above note 36, r. 11 (5) (b).

<sup>56</sup> *Mantrac Tanzania Ltd v. Raymond Costa*, Civil Application No. 11 of 2010 (Court of Appeal of Tanzania) TanzLII.

<sup>57</sup> *Gilbert Zebadayo Mrema v. Mohamed Issa Makongoro*, Civil Application No. 369/17 of 2019

<sup>58</sup> *David Mabende v. Salum Nassor Mattar and Another*, Civil Application No. 160/01 of 2018, Court of Appeal of Tanzania, TanzLII.

<sup>59</sup> *CF Builders Limited v. Rex Investment Limited*, civil application no. 10/01 of 2024, Court of Appeal of Tanzania at Dodoma.

<sup>60</sup> *Mantrac Tanzania Ltd v Raymond Costa*, above note 56.

In extreme circumstances, the CAT has gone further by allowing non-monetary forms of security, including mortgaged property in mortgage-related disputes or property owned by a third party, to be pledged as security for the due performance of the decree. These decisions underscore the different forms of security which the court may require when determining an application for a stay of execution.

Notwithstanding this progressive jurisprudence, the absence of express statutory guidance on when and how courts may dispense the requirement to furnish security when determining an application for stay of execution indicates a clear legal gap. This practice continues to create uncertainty and, in some cases, restrict access to justice.

### **3.2 The Legal Framework for Stay of Execution in the Supreme Court of Kenya**

The legal framework regulating the stay of execution in the Supreme Court of Kenya is primarily based on the constitutional provisions of the Republic of Kenya, statutory laws, rules of procedure, and court decisions. This framework offers a robust guideline when determining whether to grant a stay of execution in the Supreme Court of Kenya.

Access to justice is guaranteed by the Constitution of Kenya which requires the state to guarantee access to justice to all persons regardless of status.<sup>61</sup> The provision further requires the fee payable in court to be reasonable and should not act as a bar to access justice. The Supreme Court of Kenya is the highest in

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<sup>61</sup> Constitution of Kenya, 2010, above note 22, arts. 48 and 159(a).

the judiciary hierarchy, established by the Constitution.<sup>62</sup> The Supreme Court has jurisdiction to hear original election petition cases relating to the office of the president.<sup>63</sup> It also has the mandate to hear appeals from the Court of Appeal and other tribunals as prescribed by the law.<sup>64</sup> The Supreme Court has the power to grant a stay of execution on the appeal or original matters pending before it.<sup>65</sup> It offers the inherent powers of the court, including making any order that aims to achieve the ends of justice and preventing abuse of the court process by any person. Thus, the Constitution mandates the Supreme Court to grant any order that intends to achieve justice, including a stay of execution. Thus, the court may intervene whenever the enforcement of the judgment issued by the lower court may result to injustice.

In fulfilling this constitutional mandate, the Supreme Court Act provides for a legal framework that reinforces the Supreme Court's authority to grant orders aimed at achieving the ends of justice that include orders of stay of execution. The Act empowers the Court to issue any interlocutory orders for the ends of justice.<sup>66</sup> The application for stay of execution, as one of the interlocutory applications, is made by notice of motion. The rules provide for the procedure with which the applicant must comply, including filing a notice of motion to effect services to

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<sup>62</sup> *Ibid.*, arts. 48 and 159(a).

<sup>63</sup> *Ibid.*, art 163(2)(a).

<sup>64</sup> Constitution of Kenya, 2010, above note 22, art 163(2)(b)(i)–(ii).

<sup>65</sup> Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules), r 3(8).

<sup>66</sup> Supreme Court Act No 7 of 2011 (Kenya) (Rev 2022) s 21(2).

the affected party, thereby ensuring procedural fairness and due process.<sup>67</sup>

The condition for security generally has limited application in the Supreme Court of Kenya. The court requires a security deposit in election petition cases. Upon filing the petition, the petitioner is required to deposit security for the cost of one million Kenyan shillings. Unlike the Tanzania Court of Appeal Rules, which has an express provision that requires a security to be given in due performance of a decree which is ultimately binding upon the applicant, in Kenya, the Supreme Court Act<sup>68</sup> does not provide express requirements for the security of costs. That gap was evident in *Westmont Holdings SDN BHD v. Central Bank of Kenya and Two Others*<sup>69</sup> where the Supreme Court set standard guidelines for security for costs in the due performance of a decree. The court admitted that no clear guidelines on the key considerations that the court had to consider before ordering security for cost were in place. Moreover, the court created its own rules of procedure that would guide when the issues of security for costs are before the court. This was because no standard guidelines were available on key issues to be taken into consideration before ordering security for costs.

The security of costs was intended to balance the main objectives in the justice administration as provided in the Constitution.<sup>70</sup> While the court's overriding objective is to dispense justice,

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<sup>67</sup> Ibid 61, s 21(2).

<sup>68</sup> Supreme Court Act, above note 66 s 21(2).

<sup>69</sup> *Westmont Holdings SDN BHD v. Central Bank of Kenya and Two Others*, Supreme Court of Kenya, Petition No. 16 (E023) of 2021 (Unreported).

<sup>70</sup> Constitution of Kenya, 2010, above note 22, arts 48, 50 and 159.

security for cost serves to ensure that the order rendered by the court does not become nugatory after the conclusion of the proceedings and to safeguard the successful litigant from being left with a decree that cannot be executed. Nevertheless, if applied strictly, this requirement may undermine access to justice for indigent litigants, although it serves the legitimate purpose of discouraging frivolous litigation.

In its historical decision, the Supreme Court set out matters that ought to be considered when granting and not granting an order for security. However, this condition highly depends on the situation of each case. Only a few conditions are discussed in this article as follows.

In case of prospective success, the court ought to consider a potential overwhelming chance of success. In case the claims appear frivolous, the court may impose stringent conditions to ensure that the decree-holder does not go out of court with an empty decree. However, if the chance of success is great, the court may reduce the conditions for security. The other factor to consider is the judgment debtor's financial status to determine if they can pay the case in the event of loss. In the circumstance where the judgment debtor appears to have funds that he would have paid in case of such loss, the security ought to be furnished to protect the decree-holder to get what was decreed in their favour.<sup>71</sup>

The other consideration is the impact on access to justice. The court must bear in mind that imposing security conditions does

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<sup>71</sup> *Westmont Holdings SDN BHD v. Central Bank of Kenya and Two Others*, above note 69.

not impede access to justice. The purpose of security should not be to prevent litigants from accessing the court, nor should it be excessive to the extent of denying access to justice. Thus, the court may refuse to grant a security order or reduce the amount of security in the likelihood of denying access to justice by the judgment debtor. Additionally, the court ought to consider the public interest. If the case involves matters of public interest, the court may relax in imposing security for costs. Thus, in cases that raise important constitutional issues and related human rights issues that impact society at large, the condition for security should not be so stringent because doing so would overrule public interest.<sup>72</sup> Furthermore, the court considers the proportionality of the security and costs reasonable depending on the complexity, value of the claim, and overarching importance of the case. Principally, security should not be excessive and punitive; instead, it should act as a shield that ensures the decree-holder is paid the decreed amount after the conclusion of the proceedings. In the case of *Teachers Service Commission v. Kenya National Union of Teachers and 3 Others*<sup>73</sup> the court declared it pertinent for the security imposed to be proportional to the decreed amount, not to prevent the judgment debtor from accessing justice.

With regard to the court's discretion to order security as a matter of law, an order of security in the Supreme Court is within the jurisdiction of the court that determines the amount of security, the condition, and the time within which security should be

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Teachers Service Commission v. Kenya National Union of Teachers and 3 Others*, Supreme Court of Kenya, Application No. 16 of 2015 [2015] eKLR.

furnished. The exercise of discretion depends on the circumstances of each case. However, the court will exercise discretion in case of a specific statutory requirement for the imposition of security, as in an election case.<sup>74</sup>

In *George Boniface Mbugua Alias George Boniface Nyanja v. Mohammed Jawayd Iqbal (Personal Representative of the Estate of the Late Ghulam Rasool Jammohamed)*<sup>75</sup> the Supreme Court was of the view that no specific provision exists on the remedy of a stay of execution. The application of the provision in the Constitution confirms that no explicit statutory provision of the law provides for the relief of a stay of execution. Reading the rules, they provide for the court's general jurisdiction to grant interlocutory orders.

The discussion on the legal framework guiding the condition of security in the Supreme Court of Kenya suggests that, though not explicitly provided, this framework obtains its legality from the constitutional provision<sup>76</sup> legislation,<sup>77</sup> The Supreme Court Rules<sup>78</sup> and decided cases. Essentially, the Constitution guarantees access to justice and mandates the Supreme Court to issue an order that promotes justice. From the laws discussed, the requirement of security in the Supreme Court is not expressly granted, except in election petition cases. Owing to that legal gap, the Supreme Court took the initiative to develop factors to be considered when considering conditions for security. Matters that

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<sup>74</sup> Supreme Court (Presidential Election Petition) Rules, 2017, r 6.

<sup>75</sup> *George Boniface Mbugua alias George Boniface Nyanja v Mohammed Jawayd Iqbal (Personal Representative of the Estate of the Late Ghulam Rasool Jammohamed)* [2015] eKLR, at para. 22.

<sup>76</sup> Constitution of Kenya, 2010, above note 22, art 59

<sup>77</sup> Supreme Court Act, above note 61, s 21(2).

<sup>78</sup> Supreme Court Rules, 2020 (Kenya), rr 31 and 32.

the Supreme Court is required to consider include the chance of success, the judgment debtor's financial ability, the importance of access to justice, proportionality, and public interest, as was demonstrated in the case of *Westmont Holdings SDN BHD v. Central Bank of Kenya* and *Two Others*.<sup>79</sup> These factors are critical for balancing the constitutional right of access to justice and the right of the decree-holder to realise the fruits of the decree granted to him. This embryonic jurisprudence indicates the court's role in bridging statutory gaps, which the current article assesses.

#### 4. COMPARATIVE ANALYSIS

As discussed earlier, a stay of execution is an important remedy that allows the appellant to stay the execution of the decree from the lower court pending an appeal in the higher court. Nevertheless, for the court, requiring security for the appellant before an order of stay of execution is granted has been a practice and statutory requirement as was decided in *Duncan Shilly Nkya Applicant v. Oysterbay Hospital Co. Ltd Kivango Security Co. Ltd*.<sup>80</sup> This section provides a comparative analysis of the requirement of security in the apex courts of both Tanzania and Kenya by indicating the legal framework, judicial interpretation, and its likely consequences in accessing justice for these courts.

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<sup>79</sup> *Westmont Holdings SDN BHD v. Central Bank of Kenya and Two Others*, above note 69.

<sup>80</sup> *Duncan Shilly Nkya v. Oysterbay Hospital Co. Ltd and Kivango Security Co. Ltd*, Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 627 of 2023, TanzLII, at p. 12.

#### 4.1 Legal Framework on Security Requirement

In Tanzania, the Tanzania Court of Rules<sup>81</sup> The Appellate Jurisdiction Act<sup>82</sup>, and the Constitution of the United Republic of Tanzania<sup>83</sup> The primary legislation that governs the court of appeal while considering the issue of furnishing security. When the three legislations are examined properly, the appellate Tanzania Court of Appeal Rules make it mandatory for the applicant to meet the condition of furnishing security and a mandatory requirement for an order of stay of execution.<sup>84</sup> whereas the Appellate Jurisdiction Act mandates the CAT to grant an order for a stay of execution.<sup>85</sup>The Constitution of the United Republic of Tanzania provides for the right to access justice.<sup>86</sup> The right to access justice is subject to conditions of furnishing security requirements that are envisaged in the Tanzania Court of Appeal Rules.

In Kenya, the stay of execution in the Supreme Court is regulated by the Supreme Court Rules<sup>87</sup> Supreme Court Act,<sup>88</sup> and the Constitution of Kenya.<sup>89</sup> The Supreme Court Rules<sup>90</sup> do not expressly require the applicant to provide security for costs before the court can grant a stay of execution. It is from this legal gap that the Supreme Court, in the case of *Westmont Holdings*

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<sup>81</sup> Court of Appeal Rules, above note 36.

<sup>82</sup> Appellate Jurisdiction Act, above note 30.

<sup>83</sup> Constitution, above note 21.

<sup>84</sup> Court of Appeal Rules, above note 36.r 11(2) (b).

<sup>85</sup> Appellate Jurisdiction Act above note 30 r 4.

<sup>86</sup> Constitution (n 21) art 13(6) (a).

<sup>87</sup> Supreme Court Rules above note 73 r 31.

<sup>88</sup> Supreme Court Act, above note 61 s 21(2).

<sup>89</sup> Constitution above note 22 art163(2) (b) (i) (ii).

<sup>90</sup> Supreme Court Rules above 73 r 31.

*SDN BHD v. Central Bank of Kenya and Two Others*.<sup>91</sup> provided standard guidelines on factors to be considered when making an order for security for costs in court. As opposed to Tanzania, in Kenya, there is no specific provision that provides for the requirement to furnish security in the Supreme Court of Kenya for stay, save for election petition cases.<sup>92</sup> Thus, the Supreme Court of Kenya has the mandate to exercise discretionary powers when determining security. The Constitutional spirit of Kenya guarantees access to justice and upholds fair hearing in a court of law.

## 4.2 Judicial Interpretation

The inclusion of a provision for furnishing security in the Tanzania Court of Appeal Rules made it mandatory, and the CAT has consistently upheld that condition. In the case of *Ecobank Tanzania Limited v. Double A Co. Limited and 3 Others*,<sup>93</sup> The Court held that the condition that ought to be met before the court grants an order of stay of execution must be met cumulatively. One of the notable conditions is for the applicant to furnish security. At times, a rigid security requirement has been viewed as a stumbling block toward access to justice for indigent litigants.

The Kenyan Supreme Court has demonstrated flexibility in determining security requirements before a person appeals to the Supreme Court of Kenya. As discussed earlier, there is no specific provision in the Supreme Court that makes the furnishing of security a mandatory condition for granting a stay

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<sup>91</sup> *Westmont Holdings SDN BHD v. Central Bank of Kenya and Two Others*, above note 69.

<sup>92</sup> Supreme Court (Presidential Election Petition) Rules, 2017, above note 69, r 6.

<sup>93</sup> *Ecobank Tanzania Limited v. Double A Co. Limited and 3 Others*, Court of Appeal of Tanzania, Civil Application No. 178 of 2021, TanzLII.

of execution. To cure this *lacuna*, the Supreme Court, in the case of *Westmont Holdings SDN BHD v. Central Bank of Kenya and Two Others*<sup>94</sup> outlined standard guidelines on factors to be taken into account when making an order for security for costs in court. Generally, the condition for security should not impede access to justice. The guideline insists on taking into account the broad approach of access to justice and the decree-holder's interest.

### 4.3 Security Requirement

Both Tanzania and Kenya impose security requirements as a condition in granting an order for the stay of execution; however, the requirement is strictly enforced in the CAT as it is statutorily provided.<sup>95</sup> Noncompliance with this rule attracts the court to grant an order for a stay of execution, which ultimately makes the appeal process nugatory. Kenya's approach under the guidance of the Supreme Court Rules and the Constitution of Kenya<sup>96</sup> does not contain the condition for furnishing of security as a prerequisite to the grant of stay of execution, thus giving the court a discretionary power to determine security requirements. While both jurisdictions recognise the requirement of security for a stay of execution, the Kenyan Supreme Court has exercised a more flexible approach in determining security requirements for individual circumstances, while the CAT largely has maintained a rigid stance in determining the conditions for security in a stay of execution.

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<sup>94</sup> *Westmont Holdings SDN BHD v. Central Bank of Kenya and Two Others*, above note 69.

<sup>95</sup> Court of Appeal Rules, above note 31, r 11(2)(b).

<sup>96</sup> Constitution above note 22 art 163.

#### **4.4 Legal Implications of the Requirement for Access to Justice**

The stringent application of the requirement for security in the CAT impedes the constitutional right to access justice, more specifically for indigent persons.<sup>97</sup> Although the requirement for security has proved to be a mechanism for ensuring that a decree-holder does not leave the court with an empty decree, this condition should not be determined with a mechanical approach. The Supreme Court of Kenya has shown a flexible approach to construing the security furnishing condition.<sup>98</sup> This approach intends to enhance access to justice. The strict application of the rule often undermines access to justice for indigent litigants and places the constitutional right of access to justice at risk.

### **5. RECOMMENDATION AND CONCLUSION**

To create a fairer system that promotes access to justice for all persons regardless of their financial resources, the article recommends several reforms on the security requirements for a stay of execution in both Tanzania and Kenya.

First, having judicial discretion in determining whether to order security, taking into consideration the applicant's financial ability. The CAT should have more discretionary power to assess the applicant's financial ability when determining security requirements. Such discretion should be guided by clear criteria, including those currently provided in the CAT Rules, with due consideration given to whether the applicant lacks the financial or other means to furnish the required security. By embedding these

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<sup>97</sup> Ibid art 163.

<sup>98</sup> *Westmont Holdings SDN BHD v. Central Bank of Kenya and Two Others*, above note 69.

criteria within the legal framework, courts would be better positioned to balance the protection of decree-holders with the imperative of ensuring meaningful access to appellate justice. Strict adherence to security requirements for granting an order of stay of execution may at times impede access to justice for indigent litigants. An amendment of the law should explicitly provide that, when the court determines the security for costs conditions, apart from the requirement provided in the law, but also consider the applicant's financial capacity and any other relevant factors justifying the grant of a stay.

Moreover, the law on security requirements in Kenya should be amended. As discussed earlier in the Supreme Court of Kenya, there is no explicit requirement for furnishing security, except in election petitions. The Supreme Court has taken the initiative to develop guidelines through case law. However, to create certainty in the law, the requirement of security should be stated in the procedural rules that govern appeals before the Supreme Court of Kenya. The discretionary power in determining security should equally be maintained so that the indigent litigant is not placed at a disadvantage owing to the strict application of rules.

In both jurisdictions, guidelines on the exercise of discretion should be given. The law in both jurisdictions must develop guidelines that direct the way discretionary power is exercised by the court when determining security requirements. This will prevent the court from exercising its powers at its whim, which would be detrimental to justice. The essence of having discretionary powers is to ensure that judicial decisions become predictable and consistent. The absence of a guideline creates

chaos in the administration of justice, as the court may use such discretion contrary to the objective of justice.

Furthermore, human rights thoughts must be strengthened in determining security requirements as a condition for the due performance of a decree which binds the applicant. Stringent requirements of furnishing security as a mandatory requirement for the court to grant an order of stay of execution, at times, affect the fundamental right of access to justice. Thus, basic human rights principles such as access to justice and fair hearing should be considered when determining such security requirements. Including this human rights consideration will determine security in such a way that promotes access to justice in both jurisdictions.

The mandatory security requirement for a stay of execution in CAT plays a vital role in ensuring that the decree-holder obtains the fruits of the decree. However, some judicial decisions create a barrier to access justice for indigent litigants who may not afford the security requirements imposed by the law. While a reimagined approach allows the CAT to determine the type of security to be furnished by an applicant, it fails to accommodate litigants who lack the financial capacity to provide any form of security ordered by the court. Tanzania can foster an inclusive environment and promote access to justice, ensuring that litigants are not excluded solely because they are unable to meet rigid security requirements.

Thus, this article has examined the requirement of mandatory security for a stay of execution in the appellate courts of

Tanzania and Kenya. It has highlighted its legal implications for access to justice. The requirement of security conditions is important as it protects the decree-holder to ensure that they realise the fruits of the decree ordered by the court. However, strict adherence to this requirement poses a challenge to access to justice for indigent litigants. In contrast, Kenya's approach demonstrates a more flexible judicial discretion that strikes a balance between decree-holders' rights and access to justice by an indigent person. The article recommends the need to underscore judicial and legislative reforms that will enhance access to justice. By adopting a flexible approach, access to justice will be enhanced in both jurisdictions.

In conducting this research, the following challenges were observed: while discussing unlocking justice by making a comparative analysis of mandatory security for a stay of execution in the apex courts of Tanzania and Kenya, the author applied a doctrinal and comparative approach. Although this approach is valuable, it may be overlooked for want of empirical data that shows the actual applications. However, as such, the researcher devised doctrinal and comparative approaches to justify the legal framework and weaknesses of the legal framework for security requirements in both jurisdictions, which suffice and justify the study collection methods, including documentary review. Future studies should consider an empirical approach that provides a balanced view. Future studies should also consider making a comparative study from other common law jurisdictions such as India and South Africa, to mention a few.