



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

APPEAL NO. E043 OF 2025

JUBILEE HEALTH INSURANCE LTD.....**APPELLANT**
/APPLICANT

VERSUS

DAVID ODHIAMBO RIAGA.....
.....**RESPONDENT**

(Being an appeal from the Ruling and order of Hon. D.K. Matutu (SPM) in Kisumu ELRC No. 100 of 2022 delivered on 8th July 2025)

RULING

1. Before this Court for determination is the Appellant's Notice of Motion dated 30th July 2025 brought under certificate of

urgency. The application seeks stay of execution of the judgment and decree in Kisumu CMELRC No. 100 of 2022 pending the hearing and determination of the appeal. The Appellant also prays that costs of the application be provided for. The background is that the Appellant had earlier moved the trial court by an application dated 2nd May 2025 seeking to set aside the *ex-parte* judgment delivered on 29th August 2024. In a ruling rendered on 8th July 2025, the Learned Magistrate dismissed that application for want of merit. Aggrieved, the Appellant lodged this appeal vide a memorandum of appeal dated 17th July 2025.

2. Simultaneously, the Appellant filed an application before the Magistrate's Court dated 17th July 2025 seeking stay of execution pending appeal. On 21st July 2025, the Trial Court declined to grant interim stay and fixed the application for *inter partes* hearing on 12th August 2025. Fearing imminent execution, the Appellant filed the present application before this Court.
3. Pursuant to interim orders of this Court issued on 31st July 2025, the Appellant was directed to deposit the decretal sum

within forty-five (45) days. In compliance, it filed a bank guarantee dated 14th August 2025 on 27th August 2025. In support of its application, the Appellant contends that unless an order of stay is granted, the appeal will be rendered nugatory. It emphasizes that its request for stay was declined by the Magistrate's Court on 21st July 2025, notwithstanding that a memorandum of appeal had already been filed. The Appellant further avers that the Respondent is not a person of means and, in the event the decretal sum is paid out and the appeal subsequently succeeds, recovery would be impossible. To reinforce its position, the Appellant asserts that it is ready and willing to furnish such security as the Court may order for the due performance of the decree.

4. The Respondent opposed the application through a replying affidavit sworn on 13th August 2025. He contended that the application was *sub judice* and amounted to an abuse of the court process, since an earlier application dated 17th July 2025, seeking similar orders, was still pending before the Magistrate's Court. He further argued that the orders sought were untenable, as stay cannot issue against a negative order arising from the dismissal of an application. According

to him, the Appellant had failed to establish the principles necessary for the grant of stay, and he therefore urged the Court to dismiss the application with costs.

5. On the 22nd of September 2025, the Court directed that the motion be canvassed by way of written submissions. Both parties subsequently filed their respective submissions in compliance with those directions.

Applicant/Appellant's Submissions

6. The Appellant submitted that it had met the conditions for grant of stay of execution pending appeal as provided under Order 42 Rule 6(2) of the Civil Procedure Rules. It asserted that it had furnished security, filed a competent appeal, and demonstrated that it would suffer substantial loss should execution proceed and the appeal subsequently succeed. It emphasized that the application was filed timeously. The Appellant further drew the court's attention to its memorandum of appeal, which it argued discloses arguable grounds with high chances of success, and to the bank guarantee deposited as security.

7. The Appellant asserted that the Respondent would suffer no prejudice since he would still have the opportunity to be heard on appeal. In support of its position, it relied on Order 42 Rule 6(2), which requires the court to be satisfied that substantial loss may result, that the application has been brought without unreasonable delay, and that security for the performance of the decree has been furnished.
8. The Appellant also placed reliance on the principles enunciated in **MFI Document Solutions Ltd v Paretto Printing Works Limited [2021] eKLR** which in citing **Butt v Rent Restriction Tribunal [1982] KLR 417** held that:

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

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

- (3) *A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*
- (4) *The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.*
- (5) *The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.*
9. The Appellant further submitted that refusal to grant stay would amount to denial of access to justice, especially where the appeal is arguable. Citing **MFI Document solutions case** (*supra*) to the effect that:

“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 is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. 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 judgment.”

10. The Appellant clarified that the stay sought relates to the *ex parte* judgment in Kisumu CMELRC No. E100 of 2022, and not to the Ruling as claimed by the Respondent. It also pointed out that the application for stay before the Magistrate’s Court had been overtaken by events following the filing of the instant application.
11. On jurisdiction, the Appellant submitted that this court is properly seized of the matter under sections 1A, 1B, and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules. It therefore prayed that the application be allowed with costs.

Respondent's Submissions

12. The Respondent opposed the application, asserting that it was *sub judice*. He referred to the Appellant's application dated 17th July 2025, which he said sought similar reliefs. Relying on section 6 of the Civil Procedure Act, the Respondent contended that the present application is barred, since the subject matter is directly and substantially in issue in a previously instituted suit. To reinforce this point, he cited **John Florence Maritime Services Ltd & another v Cabinet Secretary for Transport and Infrastructure & 3 others (2021) KESC 2 (KLR)**, where the Supreme Court condemned *sub judice* and forum shopping, holding that any matter filed in violation must be struck out to preserve judicial integrity. The Respondent further submitted that the filing of multiple applications in different forums constituted an abuse of the court process. He urged the court to invoke its inherent powers under section 3A of the Civil Procedure Act to prevent such abuse.

13. On the issue of stay, the Respondent averred that the orders sought were untenable since what was being

challenged was a negative order, in the manner of refusal to set aside a decree. Citing the case of **Western College of Arts and Applied Sciences v Oranga & others [1976] eKLR** and **Kenya Commercial Bank Ltd v Tamarind Meadows Ltd & 7 others [2016] eKLR**, he submitted that a negative order is incapable of execution and therefore cannot be stayed. The Respondent also urged the court to order release of the security deposit to him, submitting that the Appellant's conduct amounted to abuse of process. He relied on the decision in **Tabro Transporters Ltd v Absalom Dova Lumbasi [2012] eKLR**, where the court directed that security be released due to the applicant's abuse of the court process. In conclusion, the Respondent prayed that the application be dismissed with costs, the security of costs be released to him, and that the Appellant be censured for forum shopping and abuse of process. He also invited the Court to issue any other orders it deemed fit in the circumstances.

14. The motion before the Court is one seeking stay of execution of the judgment and decree of the Learned

Magistrate in CMELRC 100 of 2022. The stay was secured before this Court by deposit of a bank guarantee for the decretal sum pending hearing of this motion. What the Court is concerned about is whether the basis for grant of stay is met. The principles guiding the grant of a stay of execution pending appeal are well settled and these principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules. Order 42 Rule 6(2) which provides as follows:

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.

15. The Court of Appeal reiterated the principles in the case of **Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, where the Court of Appeal held that whereas its power to grant a

stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. In this case, the Appellant/Applicant has met the conditions for grant of stay.

16. The Court exercises its discretion applying these principles and finds there is an appeal capable of being argued and that there would be substantial loss if the judgment and decree of the Lower Court would be executed. There has been a deposit of security and therefore I grant the stay pending determination of the appeal herein. There is however no order as to costs given the prevarication of the Appellant in the matter before this Court and the Magistrate's Court.

Orders accordingly.

Dated and delivered at Nairobi this 22nd day of October

2025

**Nzioki wa Makau, MCI Arb.
JUDGE**

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