



**KENETH K SAWE** the Acting Registrar, Administration of  
the Appellant herein who averred that:

a. The Judgment was delivered on 17<sup>th</sup> April 2025 by Hon. J.M Olando (PM) in favour of the Respondent against the Appellant for decretal sum of Kshs 3,195,698.12 together with costs and interest.

b. The trial court erroneously found that pursuant to the 2013-2017 CBA Respondent was entitled to gratuity for the period commencing on 1<sup>st</sup> November, 1987 to 27<sup>th</sup> November 2021. The Appellant being aggrieved with this judgment filed an appeal seeking to set aside the trial court judgment which appeal is arguable with good prospects of success.

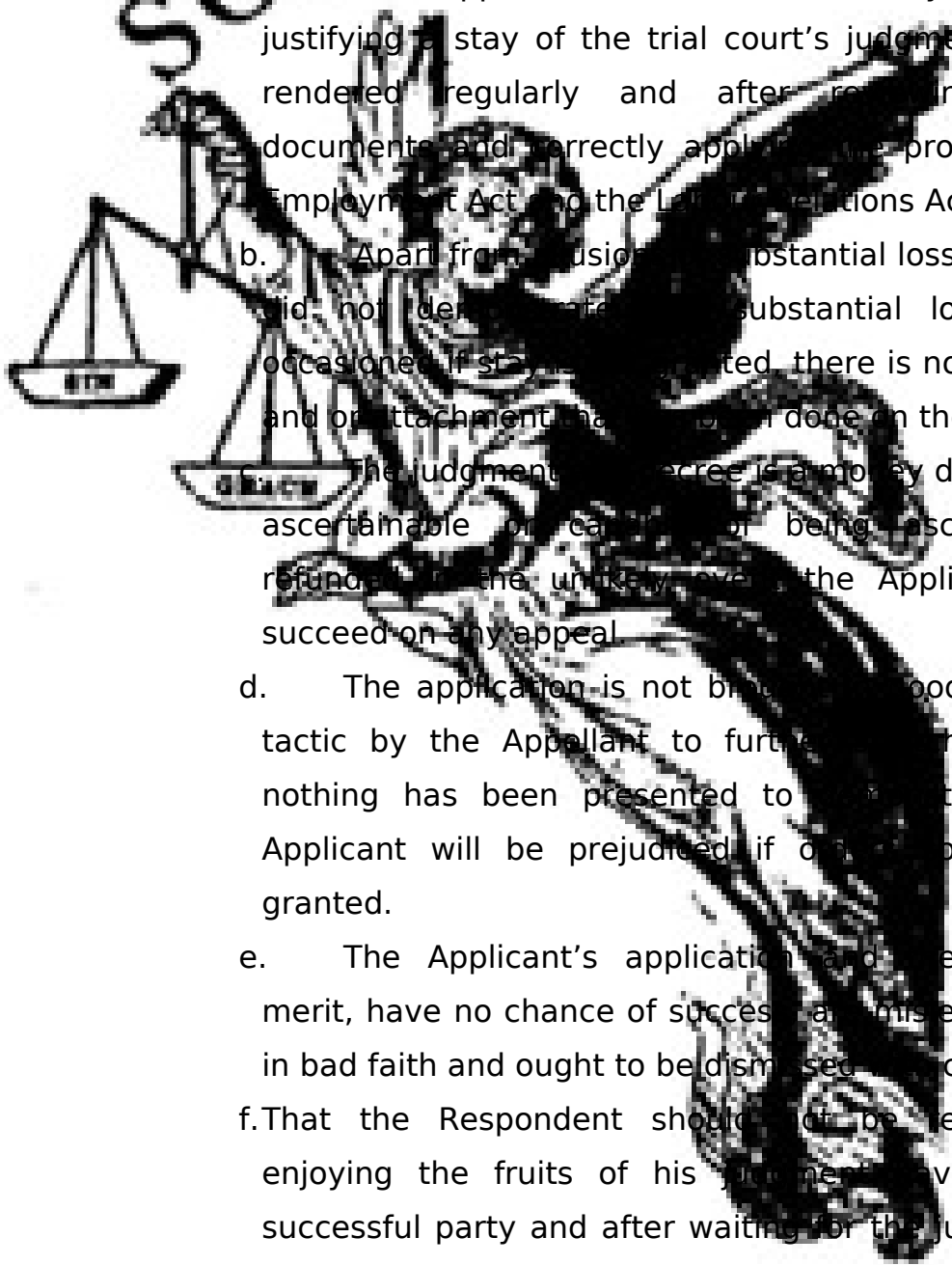
c. That the leave granted by the trial court of 30 days from 17<sup>th</sup> April 2025 lapsed and the Appellant was apprehensive that the Respondent may commence execution against the Appellant. An execution of the judgment and decree may result in attachment of the Appellant's assets despite its vital duty mandate set out under section 3 of University Act.

d. That unless the stay order is issued, payment of the substantial decretal sum is made by the Respondent whose means are unknown and if the appeal succeeds the said sum shall not be readily recovered from the Respondent which will render the appeal nugatory.

e. It will not be prudent and in accord with Article 232(1)(b) of the Constitution to commit substantial public funds by effecting payment while it is most probable that the Judgment of the trial court may be set aside in entirety and/or greatly varied.

4. In reply the Respondent filed his Replying Affidavit sworn on 16<sup>th</sup> June,2025 by the Respondent herein who averred that: \_

# SOCIAL JUSTICE



a. The Applicant did not advance any valid reasons justifying a stay of the trial court's judgment which was rendered regularly and after reviewing the filed documents and correctly applying the provisions in the Employment Act and the Labour Relations Act.

b. Apart from a decision of substantial loss the deponent did not demonstrate that substantial loss would be occasioned if stay is granted, there is no proclamation and attachment made or done on the Applicant.

c. The judgment and decree is a money decree which is ascertainable or capable of being ascertained and refundable in the unlikely event the Applicant were to succeed on any appeal.

d. The application is not brought in good faith as it is a tactic by the Appellant to further prolong litigation as nothing has been presented to demonstrate that the Applicant will be prejudiced if orders sought are not granted.

e. The Applicant's application and the appeal lack merit, have no chance of success and misleading brought in bad faith and ought to be dismissed with costs.

f. That the Respondent should not be restricted from enjoying the fruits of his journey having been the successful party and after waiting for the judgment since 2021 when he was retired.

g. In the unlikely event that this court finds merit in the application for stay, the Applicant should be ordered to

release half the decretal mount and costs to the Claimant and deposit the other half together with security for costs of the appeal in a joint interest bearing account of the advocates on record to safeguard the Respondent's interest of avoiding further delay once the appeal is finalized.

5. The Application was disposed of by written submissions.

### **APPLICANT'S SUBMISSIONS**

6. The Applicant through its Advocate CS. Fredrick Collins Omondi filed its written submissions dated 18<sup>th</sup> June, 2025 and submitted that the Respondent had not illustrated in his Replying Affidavit that he was in a position to refund the decretal sum in the event this appeal is successful. Counsel relied on the case of **Cooperative Bank of Kenya vs Taramusi Francis Ongoki (2019) eKLR** on this issue.

7. Counsel further submitted that the Applicant was a public university funded from exchequer and the matter should be heard expeditiously and determined to safeguard public money while relying on the case of **Attorney General & Anti-corruption vs Peter Mangiti & Another (2016) eKLR**. Counsel also relied on Article 232(1) (b) of the Constitution on prudent use of public resources.

8. Counsel also relied on the case of **Teachers Service Commission vs Benson Kuria Mwangi (2020) eKLR** to submit that a public institution is not required to deposit security by virtue of Order 42 Rule 8 of the Civil Procedure Rules.

### RESPONDENT'S SUBMISSIONS

9. The Respondent through his advocates OCO LAW & Co. Advocates filed his written submissions dated 30<sup>th</sup> June, 2025 and on the issue of whether the order of stay of execution should be granted he submitted that stay pending appeal is governed by Order 42 Rule 8 of the Civil Procedure Rules. That the applicant ought to satisfy the conditions set in the above provision on substantial loss if the application being made without unreasonable delay and security for costs.

10. Counsel relied on the case of **James Wangalwa & Another vs Agnes Naliaka Chesero (2012) eKLR** on what amounts to substantial loss. That no substantial loss which was shown to arise once execution proceeds as it

should be. That those were monies decreed to an employee having worked for the Applicant for 34 years.

11. Counsel further relied on the case of **RWW VS EKW (2019) eKLR** on the purpose of stay of execution order pending appeal while calling upon the court to look at the interests of both parties.

12. On the issue of security for costs, counsel relied on among another case the case of **Tom Dova vs Tarbo Transporters (2013) eKLR** on purpose for security for costs. That the Applicant is a large institution with the financial muscle to pay. The excuse that the Applicant is a government institution hence unable to offer security for costs should not be the reason to frustrate the Respondent.

13. Counsel further submitted that this being a case where viva voce evidence was not called there can be no loads of proceedings hence the Applicant should in addition to conditions above be given timelines within which to file the record of appeal and canvas the appeal.

14. Counsel submitted that the stay application should be dismissed for not meeting the conditions for such stay.

## **DETERMINATION**

15. Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2024 requires the stay application to be filed on the appeal file which the Applicant has complied and declared that the same application has not been made in another court.

16. On the issue of the grounds upon which this court exercises the discretion to grant a stay of execution are well governed by the Civil Procedure Rules under Order 42 Rule 6 which stipulate as follows:

*(2) No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the performance of such decree or order as may ultimately be made in favour of the applicant has been given by the applicant.*

17. **In Joseph Odide Walome v David Mbadi Akello [2022]**

**eKLR** the court in support of the above provision held as follows;

*An applicant needs to satisfy the court on the following conditions before they can be granted the stay orders:*

- a. Substantial loss may result to the applicant unless the order is made,
- b. The application has been made without unreasonable delay, and
- c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

18. On the issue of substantial loss, this was ably explained by

Gikonyo J in the case of **James Wangalwa & Anor v Agnes Naliaka Cheseto [2012] eKLR** where the learned Judge

observed:

*"No doubt, in law, the fact that a writ of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached property have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process...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. This is what substantial loss would amount to."*

19. The Applicant is seeking stay of execution of the judgment and decree of judgment delivered by Hon. T.M Olando on 17<sup>th</sup> April, 2025 of Kshs 3,195,000/=. The same is said to be gratuity for the 34 years the Respondent worked for the Applicant.

20. The Applicant alleged that being a government institution which solely relies on public resources which should be preserved as per Article 232(1)(b) of the Constitution it is a

public interest issue that the public funds are at stake hence substantial loss would occur.

21. Whereas the Respondent has not illustrated if he is in a position to refund the decretal amount in the event the appeal is successful this means if the appeal is successful it may be rendered nugatory if this Applicant is not allowed to preserve the decretal sum.

22. This court has noted the grounds in the memorandum of appeal and it is clear there are triable issues when it comes to the gratuity payable to the Respondent which should be determined finally, more so if the CBA applies retrospectively or not.

23. In the interest of justice having noted the grounds in the memorandum of appeal this court grants the Applicant a chance to have his appeal first heard and determined. This will avoid rendering the appeal nugatory.

24. On the second limb of approaching the court without unreasonable delay, this court notes the interim stay of 30 days issued on 17<sup>th</sup> April, 2025 lapsed on 16<sup>th</sup> May, 2025 and this

application was filed on 19<sup>th</sup> May,2025 which a reasonable period.

25. On the issue of security for costs the Applicant stated that being a public institution it should be compelled to deposit the same as per Order 42 Rule 8. The said provision provides as follows:

*No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any person who is sued in respect of an act alleged to be done by him in his official capacity.*

26. This court in **The State of Teachers Service**

**Commission v. B. K. Kuria & Mwangi**

**[2020] KEELRC 1501 (KJR)** held as such that \_

*Being a public institution, there is public interest in granting the orders of stay as the decretal sum is payable from public funds. I have considered the grounds of appeal attached as Appendix 8 to the application and I am satisfied that the appeal is meritorious. Being a public institution, the applicant is not required to deposit security by virtue of Order 42 Rule 8 of the Civil Procedure Rules.*

27. In this case therefore the Applicant should not be compelled to deposit security for costs since being a public entity the Respondent is assured of payment of the decretal sum if the appeal is not successful.

28. The Applicant has therefore met the conditions for grant of the orders of stay.

29. The application is therefore found with merit and is hereby allowed in the following terms: -

a. The Appellant is ordered to file the record of Appeal in the court within 30 days of this order and or be at liberty to apply and show reasonable cause why such appeal has not been filed.

b. The matter will be mentioned on 8<sup>th</sup> December, 2025 to confirm sentence and or further orders.

c. Costs shall be in the cause.

30. It is so ordered.

Dated at Nairobi this 9<sup>th</sup> day of October 2025

Delivered virtually this 9<sup>th</sup> day of October 2025

**Abuodha Nelson Jorum**

**Presiding Judge-Appeals Division**

