



**XRX Technologies Ltd v Maseno University (Civil Case 361 of 2016)  
[2025] KEHC 14532 (KLR) (Commercial and Tax) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14532 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 361 OF 2016  
BK NJOROGE, J  
OCTOBER 9, 2025**

**BETWEEN**

**XRX TECHNOLOGIES LTD ..... PLAINTIFF**

**AND**

**MASENO UNIVERSITY ..... DEFENDANT**

**RULING**

1. This is a Ruling in respect of an Application by the Defendant/Applicant by way of a Notice of Motion dated 15<sup>th</sup> January, 2025.

**Background Facts**

2. The Applicant filed the Notice of Motion dated 15<sup>th</sup> January 2025 seeking the following orders;
  - a. There be an order for stay of execution and/or enforcement of the Judgment and Decree of this Court delivered on 5<sup>th</sup> December, 2024, pending the hearing and determination of an intended appeal to the Court of Appeal.
  - b. Costs of this Application be provided for.
3. The said Application was supported by the Affidavit of Joy Akinyi, who contended that judgment was delivered on 5<sup>th</sup> December 2024 in favour of the Plaintiff against the Defendant. The Plaintiff was awarded special damages in the sum of Kshs. 44,873,241.47 together with interest at 2% until payment in full, costs of the suit and interest thereon. The Defendant, being dissatisfied with the said judgment, has filed a Notice of Appeal and applied for proceedings with the intention of lodging an appeal before the Court of Appeal.



4. Moreover, the thirty (30) days' stay of execution granted on 5<sup>th</sup> December 2024 lapsed on 28<sup>th</sup> January 2025, thereby exposing the Defendant to imminent execution proceedings. The Defendant argued that the decretal sum is substantial and, if execution is allowed to proceed, it will suffer substantial loss in terms of cash flow and operational assets, thereby crippling its daily business operations and occasioning irreparable harm. The Defendant further states that it is ready and willing to furnish security for the due performance of the decree. Unless an order for stay of execution is granted, the Defendant avers that it will suffer immense prejudice and be denied the statutory right to ventilate its appeal.
5. In reply, the Plaintiff filed a Replying Affidavit sworn on 17<sup>th</sup> February 2024 and contended that the Respondent opposes the application for stay of execution. This is on the grounds that the Applicant has not demonstrated the substantial loss it is likely to suffer if execution proceeds. Although the Applicant alleges that payment of the decretal sum would disrupt its programs and hinder its obligations, it has provided no evidence of its financial position to support these claims.
6. The Respondent further argued that the Applicant's suggestion that it would be unable to refund the decretal sum in the event of a successful appeal is baseless.
7. In addition, the Respondent asserted that it is a reputable company with over fifteen years in business, consistently profitable, and with assets valued at over Kshs.523 million. It therefore has the capacity to refund the decretal amount should the appeal succeed. The Respondent contends that the application is intended to deny it the fruits of a lawful judgment. However, without prejudice, it urges that if the Court is inclined to grant a stay, it should be on condition that the decretal sum is deposited into a joint interest-earning account within thirty days, failing which the stay should lapse automatically.

#### **Issues for determination**

8. Having carefully considered the parties' respective submissions, the Application and the Response therewith, the court frames the following single issue for determination;
  - a. Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

#### **Analysis**

9. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules, which provides as follows:

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
10. In *Butt v Rent Restriction Tribunal* [1982] KLR 417 at page 419 Madan JA (as he was then) held as follows:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule, ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in



Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 459:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

11. In light of the above, the Applicant herein is required to satisfy the following conditions to the court to justify the grant of an order for stay of execution pending appeal, that is, establish sufficient cause; demonstrate that he will suffer substantial loss unless a stay is granted; offer security and apply for the stay order without unreasonable delay.
12. As to what substantial loss is, it was observed in James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, that:

“No doubt, in law, the fact that the process 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 properties 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 ... 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.”
13. It was the Applicant’s submission that it is apprehensive that the decretal sum, if paid over to the Respondent, may not be recoverable should the appeal eventually succeed. Further, the Defendant is a public university that offers training to hundreds of students in various disciplines. It also undertakes research in various fields for public benefit. It employs hundreds of people in order to execute its mandate as an institution of higher learning. The payout of the money awarded to the Plaintiff will disrupt the Defendant’s programs and fatally harm its capacity and ability to discharge its contractual and statutory mandate to the youth, students, partners, employees, tax authorities and to the public in general.
14. Further to the above, where an Applicant is of the view that the Respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree, the burden is upon the applicant to prove that that is the position. See Caneland Ltd. & 2 Others v Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.
15. While the Court takes into consideration the Respondent’s ability to refund the decretal sum, it is the Court’s view that the Applicant being a public university if stay of execution is not granted, the Applicant will suffer irreparable loss.
16. Delay – the judgment was delivered on 5<sup>th</sup> December 2024 and the present Application is dated 15<sup>th</sup> January 2025. The Court observes that there has been no inordinate delay in the filing of this Application.
17. Security – on this ground, it was the Applicant’s submission that it is willing to furnish security for the due performance of the decree, while the Respondent urged that the court to direct that the decretal sum be deposited in a joint interest-earning account, within strict timelines, pending the hearing and determination of the appeal.



18. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR where 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.”

19. Evidently, the issue of security is discretionary, and it is upon the Court to determine the same. Additionally, the right of appeal must be balanced against an equally weighty right of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR, the Court stated: -

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to the fruits of his judgment; hence, the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

20. The Applicant’s Counsel during submissions did make an offer that his Client the Defendant is willing to deposit a half of the Decretal sum in an interest earning account. The Respondent’s Counsel did counter that let the entire decretal sum be deposited in an interest earning joint account.

21. Therefore, it is the Court’s considered view that the Applicant deposits  $\frac{3}{4}$  of the decretal amount in a joint interest-earning account in the names of the advocates for the parties herein within 45 days from the date hereof. The Application is allowed on this condition.

22. As to costs, the same will be in the cause.

### **Determination**

23. The Defendant’s application by way of a Notice of Motion dated 15<sup>th</sup> January, 2025 is allowed in the following terms;

- a. There be an order for stay of execution and/or enforcement of the Judgment and Decree of this Court delivered on 5th December, 2024, pending the hearing and determination of an intended appeal to the Court of Appeal. This is on condition that the Defendant/Applicant do deposit three quarters of the Decretal sum of Kshs. 44,873,241.47 being Kshs. 33,654,931.10 in an interest earning account to be opened in the joint names of the Counsel for the parties, within the next 45 days from the date of Ruling. In default the order of stay granted to lapse and execution to issue
- b. The costs of the application be costs in the cause.

24. It is so ordered.



**DATED, SIGNED AND DELIVERED AT MILIMANI THIS 09TH DAY OF OCTOBER, 2025.**

**NJOROGE BENJAMIN K.**

**JUDGE**

In the presence of:

Miss Diru for the Plaintiff/Respondent.

Miss Atieno for the Defendant/Applicant

Mr. Peter Wabwire– Court Assistant

