

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
MALINDI**

MISC. APPLICATION NO. E018 OF 2025

MICAH KATUKU NELSON

JONATHAN MUEMA MUTUNGA

[Suing as the Administrators and Legal Representatives of the Estate of

NELSON MUTUNGA (deceased)
APPLICANTS

VERSUS

BONAN CONSULT LIMITED
RESPONDENT

RULING

The ruling relates to an application filed by the respondent, Bonan Consult Limited dated 11 November 2025 premised under the provisions of Section 1A, 1B, 3A, 75 of the Civil Procedure Act, Order 42 rules 6 and 7, Order 43 rule 1(3), of the Civil Procedure Rules and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules. The respondent is seeking leave to appeal the ruling and order delivered on 30 October 2025 herein, stay of execution of the ruling and decree thereof pending the hearing and determination of the intended appeal, and a stay of execution pending the hearing and determination of **Kilifi CMCC No. E478 of 2025**, where there is a declaratory suit filed by the respondent against Jubilee Allianz General Insurance for indemnity under a WIBA policy.

The affidavit of Boniface Kyalo Muthwale supports the application.

The application is based on the court's ruling of 30 October 2025, which imposed an obligation on the respondent to pay compensation of KSh. 2,956,800 within 30 days. Jubilee Allianz General Insurance insured the respondent under a WIBA policy. The respondent has filed a declaratory suit to compel the insurer to indemnify it and discharge the liability.

The respondent asserts that the court's finding that it should have sought the joinder of the insurer ignores the limited jurisdiction of the court under Article 162(2) of the Constitution and section 12 of the Employment and Labour Relations Court Act, which does not permit declaratory suits. Where a stay of execution is not allowed, the intended appeal will be rendered nugatory.

In reply, the applicants filed the Reply in Affidavit of Micah Katuku Nelson, who avers that the court delivered a ruling on 30 October 2025, considered all the documents, and confirmed the award of Ksh. 2,956,800. The respondent had no declaratory suit in existence when it filed its reply on 29 September 2025.

Katuku avers that it has since emerged that Kilifi CMCC No. E478 of 2025 was filed after pleading herein had closed, and the court reserved the matter for ruling on 30 October 2025. Such a suit was filed belatedly and as an afterthought with the intention of circumventing these proceedings.

The respondent has come to court with unclean hands and should not be entertained.

In the ruling herein, the court held that the insurer was not joined, and this does not bar enforcement of the DOSH award under WIBA. Sections 26, 30 and 34 of WIBA allow for competitions, and a party that is aggrieved should have raised objections to the DOHS or filed an appeal under section 51 of the Act, which the respondent failed to do. The instant application should be dismissed with costs.

In his Supplementary Affidavit, Muthwale avers that, as the employer, they followed due process upon the deceased's demise. Notice issued to DOSH; upon assessment, notice issued to the insurer for settlement under the WIBA policy, which they have failed to address; hence, Kilifi CMCC No. E478 of 2025.

The applicants' averments that the respondent approached the court with unclean hands are incorrect, as the respondent has since discharged its obligations and initiated proceedings for compensation on behalf of the deceased's estate. There is no dispute regarding the award or the need for an appeal, save to forward it to the insurer for indemnification of the respondent as the policyholder under WIBA.

There is evidence that upon the fatal accident to the deceased, the respondent's manager acted promptly in handling the matter. There was good faith in addressing the matter, which is

currently before **Kilifi CMCC E478 of 2025**. The respondent has the right to address the matter with the insurer before the execution of the decree herein.

The affidavits and submissions by the parties are analysed, and the issues which emerge for determination are:

Whether the court should grant leave to appeal against the ruling herein delivered on 30 October 2025.

Whether the court should grant a stay of execution of the ruling pending the hearing and determination of the intended appeal.

Whether the court should stay execution of the decree pending the hearing and determination of Kilifi CMCC No. E478 of 2025.

On the question of leave to appeal, under section 17 of the Employment and Labour Relations Court Act, upon the court ruling on 30 October 2025, the parties have the right of appeal. Upon its ruling, the enforcement proceedings herein were fully determined. Any leave to appeal should be addressed before the appellate court.

On whether to grant a stay of execution pending hearing of an intended appeal, the principles guiding this court are addressed under Order 42, Rule 6 of the Civil Procedure Rules. These principles are enumerated by the courts including the case of Duba v Boru [2025] KEHC 18140 (KLR); Rajani & another v Rajani & 2 others [2025] KECA 1823 (KLR) and Trident Insurance Company Limited v Wambui [2025] KEHC 15698 (KLR). The applicant must demonstrate the substantial loss to be suffered, offer security, and move without delay.

Whereas the respondent as the applicant does not challenge the award under DOSH for Ksh. 2,956,800 the case is that the insurer, Jubilee Allianz Kenya Limited, should settle this. There was a WIBA policy covering the matter, hence the insurer should identify the respondent.

As the employer, the respondent bears the primary responsibility. As addressed in the ruling delivered on 30 October 2025, the non-joinder of the insurer should not be visited against the applicants. Where the respondent has since filed Kilifi CMCC E478 of 2025, such should address the issue with finality. This suit was filed in September 2025, post these proceedings. However, that matter cannot be applied before this court to delay justice.

The court finds no loss to the respondent upon payment of the DOSH award to the applicants. Due indemnity can be secured against the insurer.

With regard to security for the due performance of the appeal, save to urge the court that an intended appeal exists, only a notice of appeal has been filed. There is no appeal. No draft memorandum has been attached to the application of the supporting affidavit. Such an intention to appeal is left to bear.

Despite filing this application immediately after the ruling on 30 October 2025, the respondent fails to address the material principles for the grant of the order of stay of execution.

As regards proceedings in Kilifi CMCC No. E478 of 2025, a suit before the lower court cannot negate proceedings before this court. It should be allowed to take its natural course.

Accordingly, the court finds no merit in the application dated 11 November 2025. The same is dismissed with costs to the applicants.

Delivered in open court at Mombasa, this 16th day of December 2025

M. MBARŪ
JUDGE

In the presence of:

Court Assistant:

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