



Sana Industries Ltd v Ngunga (Employment and Labour Relations Appeal E290 of 2025) [2025] KEELRC 3564 (KLR) (10 December 2025) (Ruling)

Neutral citation: [2025] KEELRC 3564 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E290 OF 2025**

**JW KELI, J
DECEMBER 10, 2025**

BETWEEN

SANA INDUSTRIES LTD APPLICANT

AND

MARY MUENI NGUNGA RESPONDENT

RULING

1. Aggrieved by the Judgment of the Honourable Noelle Kyanya in MCELRC E011 OF 2024 dated 13th August 2025 the Applicant herein filed an Appeal against the said decision. Contemporaneously, the Applicant filed the instant Application by way of Notice of Motion dated 16th September 2025 brought under Order 40 Rule 6 and 7, Order 50 Rule 3 and Rule 6, Section 1A & 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya, (Rule 2(3) of the High Court (Practice and Procedure) Rules Section 10 Judicature Act Cap 8 Laws of Kenya) and all other enabling provisions of the law seeking for the following orders-
 - A. Spent
 - B. spent
 - C. spent
 - D. That this Honourable be pleased to grant an Interim Order for stay of all proceedings in the trial Court, pending the hearing and determination of the appeal.
 - E. That our client is ready to issue a security of the decretal sum.
 - F. That the Application be heard inter parties on such date and time as this Honourable Court may direct.
 - G. That the costs of this Application abide the outcome of the Appeal.



2. The application was further supported by the affidavit of Agnes Kagwiria dated 16th September 2025 annexing the impugned judgment and filed memorandum of appeal.

Grounds of the application

3. That judgement in the subordinate court matter was delivered on 13th August 2025 wherein the respondent herein was awarded Kshs 286,598.00 in total.
4. That immediately thereafter the Applicant/Appellant through their advocates sought for 30 days stay of execution of the Judgement and leave to appeal the said decision.
5. That the prayer for stay of execution and leave was granted.
6. That the duration given for stay of execution and leave to appeal granted is set to expired on 13th September 2025.
7. That the Applicant/Appellant is dissatisfied and aggrieved by the said Judgment and has opted to Appeal the whole of the said award.
8. That the Applicant's/Appellant's intended Appeal raises pertinent issues and has a high chance of success.
9. That the applicant is ready to provide security for the decretal sum in contention at least a quarter or half the decretal sum.
10. That unless the interim orders are granted, the Applicant will suffer irreparable damage hence it is in the best interest of justice that the application be certified urgent and orders granted as prayed.
11. That this Application will not occasion any prejudice to the Respondent.
12. That this Application has been done without any unreasonable delay.
13. That It is therefore in the interest of Justice that this Application is considered urgently and the reliefs sought granted.
14. That the applicant has met the minimum conditions for grant of stay pending appeal, by bringing the application timeously and offering security for the decretal sum.
15. The application was further supported by the affidavit of Agnes Kagwiria dated 16th September 2025 annexing the impugned judgment and filed memorandum of appeal.

Response

16. The application was opposed by the respondent by way of her replying affidavits sworn on the 30th September 2020 as follows-
17. That the Defendant/Applicant's application aforesaid is:- Fatally defective; Incompetent and lacking in merit; Frivolous, vexatious, scandalous, and otherwise an abuse of the court process; With intent to defeat justice, and should be dismissed with costs to the Claimant/Respondent.
18. That the said supporting affidavit is highly misleading and lacks merit.
19. That I am advised by my Advocates on record, whose advice I verily believe to be true and correct, that the Appellant has not met the conditions for the grant of Stay of Execution pending Appeal as the Appeal has no chances of success as required by law.



20. That I am advised by my Advocates on record, whose advice I verily believe to be true and correct, that this Honourable Court is a Court of Equity and equity demands that he who seeks equity must do equity.
21. That in response to paragraph 11 and 12 of the Supporting Affidavit of Agnes Kagwiria, the Applicant has admitted that they are unable to sustain the appeal since they are operating on overdrafts, thus unable to deposit the decretal sum in court and the very likely event that the appeal is dismissed, I will be forced to pursue execution against the Appellant for the payment of the decretal sum which renders the security required nugatory.
22. That the applicant has further stated that they are ready to deposit security, but don't give the form of security that they are willing to deposit, and they want the court to trust them blindly at my detriment, given the fact that they are already struggling to run their operational cost and are straining in liquidity. This application is highly prejudicial to me, as I may not be able to reap the benefits of the fruits of my judgment once this appeal is concluded.
23. That I am advised by my Advocates on record, whose advice I verily believe to be true and correct, that courts have allowed securities such as cash deposits, bank guarantee, and Insurance bond/guarantee.
24. That I am advised by my Advocates on record, whose advice I verily believe to be true and correct, that this Honourable Court is a Court of Equity and equity demands that Justice should not only be done, but must also be seen to be done.
25. That I pray that in the event that the court is inclined to allow the application for Stay of Execution, that the Appellant be ordered to deposit the full Decretal Sum and Costs in the total sum of Kshs. 286,598/= as per the Decree in a joint interest-earning bank account to be held by advocates for both parties within 30 days.
26. That there will be no prejudice on the part of the Appellant in depositing the decretal sum, since in the event that the Appeal succeeds, the Appellant will be at liberty to take the Decretal sum.
27. The application came up for mention on 6th October 2025 and parties were subsequently directed to file written submissions.

Appellant's submissions

28. Whether the appellant has satisfied the requirements for the grant of Orders of Stay of Execution pending hearing and determination of the Appeal? ii. Who should bear the costs of this Application? Primarily, the Appellant is seeking stay of execution of the Judgment of the Honourable Noelle Kyanya in MCELRC E011 OF 2024. The grounds upon which the application is premised exists on the face of the Notice of Motion and further elaborated in the Supporting Affidavit of Agnes Kagwiria, on behalf of the Applicant herein. 6. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides: "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. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in Sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions Section 1A(2) of



the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.” From the foregoing, the Applicant submits that for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. 10. This position was similarly upheld in *Antoine Ndiaye v African Virtual University* [2015] eKLR. ” that substantial loss may result to the applicant unless the order is made”

29. What is substantial loss was discussed in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, where the court stated 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.” Notably, in the impugned judgment, the trial magistrate failed to apportion liability to the Respondent despite noting that she absconded duty, which then entitled the Appellant to terminate her employment. The effect of the said judgment is that the excessive damages were awarded when the Respondent in fact absconded duty, hence abetting her own dismissal from employment. There also now exists the apprehension that the Respondent may commence execution proceedings against the Applicant on account of the judgment, which the Applicant seeks to be set aside by the appellate court. Due to the unpredictability of the mode of execution the Respondent may prefer to fulfill the judgment, the Applicant stands to suffer irreparable harm, as the subject of the appeal, being quantum. The Respondent has equally not demonstrated that he is able to refund the sum if the appeal succeeds. The Respondent submits that this further buttresses his point that the substance of the subject matter of the suit may be lost should stay pending appeal not be granted. Reliance is placed in the case of *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words: “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.” Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.” Vide the foregoing, the Applicant submits that it is therefore imperative that there exists a subject matter for the determination of the court during the hearing of the Appeal and this can only be possible if the instant Application is allowed in terms of staying the execution of the impugned judgment and orders thereof pending hearing and determination of the Appeal. Otherwise, the Appellant will suffer substantial loss and the whole Appeal will be futile to the detriment of the Applicant.



30. Furnishing of security - while the Applicant acknowledges that Order 42 (Rule 6) stipulates depositing of security of costs as a precondition for grant of stay pending appeal, the same is discretionary upon the courts. In the words of Justice Musyoka in *Simba Coach Limited v Kiriiyu Merchants Auctioneers* [2019] eKLR “There are no fast and hard rules on what and how much the security ought to be and in this case the court reserves its discretionary power to determine as per the circumstances of the case and the nature of the security.” Orders for security of costs have often been granted in cases where the Respondent has adduced sufficient reasons to substantiate the apprehension that the Applicant would be unable to pay the decretal sums should the appeal fail. The Applicant herein offered is ready to comply on furnishing security as the court will direct. The Applicant avers it is currently operating on bank facility due to operational cost for the business which are straining liquidity and therefore this honourable court allows the Applicant to deposit part of the decretal sum. The Applicant avers that the nature of the business undertaken by the Applicant is extremely capital intensive, hence the need for additional cash flow. At the moment, the company is operating on an overdraft facility just to be able to meet its financial needs and hence will not manage to deposit the amount in court. The Applicant avers that it would suffer substantial loss to an extent that some of its workers will be terminated to ensure it continues with its operations. In the matter of *Samvir Trustee Limited v Guardian Bank Limited* [2007] KEHC 2438 (KLR) the court held that: “...A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court... 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 judgement. ... At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain condition.” My, the Respondent has not demonstrated that if the Applicant is unsuccessful in the Appeal, it would be unable to pay the decretal sum. The Respondent advocate herein has several matters pending against our client. In respect of approximately four of those matters, where appeals have been duly filed, the parties are in preparations to open a joint interest earning account in which half of the decretal sums will be deposited in compliance with this Honourable Court’s directions. We have appeared before this Court on several occasions on similar applications for stay of execution, and in those instances, the Court graciously admitted all our client’s logbooks as security pending the hearing and determination of the appeals. While we appreciate that it is not ordinarily the business of this Honourable Court to delve into a party’s financial standing, we deem it necessary to respectfully draw the Court’s attention to the fact that our client is currently under significant financial strain arising from multiple decrees in other matters. Despite these challenges, our client has consistently demonstrated good faith and willingness to comply with court orders. In the circumstances, we humbly urge this Honourable Court to exercise its discretion and permit the Appellant to deposit a quarter of the decretal sum in a joint interest-earning account. The same strikes a fair balance between safeguarding the Respondent’s interests and ensuring that the Appellant’s right of appeal is not rendered nugatory owing to undue financial hardship.

Respondent’s submissions

31. Whether the Applicant/Appellant has satisfied the condition of security as a cardinal rule? - it is well settled in law the Conditions for Stay pending Appeal as per Order 42 rule 6 of the Civil Procedure Rules. The court has discretion to grant a stay, but only if the applicant satisfies the three cardinal



elements for a stay pending Appeal. We would like to invite this Honourable Court to scrutinize the Applicant's Supporting Affidavit dated the 25th of August 2025, and in particular paragraphs 11 and 12, where the deponent, Agnes Kagwiria, admitted that they are unable to sustain the appeal since they are operating on overdrafts, thus unable to deposit the decretal sum in court. The spirit of security as a cardinal rule before stay pending appeal is granted is for the following reasons:- # Protects the successful party (respondent) - The decree holder is entitled to the fruits of their judgment. - Security ensures that if the appeal ultimately fails, the respondent can still recover the decretal sum or benefit of the judgment without undue hardship. # Prevents abuse of stay orders - Security discourages frivolous or dilatory appeals. - Without security, an appellant might use a stay simply to delay satisfaction of the decree and frustrate the respondent. # Balances interests of both parties - It ensures there is a "balancing act" of justice where the Stay preserves the appellant's right to appeal from being rendered nugatory and acts as a security safeguards the respondent from financial loss due to delay. # Preserves status quo pending appeal - It maintains equilibrium until the appeal is heard, ensuring neither party is unfairly disadvantaged. We are guided by the authority in Civil Appeal 31 of 2012 [2012] Tarbo Transporters Ltd v Absalom Dova Lumbasi, the Court of Appeal stated that the essence of requiring security is to ensure that the decree-holder will not be prejudiced if the appeal fails; the stay "is meant to protect both parties so that no one will be worse off".(Our Emphasis) Our courts have severally held that the purpose of security is to ensure that if the appeal is unsuccessful, the decree holder will not have to initiate execution proceedings where the decree is a money decree. This was as held in the case of Gianfrano Manenthi & Another v Africa Merchant Assurance Company Ltd(2019) EKLK, where the court stated; "Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal, there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal. In Arun C Sharma –VsashanaRaikundalia T/a Rairundalia & Co. Advocatesjustice Gikonyo the court stated that; "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." Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that the courts do not assist litigants in delaying execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of the deposit of security for due performance of the decree is not a matter of willingness by the applicant but for the court to determine. He who seeks equity must do equity. The Respondent thus is apprehensive that even in the very likely event that the appeal is dismissed, she will be forced to proceed with execution to recover the decretal sum, thus rendering the purpose of security nugatory. We humbly submit that a security for the decree must be adequate and ought to be one that ensures that the Respondent can get his money without any difficulties in the event the appeal is unsuccessful. We find guidance in the case of Mata & Another v Rono & Another (Civil Appeal E034 OF 2024) (2024) KEHC 2799 (KLR) where the court stated; "The court must similarly consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were



eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. This being a money decree, we humbly submit that the same can only be adequately secured by depositing the full decretal sum of Kshs. 286,598/= into a joint interest earning account to be held by advocates for both parties. We humbly submit that the Appellant has not met the conditions for the grant of a stay of execution pending Appeal. The Appellant has not shown that it has an arguable appeal with a likelihood of success. In a nutshell, the deposit of the Decretal sum offers protection to the Respondent; the same is adequate, and we urge the court to find so. We further submit that in the event the court is inclined to allow the Application, we urge the court to order the Appellant to deposit the entire decretal sum of Kshs. 286,598/= to be deposited into a joint interest-earning bank account, to be held by the advocates for the parties, within 30 days.

Decision

Issue- whether the application for stay of execution was merited

32. Rule 73 of the Employment and Labour Relations Court Rules of 2024 provides as follows- ‘(2)Rules on execution or stay of execution of an order or decree of the Court shall be in accordance with the Civil Procedure Rules.’ The relevant rule under the Civil Procedure Rules is Order 42 Rule 6 to wit- ‘6. Stay in case of appeal [Order 42, rule 6](1)No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.(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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.’
33. The court determined there was no unreasonable delay in filing the application, judgment having been delivered on the 13th August 2025 and the application filed on 22nd September 2025. Since this is a money decree, the court believed that the respondent’s failure to file an affidavit of means demonstrating their ability to refund the money if paid in the event the appellant was successful on appeal demonstrated a substantial risk of the appellant losing any paid money. This risk could make the appeal nugatory.
34. On security of costs, the applicant proposed to deposit $\frac{1}{4}$ or $\frac{1}{2}$ of the decretal sum, and on the other hand, the respondent argued that a security for the decree must be adequate and ought to be one that ensures that the Respondent can get his money without any difficulties in the event the appeal is unsuccessful. In case of *Mata & Another v Rono & Another (Civil Appeal E034 OF 2024) (2024) KEHC 2799 (KLR)*, where the court stated; “The court must similarly consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. “The court is



guided to preserve the subject of the appeal and to balance the interest of both parties, by allowing the stay of execution on condition that ½ of the decretal sum be deposited in an interest-earning account held between the parties within 45 days of this order. In *Simba Coach Limited v Kiriyyu Merchants Auctioneers* [2019] eKLR it was held and I was persuaded “There are no fast and hard rules on what and how much the security ought to be and in this case the court reserves its discretionary power to determine as per the circumstances of the case and the nature of the security.” In the meantime the appellant to file the record of appeal within 60 days of this order. Mention on the 11th February 2026 to confirm status of the appeal and issue hearing directions.

35. On costs -The court finds that in that instant case, costs are to the respondent, in the cause, being the judgment holder, and the court having exercised discretion in favor of issuance of order of stay of execution.

36. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF DECEMBER, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – Absent

Respondent- Absent

