

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT ELDORET**  
**CAUSE NO. 259 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**CHRISTOPHER SHABIRI CHANGALWA ..... CLAIMANT**

**VERSUS**

**UNGA LIMITED .....**

**RESPONDENT**

**RULING**

1. Vide An application dated 10<sup>th</sup> June, 2025 the Applicant who was Respondent in the suit and the Judgment debtor herein seeks orders of stay of execution pending appeal. The Application is made under Articles 22, 48, 50(1) and 159 of the Constitution of Kenya, 2010, section 13 of the Employment and Labour Relations Court Act, Rule 73(2) of the Employment and Labour Relations Court (Procedure) Rules, 2024, Order 42 Rule 6 of the Civil Procedure Rules and all enabling provisions of the law.
2. The application is supported by the grounds on the face thereof and the supporting affidavit of ANNE HALWENGE

ODWA, Advocate in conduct of the suit on behalf of the Applicant. In the grounds and the affidavit it is stated that the Applicant is dissatisfied with the decision of this court and has lodged an appeal to the Court of Appeal, that it has an arguable appeal with overwhelming chances of success, and would suffer substantial loss should the orders of stay not be granted as the appeal would be rendered nugatory, noting that the Claimant is a man of straw with no means of refunding the decretal sum should the appeal succeed.

3. It is further the averment of the Applicant that it has a right of appeal under Articles 22 and 48 of the Constitution, that it is willing to deposit security as required under Order 42 Rule 6 of the Civil Procedure Rules and that no prejudice would be occasioned to the Claimant by the granting of the orders sought in the application.
4. It is further the averment of the Applicant that the application has been brought timeously, in good faith and that such application has not been presented before any other court.
5. The Application is opposed. The Claimant filed a replying affidavit sworn on 15<sup>th</sup> August, 2025 in which he deposes that the application is misconceived, lacks merit, is an abuse of

court process, and does not meet the legal threshold for grant of the

orders sought in the application.

6. The Claimant further deposes that the Applicant has not demonstrated the substantial loss it would suffer if stay is not granted as mere dissatisfaction with the judgement is not a demonstration of substantial loss, that the Applicant has not demonstrated that the appeal would be rendered nugatory should orders of stay of execution not be granted, that the Applicant has not offered security as required under Order 42 Rule 6(2)(b) of the Civil Procedure Rules and that the application is intended to delay his enjoyment of the fruits of his judgment, is prejudicial to him and undermines justice.
7. He states that he will be in a position to refund the decretal sum should the appeal succeed. Further that should the court be inclined to grant stay of execution 50% of the decretal sum plus costs should be released to the Claimant and the balance be deposited in a joint interest earning account in the names of counsel for the parties.
8. The Applicant filed a further affidavit of EDEN OGOTI, counsel for the Applicant in which he reiterates the averments in the

supporting affidavit of Ms. Odwa and joins issues with the averments of the Claimant in the replying affidavit.

9. The application was disposed of by way of written submissions. Both parties filed and exchanged submissions.

### **Determination**

10. I have considered the application and affidavits in support of the same and the replying affidavit in opposition thereto. I have further considered the rival submissions of the parties. The issues that arise for determination are whether the Applicant meets the threshold for grant of the orders sought and what orders should issue.

11. Stay of execution pending appeal is elaborately provided for in Order 42 Rule 6 of the Civil Procedure Rules as follows:

*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.*

12. The principles for grant of stay of execution are thus proof of substantial loss, unreasonable delay and security for due performance of the decree. The court is also enjoined to ensure sufficient cause for grant of such orders.
13. The Primary purpose of stay of execution is to preserve the status quo pending the hearing of the appeal as was held in **RWW v EKW [2019] eKLR**, where the court observed that:

*“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.”*

14. In **Butt v Rent Restriction Tribunal (1982) KLR** the Court gave guidance on how the court’s discretion should be exercised as follows -

*“1. The power of the 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. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*

*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.”*

15. The Respondent herein submitted that he is able to refund the decretal sum should the appeal succeed. However, as rightfully pointed out by the Applicant, no evidence of means has been produced by the Claimant. It is therefore not possible for the court to ascertain his ability to refund

whatever portion of the decretal amount that may be released to him should the appeal be successful.

16. As was held in the case of **National Industrial Credit Bank Limited v Aquinas Francis Wasike & another [2006] eKLR**, once an appellant expresses a reasonable fear that a respondent will be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter that is peculiarly within his knowledge.
17. The Claimant herein having not adduced any evidence of his financial resources, I find that he has not proved his ability to pay. The flip side of this is that the Applicant is likely to suffer substantial loss should the appeal succeed as it may not be able to recover the decretal sum from the Claimant.
18. The second requirement is that the Applicant provides security for the due performance of the decree. As is provided in Order 42 Rule 6(2), the purpose of security is to ensure due performance of the decree should the appeal not succeed. It is also intended to act as a sign of good faith to deter litigants who may file appeal only for the purpose of delaying the successful litigant from enjoying the fruits of his

appeal, hence the requirement for the court to ensure sufficient cause and equity in granting orders of stay.

19. In the instant case the Applicant has stated that it is willing to provide security as may be ordered by the court.
20. Flowing from the above, I find that the Applicant has satisfied this court on the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.
21. Consequently, I allow the application dated 10<sup>th</sup> June 2025 with  
  
an order that the Applicant deposits the entire decretal sum in a joint interest earning account in the names of counsel for both parties within 30 days.
22. The costs of the instant application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON  
THIS 22<sup>ND</sup> DAY OF DECEMBER, 2025**

**MAUREEN ONYANGO  
JUDGE**