

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC CAUSE NO. 777 OF 2019

AGATA WANGARI MUIGAI.....CLAIMANT

VERSUS

KUKU FOODS KENYA
LIMITED.....RESPONDENT

RULING

The Respondent/Applicant filed Notice of Motion application dated 30th June 2025 seeking an order in the following terms: -

- (a) Spent
- (b) Spent
- (c) This Honourable Court be pleased to grant leave for the firm of M/s. Coulson Harney LLP Advocates to come on record after judgment for the Respondent in place of M/s SED Legal LLP Advocates in terms of consent letter dated 26th June 2025.
- (d) Spent
- (e) This Honourable Court be pleased to order a stay of execution of the judgment and decree in Employment and Labour Relations Cause No. 777 of 2019 – Agata Wangai Muigai versus Kuku Foods Kenya Limited by the Honourable Justice Mathews Nduma delivered on 8th May 2025, pending the hearing and determination of the appeal.
- (f) The costs of the application be provided.

The application is supported by grounds 1 to 9 set out on the face of the Notice of Motion and by Supporting Affidavit of Sylvia Githongori, the Legal Compliance Manager of the Respondent; that the Applicant is desirous to change representation; that the court entered judgment in the sum of Kshs. 1,699,297.60 and Applicant has filed a notice of appeal and requested for typed proceedings; that the Applicant may suffer substantial loss if stay of execution is not granted; that the intended appeal has possibility of success; and that the Applicant undertakes to comply with any condition granted by the court.

Replying Affidavit by Claimant dated 20/7/2025

The Respondent vide the replying affidavit of Agata Wangari Muigai deposed that the judgment sought to be appealed from was delivered on 8th May 2025 and the applicant did not request for typed proceedings and the certified judgment within the prescribed period of 30 days from the date of the decision. Instead, the request was made on or about 30th June 2025, more than 3 weeks out of time. That any appeal filed after this period without leave of the Court is incompetent.

No application for extension of time has been made or granted to validate the delayed request or late filing of the appeal. The intended appeal is therefore a nullity and incapable of supporting an application for stay of execution

That the applicant has not demonstrated how it will suffer substantial loss if stay of execution is not issued and no concrete or acceptable proposal for security for due performance of the decree has been made

That whereas the Applicant states that it has complied with the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provide:

“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

(b) the application has been made without unreasonable delay; and

(c) such security as the court orders for the due performance of the decree has been given by the Applicant,”

the Claimant/Respondent submits there is not in existence a valid and competent appeal or an imminent and properly constituted intended appeal in that the notice of appeal was filed on 14/5/2025 but the Applicant subsequently failed to adhere to the mandatory procedural timelines required to perfect the appeal. That the Applicant failed to adhere to Rule 84(1) of the Court of Appeal Rules, 2022 which mandates a party to request for typed proceedings and a certified copy of judgment within 30 days.

That the Applicant made the request on 30th June 2025, three weeks out of time. That this fatal lapse resulted in the sixty (60) days period for lodging the Record of Appeal expiring on 13th July 2025 without any compliance. It follows ineluctably that there is presently no competent appeal before the Court of Appeal.

That an application for stay of execution is an ancillary process that derives its life from a substantive appeal and where the substantive appeal is still born, as in this case, the application for stay cannot be sustained and the court has no jurisdiction to issue the orders sought.

The court was referred to the Court of Appeal decision in the case of **Onyango and another versus District Land Registrar and 2 others (Civil application E140 of 2024) [2025] KECA 692692 (KLR)** where the court held: -

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, the party shall be deemed to have withdrawn the notice of appeal and the court may on its own motion or on application by any other party make such order.”

The Respondent further referred the court to a decision of this court ***in Fredrick Ojode versus Kenya Posts and Telecommunication Corporation [2017] KEELRC 1323 (KLR)***, where the court similarly dismissed a similar application after finding that the notice of appeal had lapsed because the Applicant failed to file a memorandum of appeal and record of appeal within 60 days under Rule 84(1). The court held that once that lapse occurs, there is no notice of appeal in being and thus no foundation for stay.

The Respondent further submits that there is no evidence by the Applicant that the Applicant would suffer substantial loss if stay is not granted. The

court was referred to the case of ***Vishram Ravji Halai versus Thoroton and Thurpi [1995] KLR 365***, where the Court of Appeal held: -

“Even if it were shown that the Respondent is a person of lesser means, that could not necessarily justify a stay of execution as poverty is not a ground for denial of a person’s right to enjoy the fruit of success. “

It is also submitted that the Applicant did not offer any security for the decretal amount contrary to order 42 Rule 6(2)(c). The court was referred to the case of ***Mwaura Karuga t/a Limit Enterprises versus Kenya Bus Services Ltd and 4 others [2015] eKLR*** where the court held: -

“...the security must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 Rule 6(2)(b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted which is seldom. The security to be given is measured on that yardstick...”

The Applicant countered these submissions by the Respondent in its submissions that a notice of appeal was filed within 14 days from the date of judgment delivered on 14/5/2025. That Applicant’s previous counsel failed to file a request for typed proceedings within 30 days from the date of

judgement. That the Applicant has since filed an application to the Court of Appeal for extension of time to file its application for typed proceedings, memorandum of appeal and record of appeal in **Civil Application No. E490 of 2025 Kuku Foods Kenya Limited versus Agata Wangari Muigai**.

The Applicant relies on the case of **Halal and another versus Thomson and Turpi 9163) Ltd [1990] KECA 65 (KLR)** and the Court of Appeal decision in **Butt versus Rent Restriction Tribunal [1979] KECA 22 (KLR)** on the guidelines the court should follow to get stay for execution pending appeal stating that the power of the court is discretionary and it must be exercised judiciously not to deny a deserving Appellant the right of appeal. That on the legal burden of demonstrating possibility of incurring substantial loss, the Applicant need only allege that the Respondent has no known means of repaying the decretal sum having lost his employment as in the present case. The court was referred to the case of **Bily versus Kenya National Union of Nurses [2022] KEELRC 3814 (KLR)** in this regard.

The Applicant further referred to the Court of Appeal decision in **CFC Stanbic Bank Limited versus John Kungu Kiarie and Dyan and Another [201] KECA 368 (KLR)** where the court held that the execution of a judgment before the determination of an appeal can render the appeal nugatory, thereby defeating its purpose and causing irreparable harm to the Appellant.

DETERMINATION

In the present application, the admission by the Applicant that it did not file an application requesting typed proceedings within 30 days from the date of judgment and that it was therefore unable to file the memorandum of appeal and record of appeal within 60 days which expired on 13/7/2025 has left this court without jurisdiction to grant stay of execution pending an appeal which is not in existence.

This fact has been confirmed by the Applicant itself that it has since lodged an application for extension of time to file the application for typed proceedings, memorandum of appeal and record of appeal before the Court of Appeal in ***Civil Application No. 490 of 2025 (Supra)***.

Accordingly, this court lacks any legal basis to grant the orders sought in this application for stay of execution pending appeal.

The application is therefore dismissed with costs. The court however grants the firm of M/s. Coulson Harney LLP Advocates leave to come on record in this matter after judgment in terms of the consent letter dated 26/6/2025.

Dated at Nairobi this **18th Day of December 2025.**

Mathews Nduma
JUDGE

Appearance:

Mr. Brian Ochieng for Claimant/Respondent

Mr. Deya for Respondent/Applicant

Mr. Kemboi – Court Assistant

ORIGINAL