

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT KERICHO
CAUSE NUMBER E008 OF 2024**

BETWEEN

NICKSON KOMEN
CLAIMANT

VERSUS

EKATERRA TEA KENYA
PLCRESPONDENT

RULING

1. The Respondent filed an application dated 12th August 2025, asking the Court to stay execution of its Judgment delivered on 27th June 2025, pending hearing and determination of an Intended Appeal, at the Court of Appeal.
2. The Judgment gave an order for reinstatement of the Claimant, without loss of salary and other benefits.
3. The application is founded on the affidavit of Legal Counsel for the Respondent, Cindy Dana, sworn on 12th August 2025.

4. Dana states that Respondent has established all the requisite grounds, necessary for grant of an order of stay of execution: a notice of appeal dated 11th July 2025 was filed; the Claimant was awarded reinstatement or re-engagement without loss of salary and benefits; his monthly salary was Kshs. 335,788, totaling approximately Kshs. 8,394,700 by 13th October 2025; the Claimant was unlikely to be able to reimburse the Respondent the decretal sum, if the Appeal succeeded; the Respondent filed its application without delay; the Claimant will not be prejudiced if the orders are granted; and the Respondent is willing to provide security for performance.
5. The application is opposed through an affidavit sworn by the Claimant on 13th October 2025.
6. His position is that the application is presented after an inordinate delay, and is made in bad faith; It was lodged 45 days after the Judgment; the Respondent's Advocates had initially intimated to the Claimant's Advocates that they intended to discuss modalities on settlement of the decree; the Respondent has not demonstrated that it would suffer substantial loss if the order is not granted; the application was filed only after the Claimant filed his party-party bill of costs for taxation; the Respondent owed the Claimant back salaries approximated at Kshs 8,394,700 at the time of making the replying affidavit; and no Memorandum of Appeal had been filed to show that there was an arguable appeal.
7. The Claimant urges the Court to dismiss the Claim.

8. Parties agreed to have the application considered and determined, on the strength of their affidavits and submissions. They highlighted those submissions at the last appearance before the Court, on 26th November 2025.

The Court Finds: -

9. The principles governing grant of an order of stay of execution pending appeal, are well-established. It is widely accepted that an applicant for an order of stay of execution of decree pending appeal, must satisfy the Court that: -
 - a. The appeal is arguable.
 - b. The application is made without undue delay.
 - c. Substantial loss may be occasioned the applicant, if the orders are not issued.
10. The Respondent has not exhibited a Memorandum of Appeal, not even in a draft form, to assist the Court in determining if there is an arguable Appeal.
11. It has not alluded to the grounds of appeal, in the supporting affidavit.
12. What the Respondent has shown to the Court, is that it intends to appeal against the Court's Judgment, and has taken procedural

measures, to appeal. But mere intention to appeal, the filing of a notice and request for trial proceedings, are not sufficient to warrant an order of stay of execution.

13. A notice filed, however timeously, does not establish that there is an arguable appeal on the way to the Court of Appeal.
14. The affidavit sworn by Counsel Cindy Dana, addresses multiple issues, except whether there is an arguable appeal. It does not exhibit a draft Memorandum of Appeal, or even make reference to the grounds upon which the Intended Appeal is based.
15. The Court cannot tell if the Intended Appeal is arguable, without a preview of the grounds.
16. While Courts have routinely underscored that an arguable appeal is not one which must necessarily succeed, but one which ought to be fully argued before the Court and one which is not frivolous, **[Supreme Court of Kenya, in Petition No. 17 [EO24] of 2021, Kenya Transmission Co. Limited [KETRACO] v. Instalaciones Inabensa S.A.]** an applicant for orders of stay of execution must establish through a Memorandum of Appeal, the grounds showing that there is an arguable appeal. The successful party must be protected from the likelihood of a frivolous appeal, intended to frustrate him from actualizing the outcome of his litigation.

17. Judgment was delivered on 27th June 2025. The Notice of Appeal exhibited in the supporting affidavit is dated at Nairobi, the 9th July 2025. The date it was lodged at the Court in Kericho, is blank. It is not clear when it was lodged.
18. The application is dated 12th August 2025 over 30 days from the date the Notice of Appeal was drawn, and about 1 ½ months after Judgment was delivered. The Respondent indicates in its application that the Claimant filed a Bill of Costs, which was due for taxation on 20th August 2025.
19. The Claimant alludes to engagement between the Parties on the mode of settlement of the decree, between the date of the Judgment and the date the application was filed.
20. There is no explanation in the supporting affidavit on the blank date relating to lodging of the Notice of Appeal, and the delay of 1½ months, in presentation of the application. The Court agrees with the Claimant that delay was unreasonable.
21. An order of reinstatement is intended to fully restore the contract which was terminated, from the date it was terminated. It is expected that salaries and benefits are paid to the Claimant from the date of termination, and continue to be paid, until he otherwise leaves employment.

22. Decisions such as that rendered by the Supreme Court recently, **Kamande v. Judicial Service Commission [2025] KESC 48 [KLR]** ought to guide Employers, in dealing with orders of reinstatement and back-salary.
23. In the above matter, the Employee was interdicted way back on 12th April 2017. He brought a Claim at the E&LRC which ordered that he is reinstated without loss of salary and other benefits. The Employer was successful at the Court of Appeal, which upheld dismissal of the Employee.
24. The Employee approached the Supreme Court, which restored the orders for reinstatement, without loss of salary and benefits, from 12th April 2017.
25. In an earlier decision by the Court of Appeal, **Kenya Education Staff Institute v. Kenya Union of Post-Primary Teachers [KUPPET] & 2 Others [2020] KECA 898 [KLR]**, orders of reinstatement with back salary were upheld a whole 9 years, after they were issued at the Trial Court.
26. Ultimately, there is always the risk of a heavy price to pay, where the orders of reinstatement are sustained on appeal. Grant of orders of stay of execution, as the appeal was heard at various levels, did not avert the payment of salary and benefits withheld from the Employees. Reinstatement is premised on full restoration of the contract of employment.

27. It is for the Employer, to devise the best way to deal with an order of reinstatement, aware that ultimately, there is always a possibility that the full restoration of the contract, will prevail.
28. The complaint by the Respondent that the monetary award stood at a high figure of Kshs. 8,394,700 at the time the Claimant filed his replying affidavit, and continues to increase monthly, is not justification to grant orders of stay of execution.
29. The Claimant was reinstated by the Court, his contract was restored, and would be exchanging his labour and skills for salaries that have continued to accumulate, since he was reinstated, had the Respondent honoured the order of reinstatement.
30. An alternative order of re-engagement was made. Why does not the Respondent recall the Claimant, and re-engage him, even on contract, until the Appeal is filed, heard and determined? Why ignore the Judgment, while complaining that the monetary award continues to rise, while the Claimant is not rendering any service?
31. The Respondent proposes that it is ready to provide security for the due performance of the decree, without suggesting to the Court what would be such security, for due performance of the decree, which requires the Respondent to restore the Claimant's contract.

32. The Court has not been shown by the Respondent that there is an arguable appeal, intended to be pursued at the Court of Appeal. The application was filed after an unexplained delay of 1½ months from the date of Judgment. It was prompted by the Claimant's application to the Court for taxation of costs. The Respondent has not suggested what its offer for security for performance of the decree, entails.

IT IS ORDERED: -

- a. The application by the Respondent dated 12th August 2025 is declined.***

- b. No order on the costs.***

Dated, signed and delivered electronically at Kericho, under Rule 68[5] of the E&LRC [Procedure] Rules, 2024, this 30th day of January 2026.

James Rika
Judge

