



**Nairobi East Hospital Limited v Ositi (Employment and Labour Relations Appeal E365 of 2025) [2026] KEELRC 189 (KLR) (23 January 2026) (Ruling)**

Neutral citation: [2026] KEELRC 189 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E365 OF 2025**

**JW KELI, J  
JANUARY 23, 2026**

**BETWEEN**

**NAIROBI EAST HOSPITAL LIMITED ..... APPELLANT**

**AND**

**STEPHEN ENIMAI OSITI ..... RESPONDENT**

**RULING**

1. The applicant, following entry of a default judgment against it by Hon Diana Orago (SRM) on the 24th September 2024, filed application by way of Notice of Motion dated 24<sup>th</sup> July 2025 seeking to set aside the default judgment and for reopening of the case to allow it defend. The lower court delivered a ruling dated 21<sup>st</sup> October 2025 and dismissed the application. The applicant aggrieved by the ruling filed a memorandum of appeal dated 23<sup>rd</sup> October 2025 and simultaneously application by way of Notice of Motion dated 23<sup>rd</sup> October 2025 brought under Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, Order 22 rule 52, Order 42 Rules 6 and 9, Order 51 rule 1 of the Civil Procedure Rules, 2010, Section 1A, IB and 3A, Section 63(e), Section 85 of the *Civil Procedure Act*, Cap 21 and Article 159 (2) of *the Constitution* of Kenya, 2010 of the Civil Procedure Rules, 2010; and all other enabling provisions of the law) for orders:
  - a. spent
  - b. spent
  - c. That pending hearing and determination of the intended Appeal, there be a temporary stay of execution of the ruling and orders of the Chief Magistrate’s Court at Ruiru by Hon. Diana Orago delivered on 21st October 2025 in CMELRC No. E052 of 2024, together with all consequential proceedings thereunder.
  - d. That this Honourable court be pleased to grant stay of execution of the judgment delivered on 24th of September 2024 and resultant decree in the interim;



- e. That this Honourable court be pleased to grant stay of execution of the judgment delivered on 24th of September 2024 and resultant decree pending hearing and determination of this Application And The Intended Appeal.
- f. That this Honourable court be pleased to issue an injunction restraining the Respondent whether by himself or through his agents, servants, employees, anyone claiming through or deriving authority from him from proclaiming, attaching, selling and/or in any way effecting the warrants of attachment dated 6th December 2024 (or in any other date) pending the hearing and determination of this application;
- g. That this Honourable court be pleased to issue an injunction restraining the Respondent whether by himself or through his agents, servants, employees, anyone claiming through or deriving authority from him from proclaiming, attaching and/or removing from the Applicant's premises and selling any property pending hearing and determination of this application;
- h. Any other orders that this Honourable court deems just and expedient to grant;
- i. That the costs of this application abide the outcome of the Appeal.

2. Grounds of the application

- a. That this matter was heard and judgement was entered without the Applicant being granted an opportunity to defend itself.
- b. b) That the Claimant has through his Advocates on record and M/s Betabase Auctioneers obtained break-in orders in Civil (Ruiru) Misc Suit E018 of 2025 and police assistance with the aim of breaking in and attaching the Applicant's goods.)
- c. That to avoid the same to proceed, the Applicant herein proceeded to file an application to, inter alia, re-open suit and to have the matter heard on its merit. The same was dismissed despite having merit.
- d. That the Applicant herein has never been served with the Claim, Summons or any other court document in relation to the case in Ruiru CMELRC Case No. E052 of 2024 and only learnt of its existence upon receipt of warrants of attachment and sale of immovable property by M/ s Betabase Auctioneers.
- e. That therefore the judgment and decree were irregularly procured by the Claimant/ Decree Holder and as such the Claimant/ Decree Holder should not be allowed to benefit from its dishonourable action.
- f. That the Applicant herein since seeks to Appeal the whole Ruling of Hon. Diana Orago (Mrs.), Senior Resident Magistrate at Ruiru, delivered on 21st October 2025 in Ruiru CMELRC Case No. E052 of 2024;
- g. That there are certain grounds of fact and law that would need to be determined such the issue of jurisdiction and whether the court in Ruiru had jurisdiction to hear the claim in the first place.
- h. That unless this application is expeditiously heard and determined, the Applicant herein will suffer substantial loss due to wrongful attachment and sale of its property.



- i. That there is need for stay of execution to enable the Applicant to canvass the application herein as well as the Appeal and any proclamation of the applicant's goods would not only affect their business, but will also affect many patients that rely on the hospital for medical attention
  - j. That unless this application is expeditiously heard and determined, the intended appeal will be rendered nugatory;
  - k. The intended appeal is arguable and raises serious triable issues of law and fact with a high likelihood of success.
  - l. The Appellant is ready and willing to comply with any reasonable conditions that the Court may impose for the grant of stay.
  - m. It is in the interests of justice that status quo be maintained pending the determination of the appeal.
  - n. That it is in the interest of justice that this court grants the orders sought herein expeditiously to the Applicant in the interest of justice.
  - o. That unless this application is heard and determined expeditiously, the Applicant's efforts of safeguarding its interests will be rendered nugatory.
  - p. That it's only fair and lawful that the application be heard and determined with utmost urgency and without any delays so that the Applicant's rights are protected.
  - q. That this application is made in good faith and it is in the interests of justice that the same be allowed and interim orders do issue staying the judgment herein and resultant decree pending hearing and determination of this Application.
  - r. That this application ought to be allowed in the interests of justice.
3. The application was supported by the affidavit of Libani Abdi dated 23<sup>rd</sup> October 2025 where he annexed, inter alia, a copy of the judgment of the lower court, copy of break- in orders and warrants of attachment obtained by the auctioneer, a copy of the impugned ruling delivered by Hon Orago on the 21st October 2025, copies of the affidavits of service relied on in the ruling, and copy of the memorandum of appeal.
  4. The application was opposed by the respondent who filed his replying affidavit sworn on the 10<sup>th</sup> November 2025 and among others stated the application was not merited as the application to set aside was filed 11 months after delivery of the judgment, that the appeal had no merit as the impugned ruling was based on evidence of return of service vide filed affidavits of service of the summons and suit and further there was no compliance with Order 42 rule 6 of the Civil Procedure Rules.
  5. The application was canvassed by way of written submissions. Both parties filed.
  6. The issue for determination is whether the application for orders of stay of execution was merited.

### **Applicant's submissions**

7. Whether the Applicant was served with the pleadings and notices in the lower court. The Applicant's primary contention is that it was never served with the pleadings, summons, or notices of hearing. This is not an ancillary issue, it goes to the heart of jurisdiction, the validity of the judgment, and the constitutional right to a fair hearing. Without service, a court cannot lawfully assume jurisdiction over a party. Service is the mechanism through which audi alteram partem is actualised. The Respondent



relied on an affidavit of service marked “SEO-1”, yet the document fails to meet the legal standard required under the Employment and Labour Relations Court (Procedure) Rules, 2016. Rule 25(8) of those Rules specifically demands that service upon corporate bodies be acknowledged by stamp and signature; none of which is present. The alleged service is unacknowledged, uncorroborated, and facially defective. The jurisprudence on this point is unequivocal. In *James Kanyiita Nderitu & Another v Ghikas & Another* [2016] eKLR, the Court of Appeal held that a judgment entered without proper service is an irregular judgment which must be set aside “as a matter of right.” Where service has been disputed, the deponent of such an affidavit should be interrogated as service must be strictly proven and that mere averments in an affidavit are insufficient where service is disputed. Further, in *Richard Nchapai Leiyangu v IEBC* (2013), the High Court reiterated that the right to be heard is a constitutional imperative incapable of dilution. The position in law therefore is that without demonstrable service, any proceedings, judgment, decree, or execution founded upon them are incurably defective. The purported judgment cannot stand. Consequently, execution flowing from such a judgment cannot be allowed to proceed.

b. Whether the Ruiru ELRC Subordinate Court possessed territorial jurisdiction to hear the matter. The Applicant’s second major ground, and one that goes to the very competency of the proceedings before the trial court, concerns the mandatory statutory requirements governing the institution of suits. The suit giving rise to the impugned judgment was filed at the Ruiru CMELRC, yet the undisputed factual position is that the Applicant is a Nairobi-based hospital that operates solely and exclusively within Nairobi County. The Respondent himself had purported to be employed in Nairobi, worked in Nairobi, and his dismissal occurred in Nairobi. All relied upon employment records, HR personnel, payroll information, and operational structures relevant to the cause of action are situated in Nairobi. At no point did the Applicant carry on business in Ruiru, maintain a branch in Ruiru, or employ the Respondent at Ruiru. These facts engage the mandatory provisions of Section 15 of the *Civil Procedure Act*, which governs where suits are to be instituted. The statute provides that subject to certain limitations, a suit must be instituted in a court within the local limits of whose jurisdiction: (a) the defendant actually and voluntarily resides or carries on business, or personally works for gain; or (b) any of the defendants resides or carries on business, provided the court grants leave or the non-resident defendants acquiesce; or (c) the cause of action, wholly or in part, arises. Further clarity is provided by the statutory explanations to Section 15, which are crucial in the employment context. Explanation (2) states that a corporation “shall be deemed to carry on business at its sole or principal office in Kenya,” and, only in respect of a cause of action arising at a place where it has a subordinate office, may jurisdiction extend to such other locations. The Applicant’s sole and principal office is in Nairobi. It has no subordinate office in Ruiru. Therefore, under the plain wording of Section 15, the Applicant can only be sued in Nairobi unless the cause of action arose elsewhere—which it did not—or unless the Applicant acquiesced—which it did not, having never been served. Under Explanation (1), temporary residence and presence at another location only justify jurisdiction when the cause of action arises at that temporary location. This principle underscores that jurisdiction cannot be artificially manufactured by the Respondent herein. In the present matter, the Respondent has not demonstrated that any part of the cause of action arose in Ruiru. Indeed, the employment contract, if any, would have been made in Nairobi, performed in Nairobi, and all monies payable under the employment relationship would be payable in Nairobi. Under Explanation (3), in suits arising out of contract, the cause of action is deemed to arise at the place where the contract was made, where it was performed, or where any money was payable. None of these points connects this employment relationship to Ruiru. The Illustrations under Section 15 reinforce this principle. For example, Illustration (a) clarifies that a plaintiff may sue at the place where the defendant carries on business or where the cause of action arose, but only where those connections exist. In this case, the Applicant carries on business exclusively in Nairobi and nowhere else. Illustration (b) underscores that jurisdiction cannot attach to a location simply because a claimant



chooses to file there; a defendant's objection defeats such a suit unless leave of court is obtained. Here, the Applicant not only objected at the earliest opportunity but did so on the basis that it had never even been served, thus negating any notion of acquiescence. The Respondent's decision to file the matter in Ruiru, a location wholly unconnected to the Applicant or the employment relationship, was therefore contrary to the statute's express terms. Section 15 is not permissive, it is mandatory. It prescribes the only lawful fora in which a suit of this nature may be filed. A party cannot override the statute by convenience, preference, or tactical forum choice. The legal effect of filing a suit in a court without jurisdiction is well settled. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil* [1989] KLR 1, Nyarangi JA stated unequivocally that jurisdiction is everything, and without it, a court must down its tools. Proceedings conducted without jurisdiction are a nullity, no matter how well reasoned or efficiently processed. This reasoning was cemented in *Phoenix of East Africa Assurance Co. Ltd v S.M. Thiga* [2019] eKLR, where the Court of Appeal held that a suit filed in a court without territorial jurisdiction is a nullity ab initio and cannot be cured by acquiescence, transfer, or amendment. It therefore follows, as a matter of law, that the Ruiru court had no authority to entertain the claim, to issue directions, to hear any application, to deliver judgment, or to issue a decree. The judgment delivered therein was rendered without foundational jurisdiction and is void to the extent that it purports to impose obligations upon a party who was not properly before the court. Such a judgment cannot lawfully anchor execution; to allow execution in such circumstances would be to endorse a proceeding that the law treats as non-existent. The Respondent's Replying Affidavit is notably silent on jurisdiction. This silence is significant. It reflects that the Respondent has no statutory or factual basis for invoking the Ruiru court's jurisdiction. The omission confirms the Applicant's position that the suit was filed in the wrong forum contrary to Section 15 and that every consequential act, including the execution now underway, rests on a void foundation. c. Whether the Applicant has met the threshold for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules. The manner of execution undertaken in this matter warrants special attention. Firstly, it came a year after judgement was entered, just enough time to claim that delay is unreasonable in the event that the applicant would try and stay it. Secondly, the Respondent's auctioneers arrived at a functioning hospital with police escorts and break-in orders, intending to seize and remove medical equipment essential for patient care. This is not routine execution; it is punitive, disruptive, and wholly disproportionate to the nature of the dispute. Execution is not meant to be a weapon of ambush or oppression. In *Shah v Mbogo* [1967] EA 116, the Court held that judicial discretion must be exercised to prevent execution that would operate unjustly or oppressively. Similarly, in *CMC Holdings Ltd v Nzioki* [2004] 1 KLR 173, the Court warned against allowing litigants to take advantage of procedural irregularities to inflict injustice. Given that execution is rooted in a judgment tainted by want of service and want of jurisdiction, the Respondent's continued attempt to enforce it amounts to abuse of the court process. Allowing execution to proceed would not only undermine the integrity of the judicial process but also expose the Applicant's patients and staff to unnecessary risk. d. Whether the Applicant is entitled to temporary injunctive relief pending appeal.

8. Order 42 Rule 6 of the Civil Procedure Rules requires an applicant for stay to demonstrate substantial loss, absence of unreasonable delay, and willingness to provide security. The Applicant satisfies all three requirements. On substantial loss, the risks are self-evident and severe. The Applicant is a hospital providing essential health services. Execution would entail removal of machinery, medical equipment, beds, and oxygen systems, thereby endangering patients. Substantial loss is not only foreseeable but inevitable. As held in *Kenya Shell Ltd v Kibiru* [1986] KLR 410, substantial loss is the cornerstone of stay, and courts must prevent irreversible harm. Also, that loss can be inferred in the circumstances. On delay, the Respondent's argument that the Applicant waited 11 months is misconceived. The relevant date for assessing delay is the date of the ruling under appeal as we were not aware of the previous claim until after year when execution was underway and auctioneers knocking down Applicant's door. The ruling was delivered on 21st October 2025; the appeal was filed two days later; and the



application for stay was filed within 48 hours. This is prompt by any standard and fully aligns with the principles articulated in *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365. On security, the Applicant acknowledges the Court's discretion to impose reasonable security. However, security cannot be imposed in a manner that validates a void judgment or cripples a hospital's operations. Where the judgment is irregular or void, courts have consistently declined to impose heavy security requirements, as doing so would amount to compelling a party to underwrite an illegality. The Supreme Court delivered a judgment in the case of *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others* [Petition No. 16 (E023) of 2021] (the Westmont Case) in which it outlined standard guiding principles that courts ought to consider when making an order for security for costs. In the Westmont Case, the Supreme court listed twenty-one principles that ought to be considered by every court in imposing security for costs. Taking the checklist into account, it is fair to aver that the Respondent's demand for deposit of the entire decretal sum is neither justified nor consistent with the principles governing the Court's discretion under Order 42 Rule 6. Security is not intended to punish an applicant or validate a judgment under serious legal challenge; rather, it is meant to balance the parties' interests while safeguarding access to justice. In this case, the appeal raises substantial and weighty questions; including want of service, lack of territorial jurisdiction under Section 15 of the *Civil Procedure Act*, and violations of Articles 25(c) and 50 of *the Constitution* of Kenya 2010, which strongly enhance the Applicant's prospects of success. The proceedings are entirely genuine, prompted by discovery of execution attempts following an ex parte judgment of which the Applicant had no notice. Requiring full security in these circumstances would risk stifling the Applicant's right of appeal, particularly because the Applicant, a functioning hospital, is effectively in the position of a defendant responding to an irregular judgment and is not a voluntary initiator of litigation. Moreover, considerations of public interest weigh heavily against an onerous security order. Execution threatens essential medical equipment and could jeopardise ongoing patient care, making it imperative that the Court adopts a proportionate and balanced approach. The security sought is neither necessary nor proportionate to the subject matter of the appeal, and granting it in full would divert resources away from critical healthcare operations. Given the Applicant's prompt filing of both the appeal and the stay application, and the potential for injustice if access to appellate relief is curtailed, the Court is urged to adopt a minimal or moderated security approach or, in the circumstances, decline to order security altogether. This would best serve the ends of justice, preserve the integrity of the appellate process, and protect both the public interest and constitutional rights at stake. e. Whether the Applicant's intended appeal is arguable and risks being rendered nugatory absent stay. The Applicant also seeks injunctive relief pending appeal. Under the well established test in *Giella v Cassman Brown* (1973), an applicant must demonstrate a prima facie case, irreparable harm, and that the balance of convenience tilts in its favour. A prima facie case is overwhelmingly established given the dual defects of want of service and want of jurisdiction. These defects strike at the heart of the fairness and legality of the proceedings. In *Mrao Ltd v First American Bank* (2003), the Court stated that a prima facie case exists where there is a violation of rights capable of protection by the Court. We have indicated, under paragraph 11 of our supporting affidavit as well as the memorandum of appeal marked as annexure LA8, our formidable grounds of appeal inter alia that the learned magistrate misdirected herself by considering irrelevant matters and failing to exercise judicial discretion to prevent abuse of court process and injustice arising from execution on an irregular decree. Also, that she failed to appreciate that the Appellant had demonstrated sufficient cause for stay of execution, including ongoing hospital operations serving the public interest, and that irreparable harm would result if execution proceeded. The harm facing the Applicant is irreparable. Removal of medical equipment cannot be compensated by damages, and interruption of hospital operations affects vulnerable patients. The public interest in maintaining uninterrupted medical services is strong and persuasive. The balance of convenience heavily favours the Applicant. The Respondent waited nearly a year before commencing execution,



demonstrating no pressing urgency. He waited a whole year after judgement to execute. The Applicant, on the other hand, faces immediate operational paralysis if execution proceeds. Preserving the status quo is therefore the most just outcome. The Applicant's appeal raises substantial and bona fide issues that warrant full appellate consideration. These include whether the lower court erred in finding service adequate, whether it exercised jurisdiction it did not possess, and whether it misapplied the principles governing setting aside of ex parte judgments. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal held that stay should be granted where failure to do so would render the appeal nugatory. If execution proceeds, the Applicant will lose essential hospital equipment, and the damage to public health and operational capacity will be irreversible. Even if the appeal succeeds, the hospital's operations may never fully recover. f. Whether anything in the Respondent's Replying Affidavit displaces the Applicant's entitlement to stay. The Respondent's Replying Affidavit, while lengthy, does not dislodge the Applicant's entitlement to stay. The assertion that the appeal is frivolous is untenable given the weight of the jurisdictional and procedural issues raised. The claim that service was proper is contradicted by the defective affidavit of service and the absence of any acknowledgment of service, contrary to Rule 25(8). The Respondent's position on delay misconstrues the legal test for promptness, while his arguments on substantial loss ignore the unique and urgent nature of hospital operations. Moreover, the invocation of the "right to enjoy fruits of judgment" rings hollow where the underlying judgment is irregular and potentially void. In the final analysis, the Replying Affidavit does not provide any substantive basis upon which this Court can refuse stay. Instead, it underscores the urgency of ensuring that public health and constitutional rights are protected pending the appeal.

### **The Respondent's submissions**

9. Whether The Applicant Has Met The Threshold To Warrant The Grant Of Stay Of Execution? - The granting of stay of execution pending appeal by the High Court is governed by Under Order 42 Rule 6 of the Civil Procedure Rules. It is grantable at the discretion of the court on sufficient cause being established by the applicant. The incidence of the legal burden of proof on matters which the applicant must prove lies with the Applicant. See the Halsbury's Law of England, vol.17, paragraph 14: Incidence of the legal burden ..... in respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is an essential of his case. Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court that:  
a) Substantial loss may result to the applicant unless the order is made, b) The application has been made without unreasonable delay, and c) such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant. We submit the case of *Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000*:- "As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice .....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has brought expeditiously," Requisite Security - We submit that pursuant to Order 42 Rule 6 (2) of the CPR empowers the Honourable Court to direct the Applicant to pay security for cost.
10. The Honourable Court directed the Applicant to reach out to the Respondent and proposed cost as due performance of the decree of the lower court. However, the Respondent has not received any offer which ought to have been done as a sign of good faith. 9. In the circumstance, we humbly propose that the Honourable Court directs the Applicant to deposit the decretal amount being Kes. 525,828.01/ as



security for cost. Whether the application was filed expeditiously. We have perused the Ruling and the Memorandum of Appeal and confirm that they were filed within the regulated timeline. Substantial loss may result to the applicant unless the order is made. We submit the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus: “...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.” The applicant has attached warrants of sale dated 6th December, 2024 to demonstrate potential loss. However, the instant Application was filed on the 24th October, 2025 nearly eleven (11) months after the alleged threat of execution. It is therefore manifest that there is neither an imminent sale, proclamation, nor attachment and the plea of substantial loss is speculative and unsubstantiated. Further, a careful examination of the Memorandum of Appeal alongside the ruling of the Honourable Court clearly demonstrates that the Appeal is predicated on mere denials and dissatisfaction with the trial court’s factual findings, as opposed to identifying any discernible errors of law, procedure, or principle. The Appellant has failed to meet the established threshold for appellate interference with the exercise of judicial discretion, rendering the Appeal devoid of merit. The Respondent strictly complied with the prescribed procedure for service and duly placed before the trial court all the requisite Affidavits of Service, both prior to and subsequent to the delivery of judgment. Upon due consideration, the trial court expressly found no fault or irregularity in the said service. The Applicant’s allegations of non-service are therefore unsupported by any evidence, are contrary to the court record, and amount to a belated attempt to impeach a process that was conclusively settled by the trial court. In the circumstances, it is the Respondent’s firm submission that the Appeal is a non-starter, does not disclose a prima facie case, and is an abuse of the court process. The Application herein is consequently undeserving of the court’s discretion and ought to be dismissed with costs. We submit that the applicant’s appeal is a nonstarter and they have failed to demonstrate imminent loss hence we implore the Honourable Court to dismiss the application.

11. Whether The Claimant Should Bear Costs Of The Suit? - it is the Respondent’s humble submission that it is entitled to cost as against the Claimant based on the principle that “costs follow the suit.” In the case *Morgan Air Cargo Limited V Evrest Enterprises Limited*, the court stated the following circumstances should be taken into consideration- “the conduct of the parties, the subject of litigation the circumstances which led to the institution of the proceedings the events which eventually led to their termination e. the stage at which the proceedings were terminated f. the manner in which they were terminated g. the relationship between the parties and h. The need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of *the Constitution*.” Further, Section 27 of the *Civil Procedure Act* dictates that the Cost must follow the event unless the court for good reasons orders otherwise. The Appellant urges the Honourable Court to consider the conduct of the parties and the circumstances which lead to the institution of the proceedings, in making its determination of costs.

## Decision

12. 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.”

13. The court established there was no unreasonable delay in filing the application. The memorandum of filed with the application raised issue for breach of fair hearing which is a constitutional right of the applicant and thus arguable grounds of appeal having been raised.
14. In *Butt -vs Rent Restriction Tribunal (1982) KLR 417* the Court of Appeal(Madan J.A) gave guidance on how a Court should exercise discretion in an application for a stay of execution, that: -

“ If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2) 12 Ch D (1879) 454* at p 459. In the same case, Cotton LJ said at p 458:“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”
15. The appeal relates to a ruling to set aside a judgment. The appeal was filed within the 30 days of the ruling hence no delay for purposes for the instant application.
16. On whether there is arguable appeal, the appeal challenged the service of summons and pleadings before judgment. The applicant said the service was not acknowledged. The court finds that the Civil Procedure Rules envisages the refusal to acknowledge service in Order 5 Rule 13 as follows- ‘Where a duplicate of the summons is duly delivered or tendered to the defendant personally or to an agent or other person on his behalf, the defendant or such agent or other person shall be required to endorse an acknowledgment of service on the original summons: Provided that, if the court is satisfied that the defendant or such agent or other person has refused so to endorse, the court may declare the summons to have been duly served.’ The Court, however, opines that whether service was effected or not is an issue for determination on merit, and the appellant has an unqualified right to be heard on appeal on the same.
17. On substantial loss this being a money decree the loss is disclosed as the respondent did not demonstrate capacity to repay the money in event of successful appeal by filing affidavit of means.
18. On the issue of security this is a mandatory condition under section 42(6) of the Civil Procedure Rules. The appeal concerns the ruling on the application to set aside the default judgment and further seeks stay of the judgment. The applicant stated it was willing to comply with conditions of the court to



be granted the stay. The respondent sought, without prejudice, for the deposit of the decretal sum in a joint interest-earning account. The instant appeal does not challenge the merit of the Judgment but raises issue of whether the appellant was denied chance of hearing. Security being a mandatory condition the court orders half of the decretal sum be deposited in court within 30 days of this ruling.

19. The court consequently grants the Order of stay of execution on condition that ½ of the decretal sum be deposited in court within 30 days. The record of appeal be filed within 45 days. Costs of the application to the respondent to abide outcome of the appeal.

20. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23<sup>RD</sup> JANUARY, 2026.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Applicant - Mohammed

Respondent-Waweru

