



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT KISII**

**APPEAL NO. E030 OF 2025**

SYALA CONSORTIUM .....**APPELLANT/APPLICANT**

**VERSUS**

PAUL OUMA OCHAMA.....**1<sup>ST</sup> RESPONDENT**

SYAGGA & ASSOCIATES LTD.....**2<sup>ND</sup> RESPONDENT**

**RULING**

1. For determination is the Appellant/Applicant's motion dated 8<sup>th</sup> July 2025 in which it seeks the following orders:

(i) *Spent*

(ii) *Spent*

(iii) That this Court be pleased to stay warrants of arrest and proceedings in Kisumu ELRC Cause No. E229 of

2021 pending hearing determination of the appeal herein.

(iv) That this Court be pleased to grant unconditional stay of execution in Kisumu ELRC Cause No. E229 of 2021 pending hearing and determination of the appeal.

(v) That cost of the application be provided for.

2. The application is premised on the grounds set out on its face and supported by the affidavit of Mr. Francis Oketch, a Project Manager with the Appellant/Applicant. He deposes that following an application dated 7<sup>th</sup> September 2024 seeking to set aside the Trial Court's *ex parte* judgment, the Applicant was directed to deposit the sum of Kshs. 345,650/-, being the amount indicated in the Notice to Show Cause, which the Applicant was unable to raise. Consequently, the Applicant filed an application dated 25<sup>th</sup> February 2025 seeking review of that ruling. The said application was dismissed, thereby precipitating the present appeal.

3. The deponent further avers that while pursuing the appeal, he became aware that warrants of arrest had been issued against him for non-compliance with the conditions imposed by the Trial Court. He contends that his arrest would unjustly render him personally liable for the Applicant's inability to comply with the court's orders and would, in effect, render the appeal nugatory.
  
4. In response, the 1<sup>st</sup> Respondent filed a replying affidavit sworn on 10<sup>th</sup> September 2025 together with grounds of opposition of even date. He asserted that the application is intended to defeat lawful execution and is incompetent for want of a properly instituted appeal in accordance with Rules 11, 15(1) and (2), and 21 of the Employment and Labour Relations Court (Procedure) Rules, 2024. The 1<sup>st</sup> Respondent further contended that although the Applicant did not participate in the primary suit, it was nonetheless afforded an opportunity to reopen the matter subject to compliance with conditions requiring the deposit of thrown-away costs of Kshs. 30,000/- and the sum of Kshs. 345,000/- indicated in the Notice to Show Cause within fourteen (14) days. Instead of complying, the Applicant allowed the stipulated period to

lapse and only resurfaced thereafter by filing an application seeking review of the conditions.

5. It was therefore the 1<sup>st</sup> Respondent's position that he was fully entitled to proceed with execution in accordance with the ruling, which expressly provided for the reversion of the judgment upon non-compliance with the conditions imposed. He asserted that the issuance of warrants was a natural and lawful consequence of execution and that the Applicant was disingenuously seeking to obtain an unconditional stay through the present appeal and application, despite its demonstrated disregard of court orders.

6. The 1<sup>st</sup> Respondent further argued that since Mr. Francis Oketch acknowledged acting under the authority of the Applicant, service of the Notice to Show Cause upon him was proper. On that basis, the 1<sup>st</sup> Respondent urged the Court to dismiss the application, contending that the Applicant had not demonstrated any triable issues on appeal or any prejudice that would be suffered if the application was declined.

7. The application was canvassed by way of written submissions.

#### Applicant's Submissions

8. The Applicant submits that the balance of convenience tilts in its favour, asserting that it has been denied an opportunity to be heard. It contends that it was condemned unheard in the primary suit and that the conditions imposed for setting aside the ex parte judgment were unduly harsh. In support of this position, reliance is placed on **Waithaka v Tribunal appointed to investigate the conduct of Honourable Justice Njoki Waithaka & another; Kenya Magistrates & Judges Association (Interested Party) (Civil Application 8 of 2020) [2020] KECA 571 (KLR)**, which cited Ringera J. (as he then was) in **Global Tours & Travels Limited v Five Continents Travel Limited [2015] KECA 789 (KLR)**, as follows:

*"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 discretion. Thus, the question is whether it is in the interest of justice to order stay of proceedings and if so in what terms it should be granted.*

*On deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the orders.”*

9. The Applicant further submits that it stands to suffer substantial loss should the application be declined, as the warrants of arrest would be executed, thereby rendering the appeal nugatory. In conclusion, the Applicant urges the Court to allow the application without undue regard to procedural technicalities pursuant to Article 159 of the Constitution. It submits that it should not be denied a hearing on the merits on account of inadvertent errors, relying on **Philip Keiptoo & Another v Augustine Kubende [1983] KECA 87 (KLR)** and **Murai v Wainaina [1982] KLR 38**. It also cites **Wachira Karani v Bildad Wachira [2011] eKLR** and **Sangram Singh v Election Tribunal Kotah, Bhurey Lal Baya [1955] AIR 1955 SC 664**, which underscored the importance of matters being heard on merit and parties being allowed to take part in court proceedings.

1<sup>st</sup> Respondent's Submissions

10. In his submissions, the 1<sup>st</sup> Respondent identifies the following issues for determination:

- (a) Whether the appeal is incompetent for non-compliance with Rules 11, 15(1) and (2) and 21 of the Employment and Labour Relations Court (Procedure) Rules 2024 as well as section 3 of the Employment and Labour Relations Court Act;
- (b) Whether the Applicant has demonstrated substantial loss, an arguable appeal, and willingness to provide security to warrant stay of execution under Order 42 Rule 6 of the Civil Procedure Rules; and
- (c) Whether the Applicant's persistent disobedience of court orders and delay disentitle them from the equitable reliefs sought.

11. On the competence of the appeal, the 1<sup>st</sup> Respondent submits that it is fatally defective for failure to serve a notice of appeal within fourteen days as required under Rule 15(1) and (2), and for filing an incomplete record of appeal contrary to Rule 21. Reliance is placed on **Teachers Service Commission v Simon P. Kamau & another [2017]**

**eKLR**, which underscores that rules are not mere technicalities but are meant to ensure orderly and efficient administration of justice and failure to comply renders appeals incompetent. Additionally, he references **Teachers Service Commission v Kamau & 19 others [2015] KESC 35 (KLR)**, **Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers v Kenya College of Accountancy University [2019] eKLR**, **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others [2014] eKLR** and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**, which underscored that procedural rules are not mere technicalities.

12. Regarding the requirements for stay of execution, the 1<sup>st</sup> Respondent submits that the Applicant has failed to demonstrate substantial loss, an arguable appeal, or willingness to provide security, as required under Order 42 Rule 6(2) of the Civil Procedure Rules and set out in **Giella v Cassman Brown & Co. Ltd [1973] EA 358**. He asserts that the Applicant's alleged loss is vague and unsubstantiated, citing **James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR**, which held that

substantial loss must be proven not presumed. The 1<sup>st</sup> Respondent further submits that the appeal lacks merit as it merely rehashes arguments already considered and determined by the trial court. He maintains that any errors by the Applicant were deliberate rather than excusable citing **Philip Kiptoo Chemwolo v Augustine Kubende [1986] KLR 495**, which underscored that blunders are excusable if not deliberate.

13. On the issue of security, the 1<sup>st</sup> Respondent submits that the Applicant has offered none, despite its failure to deposit the sums ordered by the trial court. The 1<sup>st</sup> Respondent relies on **Butt v Rent Restriction Tribunal [1982] KLR 417** for the proposition that security is a mandatory prerequisite for stay. On timeous filing of the application the 1<sup>st</sup> Respondent submits that the Applicant's unexplained delay of 2 months disentitles it from stay, citing **Waithaka v Tribunal appointed to investigate the conduct of Honourable Justice Njoki Waithaka & another; Kenya Magistrates & Judges Association (Interested Party) (Civil Application 8 of 2020) [2020] KECA 571 (KLR)**.

14. On the Applicant's demonstrated disobedience of court orders, the 1<sup>st</sup> Respondent submits that it disentitles him from the orders sought and constitutes abuse of process. He relies on **Muchanga Investments Ltd v Safari Unlimited (Africa) Ltd & 2 others [2009] eKLR**, for the proposition that abuse includes using court to delay justice. Furthermore, he cites **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR**, which underscores that equity follows the law and does not aid deliberate defaulters. To buttress his point, the 1<sup>st</sup> Respondent draws attention to the Applicant's inexcusable delay punctuated by the fact that: the NTSC was issued after 20 months of the Applicant's inaction, the Applicant disobeyed the order to deposit Kshs. 375,650/- within 14 days. He cites **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR**, which stresses that:

*"The law does not set any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear*

*reasons upon which discretion can be favourably exercisable.”*

15. He submits that the Applicant should not benefit from his indolence relying on the case of **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A.**, which underscored that equity aids the vigilant not the indolent. Consequently, the 1<sup>st</sup> Respondent urges the Court to strike out the appeal, dismiss the present application, vacate any interim orders previously issued, direct the OCS Central Police Station Kisumu to effect the warrants of arrest, and award him costs of both the appeal and this application.

#### Disposition

16. The Ruling herein will dispose of the entire appeal. This is because the preliminary nature of the motion before me goes to the root of the entire appeal preferred against the decision of the Learned Magistrate. As such, the determination of the motion will determine the appeal. The Appellant was the unsuccessful party before the Learned Magistrate. It sought the stay of warrants of arrest and proceedings in Kisumu ELRC Cause No. E229 of 2021

pending hearing and determination of the appeal herein as well as a grant of unconditional stay of execution in Kisumu ELRC Cause No. E229 of 2021 pending hearing and determination of this appeal.

17. It is common ground that the Appellant/Applicant did not participate in the primary suit. After moving the Learned Magistrate, the Appellant/Applicant was afforded an opportunity to reopen the matter subject to compliance with conditions requiring the deposit of thrown-away costs of Kshs. 30,000/- and the sum of Kshs. 345,000/- indicated in the Notice to Show Cause, within fourteen (14) days of the Ruling by the Learned Magistrate. This is the opportunity for hearing that the Appellant/Applicant sought. In the case of **Sangram Singh v Election Tribunal Kotah, Bhurey Lal Baya** (*supra*) cited by the Appellant/Applicant, the Supreme Court of India, with whom I am in entire agreement stated that *procedural laws are instruments to advance justice, not to frustrate it*. It is my finding that the discretion of the Learned Magistrate aimed to balance the interests of justice as there was a litigant before the Court who had succeeded

in the suit and whose interests were to be catered for by the deposit of the sums ordered by the Trial Court.

18. The Appellant/Applicant did not deposit the sums ordered and now moves the Court herein seeking unconditional stay. The Court would be in a position to grant unconditional stay where it is appropriate. Having regard to precedent and the conduct of the Appellant/Applicant, I do not think this is one such case. There was no offer of bank guarantees or other security to secure the sum ordered by the Court. As such, I find that the failure to comply with the order of the Learned Magistrate and the moving of this Court to border on hubris. The 1<sup>st</sup> Respondent is correct in his surmise - Appellant/Applicant went mute, conveniently resurfacing after the time for compliance had lapsed. The Court finds that the motion before it unmerited and only fit for dismissal. The Appellant/Applicant will bear the costs of the failed motion before this Court.

It is so ordered.

**Dated and delivered at Kisumu this 28<sup>th</sup> day of January**

**2026**

**Nzioki wa Makau, MCIArb.**

**JUDGE**

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