

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT KISUMU**

**APPEAL NO. E080 OF 2025**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**TABAKA MISSION HOSPITAL.....**  
**APPELLANT**

**VERSUS**

**PATRICIA CHEPCHIRCHIR**  
**MUTAI.....RESPONDENT**

**RULING**

Before the court for determination is the Appellant's Notice of Motion dated 15<sup>th</sup> December 2025 filed under Certificate of Urgency seeking Orders that:-

1. Spent.
2. Pending the hearing and determination of the Application and the instant appeal there be a temporary stay of execution of the Judgment, decree and all consequential Orders arising from the Judgment delivered in Etago PM ELRC No. E001 of 2024.
3. Pending the hearing and determination of ELRC appeal No. E080 of 2025, there be stay of execution of the Judgment and decree in Etago PM ELRC No. E001 of 2024.

4. *The condition imposed by the ruling delivered on 4<sup>th</sup> December 2025, requiring the appellant to pay 50% of the decretal sum to the respondent be set aside, varied or substituted with reasonable and proportionate security as the court may deem fit.*
5. *In the alternative, the appellant be allowed to furnish alternative security in the form of a bank guarantee.*
6. *The court has power to give directives based on Order 46 Rule of the Civil Procedure Rules.*
7. *Costs of the application be in the cause.*

The motion was expressed under Sections 1A, 1B, and 3A of the Civil Procedure Act, Order 9 Rule 9, Order 22 Rule 22, Order 46 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and was based on the grounds set fourth on its face and the Supporting Affidavit of Fr. Elphas Gervas Kolia, a Director of the Applicant who deponed that after hearing the respondent's case, the trial court awarded gratuity, Kshs.515,000.00 salary in *lieu* of notice, Kshs.37,170, 4 months compensation, Kshs.143,000.00 costs and interest, total Kshs.693,330.00 and the applicant filed the instant appeal on 16<sup>th</sup> October 2025 challenging the propriety of the awards, appreciation of the evidence and the relevant law.

That the application for stay before the trial court culminated in the Ruling dated 4<sup>th</sup> December 2025 by which the applicant was directed to pay half ( $\frac{1}{2}$ ) of the decretal sum within 30 days failing which execution would issue and the same was imminent unless the court intervened.

The affiant deponed that the conditions imposed by the trial court were punitive, excessive, oppressive and disproportionate in the circumstances as it was burdensome to the appellant.

The affiant further deponed that the applicant was a Mission Hospital providing essential medical services to the public and had limited resources and the orders would severely strain its liquidity as it was not a commercial entity.

That there was no evidence that the amount would be recoverable if the appeal was successful, Kshs.1,029,928.00, and the appeal would be rendered nugatory if the Orders sought were not granted.

Similarly, the applicant canted without delay and was ready and willing to comply with reasonable conditions the court may impose.

That it was just and equitable and in the interest of justice that the Orders sought be granted.

### **Respondent's case**

The Replying Affidavit was filed at 8:55am on 16<sup>th</sup> February 2026 outside the 7 days given on 28<sup>th</sup> January 2026.

### **Appellant's submissions**

As to whether the instant Application met the threshold for the grant of a stay of execution, counsel for the applicant relied on Order 42 Rule 6 of the Civil Procedure Rules and the decisions in **Vishram Ravji Halal V Thounton & Jurpin** [1990] KLR 365 to urge that based on the conditions imposed by the learned trial magistrate, the appellant had a sustainable case for grant of the orders sought.

As regards the requirements of Order 42 Rule 6 of the Civil Procedure Rules, counsel relied on the sentiments of the court in **James Wangalwa & another V Agnes Naliaka Cheseto** [2012] eKLR and **Kenya Shell Ltd V Kibiru** [1986] KLR 40 on substantial loss, **Butt V Rent Restriction Tribunal** [1979] on the court's discretion to grant a stay of execution and **Consolidated Marine V Nampijja & another** Civil Appeal No.93 of 1999 on the essence of stay of execution.

Finally, on security, reliance was placed on the sentiments of the court in **Mwaura Karuga T/A Limit Enterprises V Kenya Bus Services Ltd & 4 others** [2015] eKLR, **Nduhiu Gitahi V Warugongo** [1988] KLR 621, **Arun Sharma V Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 others** [2014] eKLR, **Gantranco Manerithi & another V Africa Merchant & another V Africa Merchant Assurance Co. Ltd** [2019] eKLR, **Focin Motor Cycle Co. Ltd V Ann Wambui Wangui & another** [2018] eKLR and **Dominic Wamugi Nderi V Daniel Okeri Matunda** [2022] eKLR among others to urge that the applicant's offer to provide bank guarantee as security was sufficient for purposes of grant of the Order of stay of execution pending appeal.

## **Analysis and determination**

It is common ground that the trial court delivered a Judgment in **Patricia Chepchirchir Mutai V Tabaka Mission Hospital** on 26<sup>th</sup> September 2025 in favour of the claimant and dissatisfied with the decision, the appellant filed a Memorandum of Appeal dated 16<sup>th</sup> October 2025 faulting the learned trial magistrate on various aspects.

The matter was fixed for directions before the trial court on 20<sup>th</sup> November 2025, but none of the parties was present. The court directed service of a further mention on 16<sup>th</sup> December 2025, but again none of the parties was present and a further mention was slated for 18<sup>th</sup> February 2026.

However, on the afternoon of the 16<sup>th</sup> December 2025, the appellant filed the instant application seeking the Orders prayed for.

The court did not certify the matter urgent but directed service and response and scheduled a hearing on 18<sup>th</sup> December 2025, when puzzlingly, counsel did not appear to prosecute the application.

Strangely, the appellant's counsel file another application on 18<sup>th</sup> December 2025 seeking a review of the directions of the court made on the date, he failed to appear in court.

The application is pending determination.

Directions on the filing of the submissions were issued on 28<sup>th</sup> January 2026.

The applicant is seeking a stay of execution pending appeal.

The principles that govern the grant of stay of execution pending appeal are well settled.

Order 42 Rule 6(2) of the Civil Procedure Rules provides:

**No order for stay of execution shall be made under sub-rule (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.**

It is trite law that the court's power to grant or decline a stay of execution pending appeal is discretionary as held in **Butt V Rent Restriction Tribunal** [1982] KLR 417 and the discretion is exercisable within the parameters of Order 42 Rule 6(2) of the Civil Procedure Rules. See also **RWW V EKW** [2019] eKLR.

Intriguingly, the applicant deposed that the court had granted a stay of execution on punitive and oppressive terms, yet the respondent had a judgment against it capable of being executed for payment of the entire decretal sum.

Concerning substantial loss, the sentiments of the Court of Appeal in **James Wangalwa & another V Agnes Naliaka Cheseto** are worth capturing

*"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss.. This is*

*so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal...*

*Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.” See also **Kenya Shell Ltd V Benjamin Karuga Kibiru & others.***

The applicant’s case is that complying with the court’s direction on stay of execution would be financially burdensome because it is a non-commercial entity and would strain its liquidity. The alleged strain was not demonstrated by availment of particulars.

Perhaps the most potent averment relied upon by the applicant and which remains uncontroverted is that it was apprehensive about the respondent’s financial wherewithal to refund the sum if the appeal was successful.

To that extent the applicant has fulfilled the 1<sup>st</sup> requirement.

On timing of the instant application, the applicant averred that it was filed timeously in that the trial court rendered its Ruling on stay of execution on 4<sup>th</sup> December 2025 and the application filed on 16<sup>th</sup> December 2025.

Since the question of unreasonable delay is dependent on the circumstances of each case as held in **Jaber Mohsen Ali & another V Prixcillah Butt & another** [2014] eKLR, the court is satisfied that in the instant case, the application was filed without unreasonable delay. The second requirement is thus satisfied.

As regards security, the sentiments of Mativo J (as he then was) in **Mutahi Kiranga V Margaret Wangari Waweru & another** [2015] eKLR are worth recapitulating, thus:

*“... There is therefore an offer of security coming from the applicant in satisfaction of the said requirement. It is trite law that failure by the court to make an Order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. However, the offer for security must come from the applicant as a price for stay...”* See **Carter & Sons Ltd V Deposit**

**Protection Fund Civil Appeal No. 291 of 1997, and  
Equity Bank Ltd V Taiga Adams.**

In his Supporting Affidavit, Fr. Elphas Gervas Kolia deponed that the applicant was ready and willing to comply with reasonable conditions that may be imposed by the court and offered to provide a bank guarantee for the amount the court deemed fit.

An offer to provide security coming from the party seeking stay of execution pending appeal is a mark of good faith.

Having carefully considered the application herein, the court is satisfied that the applicant has satisfied the requirements of Order 42 Rule 6 of the Civil Procedure Rules and the application is allowed on the following terms:

- (a) stay of execution be and is hereby granted to the applicant pending the hearing and determination of the appeal provided that:*
- (b) The applicant shall provide a bank guarantee for the entire decretal sum from a reputable bank in Kenya within 30 days.*
- (c) If the applicant fails to fulfil condition (b) above, the stay of execution in force shall lapse forthwith*

*and the respondent shall be at liberty to execute the decree.*

(d) *The foregoing Orders shall apply to Kisumu ELRCA No. E081 of 2025.*

Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT  
KISUMU ON THIS 19<sup>TH</sup> DAY OF FEBRUARY 2026.**

**DR. JACOB GAKERI**  
**JUDGE**  
**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of

access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**  
**JUDGE**