

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT KISUMU**  
**CAUSE NO. E086 OF 2025**

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

**1. JOSEPH NYARIKI MOSE**

**2. JOHN KIBORE MOTOKA**

**3. AGUSTINO AULO NYADIMO**

**4. MOHAMMED ABDUBA**

**5. TITUS MAINA ATSWEWA (suing in their individual capacities as former employees of the Respondent).....**

**CLAIMANTS**

**VERSUS**

**FOAM**

**MATTRESS**

**LIMITED..**

.....**RESPONDENT**

**RULING**

This is a ruling in respect of the respondent's Notice of Motion dated 16<sup>th</sup> January 2026 seeking Orders that

*1. Spent.*

*2. Spent.*

*3. This Honourable Court be pleased to grant a stay of proceedings pending hearing and determination of the appeal in the Court of Appeal.*

*4. Costs of this application be provided for.*

The Notice of Motion is expressed under Section 3, 3A and 63 of the Civil Procedure Act, Order 12 Rule 4 and Order 51 of the Civil Procedure Rules and is based on the grounds enumerated on its face and the Supporting Affidavit of Job Aloo the applicants Human Resource Manager.

The applicant's case is that it filed a Notice of Appeal against the Ruling in ELRC No. E086/2025 and if the claim proceeded and the appeal succeeded the same would be rendered nugatory, the instant application was made without unreasonable delay and the respondents would not suffer any prejudice if the application was allowed will have the opportunity to present their case.

That the applicant was ready and willing to provide reasonable security including a bank guarantee for Kshs.20,000.00 to cover costs of the appeal because what was at stake was neither a Judgment nor decretal sum and equity favoured the granting of the Orders.

In their Grounds of Opposition dated 25<sup>th</sup> January 2026 the claimants contended that a stay of proceedings was a drastic and exceptional remedy and no exceptional and compelling circumstances had been demonstrated. They

argued that the ruling being appealed against did not determine the substantive rights of the parties and cannot justify stopping hearing the claim on merits.

The claimants averred that they stood to suffer grave prejudice if the application was allowed as it would delay the suit, and in any event the applicant had not demonstrated that the appeal would be rendered nugatory if proceedings continued and the balance of convenience was tilted in favour of the allowing the matter to proceed.

That the intended appeal was a delaying tactic to forestall the hearing and delay defeats equity.

Both parties agreed to proceed without having to file and exchange submissions.

### **Analysis and determination**

Order 42 Rule 6 of the Civil Procedure Rules, provides

- (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.

Although the foregoing provision mentions a stay of proceedings the subsequent provisions make no reference to stay of proceedings since the provisions of Order 42 Rule 6(2) of the Civil Procedure Rule are exclusive to a stay of execution pending appeal.

Under Order 42 Rule 6(1) of the Civil Procedure Rules, the court has discretion to grant a stay of proceedings pending appeal and the court must exercise its discretion judicially as explained in **Global Tours and Travels Ltd HC** Winding up Cause No. 43 of 2000 where Ringera J stated:

*“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, 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 been brought expeditiously”.*

Further, in **William Odhiambo Ramogi & 2 Others V Attorney General & 3 Others** [2019] eKLR the High Court itemised the relevant factors as follows:

- (a) First, there must be the Higher Court.
- (b) Second, where the stay is sought in the court hearing the case as opposed to the higher Court to which the appeal has been filed and there is no express provision of the law allowing for such application, an applicant should explain why the stay has not been sought in the higher court. This

is because due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of application for stay of proceedings being handled in the court to which an appeal is preferred because such a court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly.

- (c) Third, the applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable.
- (d) Fourth, the applicant must demonstrate that the appeal would be rendered nugatory if the stay of proceedings is not granted.
- (e) Fifth, the applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal and
- (f) Sixth, the applicant must demonstrate that the application for stay was filed expeditiously and without delay.

These factors ought to be considered because stay of proceedings interrupts the train of enforcement of rights

by the party suing and the court's discretion to stay proceedings is exercised sparingly.

As regards the existence of an appeal, the applicant filed a Notice of Appeal dated 11<sup>th</sup> December 2025 but failed to file a draft Memorandum of Appeal to enable the court determine whether the appeal is arguable as held by Ringera J in **Global tours and Travels Ltd** (supra). See also **Bob Morgan Systems Ltd & another V Jones** [2004] 1 KLR 194.

Be that as it may, since the applicant is challenging the court's ruling that the instant suit was not *res judicata*, which implicates the court's jurisdiction to hear and determine the suit, a foundational norm, it is arguable that the intended appeal is arguable and would be rendered an academic exercise if it was successful since the matter would have been finalised by then and execution would have ensued. On the timing of the application, the court is satisfied that the application was filed without unreasonable delay bearing in mind that the Ruling sought to be appealed against was delivered on 2<sup>nd</sup> December 2025.

Relatedly, the applicant applied for certified copies of proceedings vide letter dated 26<sup>th</sup> January 2026.

Although the applicant has satisfied or met most of the requirements for a grant of stay of proceedings, it has not demonstrated any exceptional circumstances which make the stay of proceedings warranted as opposed to waiting for the matter to be concluded and file a single appeal consistent with the general principle that appeals determine all contested issues.

The foregoing is fortified by the decision in **Wildlife Lodges Ltd V Narok County Council & 3 Others** [2011] KECA 280 (KLR) where the Court of Appeal held as follows:

*“...We are left to consider whether a stay would be the best way of promoting the overriding objectives of litigation as per Sections 3A and 3B of the Appellate jurisdiction Act. If we were to grant this application as prayed, then it would mean that the parties would have to wait for the final determination of the intended appeal while the matter remains pending in the superior court. It is our view that the dispute herein could easily be brought to an end...any dissatisfied party would then have come to this court one and for all rather than the piece-meal procedure that the applicant appears to have preferred.*”

*In view of the foregoing, we are not satisfied that this is a proper case in which to grant the stay Orders sought by the applicant...”*

The foregoing sentiments apply on all fours to the facts of the instant case.

The applicant has not shown why it cannot wait for the matter to be heard and determined and then appeal on all contentious findings and awards, if any.

The resultant judgment is also capable of being stayed pending the hearing and determination of the appeal.

In the circumstances, the court is not persuaded that the applicant has demonstrated why the court should qualify the constitutional imperative that suits be heard and determined without undue delay.

In the upshot, the applicant’s Notice of Motion dated 16<sup>th</sup> January 2026 is declined.

Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT  
KISUMU ON THIS 25<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**

ORIGINAL