

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E680 OF 2020

IRENE NJOKI MUTONYI - SAKUDA.....
CLAIMANT/RESPONDENT

VERSUS

THE BOARD OF GOVERNORS
ST. ANDREWS SCHOOL, TURI.....
RESPONDENT/APPLICANT

RULING

1. Before court is the Respondent/Applicant Notice of Motion application dated 4th November, 2024, brought pursuant to Articles 48, 50(1), & 159{2}{d) of the Constitution, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules 2010, and Section 3A of the Civil Procedure Act Cap. 21 Laws of Kenya. The Respondent/Applicant seeks orders THAT: -
 - i. Spent
 - ii. Spent
 - iii. Pending hearing and determination of the appeal before the Court of Appeal, this Honourable Court be pleased to issue an order of stay of execution of the Judgment/Decree of this Court delivered on 31st October, 2024, and the consequent decree.
 - iv. The Costs of this application be provided for.

2. The application is supported by grounds on the face of the motion and the affidavit of Ms. **Joan Arang'a**, sworn on 4th November, 2024. The crux of the motion is that a judgment was delivered on 31st October 2024, where the Court ruled in favour of the Claimant and against the Respondent, and finding that the termination and non-renewal of the Claimant's contract was unfair, unlawful, and breached the implied duty of good faith and fair dealing, as well as the Claimant's right to fair labour practices.
3. The Respondent/Applicant states that it was ordered to pay six months' notice pay of Kshs. 5,129,400-, and six months' salary as compensation of Kshs. 5,129,400, bringing the total award to Kshs.10,258,800, plus costs of the case to the Claimant.
4. The Respondent/Applicant states that it is dissatisfied with the Court's Judgment of 31st October 2024 and has filed a Notice of Appeal to the Court of Appeal. It avers that the decision was delivered via email without counsel present, thereby preventing it from orally seeking a temporary stay of execution.
5. The Respondent states that it now faces the threat of execution despite having lodged an appeal that raises substantial and arguable issues, and argues that unless a stay of execution is granted, the appeal will be rendered nugatory, infringing on its right to a fair hearing and access to justice at the appellate stage.

6. The Respondent further contends that it risks suffering substantial loss if it pays the decretal sum of Kshs.10,258,800 and later succeeds on appeal, especially since there is no assurance that the Claimant would be able to refund the amount.
7. It states that to preserve the subject matter of the appeal and ensure equality of arms, it seeks a stay of execution pending appeal. The Respondent/Applicant further expresses a willingness to provide security for the due performance of the decree and proposes depositing the entire decretal amount into a joint interest earning account held by both parties' advocates.
8. It contends that it has filed the application herein promptly, without delay, and in good faith.
9. A further affidavit was lodged in support of the Applicant's Motion, sworn by Omweri Jairus Makora, Counsel on record for the Applicant. He contends that the Court initially granted a conditional stay of execution of the 31st October 2024 judgment, and required the Applicant to deposit half of the decretal sum within 30 days pending the inter partes hearing that was scheduled for 5th December 2024.
10. Counsel avers that subsequently, the parties engaged in discussions and recorded a consent dated 31st December 2024 providing for the deposit of the entire decretal sum of Kshs.10,248,800 in a joint interest earning account in the

names of both advocates, and which consent was executed on 31st December 2024, and the funds were deposited on 24th February 2025.

11. The Applicant, through counsel, depones that when the matter came before the Court on 19th March 2025 and 11th June 2025 for adoption of the consent, adoption did not occur due to the Claimant/Respondent's advocates declining to proceed, and seeking instead to vary the joint account terms from a one year auto rollover to a three month auto-rollover period.
12. The Applicant states that it agreed to the variation and forwarded the necessary documents for execution, but the Respondent's advocates neither executed nor submitted them to the bank.
13. It is their case that on 27th June 2025, the Respondent proposed a revised consent requiring release of half of the decretal sum (Kshs. 5,129,400) to them, with the balance retained in the joint account, which demand the Applicant views as bad faith negotiation and an attempt to delay the matter.
14. The Applicant argues that releasing half the decretal sum is untenable because the appeal challenges the entire award. It further maintains that the legal threshold for a stay pending appeal has been satisfied, as the application for a stay was filed promptly, the Respondent has not

demonstrated financial capacity to refund Kshs.5,129,400 if the appeal succeeds, and the entire judgment sum has already been deposited in a joint interest earning account in the names of both parties' counsel, which constitutes sufficient security for the due performance of the decree.

15. The Applicant further alleges that the Respondent has consistently acted in bad faith and is attempting to delay and frustrate resolution of the dispute by stalling the court process.
16. The Applicant finally prays that the Court allow the application for stay of execution, asserting that the legal threshold for granting a stay pending appeal has been fully satisfied.
17. The Claimant/Respondent opposed the motion vide a Replying affidavit sworn on 5th December, 2024. The Claimant/Respondent asserts that, as the successful litigant, she is entitled to enjoy the fruits of the judgment and is therefore at liberty to proceed with execution.
18. It is her position that the grant of stay of execution pending appeal is discretionary and that the Applicant has failed to satisfy the mandatory conditions under Order 42 Rule 6 of the Civil Procedure Rules, 2010.
19. The Respondent further argues that the Applicant will not suffer substantial loss if the money decree is executed and has not provided specific or cogent evidence showing any

likely loss. It is her case that in money decrees, substantial loss arises only where the Respondent would be unable to refund the decretal sum if the appeal succeeds, and that the burden of proving such inability lies with the Applicant, and the Applicant has not discharged this burden.

20. It is further contended that the Applicant has not demonstrated willingness or ability to provide security for due performance of the entire decree, and that all three conditions for stay must be satisfied simultaneously.
21. The Respondent further emphasizes her intention to execute the decree and describes the application for stay as vexatious, irresponsible, and an abuse of the court process.
22. Parties canvassed the motion through written submissions, which have been duly considered.

Analysis and Determination

23. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules provides for stay of execution as follows:-

“(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 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.”

24. The grant of an order of stay is an equitable remedy that is given at the discretion of the court. The general rule, however, is that if there is no overwhelming hindrance, a stay of execution ought to be granted so that an appeal, if

successful, may not be rendered nugatory. Cotton L J in ***Wilson v Church (No 2) 12 Ch D (1879) 454*** held: -

“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.”

25. The Court’s exercise of discretion in staying execution of a judgment is guided by the grounds set out in the case of ***Stephen Wanjohi v Central Glass Industries Ltd Nbi HCCC No. 6726 of 1991***, where the Court emphasized that:-

“For the Court to grant stay of execution, there must be:

(a). Sufficient cause.

(b). Substantial loss.

(c). No unreasonable delay and security offered for due performance of the decree.”

26. These three conditions set out in the foregoing case are conjunctive and must be satisfied simultaneously, as held in ***Equity Bank Ltd v Taiga Adams Company Ltd.***

27. On whether the application was filed without unreasonable delay, the Judgment herein was delivered on 31st October 2024, and the present application was filed on 4th November 2024, just four days later.

28. The application, having been filed within four days of judgment, cannot by any standard be said to have been filed late.
29. I therefore find that the application was filed without unreasonable delay.
30. On whether the Applicant has demonstrated substantial loss, substantial loss is the cornerstone of an application for stay pending appeal. In ***Kenya Shell Ltd v Benjamin Karuga Kibiru & Another (1986) KECA 94 (KLR)***, the Court of Appeal held that substantial loss is what must be prevented by preserving the status quo because such loss would render the appeal nugatory.
31. Further, in ***National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another (2006) KECA 333 (KLR)***, the Court of Appeal stated that once an Applicant expresses reasonable fear that the Respondent may be unable to refund the decretal sum, the evidential burden shifts to the Respondent to demonstrate financial ability to refund.
32. This, no doubt, is a money decree, and the Applicant contends that it is unaware of the Claimant's financial means and that there is no assurance of refund should the appeal succeed. The Claimant, on her part, asserts that the Applicant has not placed cogent evidence before the Court to demonstrate her inability to refund the decretal sums.

33. The peculiar circumstances of this matter are that the entire decretal sum has already been deposited in a joint interest earning account in the names of both advocates pursuant to a consent executed on 31st December 2024. That deposit, in my view, secures the decretal amount and eliminates the immediate risk of dissipation.
34. It therefore follows that the decretal sum is preserved. I am equally convinced that if execution were to proceed by release of part of the funds before the appeal is heard, and the appeal ultimately succeeds, recovery may indeed become uncertain.
35. The Court is therefore persuaded that in the context of this case, the risk of rendering the appeal nugatory has been demonstrated.
36. On security, it was held in ***Focin Motorcycle Co. Ltd v Ann Wambui Wangui & Another (2018) KEHC 8358 (KLR)*** that the purpose of security is to guarantee the due performance of the decree should the appeal fail. Here, the Applicant has not merely expressed willingness to provide security; it has already deposited the entire decretal sum of Kshs. 10,258,800 in a joint interest earning account in the names of both parties' advocates.
37. This, without doubt, constitutes adequate and sufficient security for the performance of the decree.

38. In whole, I find and hold that the Respondent/Applicant has satisfied the legal threshold for grant of stay of execution pending appeal under Order 42 Rule 6(2) of the Civil Procedure Rules, and I grant orders as follows: -

- a) That an order of stay of execution of the Judgment and Decree delivered on 31st October 2024, be and is hereby issued pending hearing and determination of the appeal before the Court of Appeal.
- b) That the decretal sum already deposited in the joint interest earning account shall remain therein pending the determination of the appeal.
- c) The Costs of this application shall abide the outcome of the appeal.

39. It is so ordered.

SIGNED, DELIVERED, AND DATED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 26TH DAY OF FEBRUARY, 2026.

**C. N. BAARI
JUDGE**

Appearance:

Mr. Wairoto present for the Claimant/Respondent

Mr. Makora present for the Respondent/Applicant

Ms. Esther S – C/A