



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISII

APPEAL NO. E007 OF 2024

SOLAR PANDA KENYA
LIMITED.....**APPELLANT**

VERSUS

RAYMOND LINNUS ODHIAMBO ONG'ARO.....**RESPONDENT**

(Being an appeal from the Judgment and Decree of Hon. Naomi Wairimu (CM) in Migori C MELRC No. E003 of 2023 delivered on 12th November 2024)

RULING

1. Through an application dated 24th January 2025, the Appellant seeks the following orders:

i. Spent

ii. Spent

iii. That there be stay of execution of the judgment and decree of the Trial Court issued on 12th November 2024 pending hearing and determination of the appeal.

iv. That costs be provided for

2. The application is premised on the grounds appearing on its face and is supported by the affidavit of Joy Asuke, the Appellant's Human Resource and Administration Manager. She deposes that the temporary stay of execution granted by the Trial Court lapsed on 12th December 2024. She further states that the Appellant has since filed the appeal herein which raises arguable grounds with high chances of success. According to the Appellant, unless the orders sought are granted, the Respondent may proceed with execution, thereby rendering the appeal nugatory. It is also contended that the Appellant stands to suffer substantial loss if the decretal sum is paid out and the appeal ultimately succeeds, particularly because the Respondent's ability to refund the decretal amount has not been demonstrated. The Appellant therefore urges the court to allow the application on the basis that it was filed without unreasonable delay, that the

Respondent will not suffer prejudice, and that the Appellant is willing to comply with any conditions the court may impose.

3. The Respondent opposed the application through a replying affidavit sworn on 15th May 2025. He contends that the application is merely intended to deny him the fruits of his judgment. In his view, the application does not satisfy the threshold for the grant of stay of execution under Rule 21(2) of the Employment and Labour Relations Court Rules and Order 42 Rule 6 of the Civil Procedure Rules. In particular, he asserts that the Appellant has not demonstrated the substantial loss it stands to suffer, has not disclosed the nature of the alleged prejudice, and has not furnished security for the due performance of the decree. Consequently, the Respondent urges the court to dismiss the application with costs.

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

Appellant's Submissions

5. The Appellant submits that it has satisfied the conditions for the grant of stay of execution pending appeal as stipulated under Order 42 Rule 6(2) of the Civil Procedure Rules, namely: demonstration of substantial loss, filing the application without unreasonable delay, and provision of security for the due performance of the decree. In support of this position, reliance is placed on **Halai & another v Thornton & Turpin [1963] Ltd [1990] eKLR**.

6. On substantial loss the Appellant submits that it would suffer irreparable financial prejudice if the decretal amount is paid out and the appeal subsequently succeeds, as the Respondent's financial ability is unknown or has at least not been demonstrated. It maintains that it has established the risk of final loss in view of the absence of evidence by the Respondent of his ability to refund the decretal sum. The Appellant relies on **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR**, where the court held that once an applicant expresses reasonable apprehension that the respondent may be unable to refund the decretal sum, the evidential burden shifts to the

respondent to demonstrate his financial capacity, especially given that it is typically not possible for the applicant to know in detail the respondent's resource capability or lack thereof. Regarding the timeliness of the application, the Appellant submits that it was filed without unreasonable delay, taking into account the time required for consultations and the obtaining of instructions. It notes that the temporary stay granted by the trial court lapsed on 12th December 2024, while the present application was filed on 24th January 2025. The Appellant relies on the case of **Frodak Kenya Limited v Simon (Miscellaneous Application E009 of 2024) [2025] KEELRC 1456 (KLR)**, where the court held that filing an application approximately one month and twenty-one days after judgment did not constitute inordinate delay.

7. With regard to security for the due performance of the decree, the Appellant submits that it is ready and willing to comply with any conditions that the court may impose, including the deposit of a reasonable portion of the decretal sum in a joint interest-earning account in the names of the parties' advocates. The Appellant also contends that the

appeal raises arguable issues with reasonable prospects of success, citing **Ndambuki & another (Suing as administrators to the Estate of the Late Gregory Ndambuki) v National Land Commission & 2 others (Civil Application E092 of 2024) [2024] KECA 534 (KLR)**, where the Court of Appeal cited **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR**, in defining an arguable appeal as one that is not frivolous and deserves full consideration by the court.

8. The Appellant therefore submits that granting the orders sought is necessary to preserve the substratum of the appeal and to prevent the appeal from being rendered nugatory. In this regard, reliance is placed on the case of **Elena Doudoladova Korir v Kenyatta University [2014] KEELRC 413 (KLR)** where the court granted stay of execution on condition that half of the decretal sum be deposited in a joint interest-earning account.

Respondent's Submissions

9. In response, the Respondent maintains that the Appellant has not met the threshold set out under Order 42 Rule 6(2)

of the Civil Procedure Rules. In respect of substantial loss, he submits that the Appellant has not demonstrated the specific loss it stands to suffer if the decretal sum is paid out. In support of this position, reliance is placed on the case of **Republic v Commissioner for Investigations and Enforcement Ex parte Wananchi Group Kenya Limited [2014] eKLR**, where the court made the following observation:

"The issue of substantial loss is crucial in such application that it ought to come out clearly in the supporting affidavit. It is therefore, not sufficient to merely state that the decretal sum is a lot of money and that the applicant would suffer if the money is paid. In an application of this nature, the applicant should show damages it would suffer if the order of stay is not granted."

10. As to whether the application was filed without inordinate delay, the Respondent disputes the Appellant's assertion and points out that the application was served nearly six months after the delivery of judgment, without any satisfactory explanation for the delay. With regard to security for the due

performance of the decree, the Respondent submits that none has been furnished for the Court's consideration. Moreover, he submits that the Appellant's argument that the appeal is arguable and has prospects of success is not a factor contemplated under Order 42 Rule 6(2) of the Civil Procedure Rules. In this regard, reliance is placed on the case of **Daniel Wanyoike v Kenya Power & Lighting Company Ltd [2015] eKLR**, where the court held that the existence of triable or arguable issues is not a relevant consideration in an application for stay pending appeal, but is instead applicable in applications seeking to set aside ex parte judgments or grant of leave to defend. On the basis of the foregoing, the Respondent urges the court to dismiss the application with costs.

Disposition

11. The issue for determination is the stay pending appeal. The Applicant asserts it ought be granted a stay as the orders of stay given by the Trial Court, expired on 12th December 2024 and therefore the substratum of the Appeal needs to be secured. The Respondent on the other hand

asserts there are no grounds advanced for the stay sought as the Appellant/Applicant has been indolent in moving the Court over 1 year 12 days after the lapse of the stay granted by the Trial Court as well as for not offering security.

12. The Court is obligated to exercise its discretion when handling a matter for stay pending appeal in line with the decision in **Halai & another v Thornton & Turpin** (*supra*). The stay sought is to preserve the substratum of the appeal so that if the appeal succeeds, the appellant is not granted a pyrrhic victory. The Applicant is required to prove that substantial loss will be suffered if stay is not granted. There must be a timeous application and an offer of security must be made for the due performance of the decree. The appeal must also be arguable. In this case, it is not disputed that the Appellant/Applicant did not move with haste. Instead, the Court was moved over 1 year after the lapse of the stay orders. The Respondent thus seeks the Appellant be denied the stay sought. The Respondent has also not been a paragon of virtue as there has been refusal to execute the decree in the absence of the stay. In acquiescing to the

informal stay, the Respondent has demonstrated that a grant of stay would not be offensive.

13. A stay pending appeal is hereby granted with the Appellant being required to deposit the entire decretal sum in an interest earning account in the names of the Counsel on record within 21 days of today. The stay granted will automatically lapse if the failure to open the interest earning account can be solely attributable to the Appellant. The costs of this application will abide the outcome of the Appeal.

It is so ordered.

Dated and delivered at Kisumu this 12th day of March

2026

**Nzioki wa Makau, MCI Arb.
JUDGE**