

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KITALE

CAUSE NO. E018 OF 2023

(Before Hon. Lady Justice Maureen Onyango)

**KENYA UNION OF COMMERCIAL AND
FOOD ALLIED WORKERS CLAIMANT
VERSUS**

R. B SHAH KENYA LIMITED RESPONDENT

RULING

1. Vide an application dated 2nd September, 2025 the Respondent seeks the following orders:

- a) THAT the application herein be certified as urgent and the same be heard ex-parte at the 1st instance.
- b) THAT there be stay of execution of the decree herein pending the hearing and determination of this application inter-parties.
- c) THAT there be stay of execution of the decree herein and restraint orders be issued restraining the respondent whether by itself, its employees, agents and/or servants from in any other manner

proclaiming, seizure and/or sale of the applicant's movable properties and assets pending the hearing and determination of this application inter-parties.

- d) THAT the time within which to lodge an appeal by the applicant herein against the judgment and decree of the Hon. Lady Justice M. Onyango that was read and delivered electronically in KITALE ELRC NO. E018 OF 2023 on 22nd May 2025 be extended by a further FORTY-FIVE (45) DAYS.
- e) THAT Costs of this application be in the course.
- f) THAT there be stay of execution of the decree herein pending the hearing and determination of the intended appeal in the Court of Appeal in Eldoret between the parties herein.

2. The application is made under sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 22 Rule 25, Order 42 Rule 6 and Order 51 Rules 1 and 4 of the Civil procedure Rules, 2010, and all other enabling provisions of the law.

3. The application is supported by the grounds on the face thereof and the affidavit of AMIT RAICHAND SHAH, the Director of the Applicant. In the grounds in support of the application as reiterated in the affidavit, the Applicant states:

- (a) That judgment of the court was delivered on 22nd May 2025 with the court granting several awards in favour of the Claimant/Respondent;
- (b) That the applicant being dissatisfied with the said judgment preferred an appeal against the whole of the said decision and which appeal is due to be filed in the Court of Appeal in Eldoret;
- (c) That the applicant did lodge in court its Notice of Appeal on 3rd June 2025 and subsequently, requested to be supplied with the Certified Typed Copies of the proceedings for purposes of preparation of the Record of Appeal;
- (d) That however, pursuant to the period within which it took the court to avail the applicant with the certified typed copies of the proceedings, the time

frame within which to lodge in court the Record of Appeal is due to lapse on 2nd September 2025 hence the need for extension of time;

(e) That the claimant/respondent has threatened to commence execution proceedings against the applicant herein towards recovery of the sums awarded in the judgment of the court and the costs of the claim as awarded therein;

(f) That the applicant has a good and arguable appeal with high chances of success to the judgment that was delivered herein granting the Claimant's prayers;

(e) That save for costs, no injury will be occasioned to the Claimant/Respondent for allowing this application and the Respondent can be adequately compensated by way of costs;

(f) That no prejudice will be occasioned to the respondent if the orders being sought are granted;

(g) That it is in the wider interest of justice that the application herein be allowed.

4. The Application is opposed by the Claimant who filed a replying affidavit of ANDREW KINYUA M'MUKIIRI in which he deposes that the application is incompetent, an abuse of the court process, lacks merit and should be dismissed with costs.
5. He further deposes that the Respondent is employing delaying tactics to delay the matter and punish the Grievant, and further that the Respondent has not provided sufficient cause to warrant the stay of execution.
6. Mr. M'Mukiiri deposes that the Respondent has not demonstrated that it will suffer any substantial loss.
7. The application was disposed of by way of written submissions. The Applicant's submissions are dated 2nd October, 2025 while those of the Claimant are dated 22nd January, 2026.
8. In its submissions the Applicant has extracted the following two issues for determination:
 - i. Whether the Applicant has demonstrated sufficient cause to warrant leave to file an appeal out of time,

- ii. Whether the Applicant has satisfied the conditions for grant of stay of execution pending appeal.
9. On the 1st issue the Applicant submits that section 95 of the Civil Procedure Act as read with Order 50 Rule 6 of the Civil Procedure Rules grants courts the power to order the enlargement of time.
10. For emphasis the Applicant relies on the decision of the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others [2014] eKLR** where the court stated that extension of time is a discretionary power to be exercised judiciously and upon sufficient cause being shown.
11. It is submitted by the Applicant that delay in filing the appeal was occasioned by the period it took for the court to avail typed proceedings to enable the Applicant file appeal, which was neither deliberate nor inordinate. The Applicant relies on the decisions in **Muthoki Brothers Company Limited v Masanga (Environment and Land Appeal E108 of 2022) [2023] KEELC 18498 (KLR)**, as upheld by the Court of Appeal in **Hussein (Suing as the Administrator of the Estate of**

Amina Sora Gube) & 2 others v Hirbo (Civil Application E072 of 2025) [2025] KECA 1413 (KLR).

12. The Applicant submits that it has acted in good faith and has a meritorious appeal with high chances of success, relying on the decision in **Sammy Mwangi Kirietho & 2 Others v. Kenya Commercial Bank Ltd (2020) eKLR** wherein the Court held;

“As regards the chances of success of the intended appeal, all that a single judge is called upon to do is make a prima facie observation, otherwise there would be a danger of usurping the powers of the full Court if at all the application for extension of time is allowed and the appeal is finally heard.”

13. The Applicant submits that it has called to question substantive issues of law and fact as evidenced in its Memorandum of Appeal dated 29th August 2025, thus the appeal is arguable. That as was held in the cases it has cited the overriding objective of the law is to do substantial justice and that courts should grant extension of time where good cause is demonstrated.

14. On the 2nd issue the Applicant submits that the right of appeal is protected under Article 50(1) of the Constitution of Kenya, 2010 and that courts should uphold the right by granting stay of execution.
15. The Applicant submits that Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 on stay of execution provides that an applicant must demonstrate substantial loss may result unless the order is made; that the application has been made without unreasonable delay; and that such security as the court orders for the due performance of the decree has been given.
16. The Applicant submits that unless stay is granted, the Respondent will proceed with execution, thereby rendering the intended appeal nugatory and occasioning substantial loss to the Applicant. It relies on the Court of Appeal in **RWW v EKW [2019] eKLR** where it was held that the purpose of stay is to preserve the subject matter of the appeal so that the appeal is not rendered nugatory.
17. It further relied on the decision in **Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited [2024] eKLR**

where the court held that where an appeal is rendered nugatory it falls within the legal meaning of substantial loss.

18. The Applicant submits that the application has been made promptly upon learning of the impending lapse of time and the resultant threat of execution. Thus, it has been without undue delay.
19. The Applicant undertakes to provide security for the due performance of the decree as may be ordered by the Court.
20. The Claimant on its part identified only one issue for determination: whether the Applicant has satisfied the threshold for grant of an order for stay of execution, and for costs.
21. It is submitted that the Applicant has not satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules and the case of **Machira t/a Machira & Co. Advocates v East African Standard (No2)**.
22. The Claimant submits that the Applicant is guilty of laches, that the application is an afterthought as the issues raised in

the Memorandum of Appeal are frivolous and not arguable. That the law of equity does not aid the indolent.

23. It is further submitted that the Applicant has come to court with misleading information and that he who comes to equity must come with clean hands.
24. The Claimant submits that should stay of execution be granted the Applicant ought to deposit security, relying on the case of **Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others [2014] eKLR** where the court stated:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants became and are judgment debtors in relation to the respondent....”

25. The Claimant further submits that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. It

relies on the decision in the case of **Samvir Trustee Limited v Guardian Bank Limited (2007] eKLR** where the Court stated: -

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner but the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

26. The Claimant submits that litigation must come to an end as was observed by the Supreme Court in **Kenya Revenue Authority v Habimana Sued Hemed & Another [2017] eKLR**. The Claimant invited the court to take into account the fact that the claim was filed in Eldoret in the year 2023.

27. On costs the Claimant submitted it is trite law that costs follow the event. It submitted that the Claimant is entitled to costs since the instant Claim is well merited and has been brought in good faith. The Claimant urged the Court to find so.

Analysis and Determination

28. I have considered the application, the grounds and affidavit in support thereof, the affidavit in opposition thereto and the rival submissions of the parties. The issue for determination is whether the Applicant is entitled to the two prayers in the application, that is, stay of execution pending appeal and enlargement of time within which to lodge appeal to the Court of Appeal.

29. Rule 82 of the Court of Appeal Rules provides for institution of appeals as follows:

82. Institution of appeals

(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—

(a) a memorandum of appeal, in quadruplicate;

(b) the record of appeal, in quadruplicate;

(c) the prescribed fee; and

(d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.

(3) The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.

30. Appeal is defined in the Appellate Jurisdictions Act as follows:
*“appeal”, in relation to appeals to the Court, **includes an intended appeal;** and “appellant” includes an intended appellant;*
31. Notice of Appeal is defined in the same Act thus:
“notice of appeal”, in relation to a criminal appeal, means a notice lodged in accordance with rule 59 and, in relation to a civil appeal, means a notice lodged in accordance with rule 75;
32. Order 42 Rule 6(4) likewise provides that *for the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*
33. The Notice of Appeal in this case was lodged by the Applicant on 3rd June, 2025. According to Rule 82 of the Court of Appeal Rules, the appeal is to be instituted within sixty days of the date when the Notice of Appeal was lodged. The Notice of Appeal having been lodged on 3rd June, 2025, the appeal ought to have been instituted on or before 3rd August, 2025,

according to Rule 3 of the Court of Appeal Rules which provides for computation of time as follows:

3. Computation of time

Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions—

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or that act or thing is done;

(b) if the last day of the period is a Sunday or a public holiday (which days are in this rule referred to as excluded days) the period shall include the next following day, not being an excluded day;

(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time; or

(e) unless the Court otherwise directs, the period of the Christmas vacation shall not be reckoned in the computation of time.

34. The application herein is dated 2nd September, 2025, one month after the lapse of the period within which the appeal was to be instituted. The Applicant's insinuation that the time for instituting the appeal lapsed on 2nd September, 2025 is not in tandem with Rule 3 of the Court of Appeal Rules as set out herein above. Only Christmas vacation is excluded in the reckoning of time by Rule 3 thereof.
35. The court notes from the application that the only reason given for delay in filing the appeal within the prescribed time is that this court delayed in availing certified typed proceedings to the Applicant to enable it compile the Record of Appeal.

36. The typed proceedings herein were certified by the Deputy Registrar on 2nd July, 2025 and payment for the same made by the Applicant on 8th July, 2025.
37. The decree was paid for on 9th July, 2025 and certified by the Deputy Registrar on 22nd August, 2025.
38. Payment for certification of Judgment was made by the Applicant on 17th July, 2025.
39. The proviso to Rule 82 of the Court of Appeal Rules states:
“Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”
40. The Applicant did not obtain a Certificate of Delay from the Deputy Registrar excluding the days required or that it took to prepare and avail certified copies of the proceedings to the Applicant.

41. Be that as it may, I do not think this court has jurisdiction to extend time for instituting an appeal in the Court of Appeal. My reading of the Court of Appeal Rules is that only the Court of Appeal has jurisdiction to extend the time. Rule 4 of the Court of Appeal Rules provides:

4. Extension of time

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

42. The Appellate Jurisdictions Act defines court as:

“Court” means the Court of Appeal and includes a division thereof and a single judge exercising any power vested in him sitting alone;

43. This definition can be contrasted with the definition in the Civil Procedure Act which on the other hand defines court as “court”

means the High Court or a subordinate court, acting in the exercise of its civil jurisdiction;

44. From the foregoing it is clear that “court” as defined in the Court of Appeal Rules means only the “Court of Appeal”. Rule 3 in my interpretation therefore means that the extension of time set in Rule 3 of the Court of Appeal Rules can only be done by the Court of Appeal.
45. The foregoing therefore imply that this court has no jurisdiction to extend time for instituting an appeal in the Court of Appeal. This court’s jurisdiction is limited to granting stay of execution and extending time for lodging a Notice of Appeal as provided in Rules 5 of the Court of Appeal Rules and Order 42 Rule 6 of the Civil Procedure Rules.
46. Having found that this court has no jurisdiction to extend the time for instituting appeal to the Court of Appeal, I will now consider the second prayer in the application which is whether the Applicant is entitled to an order for stay of execution pending appeal.
47. Order 42 Rule 6 provides for stay of execution as follows:

6. Stay in case of appeal [Order 42, rule 6.]

(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 subrule (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.

48. The opening words of Order 42 Rule 6 presuppose that there is an appeal. The words are *“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from...”*
49. In this case the Applicant has asked this court to allow it to file such appeal out of time. However, as I have found above, this court has no such jurisdiction as it is only limited to extending time for filing Notice of Appeal. In essence therefore, there is no appeal. A notice of Appeal is deemed to lapse within that would warrant orders of stay of execution.
50. As observed above Order 42 Rule 6(4) provides that for the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court a Notice of Appeal has been given.
51. The Applicant herein having filed a Notice of Appeal, it is deemed that there is an appeal to the Court of Appeal.

52. The court notes that under Rule 83 of the Court of Appeal Rules if a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. Rule 4 of the Court of Appeal Rules however gives the court powers to extend time.
53. The conditions that the Civil Procedure Rules demand of this court to consider are those in Order 42 Rule 6 being substantial loss to the Applicant, timeous filing of application and provision of security for the due performance of such decree or order.
54. The Applicant has offered to provide security as may be ordered by this court. The Applicant has further argued that it was held in **Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Limited [2014] eKLR** that where an appeal is rendered nugatory it falls within the legal meaning of substantial loss.
55. I would however not agree with the Applicant that the application was filed promptly. As I already demonstrated above there was no valid explanation why the appeal was not

lodged in time, the proceedings having been certified on 2nd July, 2025 and paid for on 8th July 2025, within the timeline of 60 days from date of lodging Notice of Appeal, as provided by law, while the instant application is dated 2nd September, 2025. Further, no Certificate of Delay has been obtained for the time required for typing of proceedings, probably because the proceedings were ready in time.

56. It is for the foregoing reasons that I find no valid reason given for the delay in filing the application for stay of execution dated 2nd September, 2025. Secondly, as of now there is no valid appeal as the Notice of Appeal lapsed as provided in Rule 83 of the Court of Appeal Rules which provides:

83. Effect of default in instituting appeal

If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served. and dismiss

57. I accordingly find no merit in the application and dismiss it with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON
THIS 26TH DAY OF FEBRUARY, 2026**

**MAUREEN ONYANGO
JUDGE**