

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC CAUSE NO. E270 OF 2021

PATRICIA MWENDE NZILU.....1ST
RESPONDENT

VERSUS

INTER-RELIGIUS COUNCIL OF KENYA.....1ST RESPONDENT

DR. FRANCIS KURIA.....2ND
RESPONDENT

CORAM

Before Lady Justice Jemimah Keli

C/ A Otieno

RULING

1. The 1st Respondent/Applicant vide Notice of Motion application dated 21st May 2025 brought under the provisions of Article 47 and 50 of the Constitution; Section 1A and 3A of the Civil Procedure Act 2010; and Order 9 Rules 9 and 10, Order 42 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules 2010, sought the following orders:-
 - a. Spent
 - b. Spent
 - c. Spent

- d. Spent
- e. This Honourable Court be pleased to stay the execution of the Judgement and subsequent Decree emanating from the Judgement dated and delivered on 19th March 2025 by Honourable Justice Ocharo Kebira at Mombasa, in Nairobi ELRC Cause No. E270 of 2021 Patricia Mwendu Nzilu vs Inter-Religious Council of Kenya & another pending the hearing and determination of the intended Appeal.
- f. This Honourable Court be pleased to make any such other and further orders that it may deem fit in the interests of justice.
- g. The costs of this Application be provided for.

2. The Application was supported by an affidavit of Linus M. Nthigai sworn on 21st May 2025.

3. Grounds of the application

- a. Judgment was delivered on 19th March 2025 by Honourable Justice Ocharo Kebira at Mombasa in favour of the Claimant and the 1st Respondent intends to challenge the aforementioned Judgement in its entirety on appeal.
- b. The 1st Respondent/Applicant lodged a Notice of Appeal dated 2nd April 2025.
- c. The Intended Appeal is highly arguable and thus meritorious with high chances of success as the Learned Judge misdirected himself and erred in law on various aspects in the Judgement dated and delivered on 19th March, 2025.

- d. The Applicant has an arguable appeal which will be rendered nugatory should the Claimant/ Respondent proceed with the execution of the Judgement/ decree issued by the Court.
- e. The Intended Appeal will raise a number of triable issues, specifically that:
 - i. The Learned Judge erred in law and fact by ignoring and/ or failing to take into account the evidence placed on record by the Respondents thereby arriving at the wrong decision;
 - ii. The Learned Judge erred in law and fact by failing to take into account the arguments and testimony of the Respondents thereby arriving at the wrong decision;
 - iii. The Learned Judge erred in law and fact in finding that the Claimant was unfairly terminated from employment and subsequently awarding her compensation pursuant to Section 49 of the Employment Act;
 - iv. The Learned Judge erred in law and fact in awarding the Claimant general damages for workplace violence and harassment without being satisfied that the Claimant was exposed to violence and harassment at the work place despite the Respondents/ Applicants' evidence that there was no form of abuse meted on the Claimant/Respondent;
 - v. The Learned Judge erred in law in awarding the Claimant/ Respondent unpaid salary for the two months that the Claimant was on compulsory leave being July and August, 2018 while also awarding her Unpaid Salary for the months between August 2018 and February 2019 (Seven months); and

- vi. The Learned Judge erred in law in awarding the Claimant/Respondent compensation pursuant to the provisions of Section 49 (1) (c) being seven (7) months' gross salary while also awarding the Claimant unpaid salary for seven months between August 2018 and February,2019.

- f. The Applicant's Intended Appeal has a very high probability of success and raises arguable grounds against the Judgement dated and delivered on 19th March, 2025 by Honourable Justice Ocharo Kebira.

- g. The 1st Respondent/Applicant is willing to deposit, in Court, a reasonable portion of the Decretal sum as this Honourable Court shall determine, within forty-five (45) days, as security for due performance of the Decretal sum.

- h. There is a real danger that if this Application is not urgently heard and the prayers sought for stay of execution of the Judgement dated and delivered on 19th March, 2025 and consequential decree are not granted, the Intended Appeal will be rendered an academic exercise.

- i. The Judgement subject matter herein being substantial, should the execution proceed pending the hearing and determination of the Intended Appeal, the Claimant/Respondent's ability to refund the Decretal amount remains unknown and presumably insufficient.

- j. This Application has been filed without undue delay.

- k. There are sufficient and reasonable grounds to warrant the granting of the orders sought.

l. The Respondent will not suffer any prejudice/ inconvenience and/ or loss should the prayers sought herein be granted.

m. The Applicant undertakes to comply with the directions as will be issued by the Court in respect to the grant of Stay of Execution Orders.

n. It is in the interest of justice that this matter be heard and determined expeditiously.

4. The application was opposed by the Claimant/Respondent through her Replying Affidavit sworn on 18th September 2025. She argued that the intended appeal by the 1st Respondent does not demonstrate good faith on their part as parties have been negotiating for an out of court settlement for the decretal amount. She also argued that the application is misconceived and defective because a certified copy of the Decree, a draft memorandum of appeal, and a letter requesting certified copies of the proceedings have not been annexed. It is the Claimant/Respondent's case that the present application was intended to frustrate her efforts to enjoy the fruits of her successful judgment.

5. The Claimant/Respondent took the position that the 1st Respondent/Applicant has not met the threshold for the grant of a stay of execution pending appeal, as there is no threat of execution by the Claimant/Respondent, hence the application is premature. No evidence has been tabled to prove the commencement of any execution process against the 1st Respondent. The 1st Respondent has also not demonstrated any substantial loss that would ensue from a refusal to grant stay of execution; has only offered to furnish a reasonable security and not the entire decretal sum as security; and that since the instant application relates to a monetary

decree, the Appeal shall not be rendered nugatory should the monies be paid because the same can be recovered if the 1st Respondent's intended appeal succeeds. She also argues that there was unreasonable delay in the filing of the present Application, with a delay of over 70 days, noting that the judgment was delivered on 19th March 2025 yet the application was filed on 27th May 2025. No explanation for the delay has been given hence the same is unjustifiable, unreasonable and intended and violates the requirement by law that such delay must be satisfactorily explained to the court.

6. It is stated by the Claimant/Respondent that she is aware, as a former employee holding a top position in the 1st Respondent organization, that the decretal sum of Kshs. 4,967,687.50 is a paltry figure compared to the sums generated by the 1st Respondent. However, the Claimant/Respondent concedes that a stay of execution may be granted if the 1st Respondent deposits the entire decretal sum in a joint interest-earning account in the name of the Claimant and the 1st Respondent at a reputable bank and within a certain duration.
7. On his part, the 2nd Respondent filed Grounds in Support of Notice of Motion, dated 16th January 2026, reiterating the 1st Respondent/Applicant's sentiments for the most part.

DECISION

8. The application was canvassed by way of written submissions. The parties complied.
9. The issues for determination are as follows:

- a. Whether the Court should grant the 1st Respondent stay of execution of the Judgment and Decree delivered on 19th March 2025 pending the hearing and determination of the Appeal.

Whether the Court should grant the 1st Respondent stay of execution of the Judgment delivered on 19th March 2025 pending the hearing and determination of the Appeal.

20. It is not in dispute that the Employment and Labour Relations Court (Hon. Kebira Ocharo, J) delivered the impugned Judgment on 19th March 2025.
21. The Employment and Labour Relations Court (Procedure) Rules 2024 on stay of execution pending appeal state as follows:-

‘21. (1) Where an application for stay of execution pending appeal has been lodged, the applicant shall, in the supporting affidavit, declare whether a similar application has been filed in any other court

(2) An application for stay of execution pending appeal shall be filed in the appeal file.’

22. Since the Rules are silent on the conditions for granting stay then the lacuna is addressed by Order 42 Rule 6 (2) of the Civil Procedure Rules to wit:-

‘(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.’’

1. In considering this issue, I am also guided by the decision of the Court of appeal in Butt -vs Rent Restriction Tribunal (1982) KLR 417 on how a Court should exercise discretion in an application for stay of execution where it held that: -

“1. the power of the Court to grant or refuse an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle is granting or reusing a stay is: If there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge’s discretion. (sic) (trial Court judgement).

3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.

4. The Court in exercising its powers under order XLI rule 4 (2) (b) of the civil procedure Rules can order security upon application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse”.

2. I have seen the 1st Respondent’s Notice of Appeal dated 2nd April 2025 filed before the Court of Appeal. Under Rule 77 of the Court of Appeal Rules 2022:

“A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.

(1) Each notice under subrule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.”

3. The Appeal against the decision of the Employment and Labour Relations Court dated 19th March 2025, lodged vide a Notice of Appeal dated 2nd April 2025, therefore seems to have been properly filed before the Court of Appeal within the statutory timelines, and in the specified form.
4. This Court’s mandate, therefore, is to analyze whether the 1st Respondent has met the conditions for the grant of an order of stay of execution, pursuant to Order 42 Rule 6 (2). Firstly, has the 1st Respondent proved that they will suffer substantial loss if the orders are not granted? The 1st Respondent insists that there is a real danger that the decretal amount, being a substantial sum, if execution proceeds and the same is paid to the Claimant, Respondent, she will not have the capacity to repay the same to the 1st Respondent if their appeal is successful.
5. The court pronounced itself on the test for determining that an Applicant will suffer substantial loss in the context of stay of execution of monetary decrees, in the case of *Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007* where it held:

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the

status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

6. On the party on whom the burden of proving the Respondent’s financial ability falls, the Honourable Court of Appeal in *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike and Another* [2006] eKLR stated that:

“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya.” In *G.N. Muema P/A Mt View Maternity and Nursing Home vs Miriam Bishar & Another* [2018] eKLR, an affidavit by Respondent showing his or her ability to pay was held to be sufficient to mitigate the substantial loss argument.

7. I now turn to the circumstances of this case, where the 1st Respondent has cast the Claimant/Respondent’s ability to repay the decretal sum of Kshs. 4,968,242/- into doubt if stay of execution is not granted. The Claimant/Respondent has not responded to the claim that she lacks capacity to repay the decretal sum, and produced evidence of her financial status in order to demonstrate her ability to repay the decretal sum if the orders sought are not granted, and the appeal is successful. As such, the court is constrained to find that the 1st Respondent/Applicant has indeed demonstrated that they will suffer substantial loss if stay of execution is not granted.

8. On the second condition for consideration under Order 42, Rule 6, namely, that the application has been made without unreasonable delay, I note that the judgment was delivered on 19th March 2025; and the application for stay of execution filed on 21st May 2025. There is therefore a delay of approximately 2 months. Is this delay unreasonable? Unfortunately, the 1st Respondent/Applicant did not make any effort to give an explanation or reasons for the two-month delay in filing the present application. That being said, taking into consideration the length of the delay, being only 2 months, and the overall ends of justice, I find that the same was not inordinate.
9. Finally, the law in Order 42 Rule 6 (2) (b) contemplates that a litigant who intends to appeal the decision of a court, may be granted stay of execution of the said decision, on condition that they deposit a security for the performance of the decree. In the case of *Michael Ntouthi Mitheu vs Kivondo Musau [2021] eklr*, the Honourable Court stated as follows on the reason why security should be given:-

*“22. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See *Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100. (Emphasis Mine)**

1. The 1st Respondent/Applicant has expressed its willingness to deposit security for performance as a condition for grant of stay of execution pending appeal. The Claimant Respondent has also conceded that stay of execution may be granted if such security is deposited by the 1st Respondent. I therefore grant stay of execution of the Judgment and Decree of the Hon. Keboira Ocharo delivered on 19th March 2025 pending the hearing and determination of the 1st Respondent/Applicant's appeal, on condition that the 1st Respondent/Applicant deposits the entire decretal sum in Court within 30 days of this Ruling. The court finds that there is a high likelihood of the appeal being rendered nugatory in the event execution proceeds and the 1st Respondent is successful in the appeal, as there is no certainty that the Respondent will be able to repay the decretal sum.

2. In the upshot the application is allowed as follows:-
 - a. The Court hereby grants an Order of stay of execution of the Judgement and subsequent Decree dated and delivered on 19th March 2025 by Honourable Justice Ocharo Kebira in Nairobi ELRC Cause No. E270 of 2021 Patricia Mwendu Nzilu vs Inter-Religious Council of Kenya & another, pending the hearing and determination of the intended Appeal on condition that the 1st Respondent/Applicant deposits the entire decretal sum in Court within 30 days of this Ruling.

 - b. Costs of the application to the respondent.

3. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2026.

J. W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Applicant : - Karumi h/b Omiti

2nd Respondent: Mugo h/b Gichuru