

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT AT NAKURU

ELRC APPEAL NO. E023 OF 2023
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

VICTONELL ACADEMY LTD.....
APPELLANT

VERSUS

FELISTER GATHONI MWANGI.....
RESPONDENT

RULING

Introduction

1. The Appellant/Applicant filed a Notice of Motion dated 16th October 2025 under Certificate of Urgency seeking the following orders that:

1. Spent

2. Pending the hearing and determination of this application inter partes, this Honourable Court be pleased issue an order of stay of execution of the Judgment on 25th June, 2025, in this matter.

3. Pending the hearing and determination of the Appellant's Appeal to the Court of Appeal, the Honourable Court be pleased to grant a stay of execution of the Judgment delivered on 25th June, 2025, in this matter.

4. The costs of this application abide by the appeal.

2. The application is expressed to be brought under **Articles 50 & 159(2)(d) of the Constitution, section 3 of the ELRC Act, Rule 17(1) of the ELRC Procedure Rules, Order 42 Rule 6(2) of the Civil Procedure Rules and all other enabling provisions of the law.**

Appellant/Applicant's case

3. The application is supported by the affidavit of James Mbevi, the Appellant/Applicant's Manager, sworn on the same date as the application with several annexures thereto.

4. The Appellant/Applicant avers that following the judgment of 25th June 2025, in which its appeal was dismissed, and the Respondent was awarded Kshs.144,765/= with costs and interest of the suit.

5. The Appellant/Applicant avers that it lodged a Notice of Appeal and filed Civil Appeal No. 154 of 2025.

6. The Appellant/Applicant avers that the Respondent has since filed a bill of costs for taxation, signalling intent to execute, which would render the intended appeal nugatory.

7. The Appellant/Applicant avers that Kshs.372,358/= is currently held jointly by the parties' advocates at KCB Bank Njoro Branch Account No. 1216063419 and proposes that the funds be maintained as security for the second appeal.
8. The Appellant/Applicant asserts that without the court's intervention, it will suffer irreparable harm and substantial loss, as execution would make recovery from the Respondent impossible.
9. The Appellant/Applicant emphasizes its readiness to comply with any conditions on security imposed by the court and maintains that the application has been filed timeously, urging that justice and fairness require granting a stay of execution to allow the appeal to be heard.

Respondent's replying affidavit

10. The Respondent opposed the application vide a replying affidavit sworn by the Respondent herself, dated 14th November 2025.
11. The Respondent avers that this Honourable court delivered judgment on 25th June 2025, where she was awarded Kshs.144,765 plus costs of both the appeal and the lower court case, with interest at 14% per annum until full payment.

12. The Respondent avers that the court confirmed that the termination on grounds of redundancy was unfair under section 40 of the Employment Act.
13. Following the judgment, the Respondent avers that her advocates on record filed a bill of costs for taxation and the applicant, dissatisfied, seeks to challenge the severance pay and costs but not the compensation for unfair termination of Kshs. 136,350/=.
14. The Respondent avers that her advocate on record maintains that the severance pay should rightly be Kshs. 62,930/= instead of Kshs.54,516/=, entitling her to an additional Kshs.8,415/=.
15. The Respondent affirms that since costs follow the event, the court properly exercised its discretion in awarding costs after finding the termination unfair.
16. The Respondent avers that the Appellant/Applicant has failed to provide any evidence showing the court wrongly exercised its discretion in awarding costs, nor demonstrated any substantial loss or prejudice that would result from payment of the severance difference and costs.

17. The Respondent emphasize that the application is an afterthought, amounting to an abuse of the court process, and therefore should be dismissed with costs against the Appellant/Applicant.

18. Parties were directed to file their written submissions.

Appellant/Applicant's written submissions

19. The Appellant/Applicant submitted that, unless a stay is granted, it will suffer substantial loss as the decretal sum may not be recoverable if paid, thereby rendering its pending second appeal nugatory. The Appellant relied on the case of Butt v Rent Restriction Tribunal [1982] KLR 417 the court stated as follows:

a) "The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal."

b) The general principle in granting or refusing 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.

c) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

d) The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

e) 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 for costs as ordered will cause the order for stay of execution to lapse."

20. The Appellant/Applicant submitted that it would suffer irreparable loss if a stay of execution is not

granted, since the decretal sum paid to the respondent may not be recoverable, thereby rendering the pending appeal nugatory. The Appellant/Applicant relied on the case of ***Mukuma v Abuoga [1988] KECA 107 (KLR)***, the Court of Appeal defined substantial loss as follows:

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

21. Similarly, in ***Consolidated Marine v Nampijja & Another (Civil App. No. 93 of 1989)***, the court stated as follows:

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.”

22. Additionally, in ***Butt v Rent Restriction Tribunal (supra)*** underscored that courts should exercise discretion in a manner that ensures a successful appeal is not defeated. Together, these authorities

reinforce the Appellant/Applicant's claim that substantial loss justifies granting a stay.

23. The Appellant/Applicant submitted that the Respondent has not shown any ability to repay the decretal sum if execution proceeds, citing the case of ***National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] KECA 333 (KLR)***, where the court stated as follows:

“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.”

24. The Appellant/Applicant submitted that the application was filed within a reasonable time, four months after judgment, only once the threat of execution became real following taxation.

Additionally, the Appellant/Applicant has offered Kshs.372,358/=, held jointly by the parties' advocates, as security, which is more than twice the decretal sum.

25. On these grounds, the Appellant/Applicant contends that the threshold for granting a stay of execution pending appeal has been met and urges the court to allow the stay while the second appeal is expedited.

Respondent's written submissions

26. The Respondent submitted that the Appellant/Applicant has not met the threshold for grant of stay of execution pending appeal under **Order 42 Rule 6(2) of the Civil Procedure Rules**. The Respondent argued that execution alone does not amount to substantial loss, citing the case of ***Andrew Kuria Njuguna v Rose Kuria* (Nairobi Civil Case 224 of 2001)**, where the court held that applicants must provide material evidence of risk of loss, and ***Republic v Commissioner for Investigations & Enforcement ex parte Wananchi Group Kenya Ltd* [2014] eKLR**,

which emphasized that merely stating the decretal sum is large is insufficient. Similarly, ***Machira t/a Machira & Co. Advocates v East African Standard [2002] KLR 63*** held that specific details of loss must be shown.

27. The Respondent contended that the severance sum of Kshs.8,415/= is not substantial and can be refunded if the appeal succeeds, while costs follow the event under ***section 27(1) of the Civil Procedure Act***, as affirmed in ***Haraf Traders Limited v Narok County Government [2022] KEHC 2357 (KLR)***.

28. On security, the Respondent submitted that Kshs. 372,358/= is already deposited, but the challenged amount is minimal.

29. Finally, the Respondent submitted that the application was delayed by over four months without plausible justification, failing the timeliness requirement.

30. Based on these grounds, the Respondent urges dismissal of the application with costs.

Analysis and determination

31. The court has considered the application, supporting affidavit, replying affidavit and the rival submissions on record.

32. **Order 42 Rule 6(2) of the Civil Procedure Rules** provides as follows:

“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.”

33. In ***James Wangalwa & Another V Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR)***, where the court set out the condition of stay of execution, including substantial loss occurring leading to irreparable loss, security for the due performance of the decree, and the application been made without unreasonable delay.

34. In this instant case, the judgment was delivered on 25th June 2025 in favour of the Respondent, awarding her Kshs. 144,765/= with costs and

interest of the suit. Dissatisfied with the judgment, the Appellant/Applicant has lodged a Notice of Appeal vide filed Civil Appeal No. 154 of 2025. The Appellant/Applicant contended that the Respondent has already filed a bill of costs for taxation, signaling an intention to execute the judgment, which would render the pending appeal nugatory. To safeguard the appeal, the Appellant/Applicant averred that Kshs.372,358/= is currently deposited in a joint account held by both parties' advocates at KCB Bank, Njoro Branch, and proposes that this amount be maintained as security for the second appeal.

35. The Appellant/Applicant has prayed for a stay of execution under **Order 42 Rule 6(2) of the Civil Procedure Rules**. The application was filed four (4) months after judgment was delivered and that is quite a long time if the Appellants were convinced they wished to file an appeal or to pray for a stay of execution. Indeed, 4 months may not be too long but long enough. However, since there is adequate security deposited in a joint account held by the parties' advocates, thereby meeting a crucial condition for the grant of stay, the court will grant stay of execution pending determination of the appeal. However, the court urges the parties to

attempt settling this matter out of court as it will save them and the courts precious time and I would say also it will save their clients more costs. The security deposited between the parties will be retained as security even in this matter.

36. Meanwhile, costs of this application will be in the cause.

Orders accordingly.

Dated, Signed and Delivered virtually at Nakuru this 12th Day of March, 2026.

**ANNA NGIBUINI MWAURE
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 15th March 2020 and subsequent directions of 21st 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE