

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATION COURT AT NAIROBI

ELRC CAUSE NO. 1583 OF 2017

KEZRHAN SALIK..... CLAIMANT/
RESPONDENT

VERSUS

MAYA DUTY FREE LIMITED.....
RESPONDENT/APPLICANT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

RULING

1. The applicant filed an application for stay of execution of the Decree of the Court pending intended Appeal against the Judgment delivered by Hon. Justice Ocharo Kebira on 26th July 2024 at Nairobi, by way of Notice of Motion dated 2nd December 2025 brought under Order 42 Rule 6 of the Civil Procedure Rules 2010. Sections IA, IB and 34 of the Civil Procedure Act, Articles 50 and 159 of the Constitution of Kenya 2010 and all enabling provisions of the Law seeking for the following orders-
 - a) spent

- b) spent
- c) THAT pending the hearing and determination of the intended Appeal, the Honourable Court be pleased to issue an order of stay of execution of the Judgment delivered on 26th July 2024 and the resultant decree.
- d) THAT costs of this Application do abide in the intended Appeal.

2. Grounds of the application

- a. THAT judgment was delivered in this case on 26th July 2024 in favour of the Claimant and thereupon the Applicant herein filed a Notice of Appeal and subsequently filed a record of appeal.
- b. THAT the Respondent/Applicant also filed an application for stay of execution of the Judgment and resultant decree which application was certified urgent and fixed for inter-partes hearing on 25th September 2024 but the same was inadvertently not listed on the said date. THAT the Claimant / Respondent has obtained warrants of attachment and sale of movable property and has on 2nd December 2025 proclaimed the Respondent Applicant's property in execution of the said decree.
- d. THAT the Respondent /Applicant is ready and willing to provide any security as this Honorable Court may direct as a condition for stay pending the determination of the appeal and is ready and willing to abide by any orders / directions issued by this Honourable Court.

e. THAT the Respondent/Applicant has an arguable Appeal with high chances of success and if the stay of execution is not granted and the appeal will be rendered nugatory as the Applicant may be forced to pay the decretal amount which may become irrecoverable as the Respondent's financial means is not known.

f. THAT unless the orders sought herein are granted, the Respondent/Applicant stands to suffer great inconvenience and irreparable loss which cannot be compensated.

3. The application was further supported by the annexed Affidavit of Ashman Sapra, sworn on December 2, 2025, in which he attached a copy of the impugned Court Judgment, copies of Notice of Appeal, memorandum of appeal, copies of warrants of attachment, and proclamation by Mbusera Auctioneers.

4. The respondent did not file a response.

5. The application was canvassed by way of written submissions. Both parties filed.

Decision

6. Rule 73 of the Employment and Labour Relations Court Rules of 2024 provides as follows-

‘(2)Rules on execution or stay of execution of an order or decree of the Court shall be in accordance with the Civil Procedure Rules.’ The relevant rule under the Civil Procedure Rules is Order 42 Rule 6 to wit- **‘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.’

7. The impugned judgment was delivered on the 26th July 2024, and the instant application filed on 3rd December 2025. The applicant stated that another application was filed on 30th July 2024, filed together with the Notice of Appeal but the same was not listed. The court confirmed that as true. The delay is justified as the applicant cannot cause list own case. It was a mistake of the court not to list the case for hearing.

8. The other condition to be considered is whether, if the stay is not granted, the applicant would suffer substantial loss. Regarding substantial loss, since this involves a money decree, the loss is evidenced by the fact that the respondent did not demonstrate the ability to repay the money in the event of a successful appeal by filing an affidavit of means. The respondent in submissions relied on the decision in National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] KECA 333 (KLR) where the Court of Appeal held 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 an 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 the instant case, the applicant expressed concern that it may not recover the decretal sum from the respondent/judgment holder because his financial means were unknown. The

respondent did not file an affidavit of means. The applicant met the test stated in the aforementioned decision of the Court of Appeal.

9. In *Butt -vs Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal (Madan J.A) gave guidance on how a Court should exercise discretion in an application for a stay of execution, that: -

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

*It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2)* 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458: “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.”*

10. On the issue of security, this is a mandatory condition under section 42(6) of the Civil Procedure Rules. The applicant stated in the supporting affidavit, paragraph 14 as follows-

‘THAT the Applicant is ready and willing to provide any security including depositing part of the decretal sum in a joint account or any other suitable security as this Honorable Court may direct pending the determination of the appeal and is also ready and willing to abide by any orders / directions which this Honourable Court may issue.’ The applicant has satisfied the court on the conditions under section 42(6) of the Civil Procedure Rules and is thus qualified to receive the order of stay of execution. Regarding security, the court orders the deposit of the decretal sum in a joint interest-earning account between the advocates for the parties within 30 days of this order as a condition for the grant of the stay.

11. The appellant to pay the cost of the auctioneers, which ought to be taxed in the normal process.

12. In the upshot. The Application is allowed. The court is pleased to issue an order of stay of execution of the Judgment delivered on 26th July 2024 and the resultant Decree and all related proceedings on condition that the Applicant deposits the decretal sum in a joint interest-earning account to be held between the advocates for the parties within 30 days of this Order. The applicant is to pay the cost of the auctioneers, which ought to be taxed in the normal process.

13. On costs-There was no written response to the application. Each party to bear own costs of the application.

14. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH
MARCH, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

claimant/respondent -absent

respondent/Applicant-absent