

**IN THE COURT OF  
APPEAL AT NAKURU**

**(CORAM: MATIVO, GACHOKA & MURUNGI,  
JJ.A.) CIVIL APPEAL (APPLICATION) NO. E197  
OF 2025**

**BETWEEN**

**SAFARICOM PLC.....APPELLANT**

**AND**

**WYCLIFF MABATUK.....RESPONDENT**

*(An application for stay of execution and stay of proceedings pending the hearing and determination of an intended appeal and an application for striking out the record of appeal arising from the judgment and decree by the Employment and Labour Relations Court of Kenya at Nakuru (A. Mwaure, J.) delivered on 26<sup>th</sup> September 2025*

*in*

***ELRC Cause No. E047 of 2023)***

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**RULING OF THE COURT**

1. Before us for determination are two applications filed by the parties.

At the hearing, parties by consent agreed to have one consolidated ruling on both applications. We shall refer to the parties as appellant and respondent as recorded in the substantive appeal. The first application is that of the appellant. It is dated 11<sup>th</sup> November 2025 seeking the following:

- 1. ... Spent;**
- 2. ... Spent;**
- 3. ... Spent;**

***4. Pending the hearing and determination of the appeal, an order be and is hereby issued staying***

**execution of the judgement of the Employment and Labour Relations Court at Nakuru [Hon. Lady Justice Anna Ngibuini Mwaure] dated and delivered on 26<sup>th</sup> September 2025, together with any decree and consequential orders resulting therefrom;**

**5. Pending the hearing and determination of the appeal, an order be and is hereby issued staying any further proceedings of the Employment and Labour Relations Court at Nakuru in ELRC No. Cause E047 of 2023: Wycliffe Mabatuk v Safaricom Plc;**

**6. The costs of and incidental to this application shall abide in the outcome of the appeal;**

**7. Such other, further, additional, alternative and/or incidental orders as the Honourable Court may deem appropriate, just, and expedient.**

2. The application is supported by the grounds on its body together with the supporting affidavit and further affidavit of Daniel Ndaba, the appellant's legal counsel, dated 11<sup>th</sup> November 2025 and 8<sup>th</sup> March 2026 respectively. The facts giving rise to the application are that the trial court in **ELRC No. Cause E047 of 2023** delivered a judgment in favor of the respondent on 26<sup>th</sup> September 2025 for the sum of Kshs. 5,624,548.60 as compensation for unfair termination of employment (inclusive of 10 months' salary compensation and one month's notice pay) plus costs of claim and interest at 14% per annum from the date

of judgment. The court thereafter issued a 30-

day temporary stay of execution pending appeal. That stay lapsed on 26<sup>th</sup> October 2025.

3. The appellant is aggrieved by those findings. It has since filed its notice of appeal dated 6<sup>th</sup> October 2025. It also filed a substantive appeal and its memorandum of appeal dated 7<sup>th</sup> November 2025 in Nakuru **COACA No. E197 of 2025** that raised several grounds of appeal. In that regard, it was deposed that the appellant had demonstrated that it had an arguable appeal.
4. On the nugatory aspect, the appellant urged this Court to consider the following: there was imminent threat of execution upon the lapse of stay; in fact, the respondent had filed a bill of costs as well as written submissions, listed for taxation on 11<sup>th</sup> March 2026; the judgment sum was so colossal that the appellant was apprehensive that the respondent would not be in a position to refund the sum in the event the appeal was successful; the respondent, admitted to financial difficulty, including having a non-performing loan facility with NCBA, as per his witness statement filed at the superior court; and absent stay, a hollow judgment would follow since the decretal sum would already have been disbursed; and the respondent had not been in employment

since 2022.

5. The appellant urged this Court to allow the application for the reason that no prejudice would be suffered by the respondent, as interest on the unpaid sums continues to accrue as long as the judgment sum is unpaid. Conversely, the appellant would be prejudiced if condemned to settle the decretal sum before its appeal is determined since the respondent's financial means of refunding the appellant in the event the appeal succeeds, remain unknown. Further, the application and appeal had been filed timeously.
6. Opposing the application, the respondent filed its replying affidavit sworn on 5<sup>th</sup> December 2025. It argued that the application failed to meet the threshold set out in rule 5 (2) (b) of the Court of Appeal Rules as no arguable appeal had been raised in the appellant's memorandum of appeal. That the findings of the learned judge were well founded in law and ought not to be disturbed. On the nugatory aspect, the respondent deposed that the appellant failed to demonstrate that its claim of his unknown financial means was supported by any evidence. That limb had thus not been met. He lamented that the stay orders had the ripple effect of denying him the right to enjoy the fruits of his

judgment. For those reasons, he urged this Court to dismiss the application with costs.

7. The second Notice of Motion is that of the respondent. It is dated 9<sup>th</sup> December 2025 seeking the following reliefs:

**1. ... Spent;**

**2. THAT this Honourable Court be pleased to issue an order striking out the Record of Appeal dated 7<sup>th</sup> November 2025 for service out of time;**

**3. THAT the appellant be condemned to pay costs of this application;**

**4. THAT this Honourable Court be pleased to grant any other order it may deem fit.**

8. The application is supported by the grounds on the application and the supporting affidavit of the respondent, sworn on 9<sup>th</sup> December 2025. According to the respondent, the appellant filed its notice of appeal and a letter requesting typed proceedings on 6<sup>th</sup> October 2025. He was served with those documents on 7<sup>th</sup> October 2025 and 8<sup>th</sup> October 2025, respectively. On 4<sup>th</sup> November 2025, copies of the proceedings and judgment were certified and ready for collection. Thereafter, the record of appeal was filed on 11<sup>th</sup> November 2025 and served on 2<sup>nd</sup> December 2025.

9. Based on those facts the respondent reckoned that the record of appeal was served 21 days after it was filed and 14 days after the expiry of the mandatory and statutory 7-day period prescribed for service of the record of appeal. In its view, that was unreasonable

and unjustified as the appellant never sought leave to serve  
the

record of appeal out of time. The respondent deposed that the application was incompetent for those reasons as rules of procedure are the handmaidens of justice and exist to ensure proper adjudication and management of cases.

10. That application was opposed by the applicant in its replying affidavit sworn by Daniel Ndaba, the appellant's legal counsel, on 15<sup>th</sup> December 2025. It asserted that, though the appellant filed and served its notice of appeal on 6<sup>th</sup> October 2025 and 7<sup>th</sup> October 2025 respectively, the respondent failed to file its notice of address of service within 14 days after service by dint of **rule 81** of the Court of Appeal Rules. It was therefore out of prudence and good faith that it served the respondent with the memorandum and record of appeal on 2<sup>nd</sup> December 2025. Accordingly, **rule 92 (1)** was only applicable after the respondent had complied with **rule 81**.

**11.** The appellant submitted that, in the circumstances, the respondent could not benefit from rule **92 (1)** as it failed to comply with **rule 81**. That the record of appeal was served in good faith, absent service of the notice of address for service. It urged this Court to invoke **Article**

**159 (2) (d)** of the Constitution to dispense justice without undue regard to procedural technicalities. Further, that the respondent

could not benefit from his own wrongdoing. It thus prayed that the application be dismissed with costs.

12. The applications were heard on the basis of the parties' written submissions that were orally highlighted on 9<sup>th</sup> March 2026. The appellant was represented by learned counsel Mr. Vincent Oloo while learned counsel Mr. Kipkoech Ng'etich represented the respondent.
- 13.** The appellant filed written submissions and a case digest dated 9<sup>th</sup> December 2025 regarding his application for stay. It urged this Court to allow its application as the appeal was arguable and would be rendered nugatory if the orders sought were not granted. It persuaded this Court to adopt the findings in **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another** [2006] KECA 333 (KLR).
14. On the application to strike out, the appellant filed written submissions and a further case digest dated 27<sup>th</sup> February 2026. It submitted that the application was unmerited and ought to be dismissed. It urged this Court to rely on the cases of **Ahmed vs. Khator & 3 others** [2023] KECA 580 (KLR) and **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others** [2014] KESC 12

**(KLR)** in so doing.

15. The appellant pointed out that the authorities cited by the respondent were distinguishable from the present circumstances. In its view, they were under no obligation to serve the record of appeal since it was deemed that the respondent did not file his notice of address of service within the parameters of **rule 81** of this Court's rules. In those circumstances, the appellant did not need to seek extension of time to appeal out of time as it did not arise in the first place.
- 16.** The respondent filed written submissions, a list of authorities and a case digest, all dated 5<sup>th</sup> December 2025 opposing the application for stay. He urged this Court to dismiss the application with costs as it had not met the threshold set out in rule 5 (2) (b) of this Court's rules. He further urged the Court to be guided by the decision in **Kenya Shell Limited vs. Benjamin Karuga Kibiru & another [1986] KECA 94 (KLR).**
17. On his application to strike out the record of appeal, the respondent filed written submissions, a case digest and a list of authorities, all dated 23<sup>rd</sup> January 2026. He submitted that **rule 81** did not suspend the appellant from complying with **rule 92 (1)** of the Court of Appeal Rules as time continued to run. In any

event, it admitted serving the record of appeal out of time. This went to the spirit of procedure and

was not a mere technicality. He prayed that the application be allowed urging this Court to adopt the reasoning in **ARM vs. NWS [2024] KECA 632 (KLR), Taracisio Githaiga Ruithibo vs. Mbuthia Nyingi [1984] eKLR, Onjula Enterprises Limited vs. Sumaria [1986] eKLR** and **Julia Wanjiru & 4 others vs. Jacinta Wairimu Njoroge [2013] eKLR**. He added that the authority relied on by the appellant was not applicable herein.

18. We have anxiously considered the applications, the responses and the rival submissions and analyzed the law. We shall first deal with the application to strike out since if it is merited, it will automatically dismiss the application for stay. The respondent has relied on **rule 86** and **92 (1)** of the Court of Appeal Rules which provides as follows:

***“86: A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—(a)that no appeal lies; or(b)that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:***

***Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.***

.....

**92 (1): The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 81.”**

19. The basis of the application for striking out which is set out in **rule 86** of this Court’s rules, is that the appellant failed to serve the record of appeal within seven days after filing the said appeal. That was not disputed by the appellant who argued that since the respondent had failed to comply with **rule 81**, it was not entitled to the reliefs sought.

20. Under rule **81 (1)** of this Court’s rules:

**“Each person on whom a notice of appeal is served shall—**

**(a) within fourteen days after service, lodge in the appropriate registry and serve on the intended appellant a notice of a full and sufficient address for service; and**

**(b) within a further fourteen days after service, serve a copy of such notice of address for service on every other person named in the notice of appeal as a person intended to be served.”**

21. It is also not disputed by the respondent that he failed to comply with

**rule 81**. The basis of his application for striking out is set out in

**rule**

**92 (1)**, which, as arrayed, requires compliance with the requirements set out in **rule 81**.

22. In the present case, we are presented with a situation in which both parties have been accused of failing to comply with mandatory provisions of the statute. On the one hand, the appellant failed to serve the respondent with the record of appeal within the statutory timelines couched under **rule 92 (1)**. On the other hand, the respondent failed to file his notice of addresses within the timelines set out in **rule 81**.

23. What is clear, however, is that under **rule 92 (1)**, a party shall serve the respondent who has complied with **rule 81**; an admitted non-compliance on the part of the respondent. At this stage, it is important to remind parties that the Rules should not be read in isolation. The respondent has presented a compelling argument, yet it can only prevail if it is proven to be valid.

24. In our view, the starting point should be **rules 77** and **79**. **Rule 77** requires a party who desires to appeal to lodge a notice of appeal within 14 days. **Rule 79** is on the service of the notice of appeal, which is to be done within 7 days. What is relevant for this application is **rule 79 (2)**, which provides as follows:

***“Where any person who is required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the superior court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on that person at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal.”***

25. Under **rule 79(2)**, the appellant ought to serve the notice of appeal within 7 days and where there is no notice of change of address, service shall be effected on the address in the superior court. If there is no notice of change of address, service should be effected on the advocate previously on record, even if the advocate has not been retained to act in the appeal.
26. A reading of **rules 81** and **92** gives a different scenario. Service under **rule 92** is to be done within 7 days on a party who has complied with **rule 81**. Meaning for a party to invoke **rule 92** for purposes of striking out the appeal, it ought to comply with **rule 81** and file a notice of address. This is the clear language of the rule. A party cannot blow hot and cold at the same time as the respondent is purporting to do. If the respondent did not comply with **rule 81**, it

cannot rely on **rule 92** and then invoke **Rule 86** to strike out the appeal.

27. **Rule 86 (2) (b)** states that an appeal can be struck out where an essential step in the proceedings has not been taken or has not been taken within the rules. In the instant application, it is the respondent who has not taken the essential step of filing the notice of address.

28. Unlike the position in **rule 79 (2)**, where the service should be done on the notice given and in the absence of such notice, on the address previously given in the superior court, including an advocate who was acting notwithstanding that he has not been retained to act in the appeal, **rule 92** provides that service should be done within 7 days on a party who has filed a notice of address in accordance with **rule 81**.

29. It is our humble view that from the facts arising, the respondent approached this Court with unclean hands. The Court of Civil Appeals of Alabama, in its decision of **Colby Furniture Company, Inc. vs. Belinda J. Overton 299 So. 3D 259** held as follows:

***“The clean-hands doctrine "prevent[s] a party from asserting his ... rights under the law when that party's own wrongful conduct renders the assertion of such legal rights***

***contrary to equity and good conscience."* J & M Bail Bonding Co. v. Hayes, 748 So. 2d 198, 199 (Ala. 1999) (quoting**

***Draughon v. General Fin. Credit Corp., 362 So. 2d 880, 884 (Ala. 1978).***”

30. It was incumbent on the respondent to comply with **rule 81** before pointing an accusatory eye on his adversary. We find the argument by the respondent attractive, but it cannot stand scrutiny when the rules are read together. Taking the above cue, we find that the application for striking out cannot stand. We take the position of this Court in the case of ***Imwatok (MCA) vs. Nairobi City County & 7 others*** [2023] KECA 993 (KLR). In that case, the applicant sought to strike out a record of appeal and yet it had not complied with **rule 81** on the filing of the notice of address. In dismissing the application, the Court held as follows:

***“Thus, the record of appeal was required to be served on the applicants within 7 days from the date it was lodged in the Registry. However, the applicants had not provided any address for service in the Court of Appeal as required under rule 81 of the Court of Appeal Rules 2022 and, therefore, the 7 days prescribed under rule 92(1) could not apply.”***

31. The application must accordingly fail and is hereby dismissed and in the circumstances of this application, we order that there shall be no order as to costs.

32. Turning to the application for stay, the principles enunciated in an

application of this nature are well settled. To succeed, an applicant

must demonstrate that the appeal is arguable and, secondly, would be rendered nugatory if the orders sought are not granted.

(See **Chris Munga N. Bichange vs. Richard Nyagaka Tongi & 2 others [2013] KECA 141 (KLR)**).

33. On the first limb, that is the arguability of the appeal, it is well settled that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. In addition, an appeal will be found to be arguable if a

**National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another (Supra)**.

34. In the present application, the appellant has attached a memorandum of appeal dated 7<sup>th</sup> November 2025 that has raised nine grounds disputing the findings of the learned judge. Those grounds have been elaboratively set out and do not appear frivolous on the face of it. We thus find that the appellant has demonstrated this first limb. As to whether those grounds are merited, we leave that to the bench that will hear the substantive appeal.

**35.** On the nugatory aspect, this Court in **Kenya Shell Limited vs.**

**Benjamin Karuga Kibiru & another** [1986] KECA 94 (KLR)

held that in consideration of an application for a stay, the Court must

address its collective mind to the question of whether to refuse it would render the appeal nugatory.

36. In this case, the appellant has demonstrated that in fact the respondent has proceeded to file its bill of costs for taxation and secured a date for assessment of those costs. The appellant is apprehensive that the respondent is not a man of straw capable of refunding the decretal sum. It attached the respondent's witness statement, relied on at trial, in which he exemplified his financial inabilities. In response, the respondent stated that the allegation was not backed by any proof.

37. ***National Industrial Credit Bank Limited vs. Aquinas Francis Wasike and Another*** (*Supra*) addressed the question where a party is accused of having no financial muscle in the following words:

***"...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 the respondent or lack of them. Once an applicant expresses 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...***

38. The onus was on the respondent to demonstrate otherwise as the evidentiary burden shifted to him. In his replying affidavit, all the respondent deposed was that the appellant's allegations were backed by no proof. However, he did not deny that he did testify at trial that he suffered financial burdens. While that is in the past, he has not stated that his financial circumstances have improved in the intervening period otherwise in this application, indicative that the *status quo* remains.
39. Considering the steps taken by the respondent to proceed to assess his bill of costs for taxation as a prelude to execution, coupled with the fact that there is no proof that he would refund the decretal sum should the appeal succeed, we are satisfied that the appellant has demonstrated that the appeal will be rendered nugatory if stay is not granted.
- 40.** Having satisfied both limbs, we grant the appellant a stay of execution of the judgment dated 26<sup>th</sup> September 2025 and further proceedings in respect to Nakuru ***ELRC Cause No. E047 of 2023*** pending the hearing and determination of ***Civil Appeal No. E197 of***

**2025.** The costs of the application shall abide the outcome of the appeal.

41. In conclusion, and for avoidance of doubt, the respondent's Notice of Motion dated 9<sup>th</sup> December 2025 seeking to strike out the record of appeal is hereby dismissed with each party bearing its own costs. The appellant's Notice of Motion dated 11<sup>th</sup> November 2025 for stay of execution is allowed with costs abiding the outcome of the appeal.

**Dated and Delivered at Nakuru this 17<sup>th</sup> day of April, 2026.**

**J. MATIVO**

.....  
**JUDGE OF APPEAL**

**M. GACHOKA C. Arb, FCIArb.**

.....  
**JUDGE OF APPEAL**

**MURUNGI B. KAIRARIA**

.....  
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

***Signed***

**DEPUTY REGISTRAR**