

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI
ELRC CAUSE NO. E428 OF 2021
(Before Hon. Lady Justice Hellen Wasilwa, J)

JAMES KHAUNYA MUKABI.....
.....**CLAIMANT**

VS

PROGRAM FOR APPROPRIATE
TECHNOLOGY IN HEALTH (PATH) -KENYA..
.....**RESPONDENT**

RULING

1 The Respondent/ Applicant filed a Notice of Motion dated 17th November 2025 seeking orders THAT: -

1. THAT pending the hearing and determination of the intended appeal, there be a stay of execution of the Judgment of the Honourable Court delivered on 4th June 2025.

2. THAT the costs of this application be in the cause.

Respondent/Applicant's Case

2 The Applicant avers that on 4th June 2025, this Court delivered its Judgment wherein it found that the termination of the Claimant's employment was wrongful, unfair and unlawful, and consequently awarded the Claimant compensation equivalent to six (6) months'

salary in the sum of Kshs. 8,447,622 together with costs of the claim.

- 3 It is the Applicant's case that being dissatisfied with part of the said Judgment, it has since lodged a Notice of Appeal dated 9th June 2025 signifying its intention to challenge the decision before the Court of Appeal.
- 4 The Applicant contends that unless an order for stay of execution is granted, there is a real apprehension that the Claimant will proceed to tax costs and execute for recovery of the decretal sum before the intended appeal is heard and determined, thereby prejudicing the Applicant.
- 5 The Applicant asserts that in the absence of stay, the intended appeal, if successful, will be rendered nugatory as there exists a significant risk that the decretal sum, being substantial, may not be recoverable from the Claimant.
- 6 It avers that the Claimant is no longer its employee and that it has no knowledge of the Claimant's assets, thereby heightening the risk of non-recovery.
- 7 It is the Applicant's submission that the decretal amount of Kshs. 8,447,622 together with costs and interest is substantial, and that it stands to suffer substantial loss not only in monetary terms but also in the time and expense

required to trace and recover the same in the event the appeal succeeds.

- 8 The Applicant maintains that it has an arguable appeal raising serious issues of law and fact, and that subjecting it to execution proceedings would occasion unnecessary costs, including auctioneer's fees, and may result in multiplicity of proceedings should recovery become necessary.
- 9 It is further contended that execution prior to the determination of the appeal would occasion grave injustice, consume further judicial time, and undermine the Applicant's constitutional right of appeal.
- 10 The Applicant therefore urges the Court to exercise its discretion in a manner that balances the interests of both parties, and avers that it is ready and willing to furnish security for the due performance of the decree by depositing the decretal sum in a joint interest earning account in the names of the parties' advocates on such terms as the Court may deem just.

Claimant/Respondent's Case

- 11 In opposition to the application, the Claimant/ Respondent filed Grounds of Opposition dated 18th February 2026, on the following grounds:

- 1. The Applicant has failed to satisfy the Statutory Conditions as they have not demonstrated*

substantial loss, is mere inability to recover the decretal sum is insufficient without credible evidence.

2. That the Applicant has not raised any plausible reasons to warrant this Honourable Court's interference as their assertions of substantial loss are speculative and unsupported by any evidentiary proof.

3. Granting stay will unjustly delay the Respondent's enjoyment of the judgment sum.

4. The Application is an abuse of the Court process and should be dismissed with costs awarded to the Claimant/Respondent.

12 The Claimant/Respondent further filed a replying affidavit dated 18th February 2026.

13 The Respondent avers that the present application is a deliberate attempt by the Applicant to deny him the enjoyment of the fruits of the lawful Judgment delivered on 4th June 2025, and that the Applicant has failed to demonstrate or satisfy the conditions for the grant of orders of stay of execution.

14 It is the Respondent's case that with respect to stay for execution, it is not sufficient for an applicant to merely allege that it will suffer substantial loss, but there must be specific and tangible proof of such loss to the satisfaction of the Court.

- 15 The Respondent contends that the Applicant has only alleged a risk of loss, which is distinct from actual or substantial loss as required in law, and has not shown any exceptional circumstances to warrant the grant of stay. He asserts that no loss has been demonstrated, rendering the application fatally defective and an abuse of the court process.
- 16 The Respondent further avers that the mere assertion that the decretal sum is substantial and may be difficult to recover is insufficient, and that as long as the Applicant can be compensated by way of damages, the application fails and should be dismissed with costs.
- 17 The Respondent reiterates that a risk of loss does not amount to substantial loss, and that the Applicant appears intent on denying him the fruits of the Judgment by delaying the conclusion of the matter.
- 18 It is his case that the application is unmerited as it is not anchored on any arguable grounds of appeal, the Applicant having failed to demonstrate any specific error in law or fact or disclose any triable issue to justify the stay sought.
- 19 The Respondent contends that the claim of risk or potential substantial loss is speculative and insufficient,

and that the mere existence of an appeal does not meet the threshold for grant of stay.

- 20 He asserts that the Applicant has not shown how the intended appeal would be rendered nugatory, as the decretal sum is recoverable and any prejudice can be compensated by damages.
- 21 The Respondent avers that mere apprehension that recovery may be rigorous does not demonstrate loss, and instead shows that the decretal sum is recoverable.
- 22 He maintains that execution is the natural progression of a matter, and the Applicant can only derail the process on meeting the threshold of grounds laid down by the law, which they have failed to meet.
- 23 The Respondent contends that while the Applicant has demonstrated that they can recover through damages and/or costs therefore no loss occasioned, however, he will be kept away from the fruits of the Judgment, yet he was occasioned great injustice when he experienced the un-procedural termination of my employment.
- 24 He further avers that the Applicant's offer to furnish security is not sufficient to warrant the grant of stay, as it is only one of the conditions, and cannot cure the failure to demonstrate substantial loss.

25 The Respondent therefore prays that the application for stay be declined to allow for the finality and enforceability of the Judgment, as granting the orders sought would occasion undue prejudice and hardship by denying him the fruits of a lawful Judgment.

Respondent/Applicant's Submissions

26 It is the Applicant's submissions that the sole issue for determination is whether this Honourable Court should grant a stay of execution of the Judgment delivered on 4th June 2025.

27 The Applicant submitted that it has met the requisite threshold under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. It was submitted that although the Employment and Labour Relations Court (Procedure) Rules, 2016 are silent on stay of execution, Rule 32 thereof saves the application of the Civil Procedure Rules, while Section 13 of the Employment and Labour Relations Court Act provides that judgments, awards, orders and decrees of this Court are enforceable in accordance with the Rules made under the Civil Procedure Act.

28 The Applicant relied on ***Rotich v Chemartin Tea Company Limited [2026] KEELRC 411 (KLR)*** and submitted that the principles for grant of stay of execution are proof of substantial loss, absence of unreasonable

delay, and provision of security for due performance of the decree, all of which it contends to have satisfied.

- 29 On substantial loss, it was submitted that the decretal sum of Kshs. 8,447,622 is substantial and that substantial loss would occur if the Respondent is compelled to pay out this amount and then they succeed on the eventual appeal. The Applicant relied on ***Antoine Ndiaye v African Virtual University [2015] eKLR***, where the Court held: *“.....Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. it refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.....So the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent.”*
- 30 It was submitted that the Claimant is no longer an employee of the Applicant, his whereabouts and current place of employment are unknown, and the Applicant has no information on his assets. The Applicant argued that it is therefore not certain that it will recover the decretal sum if the appeal succeeds.
- 31 The Applicant further submitted that the Claimant has not demonstrated his ability to refund the decretal sum, and has merely argued that the Applicant can be compensated by costs, which, it was submitted, is not the test in

determining substantial loss, as the issue relates to recovery of the decretal sum and not costs.

- 32 The Applicant submitted that having expressed fear the Claimant cannot refund the decretal sum if the appeal succeeds, the evidentiary burden shifted to the Claimant to prove his capacity to repay the decretal sum. Reliance was placed on **Bloomingdale Roses Kenya Ltd v Ndiritu [2022] KEELRC 14670 (KLR)**: *“In the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** the Court of Appeal held 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 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.”*
- 33 It is the Applicant’s submission that the Claimant has not demonstrated to this Court that he has the means to repay the decretal sum in the event that the Respondents

succeed on appeal. The Respondent, therefore, stands to suffer substantial loss if stay is not granted.

34 On delay, the Applicant submitted that the application was filed promptly and without unreasonable delay, the Judgment having been delivered on 4th June 2025, the Record of Appeal filed on 14th November 2025, and the present application filed on 17th November 2025.

35 On security, it was submitted that the Applicant is ready and willing to furnish security by depositing the decretal sum in a joint interest earning account in the names of the parties' advocates on such terms as the Court may deem just. The Applicant relied on ***Khalsa Schools & 2 others v Samuel Odhiambo Otieno [2021] eKLR***, where the Court held: *"As was stated by Parker LJ in **Rosengren v Safe Deposit Centres Ltd (1984) E ALL ER 198** which has been quoted widely with approval in many cases in Kenya, security for the due performance of a decree out to be given in a way that is least disadvantageous to the party giving security and may be in many forms including a bank guarantee. What is important is that it must be adequate and binding. It is my view that a bank guarantee from a reputable bank is adequate security for the due performance of the decree herein."*

36 The Applicant therefore submitted that it has satisfied the conditions for grant of stay and is prepared to comply with any conditions imposed by the Court, including provision

of security by way of a bank guarantee or deposit of the decretal sum in a joint interest earning account in the names of the parties' advocates.

Claimant/Respondent's Submissions

- 37 The Respondent submitted that the application is brought under Section 12(3)(viii) of the Employment and Labour Relations Court Act, Rule 21 and 45(1) of the Employment and Labour Relations Court (Procedure) Rules, 2024, and Order 42 of the Civil Procedure Rules, 2010. It was submitted that reliance on Rule 21 ousts the jurisdiction of this Court as Rule 21(2) provides that an application for stay pending appeal shall be filed in the appeal file, though Rule 73(2) preserves the applicability of the Civil Procedure Rules on execution and stay, similar to Rule 32 of the ELRC Rules, 2016.
- 38 The Respondent submitted that stay of execution is governed by Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, and that the Applicant must demonstrate substantial loss, absence of unreasonable delay, and provision of security. It was submitted that the Applicant has failed to meet this threshold and the application is unmerited.
- 39 On substantial loss, the Respondent submitted that the Applicant merely alleges that substantial loss will occur if

they are compelled to pay the Judgement sum which they claim is substantial if the Appeal is successful. It was argued that the Applicant equates substantial loss to the rigours of recovery, yet recovery is a lawful and normal legal process and cannot constitute substantial loss.

- 40 It is the Respondent's submission that the Applicant has no reason to be granted the order for stay pending appeal as indicated since they have failed to demonstrate the loss they will incur if the Claimant proceeds to execute in fulfilment of the Judgement. He relied in the explanation of substantial loss in ***Ndungu v Mutua [2024] KEHC 6276 (KLR)*** *"No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss."*
- 41 It was submitted that execution is a lawful process through which a successful litigant enjoys the fruits of judgment, and that merely alleging that the decretal sum is substantial or recovery may be rigorous does not prove substantial loss. The Applicant, it was argued, has failed to demonstrate with specificity how execution would irreparably affect it or how payment will alter the status quo which will be to their detriment.
- 42 The Respondent further submitted that the Applicant's allegations on whether or not they can recover the decretal amounts from the him if successful, that is not an

issue or ground for granting stay of execution pending appeal. It is merely an issue raised by the Applicant who in this case, does not have sufficient grounds for the granting of the orders sought whose burden of proof as stated herein above, is still not tilted to their favour. As, execution is a legal and lawful process that follows a successful trial.

- 43 It is the Respondent's submission that the Applicant has failed to prove the loss they will suffer if execution does issue. That burden never shifts whether or not the Claimant is deficient with regards to evidentiary proof on account of repayment in the case of an appeal. He cited Gachuhi Ag JA in ***Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] KECA 94 (KLR)*** "*It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay.*"

- 44 It was also submitted, relying on ***Antoine Ndiaye v African Virtual University [2015] eKLR*** and ***Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Limited [2014] eKLR***, that the legal burden of proving that the respondent cannot refund the decretal sum lies with the applicant, and mere allegations that the respondent's means are unknown are insufficient to shift the evidential burden.
- 45 It is the Respondent's submission that as stated during hearing, he is a doctor and is currently employed, thus, the Applicant's assertions that his whereabouts are unknown is not tenable. In any event, the judgement amount of Kshs. 8,447,6221 is as a result of him earning a salary of Kshs. 1,407,9371 at the time of termination of his employment, therefore, it is not in issue that the Claimant is a man of means.
- 46 On delay, it was submitted that the application was filed about five (5) months after judgment , therefore, it was not made timeously and no explanation was offered for the delay.
- 47 On security, the Respondent submitted that the mere act of offering security for costs, while it may be a factor to be considered under Order 42 Rule 6 of the Civil Procedure Rules, is not conclusive nor sufficient to compel the Court to grant stay. Security for costs is but one condition, and in

the absence of demonstrating of substantial loss, it cannot be covered or cured by the provision of security. Reliance was placed on ***Machira t/a Machira & Co Advocates v East African Standard [2002] KEHC 1167 (KLR)*** where the Court held that where no substantial loss is demonstrated, security does not arise.

- 48 I have examined all the averments and submissions of the parties herein. The main issue for consideration by this court is whether to grant the stay orders and if so on what conditions.
- 49 In consideration of the law- order 42 rule (6)(20 of the Civil Procedure Rules 2010, it is necessary to consider if the application was filed timeously and if the applicant will suffer grievous harm in case the orders are not granted.
- 50 From the submissions by the applicant, the applicant has already filed an appeal being dissatisfied with the judgment of this court. The application for stay was also filed timeously. Since the substratum of the appeal needs to be preserved, allowing stay will be reasonable in the circumstances.
- 51 The next issue would be conditions upon which stay will be allowable. Considering the magnitude of the award and the need to preserve the judgment of this court pending appeal, I would allow stay of execution on condition that

the entire decretal sum be deposited in an interest earning account held in the joint names of counsels on record within 60 days in default execution may proceed.

**Dated, Signed and Delivered Virtually at Nairobi
this 6th Day of May, 2026.**

HELLEN WASILWA

JUDGE