



REPUBLIC OF KENYA



**KENYA LAW**  
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**County Government of Vihiga v Henry & 4 others (Cause  
36 of 2023) [2026] KEELRC 1229 (KLR) (7 May 2026) (Ruling)**

Neutral citation: [2026] KEELRC 1229 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
CAUSE 36 OF 2023  
DN NDERITU, J  
MAY 7, 2026**

**BETWEEN**

**COUNTY GOVERNMENT OF VIHIGA ..... APPLICANT**

**AND**

**NDOLI HYNES HENRY ..... 1<sup>ST</sup> RESPONDENT**

**DIANAH ANDEMO ATINGO ..... 2<sup>ND</sup> RESPONDENT**

**ELIZABETH ANYANGO AJWANG ..... 3<sup>RD</sup> RESPONDENT**

**ERASTUS MIDAMBO NGASE ..... 4<sup>TH</sup> RESPONDENT**

**SHARON ILLAH AKINYI ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

**I. Introduction**

1. The Applicant filed a notice of motion dated 31<sup>st</sup> October 2025 (the application) seeking for the following orders –
  - a. Spent.
  - b. Pending the hearing and determination of this application, the Honourable Court be pleased to order stay of execution of the judgement of the Honourable Justice Jemimah Keli delivered on 14/11/2024 and Decree dated 13/02/2025 together with the consequential orders arising therefrom.
  - c. Pending the hearing and determination of the appeal in Kisumu Civil Appeal No. E060 of 2025, the Honourable Court be pleased to order stay of execution of the Judgement of the Honourable Justice Jemimah Keli delivered on 14/11/2024 and Decree dated 13/02/2025 together with the consequential orders arising therefrom.



- d. Costs of this application be provided for.
2. The application is expressed to be based on Rules 44 & 73 of the Employment and Labour Relations Court(Procedure) Rules, 2024, Sections 1A, 1B, 3A & 63 (e) of the *Civil Procedure Act*, Order 42 Rule 6 & 6(2) & Order 51 Rule 1 of the Civil Procedure Rules and Article 159 of *the Constitution*. It is premised on the grounds on the face of it.
  3. The application is supported with the affidavit of Teresiah Shijenje, a legal officer in the Office of the County Attorney, sworn on 31<sup>st</sup> October 2025, with several annexures thereto.
  4. In opposition to the application, the Respondents filed a joint replying affidavit sworn by the 1<sup>st</sup> Respondent, with the authority of the other Respondents, on 17<sup>th</sup> November 2025.
  5. By consent, the court directed that the application be canvassed by way of written submissions. The Applicant's counsel Mr. Godia filed written submissions dated 14<sup>th</sup> January 2026 while Mr. Munyori for the Respondents filed written submissions dated 8<sup>th</sup> January 2026.

## II. Evidence

6. In the supporting affidavit, it is the Applicant's case that the impugned judgment was entered in favour of the Respondents awarding to them withheld salary arrears together with costs. Aggrieved by the entire decision, the Applicant lodged an appeal in the Court of Appeal at Kisumu on 21<sup>st</sup> March 2025 and the same is pending determination.
7. Notwithstanding the pendency of the appeal, the Applicant contends that the Respondents proceeded to tax their Bill of Costs, which was allowed in the sum of Kshs522,229.33, and subsequently obtained a Certificate of Order Against the Government for a total sum of Kshs8,700,229.33.
8. The Applicant further avers that the Respondents have initiated Judicial Review proceedings in Kakamega ELRC JR No. E004 of 2025, seeking an order of mandamus to compel payment of the decretal sum together with interest at 12% per annum from 14<sup>th</sup> November 2024 until payment in full, which proceedings are pending hearing and determination before this court.
9. The Applicant contends that unless a stay of execution is granted it stands to suffer substantial and irreparable loss, as the decretal sum is payable from public funds and, there is a real risk that the same may not be recoverable should the appeal ultimately succeed.
10. It is the Applicant's position that the application has been brought timeously, before the issuance of an order of mandamus, and that no prejudice shall be occasioned to the Respondents if the orders sought are granted. The Applicant expresses willingness to comply with any conditions that this Honourable Court may impose.
11. Accordingly, the Applicant urges the Court to preserve the subject matter by granting an order for stay of execution pending the hearing and determination of both the application and the appeal, purportedly in the interest of justice and protection of public funds.
12. In the replying affidavit, the Respondents oppose the application for stay of execution and contend that the same is an abuse of the court process, brought solely to delay them from enjoying the fruits of a lawful judgment delivered on 14<sup>th</sup> November 2024.
13. It is their case that they were employees of the applicant who rendered services for periods of 20 to 22 months without pay, and that the Court conclusively determined that their purported termination was unlawful, the same having been undertaken by a body without jurisdiction. They maintain that the



intended appeal is devoid of merit and does not justify withholding payment of their lawfully earned salaries.

14. The Respondents further contend that following the impugned judgment they lawfully taxed their Bill of Costs at Kshs522,229.33 and thereafter obtained a Certificate of Order Against the Government for a total of Kshs8,700,229.33. Despite demand for payment made, the Applicant failed to settle the decretal sum, necessitating the institution of Judicial Review proceedings in Kakamega ELRC JR No. E004 of 2025 seeking an order of mandamus.
15. The Respondents argue that the present application was filed after an inordinate delay of approximately one year, and only after the commencement of judicial review proceedings, demonstrating bad faith and an intention to obstruct enforcement of a lawful judgment and decree.
16. On the legal threshold to issuance of an order for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules, the Respondents contend that the Applicant has failed to satisfy the mandatory conditions in that –
  - a. No substantial loss has been demonstrated;
  - b. The application has not been brought timeously;
  - c. No security has been offered for due performance of the decree.
17. They further submit that the mere filing of an appeal does not operate as a stay of execution and that a successful litigant is entitled to the fruits of a lawful judgment.
18. The Respondents emphasize that the decretal sum arises from salary arrears and that they have suffered financial hardship, including incurring debts, due to unduly prolonged non-payment. They invoke principles of restitution and quantum meruit, asserting that the Applicant must compensate them for services rendered and consumed.
19. The Respondents propose that if the court is inclined to grant stay, the Applicant should be ordered to deposit the entire decretal sum, costs, and interest in a joint interest-earning account in the names of the parties' advocates.
20. Accordingly, the Respondents urge the Court to dismiss the application with costs, or in the alternative, impose conditions that adequately secure the decretal sum.

### **III. Submissions**

21. Counsel for the Applicant submitted on one issue – Whether the Applicant's application dated 31<sup>st</sup> October 2025 is merited.
22. On the issue of whether there was delay in filing the application, it is submitted that the application was not filed out of time. It is argued that during the time immediately following the delivery the judgment, there was no imminent threat of execution and therefore there was no basis for seeking stay of execution. According to the Applicant, the need to file the present application only arose upon the Respondents commencing execution including filing of judicial review proceedings seeking for an order of mandamus. It is thus submitted that the application was brought within reasonable time in the ensuing circumstances.
23. On substantial loss, it is submitted for the Applicant that unless stay is granted, the appeal shall be rendered nugatory. It is argued that the decretal sum of Kshs8,700,229.33 together with interest is substantial and if paid out, there is a real risk that the same may not be recoverable in the event that the appeal ultimately succeeds. The Applicant contends that the appeal challenges the legality of the



- Respondents' employment and, should the Court of Appeal find that the, employment was unlawful or unconstitutional, then the basis for payment of salary the arrears shall collapse.
24. In this regard, the Applicant disputes the Respondents' reliance on the principle that an employee is entitled to salary for services rendered, arguing that courts have, in appropriate circumstances, ordered recovery of salaries paid where employment was found to be irregular or unlawful.
  25. The Applicants counsel further submits that the purpose of stay of execution is to preserve the subject matter and safeguard the right of appeal. Counsel cited *Selestica Ltd v Gold Rock Development Ltd* [2015] KEHC 7450 (KLR) in support of that argument.
  26. The Applicant urges the Court to exercise its discretion by balancing the competing interests of the parties, maintaining that no prejudice shall be suffered by the Respondents if stay is granted, as they will still be able to execute should the appeal ultimately fail.
  27. The Applicant's counsel also raises the issue of public interest, submitting that the decretal sum can only be paid from public funds and that if the same is paid out and the appeal subsequently succeeds, such funds may be lost thereby prejudicing the public. In support of this position, counsel cited *County Government of Laikipia & another v Wahome & 114 others* [2023] KECA 215 (KLR).
  28. On the requirement for provision of security, it is submitted that the Applicant being a County Government is exempt from providing security under Order 42 Rule 8 of the Civil Procedure Rules. On this point *Laikipia County Government v Tirus Kinyua Thumbi* [2020] eKLR and *Nzomo v Makueni County Government* [2023] KEELC 17418 (KLR), wherein it was affirmed that government entities are not required to furnish security for stay of execution.
  29. In conclusion, the Applicant's counsel submits that it has satisfied the conditions for the grant of stay under Order 42 Rule 6 of the Civil Procedure Rules namely – demonstration of substantial loss, filing the application without unreasonable delay and, lawful entitlement to exemption from security.
  30. The Court is urged to find the application meritorious and grant an order for stay of execution pending the hearing and determination of the appeal, in order to safeguard public funds and ensure that the appeal is not rendered nugatory.
  31. On the other hand, counsel for the Respondent submitted globally in opposition to the application. Counsel contends that the application does not meet the threshold for the grant of stay of execution as set out under Order 42 Rule 6 of the Civil Procedure Rules. In particular, counsel submits that the application was filed after an inordinate and unexplained delay of approximately one year from the date of the judgment. It is pointed out that during this period, the Respondents undertook lawful steps, including taxation of costs and institution of judicial review proceedings for an order of mandamus, and that the present application was only filed after those processes had substantially progressed. It is submitted that the delay disentitles the Applicant to the equitable relief sought.
  32. On the question of substantial loss, it is submitted for the Respondents that the same has not been demonstrated. Counsel argued that the decretal sum arises from salary arrears for services already rendered, and that the law does not recognize payment of earned wages as constituting substantial loss. In this regard, counsel cited *Isaac Murwon v Simon Alovi* [2013] KEHC 2259 (KLR) wherein it was held that an employer does not suffer loss by paying an employee what is lawfully due, particularly where there is no evidence that the employee would be unable to refund the sums in the event of a successful appeal. Counsel further invoked the principle in *Craven Ellis v Cannons Ltd* [1936] 2 KB 403 wherein it was held that the law imposes an obligation to pay for services rendered, even in the absence of a valid contract, on a quantum meruit basis. It is submitted further that the applicant cannot claim loss in discharging a legal and equitable obligation to pay for services already consumed.



33. The Respondent's counsel further argued that Section 18 of the *Employment Act* mandates that wages be paid when due. It is submitted that the Applicant had unlawfully withheld salaries for periods ranging between 20 and 22 months, and yet it is now seeking to benefit from its own wrongdoing by further delaying payment through the present application. It is submitted that such conduct is contrary to the law and public policy.
34. On the exercise of judicial discretion, the Court is urged to consider the relative hardship occasioned to the parties. Counsel cited *African Safari Club Ltd v Safe Rentals Ltd* [2010] eKLR wherein it was emphasized the need for a court to balance the hardships of the parties and to act justly and fairly. It is submitted that the Respondents stand to suffer greater hardship, having worked without pay for extended periods, incurred debts and endured financial distress, whereas the Applicant merely seeks to postpone fulfilment of its legal obligations.
35. Counsel emphasized the well-established principle that a successful litigant is entitled to enjoy the fruits of a lawful judgment. On this, counsel cited *Jeremiah Yatich (Suing as the Administrator of the Estate of Joshua Yatich Chepyegon (Deceased) v Christopher Kipkosgei & 3 others* [2021] KEELC 3207 (KLR), wherein the Court held that the discretion to grant stay must be exercised judiciously, balancing the right of appeal against the right of a successful party to realize the benefit of the judgment. Counsel submitted that granting stay in the present circumstances shall unjustly deprive the Respondents of that right.
36. Further, it is submitted for the respondents that the applicant has failed to satisfy all the conditions under Order 42 Rule 6 of the Civil Procedure Rules – proof of substantial loss, filing of the application without unreasonable delay, and provision of security. Counsel cited *Joseph Obachi Dianga & John Robert Ouko Odongo (suing as Legal Representatives of the Estate of Pius Dianga Audno – Deceased) v Kennedy Onyango Obiero, African Banking Corporation & Nyaluoyo Auctioneers* [2021] KEELC 4365 (KLR) wherein the Court declined to grant stay in the absence of demonstrated substantial loss, holding that such failure renders the application devoid of merit.
37. Counsel characterized the application as abuse of the process of the Court, adopting the definition by I.H. Jacob in *The Inherent Jurisdiction of the Court* that, abuse of process is misuse of the Court's machinery in a manner that is vexatious, oppressive, or intended to achieve injustice. It is submitted that the application falls within that description, as the same seeks to frustrate lawful execution and prolong litigation unnecessarily.
38. In the alternative, and without prejudice the primary position taken, the Respondents counsel submitted that if the Court is inclined to granting the stay, it should impose strict conditions, including an order that the entire decretal sum, together with costs and interest, be deposited in a joint interest-earning account in the names of advocates for the parties, so as to secure the same.
39. In conclusion, the Court is urged to find that the application is unmeritorious, fails to meet the legal threshold for granting stay of execution, and constitutes an abuse of the process of the Court. It is prayed that the application be dismissed with costs or, in the alternative, that any stay granted be subject to conditions that fully secure the decretal sum.

#### **IV. Analysis & Determination**

40. The court has carefully read and considered the application, the affidavit in support, the replying affidavit and the written submissions on behalf of the parties, alongside all the cited authorities. The following is the issue for determination – Whether the applicant has demonstrated a case for issuance of the orders for stay of execution pending appeal as prayed in the application.



## V. The Law

41. The principles guiding the grant or denial of stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules (CPR) in the following terms –

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.
42. Further, stay of execution may be granted for sufficient cause based on the overriding objective stipulated in Sections 1A and 1B of the *Civil Procedure Act*. The courts are now enjoined to give effect to the overriding objective (to do justice) in the exercise of their powers under *the constitution*, *Civil Procedure Act* and, other statutes.

## VI. The Timing

43. The Applicant contends that the application has been brought timeously. The Respondents, on the other hand, assert that the application was filed after an inordinate and unexplained delay of approximately one year from the date of judgment. They point out that during this period they progressed the matter, including taxation of costs and institution of judicial review proceedings for an order of mandamus. It is argued that the application was only filed after the above steps were taken. In their view, this delay disentitles the Applicant to the relief sought.
44. The court finds and holds that the stay of execution proceedings may be commenced in the face of danger of execution. The Applicant filed the application at the point the Respondents commenced the judicial review proceedings, and thus the same was therefore made timeously.

## VII. Substantial Loss

45. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court had this to say about substantial loss –

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

46. The Applicant contends that the Respondents have initiated Judicial Review proceedings in Kakamega ELRC JR No. E004 of 2025 seeking for an order of mandamus to compel payment of the decretal sum together with interest at 12% per annum from 14<sup>th</sup> November 2024 till payment in full. The Applicant argues that there is a danger of loss of public funds amounting to Kshs8,700,229.33 if the stay is denied and the appeal ultimately succeeds. The Applicant further contends that the appeal challenges the legality of the Respondents' employment and, should the Court of Appeal find that the employment was unlawful or unconstitutional, the basis for payment of salary arrears shall collapse.



47. The Applicant has not filed an application to stay the judicial review proceedings in Kakamega ELRC JR No. E004 of 2025, which in their nature seek to compel the applicant to pay the decretal sum, bearing in mind that no execution or attachment can be levied against the Applicant under Section 21 of the *Government Proceedings Act*. The only way a decree-holder can enforce a judgment against a county government is through a Judicial review process.
48. Were this court to consider staying the judicial review proceedings in this application, it would amount to preempting the outcome of the said proceedings before considering whether the Respondents have met the threshold for issuance of the same.
49. In a money decree, such as in the present case, substantial loss may be established where there is a likelihood that the decree-holder may be unable to refund the decretal sum should the appeal ultimately succeed. The actual amount involved is irrelevant as the key consideration is the decree-holder's ability to repay or refund.
50. The burden of proof of substantial loss, including demonstrating that the Respondents have no ability to repay the decretal sum in the event of a successful appeal, is with the Applicant.
51. This burden does not automatically shift to the Respondents to prove their financial ability to refund the sum. The burden would have shifted had the Applicant presented prima facie evidence demonstrating the Respondents' inability to repay. The Applicant has not presented any evidence showing that the Respondents lack the financial capacity to refund the decretal sum, but merely asserts that public funds are at the risk of being lost.
52. The Applicant places undue reliance on the likelihood of success of the appeal, effectively treating the grounds of appeal as if they were already successful. However, in an application for stay pending appeal under Order 42 Rule 6 of the CPR, the court's focus is not on the merits of the appeal. Rather, the relevant consideration is whether the Applicant is likely to suffer substantial loss arising from the execution of the decree should the appeal ultimately succeed.
53. The court finds and holds that the Applicant has not demonstrated or established the likelihood of substantial loss if stay of execution is denied.

### **VIII. Security**

54. The Applicant pleaded that government entities are exempt from furnishing security for stay of execution by dint of Order 42 Rule 8 of the CPR. That is the law and a county or the National Government may not be ordered to deposit security.
55. The Respondents argued that the appeal by the Applicant is not a bar to them enjoying the fruits of the judgement and pray that should the stay be granted, then the applicant be ordered to deposit the decretal sum, interest and costs of the suit.
56. In *Butt v Rent Restriction Tribunal*, the Court of Appeal gave guidance on how a court should exercise its discretion in an application for stay of execution to the effect that –
  1. The power of the court to grant or refusal 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 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. (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.
57. The Applicant has intimated that no security in satisfaction of the decree is due from it and seeks the stay purely based on the pending appeal. While the application was made without delay, the Applicant has not demonstrated that any substantial loss may be occasioned.
58. Taking all the above factors into account, the court finds and holds that the Applicant has not fulfilled the requirements for the grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.
59. In any event, this court found in favour of the Respondents and passed the judgment and issued the decree as alluded to above. This court is functus officio with matter. The Applicant ought to have filed an application for stay of execution in the Court of Appeal which is seized of the matter and may assess the probability of success of the appeal.
60. Further, judgment in Kakamega ELRC JR No.004 of 2024 was delivered on 19<sup>th</sup> March 2026 and an order of mandamus issued compelling the Applicant herein to settle the decretal sum plus costs in the sum of Ksh8,700,229.33. There is thus nothing left to be stayed.
61. Based on all the above, the application dated 31<sup>st</sup> October 2025 is hereby denied and dismissed.

#### **IX. Order**

62. The court orders that –
  - i. The application dated 31<sup>st</sup> October 2025 is hereby dismissed.
  - ii. Costs to the Respondents.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 7<sup>TH</sup> DAY OF MAY 2026.**

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**DAVID NDERITU**

**JUDGE**

