

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC APPEAL NO. E439 OF 2025

(Before D. K. N. Marete)

UNIVERSITY OF NAIROBI.....APPELLANT

VERSUS

ROSEMARY ACHIENG OKOWA.....RESPONDENT

R U L I N G

This is an application dated 16th December 2025 brought under Order 42 Rules 6 and 8 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The application seeks: an unconditional interim stay of execution of the judgment and decree entered on 25th November, 2025 in MCELRC No. E2224 of 2022, pending the *inter partes* hearing and determination of the application and a stay of the said judgment and decree pending the hearing and determination of this Appeal.

The application is supported by the affidavits of Mr. Keneth K. Sawe, Acting Registrar (Administration) of the Appellant and Mr. Michael Kitsao Menza, Director Finance of the Appellant, both sworn on 17th December, 2025.

The Respondent has sworn a Replying Affidavit dated 23rd December, 2025 in opposition to the application. The parties filed their respective written submissions on 19th January, 2026 for the Appellant/Applicant and 28th instant for the Respondent.

The background to this matter comes out thus: The Respondent was employed by the Appellant on 27th April, 1988 and retired on 30th June, 2020. She thereafter filed a claim at

the Chief Magistrates' Court, Milimani, seeking payment of gratuity at the rate of 31% of her annual basic pay for every year of service, computed from the date of her employment in 1988, pursuant to Clause 40(h) of the 2013-2017 Collective Bargaining Agreement (CBA) between the University of Nairobi Council and KUDHEIHA. On 25th November 2025, the trial court delivered judgment in **MCELRC No. E2224 of 2022, Rosemary Achieng Okowa Vs University of Nairobi**, in favour of the Respondent and against the Appellant for a decretal sum of Kshs. 2,823,000.12, together with costs of the suit and interest. The trial court granted a stay of execution for thirty days. The Appellant has since filed this appeal and by the present application seeks an order of stay of execution pending the hearing and determination of the appeal.

The Appellant submits that the appeal raises arguable issues with good prospects of success. The Appellant contends that the trial court erred in applying the 2013-2017 CBA retrospectively so as to cover the entire period of the Respondent's service from 1988, notwithstanding that the said CBA has an explicit effective date of 1st July, 2013. The Appellant relies on the decisions of this Court in **ELRC Cause No. E722 of 2022, University of Nairobi Vs KUDHEIHA**, and **ELRCA No. E047 of 2022 (Consolidated), Bernard Nyamai Ileve Vs University of Nairobi**, both delivered in November 2023 which held that the 2013-2017 CBA cannot apply retrospectively to cover the period prior to its effective date of 1st July, 2013.

On the question of security, the Appellant submits that as a public institution maintained out of public funds it is not required to deposit security as a condition for grant of stay by virtue of Order 42 Rule 8 of the Civil Procedure Rules and that in any event its financial position, as documented in the Auditor-General's Report for the year ended 30th June 2024 renders it

unable to deposit the full decretal sum. In the alternative, the Appellant offers to provide a bank guarantee in favour of the Judiciary for half of the decretal sum.

The Respondent opposes the application. They depone that the application is a non-starter and an abuse of this Court's process, that the Appellant has not advanced any valid reasons justifying a stay and that the mere assertion of substantial loss is insufficient. The Respondent submits that she is a retiree who has been awaiting her gratuity since her retirement in 2020 and is entitled to enjoy the fruits of the judgment. The Respondent relies on the authority of **Cooperative Bank of Kenya Vs Taramusi Francis Ongoki [2019] eKLR** and urges that any stay, if granted, should be strictly conditional upon the provision of a bank guarantee securing the entire decretal sum of Kshs. 2,823,000.12.

I have carefully considered the application, the rival affidavits, the submissions of both parties, and the law. The principles that govern an application for stay of execution pending appeal are well settled under Order 42 Rule 6 of the Civil Procedure Rules, 2010, and were restated in **RWW v EKW [2019] KEHC 6523 (KLR.)** The court must be satisfied that substantial loss may result to the applicant if the stay is not granted, that the application has been made without unreasonable delay, and that the applicant has given such security as the court orders for the due performance of the decree. The overriding consideration is the balance of justice between the parties.

The principles that guide the court in determining whether to grant a stay of execution pending appeal may therefore be distilled as follows;

1. Whether the applicant will suffer substantial loss if the stay is not granted.
2. Whether the application was made timeously and without unreasonable delay.
3. Whether adequate security has been or can be provided.

4. Whether prejudice would be occasioned to the Respondent.

On the first issue, whether the Appellant will suffer substantial loss, I am satisfied that this limb is established. If the decretal sum of Kshs. 2,823,000.12 is paid out to the Respondent and the appeal subsequently succeeds, there is a real risk that the said sum may not be recoverable from the Respondent, a private individual of unknown means. The Appellant has produced the Report of the Auditor-General for the year ended 30th June 2024 which discloses a negative working capital position and an acid test ratio of 1:7, confirming that for every seven shillings the Appellant owes it has only one shilling to settle. In the authorities of **Lemanken Aramat –Vs- Harun Meitamei Lempanka & 2 Others [2014] eKLR** and **Ethics & Anti-Corruption Commission –Vs- Peter Mangiti & 17 Others [2016] eKLR**, the courts recognised the public interest in protecting public funds pending the determination of a substantive appeal. This limb is therefore established.

On the second issue, timeliness, the judgment was delivered on 25th November, 2025. The Memorandum of Appeal was filed on 16th December, 2025 and so was this application. The application was therefore brought without unreasonable delay therefore satiating this limb and threshold.

On the third issue, security, the Appellant relies on Order 42 Rule 8 of the Civil Procedure Rules and the decision of this Court in **Teachers Service Commission –Vs- Benson Kuria Mwangi [2020] eKLR** and in **ELRCA/E145/2025, University of Nairobi –Vs- Rayori Isaac Mangana** where this court held that a public institution is not required to deposit security as a condition for grant of stay. I adopt and apply this holding. However, an entirely unconditional stay would leave the Respondent with no protection, or at all. The Appellant has on itself offered, in the alternative, a bank guarantee for half the decretal sum. I consider

this to be a fair condition that accommodates the Appellant's financial constraints while affording the Respondent as a measure of security. This limb is established on terms.

On the fourth issue, prejudice, I am alive to the fact that the Respondent has been awaiting her gratuity since retirement in 2020. However, any prejudice from the stay is ameliorated by the bank guarantee condition and is compensable in costs should the appeal fail. The balance of convenience tilts in favour of granting the stay on such terms. This limb is sustainable.

A consideration of the respective cases of the parties tilts the application in favour of the Applicant. The Applicant has on a balance of probabilities established a case for the grant of a stay of execution in the interest of justice.

I am therefore inclined to allow the application and order as follows;

- (i) There shall be a stay of execution of the Judgment and Decree entered on 25th November 2025 in MCELRC No. E2224 of 2022, Rosemary Achieng Okowa –Vs- University of Nairobi, pending the hearing and determination of this Appeal.
- (ii) The Appellant shall, in thirty (30) days from the date of this ruling, furnish a bank guarantee in favour of the Judiciary for the sum of Kshs. 1,411,500.06, being half of the decretal sum as security for the appeal.
- (iii) Each party shall bear their costs of this application.

Delivered, dated and signed this **14th** day of **May** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Mr. Omondi for the Appellant/Applicant
2. Miss Achila instructed by OCO Law & Company Advocates for the Respondent