

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**ELRC CAUSE NO. E371 OF 2021**

*(Before Hon. Lady Justice Hellen Wasilwa, J)*

**WILMA WAMBOI WAWERU.....**  
**CLAIMANT**

**VS**

**ZANA AFRICA GROUP LIMITED.....1<sup>ST</sup>**  
**RESPONDENT**

**ZANA AFRICA PROGRAMS.....2<sup>ND</sup>**  
**RESPONDENT**

**RULING**

1 The Respondents/ Applicants filed a Notice of Motion application dated 11<sup>th</sup> March 2025 seeking orders: -

1. *Spent*
2. *THAT the Honourable Court be pleased to grant interim orders of stay of execution of the Judgment and decree in Nairobi ELRCC/E371/2021, Wilma Wamboi Waweru vs Zana Africa Group Limited and Zana Africa Programs pending the hearing and determination of this Application.*
3. *THAT the Honourable Court be pleased to grant orders of stay of execution of the Judgment and decree in Nairobi ELRCC/E371/2021, Wilma Wamboi Waweru vs Zana Africa Group Limited and Zana Africa Programs pending the hearing and determination of the intended appeal.*

4. *THAT the Honourable Court be pleased to grant interim orders of stay of further proceedings in Nairobi ELRCC/E371/2021, Wilma Wamboi Waweru vs Zana Africa Group Limited and Zana Africa Programs pending the hearing and determination of this Application.*
5. *THAT the Honourable Court be pleased to grant orders of stay of further proceedings in Nairobi ELRCC/E371/2021, Wilma Wamboi Waweru vs Zana Africa Group Limited and Zana Africa Programs pending the hearing and determination of the intended Appeal.*
6. *THAT the honourable court orders the deposit of the decretal amount in a joint interest earning account in the names of the advocates for both parties pending the hearing and determination of the appeal or such other order for security as the honourable court may consider just and expedient.*
7. *THAT the Court do grant any other order that it may deem just and expedient to grant in the circumstances.*
8. *THAT the Costs of this application be provided for.*

### **Respondents/Applicants' Case**

- 2 The Applicants aver that on 18<sup>th</sup> September 2025, the Court delivered judgment in this matter in favour of the Claimant, declaring the termination unfair and awarding

Kshs. 2,070,000 against the 1<sup>st</sup> Applicant and Kshs. 825,000 against the 2<sup>nd</sup> Applicant, together with costs.

- 3 The Applicants state that the Court did not grant any stay of execution orders on the basis that there was no imminent threat of execution following of delivery of the judgment.
- 4 Being dissatisfied with the said judgment, they lodged a Notice of Appeal dated 29<sup>th</sup> September 2025 and applied for certified copies of the proceedings, judgment and decree to facilitate the filing of the substantive appeal, which they intend to lodge upon receipt of the typed proceedings.
- 5 It is the Applicants' case that the intended appeal raises arguable grounds of fact and law and stands a high chance of success. They assert that unless stay of execution is granted, the intended appeal will be rendered nugatory as the decretal sum is colossal and recovery thereof from the Claimant may not be possible in the event the appeal succeeds.
- 6 The Applicants aver that they will suffer substantial and irreparable loss if execution proceeds, as there is no guarantee that the sums of Kshs. 2,070,000 and Kshs. 825,000 will be recovered from the Claimant.

- 7 They state that although the matter was scheduled for taxation on 25<sup>th</sup> February 2026, the Claimant's counsel, by a letter dated 23<sup>rd</sup> January 2026, indicated an intention to waive costs, thereby creating an imminent threat of execution for the decretal sum.
- 8 The Applicants contend that there were no stay orders issued by the trial court, leaving them exposed to execution proceedings.
- 9 The Applicants assert that the Claimant has already initiated execution by applying for warrants of attachment, thus demonstrating urgency and the need for intervention by the Court.
- 10 It is the Applicants' case that if execution proceeds and the intended appeal succeeds, the same will be rendered nugatory as recovery of the decretal sums is uncertain.
- 11 The Applicants aver that the application has been brought in good faith and without undue delay, and that no prejudice will be occasioned to the Claimant if the orders sought are granted, as any inconvenience can be compensated by way of costs.
- 12 It is the Applicants' case that sufficient cause has been established, and urge the Court to certify the application as urgent and grant stay of execution pending the hearing and determination of the intended appeal.

### **Claimant/Respondent's Case**

- 13 In opposition to the Applicants' application, the Respondent filed a replying affidavit dated 7<sup>th</sup> April 2026
- 14 It is the Respondent's case that the application is incompetent, a non-starter and an abuse of the Court process, and ought to be struck out in *limine* with costs.
- 15 The Respondent states that the Applicants have not advanced any valid reasons to warrant stay of execution of the judgment, which was regularly entered after due consideration of the pleadings and proper application of the provisions of the Employment Act and the Labour Relations Act.
- 16 She avers that the Applicants have merely alluded to substantial loss without demonstrating the same, and asserts that no proclamation or attachment has been undertaken against the Applicants.
- 17 The Respondent contends that the Applicants have not provided evidence of steps taken towards prosecuting the intended appeal, save for a letter dated 29<sup>th</sup> September 2025 requesting proceedings, which was written six months prior, with no further follow-up demonstrated.

- 18 It is the Respondent's case that no appeal has been filed to date despite the lapse of time, and no evidence has been adduced to show efforts made to obtain proceedings from the Court or to lodge the substantive appeal.
- 19 The Respondent asserts that the application has been brought in bad faith and is a tactic to delay the conclusion of the matter, and that no prejudice has been demonstrated that the Applicants would suffer if the orders sought are not granted.
- 20 She contends that the Court ought to safeguard her interests as a successful litigant who has awaited the judgment since her unfair termination.
- 21 The Respondent avers that she is a person of means, engaged in freelance advocacy, operates a poultry farm with over 3,000 birds and owns property, all of which would cumulatively cover at least half of the decretal sum in the event the appeal succeeds.
- 22 It is the Respondent's case that she is entitled to enjoy the fruits of her judgment, and that the Applicants are unjustly hindering her from doing so.
- 23 The Respondent, however, states that she is not opposed to the Applicants providing security as may be ordered by the Court to guarantee due performance of the decree.

## **Respondents/Applicants' Submissions**

- 24 The Applicants submitted on two issues: whether the Applicants have satisfied the conditions for the grant of an order of stay of execution pending appeal; and whether the Applicants have met the threshold for the grant of an order of stay of proceedings pending the hearing and determination of the appeal.
- 25 They submitted that the applicable principles on stay of execution are set out under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, which provides that: *“No order for stay of execution shall be made... unless— (a) the court is satisfied that substantial loss may result... and that the application has been made without unreasonable delay; and (b) such security 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.”* These principles have been restated in ***Stejes Agencies Limited v Benjamin Malonza Paul [2021] eKLR.***
- 26 On stay of proceedings, the Applicants submitted that the Court exercises discretion guided by principles set out in ***Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*** Ringera J as he then was heard this to say on staying proceedings pending appeal; *“In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not*

*granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously".* It is the Applicants' submissions that they have satisfied the threshold for grant of both orders.

- 27 On whether there is an arguable appeal, the Applicants submitted, relying on ***Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] eKLR***, that an arguable appeal is one that is not necessarily one that must succeed, but one that raises a bona fide point of law or fact that deserves consideration by the appellate court. It need not be a winning appeal, only one that is not frivolous. They submitted that their Memorandum of Appeal raises substantial issues on the legal effect of fixed-term contracts, classification of termination by effluxion of time and application of redundancy provisions under the Employment Act.
- 28 They submitted that the trial court erred in failing to give effect to a valid fixed-term contract executed by the Claimant, and instead proceeded on the basis that the Claimant remained under a prior contractual regime. They submitted that the Court misdirected itself in finding that the conversion to a fixed-term contract was unilateral

contrary to evidence showing it was voluntarily executed by the Claimant and constituted a mutually agreed arrangement between the parties.

- 29 The Applicants further submitted that the Court failed to apply the doctrine of estoppel and/or acquiescence despite evidence that the Claimant accepted and performed the contract and derived benefit from the fixed-term contract without protest. Further, the Court erred in treating expiry of the fixed-term contract as dismissal and misapplied Section 41 of the Employment Act, thereby wrongly awarding notice pay and compensation for unfair termination in circumstances where no termination in the legal sense had occurred, the contract having come to an end by operation of law.
- 30 The Applicants submitted that in respect of the 2<sup>nd</sup> Applicant, the Court erred in finding redundancy procedurally unfair despite evidence of compliance with Section 40 of the Employment Act, including issuance of notices and consultations. They submitted that the Court failed to properly evaluate evidence including payment of dues and rationale for redundancy.
- 31 They submitted that these issues raise bona fide and weighty questions of law and fact warranting consideration, thus establishing an arguable appeal.

32 On substantial loss, the Applicants submitted that the Court must determine whether refusal of stay would render the appeal nugatory. They relied on **Antoine Ndiaye v African Virtual University [2015] eKLR**, where the Court stated:“...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...” .....” the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent....”

33 They further relied on **Geoffery Muriungi & another v John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR**, where the Court stated:

*“The undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court*

*of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal.....”*

34 The Applicants submitted that the decretal sums of Kshs. 2,070,000 and Kshs. 825,000 are colossal and if paid out, recovery may not be possible, thus occasioning substantial loss. The Respondent’s assertions of financial means were unsupported by documentary evidence. They relied on **James Wangalwa & Another V Agnes Naliaka Cheseto[2012]eKLR**, submitting that substantial loss arises where execution creates a state of affairs that renders the appeal nugatory.

35 On security, the Applicants submitted that they are willing to provide security as required under Order 42 Rule 6(2), and relied on **Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014 eKLR]**, where the Court held:

*“...The Respondent, on the other hand, has a right to the fruits of its judgment which should not be taken away; and where the right is postponed, it can only be upon adequate security for the due performance of such decree or order as may ultimately be binding on the Applicant.”*

36 On delay, the Applicants submitted that the application was brought without unreasonable delay. The judgment

was delivered on 18<sup>th</sup> September 2025, they filed a Notice of Appeal on 29<sup>th</sup> September 2025 and applied for proceedings, and only moved the Court upon crystallisation of the threat of execution.

- 37 On whether the appeal will be rendered nugatory, the Applicants submitted that continuation of execution and post-judgment processes will overtake the appeal and render it academic, and relied on ***Global Tours & Travels Limited (Supra)***.
- 38 On prejudice and interests of justice, the Applicants submitted that no prejudice will be occasioned to the Respondent as the decretal sum can be secured, whereas they will suffer substantial loss if stay is denied. The balance of convenience tilts in favour of granting stay.
- 39 It is the Applicants' submission that the Court should exercise its discretion in their favour as guided by ***Butt v Rent Restriction Tribunal [1982] KLR 417***, as cited in ***John Mwangi Ndiritu v Joseph Ndiritu Wamathai [2016] KEHC 6020 (KLR)***, where it was held:

*“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.....A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better*

*remedy may become available to the applicant at the end of the proceedings.”*

- 40 They submitted that they have demonstrated substantial loss, arguable appeal, willingness to furnish security and absence of delay, and urged the Court to grant stay of execution and stay of proceedings pending appeal with costs.

### **Claimant/Respondent's Submissions**

- 41 The Respondent submitted that the issue for determination is whether the Applicants have met the threshold for grant of stay of execution pending appeal.
- 42 She submitted that stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, which states that:

*“(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.”*

- 43 It is the Respondent’s submission that the Applicants have not satisfied the Court that they will suffer substantial loss. She submitted that the claim of substantial loss is extinguished by the averments that she is not a lady of straw and is in a position to reimburse the decretal amount in the event the appeal succeeds.
- 44 The Respondent submitted that despite there being no pending execution at the time of delivery of judgment, the Applicants have only made a single request for proceedings, judgment and decree over a period of six months. She submitted that had she not waived her rights to costs, the Applicants would have continued to occasion delay in facilitating the filing of their intended appeal.

- 45 The Respondent further submitted that the effort to make an argument for filing a substantive appeal through the present application has been necessitated by steps taken by her and not by the Applicants' need to expeditiously file an appeal.
- 46 She submitted that while the power of the Court to grant or refuse stay is discretionary, the Court ought to weigh the Applicants' right of appeal against her right as a successful litigant not to be deprived of the fruits of her judgment.
- 47 It is the Respondent's submitted that the Applicants have not demonstrated substantial loss and that the application is marked by unreasonable delay, and urged the Court to dismiss the same with costs.
- 48 In the alternative, she submitted that the Court should grant her a portion of the decretal sum being Kshs. 825,000 and order that the balance of Kshs. 2,070,000 be secured by way of security as offered by the Applicants.
- 49 She further submitted that if the Court is not inclined to grant that prayer, then a conditional stay of execution pending appeal be granted with timelines for securing the full decretal sum.
- 50 It is the Respondent's submission that the Court should issue directions to the Deputy Registrar to prioritize

availing all requested documents necessary to enable the Applicants file their appeal.

51 I have examined all the averments and submissions of the parties herein. The applicants have come to this court seeking stay having been dissatisfied with the judgment of this court and having proceeded to file a notice of appeal before this court. Order 46 rule 6 of the Civil Procedure Rules provides parameters to be applied before stay orders can be granted. The applicants have indeed preferred an appeal having filed a Notice of appeal and if the orders of stay are not granted, they stand to be prejudiced and the appeal may be rendered nugatory.

52 It is also clear that the applicants came to court seeking stay orders timeously and have offered to deposit the decretal sum in joint interest earning account held in the names of counsels on record. It is my finding that the application for stay of execution is merited and is allowed accordingly on condition that the entire decretal sum is deposited in a joint interest earning account held in the joint names of counsels on record within 30 days. In default execution may proceed. Costs in the cause.

**Dated, Signed and Delivered Virtually at Nairobi  
this 12<sup>th</sup> Day of May, 2026.**

**HELLEN WASILWA**

# JUDGE