



REPUBLIC OF KENYA



**KENYA LAW**  
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**Guerra v Urysia Limited (Cause 649 of 2017)  
[2025] KEELRC 25 (KLR) (14 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 25 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 649 OF 2017  
JW KELI, J  
JANUARY 14, 2025**

**BETWEEN**  
**LUIS MANUEL FONSECA PASSOS GUERRA ..... CLAIMANT**  
**AND**  
**URYSIA LIMITED ..... RESPONDENT**

**RULING**

1. The Applicant/ Judgment Debtor vide Notice of Motion Application dated 8<sup>th</sup> day of April 2024 brought under Sections 1A and 1B of the [Civil Procedure Act](#), Order 42 rule 6 of the Civil Procedure Rules, 2010 and under the inherent powers of the court sought the following Orders:-
  - i. Spent
  - ii. That pending the interpartes hearing of the Application herein, an order of stay do issue against the judgement delivered by this Honourable Court on 23<sup>rd</sup> February 2024.
  - iii. That pending the determination of the Application herein, an order of stay do issue against the judgement delivered by this Honourable Court on 23<sup>rd</sup> February 2024.
  - iv. That pending the full hearing and determination of the Appeal to the Court of Appeal, there be a stay of the judgement delivered by this Honourable Court on 23<sup>rd</sup> February 2024.
  - v. That the Applicant be at liberty to apply for further Orders and/or Directions as the Honourable Court may deem fit and just to grant.
  - vi. That the costs of this Application abide the outcome of the appeal.



## Grounds of the application

2. That the Judgement herein was delivered on 23<sup>rd</sup> February 2024 and the interim thirty (30) days stay granted by the Honorable Court was lapsing. The Honourable Court entered judgement against Urysia Limited (the Applicant in this Application) for a total amount of KES. 13,536,900.00, as well as interest and costs of the suit.
3. The Applicant is dissatisfied with the Honourable Court's judgment lodged its Notice of Appeal on 4<sup>th</sup> March 2024 and requested for certified copies of proceedings, and the Judgement, which are in the process of being prepared by the Court. The Applicant's appeal is merited, arguable, and raises pertinent points of law and facts thus it has high chances of success.
4. The Applicant is reasonably apprehensive that the Respondent, as a Decree Holder, may proceed to levy execution against them now that the interim 30-day stay period has lapsed. Unless a stay is granted, the Respondent will execute the said judgement of 23<sup>rd</sup> February 2024; the intended Appellant's appeal shall be rendered nugatory, and the intended Appellant shall suffer irremediable damage.
5. The Judgement sum is of a substantial amount and the Applicant is apprehensive that if the same is paid out to the Respondent, it shall catalyze unintended consequences i.e., shutting down, inability to pay salaries. The Applicant has furnished documentary proof that to demonstrate its negative financial position and poor financial health. Notwithstanding, the Applicant is willing to deposit a guarantee for the notice pay of KES. 1,041,300.00 as security to the Court.
6. The Application is made in good faith and has been brought without unreasonable delay.
7. The Application was further supported by the annexed affidavit of Fiona Achieng' sworn on the 8<sup>th</sup> April 2024 where she annexed a copy of the judgment dated 23<sup>rd</sup> February 2024 as UL-1, a copy of Notice of Appeal filed on the 4<sup>th</sup> March 2024 as UL-2, a copy of uncertified typed proceedings as UL-3 and a copy of a draft memorandum of appeal as UL-4. Fiona stated that the applicant's business was experiencing reduced sales and increased costs of business and that payment of the awarded amount of Kshs. 13,536,900 plus interest and costs would cripple the business. She annexed as UL-5a the Applicant's annual report and financial statement. She prayed for the court to preserve the business of the applicant. She stated that she had been advised by her advocate that security was not necessary. Further Fiona stated that in the event the court was inclined to Order security the applicant was willing to deposit a guarantee of the Notice pay of Kshs., 1,041,300.00 to the court pending the appeal.

## Response

8. The application was opposed vide the replying affidavit of the Decree-Holder /Respondent sworn on the 5<sup>th</sup> Day of June 2024. Among others, the Decree Holder stated that the application was filed by a new advocate without compliance with Order 9 rule 9 of the Civil Procedure Rules hence a nullity and ought to be struck out. That no appeal has been filed despite the applicant having had the judgment hence delay tactic as certified typed proceedings are not a prerequisite for the filing of appeal. That there was no arguable appeal. That the court gave justification for the maximum compensation. That financial challenges cannot be a basis for a stay of execution. The Applicant is the sole importer and distributor of Peugeot in Kenya and the East African Regions. The Respondent further stated that he had incurred relocation costs coming into the country for the work. That the deposit of guarantee of the notice pay only was unreasonable. He asked that the full decretal amount be deposited in interest-earning account in the names of the advocates.



9. The applicant in reply to the response filed a further affidavit sworn by Ondari Johnson Advocate on the 19<sup>th</sup> July 2024 and specifically in response to the issue of non –compliance with the provisions of Order 9 Rule of the Civil Procedure Rules annexed consent of change of advocates dated 2<sup>nd</sup> April 2024 executed with the former advocates Muthoga Gaturu & Company advocates as OJ-1. He averred that the consent had been uploaded to the CTS system. The court noted that the consent of change of advocates dated 2<sup>nd</sup> April 2024 was filed in court on 14 May 2024. The court finds that the issue is settled and the application is properly before the court.

### **Decision on the merit of the application**

10. The application was canvassed by way of written submissions. Both parties filed. The issue for determination in the ruling was whether the application was merited.
11. The Employment and Labour Relations Court (Procedure) Rules 2024 on stay of execution in case of appeal provides: - “21. (1) Where an application for stay of execution pending appeal has been lodged, the applicant shall, in the supporting affidavit, declare whether a similar application has been filed in any other court.
- (2) An application for stay of execution pending appeal shall be filed in the appeal file.” Since the Court rules are silent on the conditions for granting stay of execution in the case of appeal, then the lacuna is addressed by Order 42 Rule 6 (2) of the Civil Procedure Rules to wit:- “(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.”
12. The parties relied on different authorities on the conditions for the Order of stay of execution to be issued which the court perused. The court finds that the law is settled on the conditions for issuance of an Order of stay of execution pending appeal as stated by the Court of Appeal in Butt -vs Rent Restriction Tribunal (1982) KLR 417 where the Court gave guidance on how a Court should exercise discretion in an application for stay of execution and held 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 is granting or reusing 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”.



13. The court was focused on ensuring that the intended appeal is not rendered nugatory and on compliance with the conditions of under order 42 Rule 6 (2) of the Civil Procedure Rules and as enunciated in the Butt decision (supra). The court found that there was no inordinate delay in filing the application.
14. On condition of substantial loss likely to be suffered by the Applicant, the court noted the submissions of the Applicant that: "Further from his Replying Affidavit it is apparent that the Respondent no longer resides/works in Kenya. Also, the Respondent has no known assets in Kenya. As such we believe that the Applicant has proven the limb of substantial financial loss.....We rely on the case of Dickson Isabwa Angaluki & 2 Others vs. Ukwala Supermarkets Ltd & 2 others [2013] eKLR it was held that: "Substantial loss may be inability to recover, or undue difficulty in recovering, from the respondent the decretal sum in the event that the appeal succeeds, thus rendering the appeal nugatory. " The court finds that this position of the Respondent no longer residing in the country was not controverted. The foregoing a good basis for issuance of stay of execution as the chances of the applicant of recovering the decretal sum in the event of success on appeal are slim hence likelihood of substantial loss.
15. On the condition of security for performance of the decree, the court agreed with the Respondent / decree holder that the offer of deposit of bank guarantee of notice pay only was unreasonable. The court must balance the right of the applicant to be heard on appeal and their appeal not to be rendered nugatory in the event it is eventually successful with the right of the decree-holder to enjoy the fruits of his judgment. The issue of the financial position of the applicant was not material to the application as there is a valid judgment against the applicant. The court finds, in the instant case, that deposit of half of the decretal amount in an interest-earning account held by advocates of the parties is a reasonable security of any eventual performance of the decree.

## **Conclusion**

16. In the upshot the application dated 8<sup>th</sup> April 2024 is allowed as follows:-
  - a. The court hereby issues an Order of stay of execution of the Judgment delivered by the Court on the 23<sup>rd</sup> February 2024 pending the hearing and determination of the intended appeal to the Court of Appeal on condition that half of the decretal sum is deposited in a joint interest-earning joint account within 30 days to be opened in the names of the advocates for the parties and in default execution may proceed.
  - b. Costs of the application to the Respondent.
17. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14<sup>TH</sup> DAY OF JANUARY, 2025.**

**JEMIMAH KELL,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Applicant : - Ondari

Respondent: Gakunga

