



Gichuru v Startimes Media (Kenya) Company Limited (Employment and Labour Relations Cause 2384 of 2016) [2025] KEELRC 473 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 473 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2384 OF 2016**

JW KELI, J

FEBRUARY 20, 2025

BETWEEN

ANDERSON NG'ARU GICHURU CLAIMANT

AND

STARTIMES MEDIA (KENYA) COMPANY LIMITED RESPONDENT

RULING

1. The Respondent/Judgment debtor filed Notice of Motion application dated 14th November 2024 brought under Section 3 and Section 12 (3) (i) and (viii) of the *Employment and Labour Relations Court Act*, 2011, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and all enabling provisions of the law seeking the following substantive orders:-
 1. That pending the hearing and determination of the Stay Application dated 2nd August 2024, this Honourable Court be pleased to issue a stay of execution of the Judgment dated 28th June 2024.
 2. That the costs of this Application be provided for.
2. Grounds of the application
 - a) On 24th September 2024, the Hon. Justice Ocharo Kebira gave further directions in respect of the Stay Application dated 2nd August 2024. However, informed the parties that he was on transfer and therefore the matter would be mentioned on 23rd October 2024 before the incoming Judge, Hon. Lady Justice Jeminah Wanza Keli to give further directions as to the disposal of the Application.
 - b) The matter was listed for mention on 23rd October 2024 before Hon. Lady Justice Jeminah Wanza Keli and simultaneously listed for taxation on 7th October 2024. On 23rd October



2024, the Hon. Lay Justice Jemimah Wanza Keli was not sitting however parties were given new dates by the Court. The Court directed that the matter be mentioned on 11th November 2024 before the Honourable Judge.

- c) On 11th November 2024, the matter was listed and proceeded before the Hon. Deputy Registrar but not the Honourable Judge. The Hon. Deputy Registrar directed that the ruling on the Claimant's Bill of Costs will be delivered on 20th November 2024.
 - d) The Respondent's counsel on record on the same day appeared before the Honourable Judge and informed the Court of the matter and further that there was a pending Stay Application that was filed under urgency and was intended to be mentioned before her on that day. The Hon. Lady Justice Jemimah Wanza Keli gave express orders that the file be listed before her on 18th November 2024 for hearing of the Stay Application
 - e) On 12th November 2024, the Claimant's advocates served the Respondent's advocates with its draft decree for approval within 7 days, failure to which, the Claimant's advocates would proceed to have the decree signed and sealed. Therefore, there is an immediate threat of execution against the Respondent for payment of the decretal amount sum.
 - f) There has been a material change of circumstances that warrant the interim orders sought by the Respondent to be granted pending being heard. Otherwise, the Respondent stands to suffer prejudice, its appeal being rendered nugatory and its unfettered Constitutional right to be heard being compromised.
 - g) The Application herein has been brought in good faith and without any undue delay.
 - h) In the circumstances, it is in the interest of justice that the Application herein be heard as a matter of urgency and the orders sought herein be granted as prayed.
3. The court on the 18th of November 2024 issued a temporary stay of execution of the judgment in the suit pending the hearing and determination of the application together with the application dated 2nd August 2024 inter-partes.
 4. The earlier application dated 2nd August 2024 by way of Notice of Motion by the same applicant/ judgment debtor sought for the following substantive orders for the purposes of this ruling :-
 - a. That this Honourable court be pleased to enlarge time for the respondent to serve the duly filed notice of appeal dated 12th July 2024 and /or be pleased to deem the duly filed notice of appeal dated 12th July 2024 as properly served upon the claimant.
 - b. That pending the hearing and determination of the appeal, the honourable court be pleased to grant an order of stay of execution of the judgment delivered on the 28th June 2024 and any resultant decree or consequential orders therefrom.
 - c. The costs of the application be provided for.
 5. In the supporting affidavit of Ann Kithinzi of 2nd August 2024 the applicant stated that the judgment amount of Kshs. 2,058, 400 was substantial and it was ready to provide a bank guarantee for the judgment plus interest and costs of the suit for due performance of the Decree.
 6. The application as opposed by the respondent/ judgment holder who filed his replying affidavit dated 20th September 2024. The respondent averred that there was no good reason advanced why the notice of appeal was not served within the requisite timelines. That he was a man of means capable of refunding the decretal sum in the event the Court of Appeal reversed the judgment. That the employer



- knew of his next of kin , residence, and the assets he owned from information furnished during employment. That on the converse the applicant was a foreign owned company that could fold anytime with eventuality of leaving him with a paper judgment. That without prejudice the applicant was a multi-billion company and an outflow of Kshs. 2058,400 was insignificant and would not cause any prejudice. He filed suit in year 2016 to recover terminal dues and deserved to enjoy the fruits of his judgment without delay. He alleged that it had come to his attention there was arithmetical error in the judgment in tabulation of the compensation which he stated ought to have been 761808 and not 458400 which error the court could rectify.
7. The respondent filed a further affidavit in response to the application dated 14th November 2024 where he stated that the application was frivolous, vexatious and unfair attempt to appeal previous rulings of the court through the backdoor. That in the initial application the court declined stay of execution and directed that the matter proceed to taxation of the party to party bill of costs. (ANG-I) That when the matter came up before Justice Ocharo Kebira and the applicant applied for an interim stay the judge directed the matter to proceed to taxation of bill of costs as directed by Justice Radido. That the court had already pronounced itself on the stay of execution twice hence the matter was resjudicata. The decisions were neither sought for review or appealed against. That there was no decree to be executed hence the matter was premature.
 8. The applicant filed further affidavit of Francis O. Okongo, its country Human Resources Manager sworn on the 29th of January 2025 in response to the two affidavits filed by the Respondent. He stated that on the 3rd December 2024 the applicant filed its record of appeal before the Court of Appeal where the appeal was registered as COACA/E961/2024 Startimes Media Kenya Limited v Anderson Ngáru Gichuru. He stated that the parties were waiting directions of the court (FOO-1 was an excerpt of the ROA). On issue of delay the deponent stated that the application was filed 14 days after the lapse of the 30 days interim stay and hence the delay was not inordinate. That the respondent extracted the decree and served them and the bill of costs was pending ruling. That the application had never been heard interpartes hence not resjudicata.
 9. That on whether the claimant/judgment holder was a man of means capable of refunding judgment amount there was no basis laid for that. The Claimant left employment 9 years ago and the applicant had no knowledge of his current contact, assets or whereabouts. That the Applicant was a company incorporated as a limited liability in Kenya and had been in operation in Kenya since 2006 with over 500 people in Kenya hence no imminent risk of flight. That the judgment amount was substantial and the applicant would suffer substantial loss if they were to succeed on appeal and the respondent is not able to refund rendering the appeal nugatory and the only way to secure the judgment amount was through security.
 10. That the errors in judgment raised in the further affidavit of the Respondent were not properly before the court.

Decision

11. The two applications were canvassed together by way written submissions . Both parties filed.

Issues for determination

12. Having evaluated the pleadings by the parties the court was of the opinion that the appeal having been registered before the Court of Appeal as COACA/E961/2024 Startimes Media Kenya Limited v Anderson Ngáru Gichuru the only issue for determination in both appeals was on stay of execution.



Any technicalities on the notice of appeal or the appeal are now under the jurisdiction of the Court of Appeal.

Whether the Order of stay of execution was merited.

13. The Employment and Labour Relations Court (Procedure) Rules 2024 on stay of execution pending appeal states at Rule 21: - “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 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.”
14. The parties relied on several authorities which the court noted were consistent with the decision in *Butt vs Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal (Madan J.A) gave guidance on how a Court should exercise discretion in an application for a stay of execution, that: -

If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458: “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”
15. The court having delivered the judgment (Justice Ocharo Kebira) it is not its place to decide on whether the appeal raised is arguable / triable issues. That would be akin to sitting on own appeal. The court restricted itself to the conditions under Order 42 rule 6 of the Civil Procedure Rules (supra).
16. On whether substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; The application was filed within 14 days of the lapse of the interim order of stay of execution issued by the trial Judge. In the mind of the court that was not unreasonable delay. On the condition of substantial loss the applicant submitted as follows:-
17. It is now settled law that the Court must address its collective mind to the question of whether to refuse an application for stay would occasion substantial loss to the Respondent and in turn, render the appeal nugatory. The Applicant submitted that the decretal sum of KES 2,058,000 is a substantial amount. In this regard, it relied on the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, wherein the Court observed that the sum of KES 1,414,493 was no doubt a substantial amount. The Court in the said case held as follows: “I am of the view that the applicant



has proved that he is likely to suffer substantial loss and the appeal may be rendered nugatory. A sum of Ksh.1,414,493/= is no doubt a substantial amount. It is the loss which the applicant will incur. The applicant need not go further after establishing that he is likely to suffer that substantial loss.” Similarly, in the case of Mutuma Mugambi vs. Kenya Methodist University (Supra), the Court granted an application for stay of execution, citing the large decretal sums involved and the risk of substantial loss in the event that the Respondent was unable to refund the same. In determining what amounts to substantial loss, the Court of Appeal in the case of Antoine Ndiaye vs. African Virtual University [2015] eKLR, observed as follows: “...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. In other words, he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back”

18. The Applicant submitted that the Claimant had not demonstrated to this Honourable Court that he had the means to repay the decretal sum in the event that the applicant succeeds on Appeal. The Claimant, in his response to the Application, had not disclosed his assets or any other source of income. It is now trite law that once the Claimant’s financial ability is called into question, the burden of proving the ability to refund immediately shifts to the Claimant. This was the position adopted in the case of Kenya Orient Insurance Co. Limited vs. Paul Mathenge Gichuki & Another (2014) eKLR where the court cited with approval the case of ABN Amro Bank N.V. vs. Le Monde Foods Ltd. Civil Application No. Nai 15/2002 where the court expressed itself as follows:-“They of course, cannot be expected to go into the bank accounts, if any, operated by the respondents to see if there is any money there..... In those circumstances, the legal burden still remains on the applicant, but the evidential burden would have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. The evidential burden would be very easy for a respondent to discharge. He can simply show what assets he has.....such as land, cash in the bank and so on.....(Emphasis added).”

The Respondent’s submissions on substantial loss

19. The Respondent submitted that the Applicant urged that execution would lead to substantial loss, however, the risk of execution taking place does not, of itself, amount to substantial loss. In the case of James Wangalwa & Another –vs- Agnes Naliaka Cheseto [2012] eKLR, it was stated that:- “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. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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.” That the decree in question, being a money decree, cannot lead to any substantial loss. In the case of Kenya Hotel Properties Limited v Willesden Properties Limited Civil Application Nai. No. 322 of 2006 (UR 178/06), the Court of Appeal held as follows- “The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person



who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”.

20. The Respondent submitted that the Applicant is a foreign multi-billion company. It would not suffer any loss for paying a sum of merely Kshs. 2 million. On the contrary, being a foreign company, it may close at any time and relocate its assets to foreign countries which will render execution impossible. The Claimant/Respondent had proved that he is not a man of straw. He has adequate assets and resources to repay back the decretal sum should a need arise. He has also demonstrated that he has been seeking for terminal dues since the year 2016 when he was terminated. It is therefore just and fair that he is paid the fruits of his judgment.

Decision

21. The applicant had already lodged his appeal to the court of appeal and been given registration number of the case as COACA/E961/2024 Startimes Media Kenya Limited v Anderson Ngáru Gichuru. It seeks stay of execution pending determination of the said appeal. The appeal is on a money decree arising from the judgment sum of Kshs.2,058,000 which the applicant stated if paid before the appeal is determined there was a risk to it of substantial loss as the means of the respondent were unknown risking rendering any successful appeal nugatory.
22. The court upheld the position of the Court of Appeal on the issue of substantial loss in Kenya Hotel Properties Limited v Willesden Properties Limited Civil Application Nai. No. 322 of 2006 (UR 178/06), where the Court of Appeal held as follows- “The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”.
23. The court having perused the replying affidavit of the Respondent did not find evidence of his means. He was employed over 9 years ago by the Applicant and thus cannot rely on the record of employment to prove his means. 9 years is a long time to expect a former employee to remain in one situation. The burden shifted the respondent to prove his means once the Applicant stated he was not a man of known means. Having failed to do so the court held in favour of the applicant that they are likely to suffer substantial loss if the judgment monies are paid pending hearing and determination the appeal to the respondent.
24. The last factor under Order 42 Rule (6) CPC was security for the performance of judgment. The applicant stated it was ready to give security in the form of a bank guarantee for the judgment amount together with interest and costs. The Applicant submitted that as deponed in its Supporting Affidavit, it was ready and willing to furnish security in the form of a bank guarantee for the satisfaction of the decretal sum or on such terms as this Honourable Court may deem just as a prerequisite for orders sought. It was the Applicant’s contention that this is a sign of good faith as the Application is not meant to deny the Claimant the fruits of his judgment but to pave way for the expeditious determination of the Appeal while securing the interests of both parties. By furnishing of security, the interests of both parties are balanced. These were the observations of the Honourable Court in Focin Motorcyle Ltd v Ann Wangui and Another [2018] eKLR where the Court made the following observation: “The applicant has deponed that he is ready to provide security and went on to cite Arun C Sharma v Ashana



Raikundalia T/A Rairundalia & Co. Advocates wherein the Court stated that: “The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose. Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground for stay.”

25. The court perused the decision in *Focin Motorcycle Ltd v Ann Wangui and Another* [2018] eKLR and found the court ordered security of deposit as follows:- “ The appellant will provide security by depositing the decretal sum in an interest earning account in the joint names of the counsels on record for appellant and the respondent. “
26. Faced with a similar offer of security of performance of bank guarantee Justice S.N. Mutuku in *Kenya Power & Lightning Company v Loiman & another* (Suing as the Legal Representatives of Shadrack Kian) [2024] KEHC 9685 (KLR):-

However, I do not think a bank guarantee would be appropriate in this regard.

24. Consequently, I hereby allow the Notice of Motion dated 16th February 2024 in the following terms:
 - a. That this court be pleased to issue an order for stay of execution of the decree issued pending the hearing and determination of the intended appeal.
 - b. That the Applicant shall deposit the decretal sum in a joint interest earning account in both names of the advocates currently on record for the Applicant and the Respondent within 45 days from the date of this Ruling.”
27. Similarly, I do not think a bank guarantee would be appropriate security of performance. That proposal is rejected. Guided by the *Butt* decision that discretion should be exercised towards sustaining the appeal, the court observed the period of appeal is uncertain and inflation leads to loss of value of money over time. The court held that the security of deposit of the judgment amount in interest-earning account would serve the interest of both parties better.
28. The Court held that the applications were not resjudicata as there was no ruling on merit by any of the previous judges on the issue of stay of execution. Further the errors in judgment raised in the further affidavit of the Respondent were not properly before the court through an application for review of the judgment.
29. Consequently, the Court allows the Notice of Motion dated 2nd August 2024 and that of 14th November 2024 as follows:-
 - a. That this court be pleased to issue a temporary order for stay of execution of the judgment and decree issued in the suit pending the hearing and determination of the appeal.



- b. That the Applicant shall deposit the judgment sum in a joint interest-earning account in both names of the advocates currently on record for the Applicant and the Respondent within 45 days from the date of this Ruling.”
- c. Costs of the application to the Respondent.

30. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

claimant: Mugo

Respondent: Ms Kithinzi

