



**University of Nairobi v Kitumbui (Appeal E198 of 2024)
[2025] KEELRC 453 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 453 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E198 OF 2024
M MBARÚ, J
FEBRUARY 20, 2025**

BETWEEN

UNIVERSITY OF NAIROBI APPELLANT

AND

VICTOR KITUMBUI RESPONDENT

RULING

1. The appellant filed an application dated 12 November 2024 under the provisions of Order 42 Rule 6 seeking orders that the sum of Ksh.300,500 deposited in court will be deemed as a security deposit in compliance with conditional stay orders in Mombasa MCELRC No.E797 of 2021. There will be a stay of proceedings pending the appeal hearing herein.
2. The application is because judgment was delivered by the trial court on 24 September 2024 in favour of the respondent with an award of Ksh.300, 500 plus interests and costs from 10 December 2021. Aggrieved by the judgment, the appellant filed the instant appeal. The court issued interim orders directing the appellant to deposit the decretal sum in court, which the appellant has done.
3. The application is supported by the affidavit of Kenneth Sawe, the acting registrar administration, who avers that there is an arguable appeal with high chances of success. Unless the orders sought a stay of execution pending appeal, the appellant would suffer irreparable loss and damage. The deposit in court is to serve as security for the due performance of the judgment in the event the appeal is concluded.
4. In reply, the respondent filed his Replying Affidavit and aver that he should be allowed to enjoy the fruits of his judgment. The appellant was issued orders to deposit the decretal sum in court on 11 October 2024 within 14 days but failed to do so. The non-compliance is an attempt to frustrate his judgment, which was awarded him his dues upon finding of unfair termination of employment. No sufficient cause is established for the grant of the orders sought.



5. The appellant filed a Supplementary Affidavit of Paul Ndungu Kariuki, the director of ICT, who avers that in October 2024, the appellant faced general server and internet connectivity challenges that affected online operations, including access to court files and documents. In the first week of November 2024, the legal office and department experienced similar challenges, hence the non-compliance as directed.
6. Both parties attended court and agreed to file written submissions, which are analyzed. The issues which emerge for determination are whether a stay of execution should be issued, whether the security deposited in court should apply pending appeal, and who should pay costs.
7. The appellant filed the instant appeal on 26 September 2024, immediately upon the trial court judgment on 24 September 2024.
8. The appellant applied for a stay of execution pending appeal. The court directed for a deposit of the judgment sum in court. There was a delay in depositing within the timelines allocated.
9. The appellant filed the Supplementary Affidavit of the director, ICT, because of a downturn in general internet connectivity. Although the court virtual system is not dependent on the appellant's online operations but accessible at basic levels, including one's cellphone, computer, or any gadget with internet access, the appellant made the security deposit.
10. The conditions set under Order 42 Rule 6 of the Civil Procedure Rules require that an order of stay of execution be issued where good cause exists. The applicant must demonstrate that there is an arguable appeal with high chances of success and that unless the orders sought are issued, there will be irreparable loss and damage as held in the that Desbro (Kenya) Limited v General Printers Limited; NCBA Bank Kenya PLC & another (Objectors)[2021] eKLR where the court referred to the case of Tropical Commodities Suppliers Ltd v International Credit Bank (in Liquidation) Kampala Miscellaneous Application No. 379 of 2003 where the court held that;

...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, of real worth or value as distinguished from a loss without value or a loss that is merely nominal...
11. In the case of Bashir Godana v Fatuma Godana Tupi[2018] eKLR, the court, in granting an order of stay of execution, held that the discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by an order of the court as such order do not introduce any disadvantage but administers the justice that the case deserves.
12. In this regard, Section 17 of the *Employment and Labour Relations Court Act* gives a party dissatisfied with the court's orders the right of appeal. A successful party with a valid judgment has a legitimate expectation that he should be allowed to enjoy the fruits therefrom. To balance the right of appeal and the legitimate expectations, the orders of stay of execution secured through the security deposit in court shall be issued on the following conditions:
13. Accordingly, the application dated 12 November 2024 is allowed with an order of stay of execution pending a hearing of the appeal on the following conditions;
 - a. The deposit of Ksh.300,500 in court shall apply as security for the due performance of the judgment;
 - b. The appellant is to file and serve the Record of Appeal within 30 days of closing on 24 March 2025 taking into account the timelines allowed under the Employment and Labour Relations Court (Procedure) Rules, 2024;



- c. Where there is no compliance (b) above, orders (a) shall lapse and the deposit be released to the respondent.
- d. Costs to abide by the outcome of the appeal.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 20TH DAY OF FEBRUARY 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

