



**County Government of Kirinyaga & another v Njagi (Appeal
E034 of 2024) [2025] KEELRC 255 (KLR) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 255 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
APPEAL E034 OF 2024
ON MAKAU, J
FEBRUARY 4, 2025**

BETWEEN

COUNTY GOVERNMENT OF KIRINYAGA 1ST APPELLANT

KIRINYAGA COUNTY SECRETARY 2ND APPELLANT

AND

HON PETER NDAMBIRI NJAGI RESPONDENT

RULING

1. By Notice of Motion dated 3rd December 2024, the applicant seeks the following orders: -
 - a. THAT the Honorable Court be pleased to stay execution of the Judgment and Decree by Honourable M.W.Mutuku (Ms) CM dated 15th October 2024 pending the hearing and determination of this Application.
 - b. THAT this Honorable Court be pleased to grant any other orders it may deem just and expedient to meet the ends of justice.
 - c. THAT the costs of this Application be borne by the claimant.
2. The Application stands on the grounds set out on the body of the motion and the supporting Affidavit of one Tom Nyatika sworn on 3rd December 2024. The respondent has opposed the application by the Grounds of Opposition dated 11th December 2024. Both sides have also filed written submissions and orally highlighted the same on the issue of security.
3. The applicants submitted that they have met the legal threshold for grant of stay as provided under order 42 Rule 6 of the Civil Procedure Rules. They submitted that the Respondent has since left employment of the 1st Appellant and his whereabouts and his pecuniary liquidity is uncertain by the appellants. Consequently, it was submitted that should the court decline to grant stay pending the



appeal herein, the same will be rendered nugatory as the appellants will not recover the decretal sum of Kshs.5,700,000 should the appeal succeed, which amounts to substantial loss.

4. As regards to the issue of security for the due performance of the decree, the applicants offered to deposit in court Kshs.500,000 in the written submission but during the oral submission, the security was enhanced to Kshs.5,000,000 citing budgetary constraints.
5. Finally, the applicants submitted that the application for stay was made without unreasonable delay and prayed for the same to be allowed with costs.
6. The respondent on the other hand, contended that no evidence was advanced to prove that he is a man of straw and as such the application did not meet the legal threshold for granting stay pending appeal. It was submitted that mere allegation that he may not be in position to refund the decretal sum should the appeal succeed does not demonstrate substantial loss as required under Order 42 Rule 6 (2) of the Civil Procedure Rules.
7. As regards the issue of security, he submitted that the applicants ought to pay him half of the decretal sum and the balance by a bank guarantee and in the alternative, they deposit the whole decretal sum of Kshs.5,700,000 in a joint account in the name of the Advocates. He submitted that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules uses the word SHALL to mean that the security offered has to secure the due performance of the whole decree should the decree fail. For emphasis, reliance was placed on Solomon Mwangi Muthui v Mary Muthue Kasivu (Civil Appeal E 268 of 2023) (2024) KEHC 9627 (KLR) (29 July 2024) (Ruling).

Determination

8. Having considered the Application, supporting affidavit, grounds of opposition, memorandum of Appeal and the rival submissions, the main issue for determination is whether the application meets the legal threshold for granting stay pending appeal.
9. Order 42 Rule 6 (2) of the Civil Procedure Rules provides that: -
 - “No order for stay of execution shall be made under sub-rule (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.”

Delay

10. The impugned judgment was rendered on 15th October 2024 and the application herein was filed on 4th December 2024 equaling to a delay of one and half months. Judging by the fact that the appeal was filed one month before the application and no execution was imminent, I hold that the delay in making the application was not unreasonable.

Substantial loss

11. The appellant contended that the respondent’s whereabouts and his capacity to repay the decretal sum is not ascertainable to them. They argued that the respondent has since left his employment with the 1st Appellant and as such he may be unable to refund the decretal sum, should the appeal succeed.



12. The respondent did not swear any affidavit to controvert the alleged lack of capacity to pay. Instead he faulted the applicants for making mere allegations about his financial incapacity without adducing evidence to prove that he is a man of straw.

13. The issue of the burden of proof of substantial loss was settled by the Court of Appeal in *National Industrial Credit Bank Limited v Aquinas Francis Wasike and Another* [2006] e KLR, where it was held thus:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

14. I need not say more here since I am both guided and bound by the above precedent. The respondent has not discharged his evidential burden of proof of his capacity to repay the decretal sum should the appeal succeed. Consequently, I am satisfied that the applicants have demonstrated that they are likely to suffer substantial loss if the stay order is declined.

Security

15. The applicants offered a security of Kshs.5,000,000 to be deposited in court pending appeal but the respondent demanded payment of the decretal sum and bank guarantee as security for the balance. In the alternative, he demanded that the whole decretal sum of Kshs.5,700,000 be deposited as security in a joint bank account between the two Advocates.

16. The purpose of ordering for deposits of security for due performance of the decree cannot be over emphasized. It is mainly to strike a balance between the right to be heard on appeal, and the right to enjoy the fruit of the judgment immediately the appeal fails to succeed. It is meant to save a successful appellant the pain of pursuing the decree holder to recover the substration of the appeal and on the same note it saves the decree holder the agony of reviving execution against the judgment debtor after the appeal is dismissed.

17. Having put the said rights on a weighing scale, and considering the fact that the respondent has not demonstrated his capacity to refund any portion of the decretal sum, I direct the applicants to deposit in this court the sum of Kshs.5,000,000 as security for the due performance of the decree within 45 days of this ruling.

Disposition

18. I am satisfied that the applicant has met the legal threshold for grant of stay of execution of the impugned judgment pending appeal herein. The stay order is given on condition that, the applicants deposit the Kshs.5,000,000 in this court as security for due performance of the impugned decree within 45 days of this ruling. In default to comply with the said condition, the stay order shall lapse automatically. Costs of the motion shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS 4TH DAY OF FEBRUARY, 2025.

ONESMUS N MAKAU

JUDGE



Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

