



**St Elizabeth Academy Karen Limited v Mutuota (Employment and Labour Relations Appeal E196 of 2024) [2025] KEELRC 1046 (KLR) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1046 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E196 OF 2024**

**JW KELI, J  
MARCH 28, 2025**

**BETWEEN**  
**ST ELIZABETH ACADEMY KAREN LIMITED ..... APPLICANT**  
**AND**  
**SIMON MUTUOTA ..... RESPONDENT**

**RULING**

1. The Appellant filed an application by way of Notice of Motion dated 15<sup>th</sup> October 2024 brought Under Order 50 Rule 6, Order 42 Rule 6 and Order 9 Rule 9 of the Civil Procedure Rules 2010, Section 79G, and Sections 1A, 1B, 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, and all other enabling provisions of the law for Orders: -
  1. Spent
  2. Spent
  3. That this Honourable Court be pleased to stay the execution of the Judgment and Decree issued on 12th February 2024, and the 19th of February respectively, all subsequent proceedings, and all consequential execution orders including the Garnishee Orders, Warrants of Attachment, and seizure of the Applicant's movable properties, pending the hearing and determination of the appeal.
  4. That this Honourable Court be pleased to stay the execution of the Warrants of Attachment issued on 15th August 2024 and any subsequent seizure, sale, or auction of the Applicant's assets, including the public auction of the school bus, Isuzu FRR registration number KBB 287X, pending the hearing and determination of the intended appeal.
  5. That this Honourable Court be pleased to make such further or other orders as it deems just and expedient in the circumstances of this case.



6. That the costs of this application be in the cause.
2. Grounds of the application
    - a. The judgment in MCELRC No. E1236 of 2023 was entered ex parte on 12th February 2024, awarding the Respondent Kshs. 390,832 together with costs and interest. The decree was subsequently issued on 19th February 2024.
    - b. Following the delivery of the Judgement and Decree, the Applicant herein filed an application dated 20th February 2024 seeking a stay of execution, setting aside the ex parte judgment, and enlargement of time to file its defence.
    - c. However, said application was dismissed in a ruling delivered on 1<sup>st</sup> July 2024.
    - d. The Applicant, discontented with the dismissal of its application, engaged its former legal representatives, FEB Advocates, to file an Appeal. Subsequently, the said Advocates filed a Memorandum of Appeal dated 15th July 2024. However, an inadvertent error and oversight by the said Advocate to file the intended Appeal which was filed on the 15th July 2024 by its former advocates but no attachments e.g the judgements, orders, decrees and proceedings were filed in support of the Memorandum of Appeal thereby rendering the Memorandum of Appeal as incomplete and unsubstantiated to support the possible success of the Applicant's Appeal.
    - e. The delay in filing the appeal is attributable to the advocates failure, and the Applicant should not be condemned to suffer the consequences of its advocate's negligence.
    - f. The Applicant has upon learning of the procedural lapse, moved with speed to file this Application seeking to regularize the appeal process.
    - g. That judgement having been delivered on the 12th of February 2024, leave is required for the firm of Horeria Kamau & Company Advocates to come on record for the Applicant in the place of FEB Advocates in line with the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2020.
    - h. The Respondent has initiated execution proceedings, including the filing of Garnishee Applications, warrants of attachment, and seizure of the Applicant's movable properties, which, if executed, will cripple the Applicant's operations and render the intended appeal nugatory.
    - i. The Applicant is likely to suffer substantial and irreparable loss if further proceedings of the execution is carried out, as the Respondent seeks to enforce the judgment through the attachment and sale of the Applicant's assets, as well as the attachment of the Applicant's bank accounts which could result in the cessation of its educational operations, to the detriment of students, staff, and the general public.
    - j. The Applicant has a meritorious appeal with high chances of success, and the failure to file the attached complete bundle of the Memorandum of Appeal on time was not due to any wilful neglect or delay on the Applicant's part, but on the part of the blame on their previous Advocates on record.
    - k. The balance of convenience tilts in favour of granting the orders sought as the Applicant's ability to continue operating its educational institution outweighs any inconvenience to the Respondent, which can be compensated by an award of damages should the appeal fail.



- l. It is in the interest of justice and fairness that this Honourable Court exercises its discretion in favour of the Applicant to prevent an unjust and oppressive outcome, particularly in light of the fact that the Respondent has already commenced execution proceedings.
  - m. The Applicant is willing to comply with any conditions that this Honourable Court may impose as a precondition for stay, including the provision of appropriate security for costs of the Decretal sum within 90 days of the Orders of this Honourable Court by depositing security in the form of a logbook or title deed with the Court.
3. The application was supported by the Affidavit of Ann Wanjiku Munene dated 15<sup>th</sup> October 2024 where she annexed the default judgment of the lower court dated 12<sup>th</sup> February 2024; copies of application dated 20<sup>th</sup> February 2024 seeking to set aside the default judgment and enlarge time to file defence and a copy of the ruling date 20<sup>th</sup> February 2024. She also annexed a copy of the memorandum of appeal dated 15<sup>th</sup> July 2024, copy of notice of change of advocates dated 15<sup>th</sup> October 2024, copy of letter dated 8<sup>th</sup> October 2024 to the Deputy Registrar Milimani law courts dated requesting for certified copies of the proceedings, ruling, judgment and decree, copies of garnishee proceedings, Garnishee orders dated 15<sup>th</sup> October 2024, warrants of attachment of movable poverty dated 15<sup>th</sup> August 2024, notification of sale by auction of school bus Isuzu FRR KBB 287X, October 2024 IGCSE exam timetable, 2024 KCSE exam timetable, and draft response to the claim.
4. The application as opposed by the respondent /Decree Holder who filed a replying affidavit dated 20<sup>th</sup> November 2024 to the effect that the application had no merit, that the basis of substantive loss based on the garnishee proceedings was disposed of with as there were enough funds to settle the decree, the IGSCSE exams ended in October 2024, and that the application had been brought with unreasonable delay the impugned ruling having been delivered on the 28<sup>th</sup> June 2024 after which he started execution of which the applicant as aware. The applicant stated that this being a money decree the only security that can be offered is of the full decretal amount to be deposited in a joint interest-earning account in 30 days.
5. The applicant in reply to the replying affidavit filed a supplementary Affidavit of Ann Wanjiku Munene dated 31<sup>st</sup> January 2025 who annexed the memorandum of appeal dated 15<sup>th</sup> July 2024 , and a copy of a letter dated 8<sup>th</sup> October 2024 requesting for certified copies of proceedings and decisions of the lower court.
6. The court directed the application be canvassed by way of written submissions and both parties filed.

## **Decision**

### **Whether the application for stay pending appeal was merited.**

7. 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.”

8. 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.”

9. The judgment of the lower court for which execution is sought to be stayed was a default judgment. There is a draft response annexed, which the court on perusal found raised triable issues. It is trite in application for stay of execution the court is to be satisfied on the three conditions under Order 42 (6) namely:-“(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.”

10. The respondent states that since the ruling on the application to set aside the default judgement was delivered on the 28<sup>th</sup> of June 2024, and the memorandum of appeal filed on the 15<sup>th</sup> July 2024 and the instant application filed on the 16<sup>th</sup> October 2024, there was unreasonable delay. It was the applicant’s case that the delay was on account lapse of the former the advocate as they gave instruction timely when filing the memorandum of appeal. The court noted that authorities relied on. What is unreasonable delay varies from case to case. The applicant filed appeal on time an indication to the court of non –satisfaction with the decision, consequently the intention to seek a stay. The court accepted the explanation of the blame on the former advocate's failure to file the application for stay with the memorandum of appeal.

11. On the condition of substantial loss the applicant submitted that they were unlikely to recover the money if successful on appeal. The respondent did not in response demonstrate ability to refund the money. 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 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” The court finds that for failure to demonstrate ability to refund the money in the event the appeal is successful potential applicant substantive loss to the appellant /applicant was demonstrated.

12. The last factor under Order 42 Rule (6) was security for the performance of judgment. The applicant stated it was ready to give security in the form of a logbook or title deed. That the decretal sum was substantial and it requires time to arrange security.
13. The respondent was opposed to the offer of log book or title deed and submitted that copies of the same was not annexed as evidence. That the statement merely meant the applicant had assets capable of being sold to settle the decretal sum and relied on the decision in Anwar Ali & another v Monica Muthoni & another 2021 e KLR where the court took cognizance that the applicant did not attach any official search or any valuation report showing the value of the motor vehicle or land to establish the same was of equal value as the decretal sum. That the court observed that such security may compromise the right realise the fruit of judgment as their value may depreciate due to time taken in court process.. The Respondent relied on several authorities to the effect that a log book was not suitable security due to fluidity of the asset. See Esri Star Ltd & another v Sila Oweshiwani (2018)e KLR , Regional institute of Business management v Lucas Ondong’ Otieno 2021 e KLR and Simba Coach Limited v Kiiriyu Merchants Auctioneers (2019)
14. The Respondent submitted that the best security was a deposit of the decretal sum in joint interest earning account and submitted that the applicant relied on the decision in Focin Motorcycle Ltd v Ann Wangui and Another [2018] e KLR where court ordered security of deposit of decretal amount in joint interest-earning bank account. In Focin Motorcycle Ltd v Ann Wangui and Another [2018] eKLR 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.”
15. The Court finds that the security offered on a log book or title deed was unsatisfactory for reason of lack of demonstration of the property existence and value. The court upheld the decision in Focin Motorcycle Ltd v Ann Wangui and Another [2018] eKLR and found that the type of security offered by the applicant did not meet the condition under Rule 42(6) of the Civil Procedure Rules as security for due performance of such decree or order as may ultimately be binding on the applicant. The court in the circumstances then agreed with the respondent and ordered security of deposit of the decretal



sum as per decree dated 9<sup>th</sup> February 2024 within 45 days of this order in joint interest-earning account held by the advocates for the parties.

## **Conclusion**

16. In conclusion, the application dated 15<sup>th</sup> October 2024 is allowed as follows:-
  - A. That this Honourable Court is pleased to grant a temporary order of stay the execution of the Judgment and Decree issued on February 12, 2024, and the 19<sup>th</sup> of February respectively, all subsequent proceedings, and all consequential execution orders including the Garnishee Orders, Warrants of Attachment, and seizure of the Applicant's movable properties, pending the hearing and determination of the appeal on condition that the decretal amount is deposited in joint interest earning bank account in the name of the advocates on record within 45 days of this Order in default to lapse.
  - B. That this Honourable Court is pleased to stay the execution of the Warrants of Attachment issued on 15<sup>th</sup> August 2024 and any subsequent seizure, sale, or auction of the Applicant's assets, including the public auction of the school bus, Isuzu FRR registration number KBB 287X, pending the hearing and determination of the intended appeal on condition Order A above and on the deposit the Motor Vehicle be released to the applicant upon settlement of the auctioneer charges.
  - c. Cost in the cause.
17. Mention on May 21, 2025 for further directions in the appeal.
18. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH, 2025.**

**J.W. KELI,  
JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Appellant : - Kimani Horeria

Respondent: Ms. Akinyi hb Mbaabu

