



**Mt. Elgon Orchards Ltd v Shikuku (Appeal E007 of 2024)  
[2025] KEELRC 1027 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1027 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE  
APPEAL E007 OF 2024  
MA ONYANGO, J  
MARCH 27, 2025**

**BETWEEN**

**MT. ELGON ORCHARDS LTD ..... APPELLANT**

**AND**

**ROBERT WANJALA SHIKUKU ..... RESPONDENT**

**RULING**

1. Vide an application dated 9<sup>th</sup> September, 2024 the Appellant seeks the following orders:
  - a. That the Honourable Court be pleased to certify this matter as urgent, that service be dispensed with in the first instance and the Application be heard Ex-Parte.
  - b. That this Honourable court be pleased to order stay of execution in Kitale CMELRC Suit No. 19 of 2023 Robert Wanjala Shikuku V Mt. Elgon Orchards Limited pending the hearing and determination of this Application.
  - c. That this Honourable court be pleased to order stay of execution in Kitale CMELRC Suit No. 19 of 2023 Robert Wanjala Shikuku V Mt Elgon Orchards Limited pending the hearing and determination of this Appeal.
  - d. That the costs of this Application be provided for.
2. The grounds in support of the application are that:
  - i. That Hon. Symphie Makila- PM entered Judgment in Kitale CMELRC Suit No. 19 of 2023 Robert Wanjala Shikuku V Mt Elgon Orchards Limited against the Appellant/Applicant on 14th August 2024 without taking into consideration the Appellant/ Applicants evidence.
  - ii. That the Court delivered judgment in favour of the Respondent herein against the Appellant in terms that:



- (i) Compensation for unfair termination of Kshs.180,000/=
  - (ii) One month's salary in lieu of Notice of Kshs. 15,000/=
  - (iii) Leave pay of Kshs. 121,154/=
  - (iv) Salary arrears of Kshs.15,000/= all totalling to Kshs.331,000/= together with costs and interests of the suit from the date of filing suit.
- b) Certificate of service pursuant to Section 51 of the *Employment Act*
- iii. That being aggrieved with the judgment of the Court, the Appellant wishes to appeal against the Judgment of the Court on the grounds that:
    - a. That the Learned Trial Magistrate erred in law and fact by failing to consider the evidence adduced by the Appellant by awarding the Claimant/Respondent Compensation for unfair termination of Kshs.180,000/=.
    - b. That the Learned Trial Magistrate erred in law and by failing to consider the evidence adduced by the Appellant by awarding the Claimant/Respondent Kes One month's salary in lieu of Notice of Kshs. 15,000/-.
    - c. That the Learned Trial Magistrate erred in law and by failing to consider the evidence adduced by the Appellant by awarding the Claimant/Respondent Leave pay of Kshs. 121,154/=.
    - d. That the Learned Trial Magistrate erred in law and by failing to consider the evidence adduced by the Appellant by awarding the Claimant/Respondent Salary arrears of Kshs.15,000/=.
    - e. That the Learned Trial Magistrate erred in law and by failing to consider the evidence adduced by the Appellant by awarding the Claimant/Respondent a Certificate of service.
    - f. That the Learned Magistrate erred in law and fact by failing to consider the evidence adduced by The Appellant by awarding the Claimant/Respondent costs of the suit.
    - g. That the Appellant/Applicant herein is apprehensive that it shall be grossly prejudiced should the execution proceed and shall not be able to recover the decretal sum from the Respondent/Claimant.
    - h. That the Respondent will not be prejudiced should the Appellant/Applicant herein application be allowed and stay of execution granted pending hearing and conclusion of this Appeal.
    - i. That the Appellant/Applicant therefore prays that the Orders sought herein be allowed as prayed.
- 3. The application is brought under section 12(3) of the *Employment and Labour Relations Court Act*, Under Rule 12 & 21 of the Employment and Labour Relations Court (Procedure) Rules, 2024, Order 22 rule 22, Order 42 Rules 4 and 6, Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, Section 3,3A, 77,78, 79G, 95 of the *Civil Procedure Act* and all other enabling provisions of the law
  - 4. The Application is supported by the grounds on the face thereof and the supporting affidavit of Judy Sambay sworn on 9<sup>th</sup> September, 2024.



5. In summary, the Applicant is aggrieved by the judgment of Hon. Sympie Makila, PM dated and delivered on 14<sup>th</sup> August, 2024 in Kitale CMELRC Suit No. 19 of 2023 Robert Wanjala Shikuku V Mt Elgon Orchards.
6. The Applicant states that it has lodged an appeal against the whole of the decision and applied for certified copies of the judgment and proceedings for purposes of the appeal.
7. The Applicant states that the appeal is merited and has high chances of success, that should orders of stay not be granted it stands to suffer substantial loss and damages as the Claimant (Respondent herein) may levy execution against the Applicant since no stay was obtained from the trial court.
8. The Applicant states that it is apprehensive that the appeal would be rendered nugatory and a pure academic exercise should the orders sought not be granted as it may never recover the decretal sum from the Respondent herein who has no known source of income or financial stability as was established during cross examination in chief at the trial.
9. The Applicant states it is willing to provide security as may be determined by this court to ensure due performance of the decree.
10. It states that the Respondent will not be prejudiced by the grant of the orders sought and it is in the interest of equity and justice to grant the orders.
11. The Respondent opposes the application through his replying affidavit sworn on 22<sup>nd</sup> October, 2024 in which he deposes that the merits and demerits of the appeal cannot be canvassed at this application stage.
12. The Respondent states that the process of execution has not been put in motion, that the Applicant has not demonstrated it stands to suffer loss and the fears of the Applicant that execution is likely to be put in motion do not amount to substantial loss.
13. The Respondent contends that execution is a lawful process hence 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.
14. The Respondent further states that having worked for the Appellant for many years he has established himself as a successful farmer hence any allegations that he has no known source of income are not substantiated.
15. It is the position of the Respondent that should the court grant the orders sought the Applicant should be compelled to pay half of the decretal sum to him as a condition for the stay pending appeal.
16. The application was disposed of by way of written submissions.
17. In its submissions dated 9<sup>th</sup> December, 2024 the Applicant sets out the issues for determination to be whether the Applicant should be granted stay of execution pending the hearing and determination of this application and appeal and whether costs of the application should be provided for.
18. On the first issue the Applicant submits that the principles of stay of execution were stated in the case of *Giella v Cassman Brown & co. Ltd* (1973) EA 358 being:
  - a. Whether the applicant has shown prima facie case with a probability of success;
  - b. Whether the applicant shall suffer irreparable injury which cannot be compensated by damages; and,



- c. If the court is in doubt, whether it can decide the application on a balance of convenience.
19. On the first issue the Applicant submits that from the evidence it adduced during trial it is clear that it has a prima facie case and the appeal has high probability of success.
  20. On the second principle whether the Applicant would suffer irreparable injury which cannot be compensated by damages the Applicant submits that the judgment was arrived at without consideration of the evidence it adduced at the trial and is therefore prejudicial to the Applicant.
  21. It further submits that the appeal has high chances of success relying on the decision in *Butt v Rent Restriction Tribunal* [1979] eKLR where the Court of Appeal gave guidance on how a court should exercise discretion in granting or refusing an application for stay of execution.
  22. The Applicant reiterated that the Respondent has no known source of income and if the orders sought in the application are not granted and the Respondent executes, the appeal will be an academic exercise.
  23. The Applicant further relied on the decision in *G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Bishar & another* [2018] eKLR where the court considered the Respondent's ability to repay the decretal sum in the event the appeal succeeds as there was no affidavit evidence by the Respondent on record on means.
  24. The Applicant submits that the fact that there is yet no application for execution is not an undertaking not to execute. It submits that it is willing and able to comply with an order as to security pending determination of the appeal but the same should be deposited into a joint account or with the court and not paid to the Respondent.
  25. The Applicant further submits that there has been no inordinate delay in bringing this application or the appeal as the judgment in the trial court was delivered on 14<sup>th</sup> August, 2024 and the Memorandum of Appeal filed on 9<sup>th</sup> September, 2024.
  26. The Applicant submits that it is in the interest of justice to grant the orders sought.
  27. On costs of the application the Applicant submits that costs should follow the event.
  28. The Respondent filed submissions dated 2<sup>nd</sup> December, 2024 in which it sets out the issues for determination in the instant application to be whether stay of execution orders should be granted to the Appellant pending hearing of the appeal and who should pay costs of the application.
  29. It is the submission of the Respondent that the instant application is incompetent for failure to comply with the provisions of law to warrant the orders sought by the Appellant.
  30. It is submitted that paragraphs 2, 3, 4, 5, 6 and 7 of the Appellant's supporting affidavit delve into the merits and demerits of the appeal by replicating the grounds of appeal.
  31. The Respondent poses the question: can the said appeal be determined in this application? He then answers the question in the negative, relying on the decision in *Peter Samoei v Issac K Ruto* [2012] eKLR where the court stated that when considering an application for stay it need not go into the merits of the appeal.
  32. The Respondent submits that the conditions for granting stay of execution pending appeal are provided for under Order 42 rule 6 of the Civil Procedure Rules. He submits that the Applicant has not demonstrated the substantial loss it is likely to suffer should orders of stay of execution not be granted. That the execution process is yet to be put in motion.



33. Relying on Hulsbury's Laws of England Vol. 17 paragraph 14 which echoes section 107 of the [Evidence Act](#), the Respondent submits that the burden of proof lies on the Applicant.
34. For emphasis the Respondent quotes the case of Machira T/A Machira & Co. Advocates v East African Standard (No. 2) (2002) KLR 63 as quoted by the Court of Appeal in Njenga v Njeri & 2 others (Civil Appeal No. E125 of 2023 where the court considered the instances that amount to substantial loss.
35. It is submitted that although the Applicant has offered to provide security it does not proposed the amount. The Respondent urges the court to make an order that the Applicant pays half of the decretal amount to the Respondent as security for the appeal, relying on the decision in Arun C. Sharma v Ashana Raikundalia T/A Raikundalia & Co. Advocates [2014] eKLR where the court stated the purpose of security for due performance of the decree.

### **Analysis and Determination**

36. Having considered the rival submissions of the parties in respect of the application before me for determination it is my view that the issue for determination is whether stay of execution pending judgment should be granted to the Applicant.
37. With all due respect to the Applicant, Giella v Cassman Brown does not set out the principles for stay of execution pending appeal, but interlocutory injunctions. Stay of execution pending appeal is elaborately provided for in Order 42 Rule 6 of the Civil Procedure Rules as correctly submitted by the Respondent.
38. Order 42 Rule 6 provides:
  6.
    - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
    - (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.
39. The principles for grant of stay of execution are thus proof of substantial loss, unreasonable delay and security for due performance of the decree. The court is also enjoined to ensure sufficient cause for grant of such orders.



40. The Primary purpose of stay of execution is to preserve the status quo pending the hearing of the appeal as was held in *RWW v EKW* [2019] eKLR, where the court observed that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

41. In *Butt v Rent Restriction Tribunal* (1982) KLR the Court gave guidance on how the court’s discretion should be exercised as follows –

- “1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing 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.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. 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 for costs as ordered will cause the order for stay of execution to lapse.”

42. In *Antoine Ndiaye v African Virtual University* (2015) eKLR the court opined -

“...stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the Court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...”

43. In the case of *Mutua Kilonzo v Kioko David Machakos* [2008] eKLR the Court in dismissing an application for stay pending appeal for a monetary decree as the Applicant/Appellant failed to prove how he will suffer substantial loss stated that:

“To my mind, the Applicant has failed to establish what loss he would suffer if the decree is executed. I say this with respect because Lilian Munyiri aforesaid is an officer at Gateway Insurance Company Ltd and has not stated that she personally knows the means of the Respondent. She merely states that from evidence at the trial he is a man of straw. How that



conclusion is reached and based on what evidence, I cannot tell. It is now a catchphrase that every Respondent in an application for stay of execution is called a man of no means? That is all fine if there is evidence to back up that position. If the job done or other means of living are clearly deponed to, then it is easy to fathom what means the Respondent has.

44. Ringera J in Lalji Bhimji put it succinctly when he stated thus:

“..he (the applicant) must persuade the Court that the decree holder is a man of straw from whom it will be nigh to impossible or at least very difficult to obtain back the decretal amount in the event the intended appeal succeeding. Such persuasion must spring from affidavits or evidence on record.”

45. In M/S Portreitz Maternity v James Karanja Kabia – Civil Appeal No.6 of 1997 the Court stated that:

“The right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

46. The Respondent herein submitted that he is a man of means. As rightfully pointed out by the Applicant, no affidavit of means has been submitted by the Respondent. It is therefore not possible for the court to ascertain his ability to refund whatever portion of the decretal amount may be released to him should the appeal be successful.

47. As is provided in Order 42 Rule 6(2), the purpose of security is to ensure due performance of the decree should the appeal not succeed. It is also intended to act as a sign of good faith to deter litigants who may file appeal only for the purpose of delaying the successful litigant from enjoying the fruits of his appeal, hence the requirement for the court to ensure sufficient cause and equity in granting orders of stay.

48. In the instant case I am satisfied from the grounds of appeal that the appeal is not frivolous. As to whether the same may or may not be successful, that is to be determined after the appeal has been heard.

49. I therefore grant the orders sought in the application dated 9<sup>th</sup> September, 2024 in the following terms:

- a. There shall be stay of execution of the judgment of Hon. Sympie Makila, PM dated and delivered on 14<sup>th</sup> August, 2024 in Kitale CMELRC Suit No. 19 of 2023 Robert Wanjala Shikuku V Mt. Elgon Orchards pending hearing and determination of the appeal herein.
- b. The stay shall be conditional upon the Appellant depositing 50% of the decretal sum in a joint interest earning account in the names of counsel for both parties.
- c. Costs of this application shall be in the appeal.

50. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 27<sup>TH</sup> DAY OF MARCH, 2025.**

**M. ONYANGO**

**JUDGE**

