



**Mosongo v Pathologists Lancet Kenya (Cause E341 of 2022)
[2025] KEELRC 937 (KLR) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 937 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E341 OF 2022
DKN MARETE, J
MARCH 26, 2025**

BETWEEN

EDWIN MOSONGO CLAIMANT

AND

PATHOLOGISTS LANCET KENYA RESPONDENT

RULING

1. This is an application dated 13th December, 2024 and comes out as follows;
 1. That the Application herein be certified urgent and heard ex-parte in the first instance.
 2. That pending hearing of this application inter-partes, this Honourable Court be pleased to grant an interim order for stay of execution of the Judgment delivered on 27 November 2024 by Honourable Justice D. K. Njagi Marete.
 3. That pending hearing and determination of this application, this Honourable Court be pleased to grant an interim order for stay of execution of the judgment delivered on 27th November 2024 by Honourable Justice D. K. Njagi Marete.
 4. That pending the hearing and determination of the Appeal, this Honourable Court be pleased to grant an order for stay of execution of the Judgment delivered on 27 November 2024 by Honourable Justice D. K. Njagi Marete.
 5. That the Applicant/Respondent be at liberty to apply for further orders and/or directions as this Honourable Court may deem fit and just to grant.
 6. That costs of an incidental to this application do abide the outcome of the appeal.



2. The application is grounded on the basis that the applicant is aggrieved by this court's judgment dated 27th November, 2024 and intends to appeal against it. This is on grounds, inter alia as set out on paragraph IV of the application.
3. It is the applicant's position that the appeal is meritorious and raises several considerable issues for determination as shall be set out in the Memorandum of appeal. Further, the applicant will suffer irreparable loss and damage in the event of execution if the decree for the sum of Kshs.5,877,227.00 is paid to the claimant.
4. The applicant's further pledges that she is willing and ready to provide security for the decretal sum and also abide by any terms and conditions that may be imposed by this court.
5. The Respondent in a Replying Affidavit sworn on 23rd December, 2024 opposes the application for being premature, unmeritorious and speculative in the following manner;
 - a. the Applicant has not filed an appeal against the judgment of this Honourable Court and there is no substantive appeal pending before the Court of Appeal therefore any order of stay of execution will be issued Indefinitely and in perpetuity and will amount to a grave miscarriage of justice:
 - b. under Order 50 Rule 4 of the Civil Procedure Rules, no execution can take place during the Court's vacation period which ends on 13 January 2025 therefore the allegation that I will hurriedly proceed to executing the judgment is unfounded thus making this application premature:
 - c. filing of the Bill of Costs is a lawful and procedural step that follows the delivery of a valid judgment and does not in itself constitute an act of execution or create an Irreparable effect that would Invalidate any intended appeal:
 - d. there is no Imminent execution against the Applicant and neither has a proclamation or attachment notice against the Applicant's property been issued therefore the instant application is premature and highly speculative:
 - e. as the successful litigant, the balance of convenience falls against granting the orders of stay of execution as I stand to suffer greater prejudice as it would unjustly delay the realization of the decretal amount,
 - f. the Applicant will suffer no irreparable harm from satisfying the decree, as restitution remains an available remedy should the Applicant succeed in the Intended appeal
 - g. the Respondent is more than capable of fully refunding any monies paid to him under the decree in the event any appeal filed by the Applicant succeeds:
 - h. the Applicant has merely raised speculative concerns that cannot override my rights to the fruits of the judgment, to which granting the prayers sought would be unjust and contrary to the principles of fairness and finality of litigation.
6. Further, the Respondent avers as follows;
 4. THAT further to the above, the Applicant has not demonstrated its financial capacity or furnished any proof of its ability to provide adequate security for costs and this raises genuine and serious concerns that should stay of execution be granted, I will be exposed to prolonged litigation without any assurance of compensation.



5. THAT, consequently, the Applicant's application is effectively inviting this Honourable Court to sit on appeal over its own judgment which is an abuse of court process and contrary to the well-founded principle that litigation must come to an end.
7. The Applicant in a Supplementary Affidavit sworn on 13th January, 2025 avers that the issues raised in the Replying Affidavit of the Respondent are not onerous. This is as follow;
 3. THAT I believe that the Respondent's Replying Affidavit contains averments that are meant to muddle the issues before this Honourable Court and defeat the intent of the instant application and the intended appeal.
 4. THAT in response to the contents of paragraph 3 of the Respondent's Replying Affidavit, I wish to reiterate that the instant application is properly filed before this Honourable Court and the same satisfies the requirements for grant of stay of execution pending appeal.
 7. That in response to the allegations contained in paragraph 3(1) of the Respondent's Replying Affidavit, I wish to state that the Applicant has satisfied the criteria for grant of stay of execution which I have been advised by the Applicant's advocates include: timeous filing of the instant application; demonstrating that substantial loss would occur unless stay is granted, 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. That that the instant application was timeously filed before this Honourable Court, a day after the lapse of the initial 15 days' stay that was granted on 27 November 2024.
 9. That I wish to state that the Applicant is prone to suffer substantial loss if the stay orders are not granted. Execution of the money decree through a pay-out of a substantial amount (compensation of Kshs 5,877,227.00 plus costs and interests) would cause the diversion of budgeted resources that would ordinarily be used in providing essential medical services in the form of laboratory pathology services to the Kenyan public. Consequently, such diversion has the adverse effects of crippling the business operations of the Applicant Company and driving it out of business.
8. The Respondent/Applicant in a written submission dated 15th January, 2025 seeks to rely on Rule 73(2) of the ELRC Procedure Rules which amplifies the application of Order 42 Rule 6 of the Civil Procedure Rules, 2010 in matters of stay of execution. This is as follows;
 - (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.
9. The Applicant further submitted in reliance on authority of *Butt vs. Rent Restriction Tribunal [1979]* where the court emphasized on the factors to be considered in granting stay of execution thus;
 - i. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent on appeal.
 - ii. 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 the appeal court reverse the judge's discretion.



- iii. 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.
 - iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
10. It is her case that this application meets the criterion set out above for issue of stay of execution.
 11. The Claimant/Respondent in his written submissionS dated 22nd January, 2025 submits that the application in toto fails to meet the legal muster for grant of stay of execution as envisioned by order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Applicant seeks stay of the execution pending appeal in an intended appeal.
 12. The Applicant’s reliance on a draft of Memorandum of Appeal and not filing an actual appeal raises issues on her bona fides. It smacks good faith and sincerity in so doing. Nothing would have prevented the applicant from filing an appeal and seeking stay the normal way. Further, the search for stay is without a definitive timeframe thereby allowing the stay to persist whether an appeal is filed or not. This would all together place the Respondent in a state of perpetual uncertainty.
 13. The Respondent further submits that the ground of the intended appeals are not arguable or do not raise serious matters for determination bearing in mind that the Applicant had constructively and wrongfully terminated the employment of the Respondent. Moreover, the separation was not voluntary in nature and that the Applicant had failed to tender any evidence to support its counter claim.
 14. The Respondent again disputes that the Applicant has demonstrated substantial loss in the event of non-issue of stay of execution. Here, he relies on authority of Kenya Shell Limited V Benjamin Karuga Kibiru & Another [1986] KLR 410 where the Court of Appeal held thus;

“..if there is no evidence of substantial loss to the applicant it would be a rare case when on appeal would be rendered nugatory by some other event.

Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay..

Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.
 15. Again, the court was emphatic that;

“It is not sufficient by merely stating that the sum of Shs 20.380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be?

In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted. By granting a stay would mean that status out should remain as it before were before Judgment. What assurance can there be of appeal success ding?

On the other hand, granting the stay would be denying a successful ligand of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay.
 16. The Respondent finality faults the Applicant case and submission of a deposit of the sum of Kshs.1,000,000.00 despite an earlier offer of such security as the court may decide.



17. Overall, the Respondent's case and submissions overwhelm that of the applicant. The Application is sufficiently premature for being experimental. It is not common and is unusual for applicants to seek stay in instances where there is no appeal on record. This is speculative and unfair to the decree holder who at all times is entitled to the fruits of his judgment.
18. Again, the Applicant has not offered sufficient evidence of irreparable loss that would arise if stay of execution was not granted. This is also so for evidence of the appeal being rendered nugatory in such instance.
19. I am therefore inclined to dismiss the application with orders that each party bears their costs of the same.

DELIVERED, DATED AND SIGNED THIS 26TH DAY OF MARCH 2025.

D. K. NJAGI MARETE

JUDGE

Appearances:

1. Mr. Nyanjwa instructed by Mwaniki Gachoka & Company Advocates for the Applicant/Judgment Debtor
2. Mr. Munene instructed by MMW Advocates LLP for the Decree Holder

