



**Frodak Kenya Limited v Makunda (Appeal E005 of 2023)
[2025] KEELRC 1122 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1122 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
APPEAL E005 OF 2023
DN NDERITU, J
APRIL 4, 2025**

BETWEEN

FRODAK KENYA LIMITED APPELLANT

AND

PHILIP LUMANYASI MAKUNDA RESPONDENT

RULING

I. Introduction

1. In a notice of motion dated 9th December, 2024 (the application) under certificate of urgency, the appellant/applicant (applicant) is seeking for orders that –
 - i. Spent.
 - ii. Spent.
 - iii. There be a stay of execution of the judgment and decree of this court Hon. Lady Justice Keli. J dated and delivered on 18th September, 2024, and all its consequential orders and processes, pending hearing and determination of an intended appeal to the Court of Appeal.
 - iv. The court be pleased to issue any further orders in the interest of justice so as to preserve and protect the appellant's/applicant's undoubted right of appeal conferred both by *the Constitution* and statute law.
 - v. Costs of this application be in the intended appeal.
2. The application is expressed to be premised on Sections 3, 17 & 20 of the *Employment and Labour Relations Court Act*, Rules 21(1), 44, 45, 47, 54, 58 & 68 of the Employment and Labour Relations Court (Procedure) Rules, 2024, and Order 42 Rule 6 of the Civil Procedure Rules, 2010. It is based on the grounds on the face of it.



3. The application is supported with the affidavit sworn by Fredrick Otieno Onyango, the director of the applicant, on even date with several annexures thereto.
4. In opposition to the application, the respondent filed a replying affidavit sworn by the respondent on 17th December, 2024.
5. By consent, the court directed that both the application and preliminary objection be canvassed by way of written submissions.
6. The applicant's counsel, Miss. Achieng, filed written submissions on 28th January, 2025. The respondent's counsel, Mr. Kagunza, filed on 5th February, 2025.

II. Evidence

7. In the application and the supporting affidavit, it is deponed that the applicant filed a notice of appeal (FO1) after being dissatisfied with the judgment delivered on 18th September, 2024.
8. It is deponed that in the judgment, the court issued a 30-day stay of execution which shall lapse before the intended appeal is heard and determined necessitating the filing of present application seeking to stay imminent execution of the decree by the respondent.
9. It is deponed that the intended appeal is arguable with a high chance of success and that unless the stay of execution orders are issued the applicant shall suffer substantial loss as the substratum of the intended appeal shall have been lost if the appeal succeeds. It is further deponed that the applicant stands to suffer loss if the decreed judgment sum is paid out to the respondent who is not in a position to refund the same in the event the appeal is successful.
10. It is deponed that the application has been made without delay and the applicant wishes to exercise its right to appeal. The applicant asserts that it is ready to avail security in satisfaction of the decree in case the intended appeal is unsuccessful.
11. It is further deponed that the respondent's financial means are unknown and in allowing the stay orders no prejudice shall be occasioned to the respondent as the matter will be before the Court of Appeal for the hearing and determination of the intended appeal.
12. It is urged that failure to allow the application shall occasion great loss and unnecessary expenses to the appellant if the decree is ultimately executed and the appeal is successful.
13. In the replying affidavit, it is deponed that the application is incompetent as the letter requesting for typed proceedings and the notice of appeal were never served upon the respondent's counsel to entitle the applicant to the provisions of Rule 82(1) of the Court of Appeal Rules on the timelines for filing of the appeal.
14. It is deponed that the application is defective as it is based on the wrong provision of law and incompetent for lacking a seal. It is further deponed that the application is an afterthought and the delay in filing the same is inexcusable as the judgment was delivered on 19th September, 2024 while the present application was filed on 9th December, 2024. It is deponed that the applicant has not explained the delay in filing of the application as to benefit from the discretionary powers of the court to issue the orders sought.
15. It is deponed that no draft memorandum of appeal has been availed to disclose and demonstrate the arguability of the appeal. It is deponed that the application is only meant to stifle, sabotage, or delay



the execution of the decree. It is further deponed that the applicant is guilty of material non-disclosure and undeserving of the court's audience.

16. It is deponed that the applicant is yet to pay the costs of the suit in the trial court and the applicant has not demonstrated that costs may not be adequate compensation for the alleged substantial loss. It is deponed that the applicant has not substantiated the loss he stands to incur should the application be disallowed and in the absence of any stay orders nothing should bar the respondent from executing the decree issued by the superior court.
17. It is deponed that the applicant has not satisfied the threshold for grant of the orders sought under Order 42 Rule 6(2) of the Civil Procedure Rules and, in the best interest of justice, the application should be dismissed.
18. It is deponed that the applicant intends to delay justice and that the balance of convenience should tilt in the respondent's favour. The court is urged to dismiss the application as the applicant will suffer no prejudice if the orders sought are not granted.

III. Submissions

19. The applicant's counsel submitted on a single issue – Whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.
20. It is submitted that Order 42 Rule 6(2) of the Civil Procedure Rules sets the conditions necessary for the grant of a stay of execution as the proof of substantial loss, evidence of the application being made without unreasonable delay, and provision of security for the due performance of a decree.
21. Citing *Antoine Ndiaye v African Virtual University (2015) eKLR* & *James Wangalwa & another V Agnes Naliaka Cheseto (2012) eKLR*, it is submitted that substantial loss is the cornerstone for grant of an order for stay of execution order but, an applicant must establish the other factors to prove the irreparable loss that an applicant may suffer if the stay is denied.
22. It is submitted that the applicant has been dissatisfied with the judgment of the court delivered on 18th September, 2024 and hence lodged the Kisumu Civil Appeal No. E299 of 2024 in the Court of Appeal.
23. Citing *G.N. Muema P/A (Sic) Mt. View Maternity & Nursing Home v Miriam Bishar & Another (2018) eKLR*, *Butt V Rent Restriction Tribunal (1979) eKLR*, and *James Wangalwa & Another v Agnes Naliaka Cheseto (2012) eKLR*, it is submitted that the subject matter herein is substantial and should execution proceed, the applicant shall suffer irreparable loss and prejudice in the absence of the respondent's proof of means to refund the decretal sum plus costs and interest. The court is urged to exercise its discretion pending the determination of the appeal which, if successful, shall be rendered nugatory should the stay be declined.
24. It is submitted that while the appeal raises triable issues, the grant of stay of execution should not be based on the merits of the appeal. It is further submitted that the applicant is capable of settling the decree if the appeal is unsuccessful and is prepared to avail security in the satisfaction of the decree should the appeal ultimately fail.
25. On the other hand, the respondent's counsel submitted on two issues –

Whether the applicant has met the threshold for grant of stay orders pending appeal; and,
Whether an order for stay of execution of taxed costs can be granted by this Honourable court.



26. On the first issue, counsel cited *Mutua Kilonzo v Kioko David Machakos* (2008) eKLR in asserting that the applicant has failed to satisfy the condition on how it will suffer substantial loss under Order 42 Rule 6 of the Civil Procedure Rules.
27. It is submitted that the applicant has failed to prove that the respondent is a man of straw incapable of refunding the decretal sum were the appeal to succeed.
28. Citing *Kenya Shell Limited v Benjamin Karuga Kibiru & another* (1986) eKLR; *Machira t/a Machira & Co. Advocates v East Africa Standard (No.2)* (2002) KLR 63 and *Caneland Ltd & 2 others v Delphis Bank Ltd* (2000) eKLR, it is submitted that an appeal cannot be rendered nugatory simply because the money decree has been settled.
29. It is submitted that the intended appeal has no merits and that the application herein was filed after unexplained and unreasonable period of time. The court is urged to allow the respondent to enjoy the fruits of the judgment made in his favour.
30. It is submitted further that subject to Rules 42(1), 75,82(1) & 83, & 84 of the Court Appeal Rules the applicant failed to serve upon the respondent the letter requesting for typed proceedings – see *Mabel Kibore V National Oil Corporation of Kenya Limited* (2019) eKLR. It is further submitted that the applicant failed to comply with the timelines prescribed under the Court of Appeal in filing an appeal and, in any event, no draft memorandum of appeal was attached to the application rendering the application ripe for striking out as the same is incompetent.
31. On the second issue, counsel cited *S. Gichuki Waigwa v Nina Marie Ltd* [2005] KEHC 2830 (KLR) & *Francis Kabaa V Nancy Wambui & another* [1997] eKLR. It is submitted that there is a certificate of cost on record, which has not been challenged or set aside, and by dint of Section 51(2) of the [Advocates Act](#) the same is final and binding.

IV. Analysis & Determination

32. The court has carefully read the application, the affidavit in support, the replying affidavit, and the written submissions by both parties, alongside all the cited authorities. The following issues commend themselves to the court for determination – Whether the applicant has demonstrated that it deserves an order for stay of execution pending the hearing and determination of the appeal.
33. The principles guiding the grant of an order for stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules which provides –
 - 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.
34. Further, stay of execution may only be granted for sufficient cause and the Court in deciding whether or not to grant the stay shall consider the overriding objective stipulated in Sections 1A and 1B of the [Civil Procedure Act](#). Courts are now enjoined to give effect to the overriding objective in the exercise of their powers under the [Civil Procedure Act](#) or in the interpretation of any of the provisions therein.



35. Section 1A (2) of the *Civil Procedure Act* provides that –

The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective. Section 1B provides some of the aims of the said objectives to include – the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

36. As to what constitutes substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* (supra) that –

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

37. The applicant takes the view that it stands to suffer a gross loss of over Kshs175,227/= as well as costs and interest, should the stay of execution be denied. The respondent has not filed an affidavit of means to prove that he is capable of refunding the decretal sum plus costs should the appeal be successful. The applicant is ready and willing to comply with any order issued by the court on provision of security in satisfaction of the decretal sum plus costs.

38. The respondent has argued that the applicant has not demonstrated an arguable appeal having failed to attach a memorandum of appeal it is argued that the applicant has not demonstrated the substantial loss that it may suffer if the stay is not granted. It is submitted that the applicant has not offered security in satisfaction of the decree. The respondent further asserts that the applicant inordinately delayed in coming before this court with this application and objects to the grant of stay arguing that the applicant only wishes to prevent the respondent from enjoying the fruits of the lawful judgment.

39. The Court of Appeal stated the principles for grant of stay of execution in *Butt -vs Rent Restriction Tribunal* (1982) KLR 417 as cited in *MFI Document Solutions Ltd v Paretto Printing Works Limited* (2021)eKLR of –

1. the power of the court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle is granting or reusing 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. (sic) (trial court judgement).
3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
4. 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 of costs as ordered with cause the order for stay of execution to lapse.



40. The applicant asserted that the respondent has not provided an affidavit of means as to his ability to repay the decretal sum in case the appeal succeeds. The respondent has not provided any material to prove that he is capable of refunding the sums. In light of the depositions by the applicant that they shall suffer substantial loss if the stay is not granted, the court is persuaded that substantial loss may occur and the appeal rendered nugatory if the same ultimately succeeds.
41. The respondent asserts that the applicant failed to serve upon him the letter requesting for proceedings as to be entitled to the proviso under Rule 84 (2) of the Court of Appeal Rules in computing time when an appeal is to be instituted. The respondent further states that no memorandum of appeal has been availed to demonstrate that the appeal shall be arguable.
42. Under Rule 84(1) of the Court of Appeal Rules, the memorandum of appeal should be filed within sixty days after the date when the notice of appeal was lodged or such period after the proceedings requested are availed.
43. The applicant asserted that an appeal – Kisumu Civil Appeal No. E299 of 2024 – was lodged at the Court of Appeal at Kisumu. The competency and merits of the appeal only be argued in the hearing of the said appeal. It is not within the purview of this court to consider the merits of the same.
44. The judgment appealed was delivered on 18th September, 2024 and the notice of appeal was lodged in court on 24th September, 2024, six days later. The court is satisfied that there was no inordinate delay in filing the notice of appeal. The application was filed on 10th December, 2024, about two-months and 21-days after the judgment was delivered. The court finds that the application was not filed after a lengthy or inordinate period. In any event, there is no record to show that the respondent commenced the execution proceedings within the said period.
45. As to security for due performance of the decree, the applicant is ready and willing to comply with any conditions that the court may impose.
46. On the certificate of costs referred to by the respondent, the same flows from the judgment sought to be stayed and the same cannot be divorced from the stay of execution proceedings.
47. Taking all the above factors into account and, in order not to render the intended appeal nugatory and, to give effect to the overriding objective of the fair dispensation of justice, the court finds and holds that the applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.
48. Accordingly, the court finds the application dated 9th December, 2024 merited and grants stay of execution of the decree dated 11th December, 2024 on the condition set out below.

V. Costs

49. The costs of the application shall abide with the outcome of the appeal.

VI. Order

50. The court issues the following orders –
 - a. An order for stay of execution be and is hereby issued.
 - b. The applicant/appellant shall deposit the entire decretal sum plus costs in court, within 30 days of this ruling.
 - c. Costs of the application to abide with the outcome of the appeal.



DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 4TH DAY OF APRIL, 2025.

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DAVID NDERITU

JUDGE

