



**Ken Knit Kenya Ltd v Nandwa (Appeal E033 of 2024)
[2025] KEELRC 1132 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1132 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
APPEAL E033 OF 2024
MA ONYANGO, J
APRIL 4, 2025**

BETWEEN

KEN KNIT KENYA LTD APPELLANT

AND

MOSES AMWAYI NANDWA RESPONDENT

RULING

1. Vide an application dated 16th October, 2024 the Appellant seeks the following orders:
 1. This application be certified as urgent, fixed for hearing on priority basis and Service be dispensed with in the first instance.
 2. The court be pleased to grant a stay of execution of the judgment and decree in Eldoret ELRC CMCC No. E91B of 2020 Moses Amwayi Nandwa v Ken IQ.IIT pending hearing and determination of this application interparty.
 3. The court be pleased to grant a stay of execution of the judgment and decree in Eldoret ELRC CMCC No. E91B of 2020 Moses Amwayi Nandwa v KNIT pending hearing and determination of the appeal.
 4. Costs for this application be provided for.
2. The grounds in support of the application are that:
 - i. The Applicant is aggrieved by the judgment of the Chief Magistrate in Eldoret ELRC No. E91B of 2020 delivered on 1st October 2024.
 - ii. The applicant is aware that at the time of delivery of judgment, on 1st October, 2024, the court granted the respondent now applicant a 30 day stay of execution which shall lapse on or about 30th October, 2024 after which the applicant shall remain exposed to the vagaries of execution.



- iii. If the applicant does not have a stay pending hearing of this application interparty and the appeal, then the whole appellate exercise shall be academic in nature with no reach on rights of the parties as contemplated in law since execution would have ensued.
 - iv. The Applicant has a good appeal against the Respondent as laid out in the Memorandum of Appeal.
 - v. That this Application is made in good faith and has been lodged expeditiously even before the stay granted by the honorable Magistrate court lapses.
 - vi. That it is fair, just and expedient that this application be allowed.
3. The application is brought under sections 3 & 3A of the *Civil Procedure Act* and Order 42 rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 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 REBECCA CHELUGET sworn on 16th October, 2024.
 5. In summary, the Applicant is aggrieved by the judgment of Hon. Cherono Kesse, PM dated and delivered on 1st October, 2024 in ELDORET ELRC CMCC NO. E91B OF 2020 ROBERT MOSES AMWAYI NANDWA V KEN KNIT KENYA LTD, a copy of which it has attached to the supporting affidavit as Annex RC-2.
 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, 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 Respondent has filed his bill of costs now awaiting taxation.
 7. That the Appellant was granted 30 days stay of execution by the trial court which has now lapsed and the Appellant is now exposed to the vagaries of execution.
 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.

Response

10. The Respondent opposed the application through his replying affidavit sworn on 5th November, 2024 in which he deposes that the appeal lacks merit, is an abuse of court process and should be dismissed with costs.
11. The Respondent states that the judgment of the lower court is sound and the appeal has been filed to delay his just entitlement. That the appeal has no chances of success, that the Applicant has not demonstrated that it stands to suffer loss as this is a money appeal that cannot be rendered nugatory.
12. The Respondent deposes that after leaving the services of the Appellant he got employment with DPL Festive Ltd.
13. That the application does not meet the threshold for granting stay of execution pending appeal and should be dismissed.



Submissions

14. The application was disposed of by way of written submissions.
15. In its submissions dated 26th November, 2024 the Applicant states that it is apprehensive that it will not be able to recover the decretal sum of Kshs. 1,431,101 together with costs in the event that the appeal is successful. That the Respondent has not provided any evidence that it is capable of paying the decretal sum should the appeal be successful. That the burden of proof that he is not a man of straw lies with the Respondent who has not produced any evidence such as a pay slip, bank statement or any other evidence of means.
16. The Applicant relied on the decision in Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francos Wasike & Another (UR) where the court held:

“The court has said before and it would bear repeating that while the legal duty in an application to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to repay back the decretal sum, it is unreasonable to expect such an applicant to show in detail the resources owned by the Respondent or lack of them. Once an applicant expresses a reasonable fear 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 of which is peculiarly within his knowledge”.
17. It was further the Applicant’s submission that the application has been brought expeditiously as judgment was delivered on 1st October, 2024 and the application filed on 16th October, 2024.
18. On whether the appeal would be rendered nugatory should the orders sought not be granted the Applicant submitted that it will not be able to recover the decretal sum of Kshs. 1,431,101 from the Respondent. For emphasis the Applicant relied on the decision in Ishmael Kagunyi Tande v Housing Finance Company of Kenya Ltd [2005] eKLR as quoted in Kenya Kazi Security Services Limited v Kenya National Private Security Workers Union [2013] eKLR where the court opined:

“... for an applicant to succeed, he must not only show his appeal or intended appeal is arguable but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal may be rendered nugatory.”
19. The Applicant further relied on the decision on Housing Finance Company of Kenya v Sharok Kher Mohammed Ali Hirji and Another [2015] eKLR where the court stated:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.”
20. The applicant submitted that its appeal is arguable and not frivolous as is evident from the annexed Memorandum of Appeal. That the grounds of appeal raise legitimate points for consideration by the court.



21. Finally, the Applicant submits that it is willing to abide by such reasonable stay terms as the court may order in the interest of both parties and justice as stated in the supporting affidavit. The applicant prays that in case the court orders conditional stay the entire decretal sum be deposited in a joint interest earning account in the names of both advocates as was held in HCCA No. 40 of 2009 James Finlay (K) Ltd v Jared Ontwori Mogere where the court was of the view that:

“Stay of execution should be for the whole sum with or without condition. If conditions are given it should be that the whole sum is deposited in court or in a bank of two parties concerned having an interest account deposit.”

Analysis and Determination

22. 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.
23. Stay of execution pending appeal is elaborately provided for in Order 42 Rule 6 of the Civil Procedure Rules as follows:

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.

24. 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.

25. 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.”

26. 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.”

27. 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...”

28. The Respondent herein submitted that he is a man of means, that he got employment after leaving the service of the Appellant. As rightfully pointed out by the Applicant, no evidence of the same has been produced by the Respondent. The Respondent produced neither a letter of appointment nor a pay slip. 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.

29. 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.

30. In *James Finlay (K) Ltd v Jared Ontwori Mogere (supra)* the court state that:

“Stay of execution should be for the whole sum with or without condition. If conditions are given it should be that the whole sum is deposited in court or in a bank of two parties concerned having an interest account deposit.”



31. I am satisfied from the grounds of appeal herein that the appeal is not frivolous. The issue whether the appeal may or may not be successful is to be determined in the appeal.
32. Based on the foregoing I find merit in the application dated 16th October, 2024 and grant orders as follows:
- a. There shall be stay of execution of the judgment of Hon. Cheron Kesse, PM dated and delivered on 1st October, 2024 in Eldoret ELRC CMCC No. E91b Of 2020 Robert Moses Amwayi Nandwa V Ken Knit Kenya LTD pending hearing and determination of the appeal herein.
 - b. The stay shall be conditional upon the Appellant depositing the decretal sum in a joint interest earning account in the names of counsel for both parties within 30 days.
 - c. Costs of this application shall be in the appeal.
33. Orders accordingly.

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

M. ONYANGO

JUDGE

