



**University of Nairobi v Mayaka (Employment and Labour Relations Appeal
E167 of 2021) [2025] KEELRC 2013 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2013 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E167 OF 2021**

**HS WASILWA, J
JUNE 30, 2025**

BETWEEN

UNIVERSITY OF NAIROBI APPELLANT

AND

LIVINGSTONE M. MAYAKA RESPONDENT

RULING

1. The Appellant filed a Notice of Motion dated 18th February 2025 seeking orders that: -
 1. spent
 2. the court issues an Order of Stay of Execution of its judgment dated 25th October 2024 pending the Hearing and determination of this application.
 3. the court issues an Order of Stay of Execution of its Judgment issued on 25th October 2024 pending the hearing and determination of the Appellant's application for enlargement of time dated 3rd December 2024 in COACAPPL NO. E678 OF 2024 UNIVERSITY OF NAIROBI -vs- LIVINGSTONE MAYAKA-NAIROBI and or pending appeal.
 4. the security provided by the Appellant and deposited in the name of the Advocates for the Appellant and Respondent pursuant to the Order of Hon. Lady Justice Anna Mwaure issued on 7th July 2022 continue being held in the
 5. joint account and be applied as security for granting the Order of Stay of Execution pending Hearing and determination of COACAPPL NO. E678 OF 2024 UNIVERSITY OF NAIROBI -vs- LIVINGSTON MAYAKA-NAIROBI and or the Intended Appeal.
 6. the court issues any other order it deems appropriate in the circumstances to meet the ends of justice.



7. costs of this application be provided for.

Appellant's Case

2. The Appellant avers that judgment was entered for the Respondent on 25th October 2024 whereby the court granted a thirty-day stay of execution of its judgment which period has lapsed.
3. The Appellant avers that it intends to appeal the said judgment and has duly filed its Notice of Appeal dated 25th November 2024 and its application to the Court of Appeal to have the appeal regularized. It contends that it has an arguable appeal to the Court of Appeal which if successful will be rendered nugatory if execution proceeds.
4. The Appellant avers that the Respondent's costs of this Appeal have been taxed by the Deputy Registrar, Hon. D. Mbeja at Kshs. 305,509/= vide a ruling delivered on 13th February 2025.
5. It is the Appellant's case that the Respondent retired from the Appellant's service on 31st December 2016 having attained the mandatory retirement age of sixty years. Therefore, the Respondent's means and/or assets of repaying the decretal sum in the event the same are paid out to him and the Appeal is successful is unknown and the Appellant would suffer substantial loss.
6. The Appellant avers that the decretal sum awarded by the trial court was already deposited in a joint interest earning account held in the name of the Advocates for the parties at SBM Bank; and that this application has been brought without unreasonable delay.
7. The Appellant avers that any delay that was occasioned in lodging the Notice of Appeal was due to the delay by the court registry in availing a copy of the judgment, facts which are raised in the application before the Court of Appeal and are within the Respondent's knowledge. In the absence of the judgment of this court, the Appellant was not able to instruct its Advocate to appeal against the judgement delivered on 25th October 2024.
8. It is the Appellant's case that this court has jurisdiction to issue an Order of stay of execution upon such terms as it deems fit pending the Hearing of a formal application.
9. The Appellant avers that the Respondent's argument that this the court is functus officio and has no basis as it does not seek to re-open this case and or raise issues unrelated to the judgment delivered herein but only stay its execution pending hearing and determination of its Appeal.

Respondent's Case

10. In opposition to the Application, the Respondent filed a replying affidavit dated 28th February 2025.
11. The Respondent avers that a judgment in his favour was delivered on 25th October 2024 and following the Appellant's appeal to this court against the trial court's decision, this court directed that the Appellant to deposit the entire decretal sum as security in a joint interest earning account held in the names of both parties' advocates pending and determination of the appeal.
12. In compliance with this order, the Appellant deposited Kshs. 2,989,520 in a joint account number 0293401443002 at SBM Bank held in the names of Omongo Gatune & Co. Advocates and Lutta & Company Advocates in July 2022.
13. The Respondent avers that the appeal was heard and determined in his favour dismissing the appeal, save for a minor adjustment of Kshs. 251,027 which was not contested. The Appellant was granted a thirty day stay of execution which period has since lapsed.



14. The Respondent avers that he is 69 years old and kept away from his rightful terminal dues since December 2016 when he retired and further denied access to the decretal sum since October 2021 when the trial court first determined he was entitled to payment.
15. He further avers that he has been awarded costs both at the trial court and in this court and the same has been taxed by the Deputy Registrar, Hon. D. Mbeja at Kshs. 305,509 vide a ruling delivered on 13th February 2025; and this is the sole reason that triggered the current application.
16. The Respondent denied that the Appellant has an arguable appeal to the Court of appeal and avers that it is engaging delaying tactics to frustrate the Respondent's enjoyment of his hard-earned terminal benefits.
17. It is the Respondent's case that the court is functus officio having determined the appeal, issued a decree together with a certificate of taxation and granted the Appellant a 30 day of execution which has lapsed.
18. The Respondent further avers that there is no competent appeal before the Court of Appeal as the Appellant filed a Notice of Appeal out of time and is now seeking extension of time within which to lodge the Notice of Appeal.
19. Additionally, the appropriate forum for seeking stay of execution pending appeal to the Court of Appeal is the Court of Appeal not this court, and stay orders cannot be extended indefinitely at the expense of a successful litigant especially one who has been denied his terminal benefits for over eight years since retirement.
20. The Respondent contends that it is in the interest of justice that the funds held in the joint account be released to him as the successful party. And he stands to suffer substantial prejudice if the application is allowed considering his advanced age and the inordinate delay in accessing his terminal dues.
21. It is the Respondent's case that the Appellant being a public institution, will not suffer any substantial loss if required to pay the decretal sum now as it can recover the same from him if the intended appeal succeeds.
22. The Respondent avers that he is entitled to: Kshs 2,456,408.09 being the principal sum awarded (after deducting the Kshs. 251,027 adjustment); Kshs. 167,260 being costs in the trial court; and Kshs. 305,509 being costs of the appeal in this court. This amounted to a total of Kshs. 2,929,177.09 together with all interest accrued thereon since July 2022.
23. It is the Respondent's case that the stay of execution granted having lapsed, he entitled to enjoy the fruits of his judgment without further delay.
24. Based on these above grounds, the Respondent also filed a notice of motion application dated 27th February 2025 seeking orders that:
 1. this application be dealt with concurrently with the application dated 18th February 2025.
 2. this Honourable Court be pleased to issue orders directing SBM Bank to release Kshs. 2,929,177.09 together with all interest accrued thereon since July 2022 from the joint account number 0293401443002 at SBM Bank held in the names of Omongo Gatune & Co. Advocates and Lutta & Company Advocates to the Respondent's advocates, Omongo Gatune & Co. Advocates.
 3. the costs of this application be provided for.



Appellant's Submissions

25. The Appellant submitted that Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:

“No order for stay of execution shall be made under subrule (1) unless 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 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.”

26. On substantial loss, the Appellant submitted that there is real danger of the decretal sum being irrecoverable in the event of the sums being paid over to the Respondent and the Appellant's appeal to the Court of Appeal succeeds; and the Respondent has failed to properly rebut this assertion in his response rendering it uncontroverted.

27. On unreasonable delay, it is the Appellant's submission that the reason for delay in filing the application for stay was that the judgment was delivered on 25th October 2024, whereas, its advocate had been involved in treating his ailing father since December 2024 until 23rd January 2025 when he passed away, upon which he settled back in office and filed this application on 18th February 2025. This reason is plausible and has not been controverted.

28. On the validity of the Notice of Appeal, the Appellant submitted that the validity or otherwise of a Notice of Appeal can only be challenged via the relevant application under Rule 86 of the Court of Appeal Rules, 2022, upon which such Notice may be struck out. In this case no such application was proved to have ever been filed by the Respondent rendering his assertion baseless.

29. The Appellant submitted that it has an arguable appeal with an overwhelming chance of success. It relied on the Court of Appeal case of *Jomo Kenyatta University of Agriculture & Technology v Higirow* [2024] KECA 1668 (KLR) which held as follows regarding the nature of an arguable appeal:

“Regarding the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay orders sought, this Court in the case of *Yellow Horse Inns Ltd v A. A. Kawir Transporters & 4 others* [2014] eKLR, observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point would succeed, as this Court held in *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR.”

30. The Appellant submitted that it is undisputed that it had deposited security amounting to Kshs 2,989,520/= in a joint account with the Respondent in the names of the parties' advocates on record; and this is sufficient security to protect the Respondent's interest in the event the appeal by the Appellant fails as the deposited security continues to earn interest. Therefore, it has satisfied the criteria for grant of stay of execution pending hearing and determination of its appeal to the Court of Appeal.

Respondent's Submissions

31. The Respondent submitted that the purpose for which the security was ordered has been exhausted as the order of Hon. Lady Justice Mwaure stated that the security was to be held pending hearing and determination of the appeal. This appeal has since been heard and determined by this court on 25th October 2024 with judgment in his favour. Therefore, the purpose of securing the decretal sum has been exhausted and he is entitled to enjoy the fruits of his judgment.



32. The Respondent submitted that the continued retention of his terminal dues constitutes a serious injustice considering his advanced age and the long period he has been kept from accessing funds rightfully due to him upon retirement.
33. The Respondent further submitted that the specific amounts due to him are clearly quantified and undisputed and he is therefore entitled to receive them without further delay.
34. On Appellant's application for stay, the Respondent submitted that the matter is functus officio as the court fully discharged its duty by determining the appeal in the negative and granting a temporary stay which has lapsed. Thus, this court cannot extend its jurisdiction to grant further stay of execution pending an appeal to the Court of Appeal.
35. It is the Respondent's submission that in accordance with Rule 21(2) of the ELRC Procedure Rules, once a court has determined a matter before it and a party is aggrieved and intends to appeal, any application for stay pending appeal should be made to the court which the appeal lies, not the court that has already determined the matter. Therefore, the Appellant should seek stay orders from the Court of Appeal not this court.
36. The Respondent submitted that the purported Notice of Appeal was filed out of time without leave of the court thus invalid and cannot form the basis for grant of stay orders.
37. The Respondent submitted that the Appellant merely made assertions that he may not be able to refund the decretal sum if the appeal succeeds without providing evidence to support this claim. In contrast, the Appellant being a public university which stable funding, failed to demonstrate it would suffer substantial loss of the decretal sum if released.
38. The Respondent submitted that the Appellant filed its application for further stay on 18th February 2025, nearly three months after delivery of the judgment. The delay is unreasonable and constitutes a ground for dismissing the application.
39. It is the Respondent's submission that the principle that litigation must come to an end is a fundamental tenant in the legal system. He has been litigating this matter since 2018, first at the trial court and then in this court and has been successful at both levels. Therefore, allowing a further stay of execution pending a second appeal would unduly prolong the litigation and deny him the fruits of his judgment indefinitely.
40. I have examined all the averments and submissions of the parties herein. The judgment in this court was determined on 17/12/2021 before the CMEL 590/2018 vide ruling of this court (Mbaru J) on 17/2/2022. Leave to appeal over time was granted and stay orders were also granted pending the hearing and determination of the applicants appeal. The appellant was granted 7 days to file and serve the respondent with a memorandum of appeal together with order granting the leave., 7 days from 22/2/2022 would thus expire on 29/2/22 or 1/3/22 depending on whether it was a leap year or not.
41. On 3/5/2022 this court (Hon. Judge Mwaure) also granted further orders staying execution of the judgment dated 25/10/21 for 14 days and directed the matter be mentioned on 30/3/22. J. Mwaure further delivered a ruling dated 7/2/22 allowing stay of execution with condition to deposit the decretal sum in court within 30 days. The appeal was thereafter determined and judgment delivered by Judge Mwaure on 25/10/24.
42. The applicants are now back before this court seeking orders of stay of the Employment and Labour Relations Court judgment pending the hearing and determination of their application for enlargement of time dated 3/12/2024.



43. Based on the fact that there is already security deposited in court to satisfy the decretal sum and on the ground that the applications have a pending application before the court to allow them prosecute their appeal, I will allow stay orders sought pending determination of the application for enlargement of time to file the appeal before the Court of Appeal. The prayers to release the security deposited in court is denied. Costs in the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH OF JUNE, 2025.

HELLEN WASILWA.

JUDGE

