



**Wafula v Principal, Masimba High School & another (Cause
E066 of 2023) [2025] KEELRC 1806 (KLR) (18 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1806 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E066 OF 2023
NZIOKI WA MAKAU, J
JUNE 18, 2025**

BETWEEN

STEPHEN WANJALA WAFULA CLAIMANT

AND

PRINCIPAL, MASIMBA HIGH SCHOOL 1ST RESPONDENT

BOARD OF MANAGEMENT, MASIMBA HIGH SCHOOL 2ND RESPONDENT

RULING

1. Before the Court is the notice of motion application dated 5th May 2025 by the Respondent seeking leave to appeal out of time. It seeks the following orders:
 - a. Spent.
 - b. That leave be granted to the Applicant to file a Notice of Appeal out of time from the Judgement of Employment and Labor Relations court in Kisumu ELRC No. 66 of 2023 *Stephen Wanjala Wafula v B.O.M Masimba High School & another*.
 - c. That the Notice of Appeal annexed hereto be deemed as duly filed and served.
 - d. That this Honourable Court be pleased to grant an order of stay of execution of the Judgement and/or the decree herein and all consequential orders arising pending the hearing and determination of the appeal.
 - e. That the costs of this application be provided for.
2. The motion is supported by the affidavits of the Respondent's Principal Mr. James Otero Kinanga as well as that of the advocate, Principal State Counsel Miss Lorna Orege sworn on 5th May 2025. In it, she deposes that as State Counsel handling the matter she was on transfer to Nairobi and that there was inadvertence and oversight in filing the Notice of Appeal. She deposed that by the time she got a



hand on the matter time for filing the appeal had lapsed. She states that she bespoke typed copies of the proceedings and that the motion had been brought without undue delay. She asserts the intended appeal that is to be lodged has very good chances of success and that the Respondents are apprehensive the Claimant/Respondent may commence execution against them. She holds that it is in the interest of justice that the motion be granted pending the hearing and determination of the intended appeal.

3. The Respondent was opposed and filed an affidavit sworn on
4. The application was disposed of by way of submissions.

Respondents/Applicants submissions

5. The Respondents/Applicants submit that the issues for determination are the following:
 - a. Whether the application was made without unreasonable
 - b. Whether the Application will be rendered nugatory and would cause the Applicants irreparable loss if stay is not granted and on provisions such as security as to costs?
 - c. Whether there is requisite security
 - d. Whether the intended appeal is meritorious.
 - e. Whether there was delay and if so, whether the delay was inordinate
6. The Respondents submitted that the application was brought without undue delay. As to whether the Application will be rendered nugatory and would cause the Applicants irreparable loss if stay is not granted and on provisions such as security as to costs, the Respondent asserted that grant of stay of pending appeal is provided under Order 42 Rule 6 of the *Civil Procedure Rules*. It was submitted that basically, the applicant is required to demonstrate that: -

“Substantially loss may result unless the order is made. The Application has been made without unreasonable delay; such security as the court orders for the due performance of the decree has been given before Applicant”.
7. The Respondents submit that enforcing the judgment or orders in questions will place an immense financial burden on public resources. It was submitted that public interest weighs heavily in favour of granting the Applicants request. The stay of execution or delay in enforcement is necessary to ensure that no adverse consequences fall on the general public especially the learners and their parents. Public interest is a factor that the court should consider especially where substantial loss to the Government could affect the public since learning activities are of public interest. The Applicants submitted that the balance of convenience is inclined in favour of granting the application for stay and preventing the substantial loss that would arise from the immediate enforcement. There is a duty of care owed by the courts to ensure that the public is not adversely affected and that any loss or prejudice is avoided.
8. On the issue of security for costs under Order 42 Rule 8, the Applicants submit that no security shall be required from the Government. It was submitted that the Rule provides as follows:-

“No such security as is mentioned in Rule 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued on respect of an act alleged to be done by him in his official capacity”.



9. The Respondents rely inter alia on the case of *G. N Muema p/a (sic) View Maternity & Nursing Home v Miriam Wacehim Bisbar & another* [2018] eKLR where the court stated as follows: -

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an Applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting leave proceedings to recover the decretal sum if paid to a Respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful”

10. The Respondents submit that enforcing the Judgment or orders will place immense financial burden on the school because the funds, the total amount adding up to Kshs. 779,000/-, will come from the school’s account which is designated for paying other workers, making improvements in the school, purchasing of learning materials and equipment like books and lab apparatus and other needs in the school. The stay of execution will ensure that there is no unfavourable outcome for the school and the running of the school will continue without any strain.
11. The Respondent submit the balance of convenience is inclined in favour of granting the application for stay and preventing the substantial loss that would occur from the immediate enforcement of the decision. They submit that the Court, in granting a stay of execution, must balance the interests of the appellants alongside those of the defendants to ensure that there is fairness in the process. There is a duty of care owed by the courts to ensure that the school and the students are not adversely affected.
12. The Respondents cited the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR where the applicant argued that paying the decretal sum immediately could result in substantial loss, especially if the appeal succeeded and the respondent was unable to refund the money. They submit that the High Court evaluated whether the appellant had demonstrated, substantial loss if execution proceeded, whether there was timely filing of the application, whether there was willingness to provide security for the judgment sum and if there was requisite security.
13. It was submitted that Order 42 Rule 6 of the *Civil Procedure Rules*, provides that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. It was submitted that as a Government institution, the Applicants are not obliged to provide any security for the stay of execution and should the Court be inclined to issue security then the Court should allow the Applicants to issue security by way of Bank guarantee.
14. As to whether the intended appeal is meritorious, the Applicants submit that as to whether the appeal is an arguable one deserving a day in court or whether it is frivolous one which could only result in the delay of the course of justice, the Respondents shall rely on the courts pronouncement in the case of *Kenya Tea Growers Association & another v Kenya Planters & Agricultural Workers Union* Civil Application Nairobi No. 72 of 2001 (unreported) where the Court of Appeal addressed itself to the issue of the arguability of the appeal thus:

“He (The Applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the court should pronounce its decision”.

15. It was submitted that it is trite law that demonstration of the existence of even one arguable point will suffice in favour of the applicant. The Respondents submit that in the proposed appeal, the Applicants seek to show the court that indeed the trial court erred on several issues of law that have been raised in the Memorandum of Appeal. The Respondents thus urge the application be allowed as prayed.



Claimant/Respondent's submissions

16. The Claimant/Respondent submitted that in his view, the issues that fall for determination are
- i. Has the Applicant satisfied the threshold for grant of Leave to file Appeal out of time and also to warrant grant of Stay pending appeal.
 - ii. Who is to bear the costs of the Application.
17. He submits that principles for grant of leave to file an appeal out of time were set out by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR. In brief, the following were set out in the aforesaid case:
- a. Extension of time is not an automatic right of a party.
 - b. Rather, the same is an equitable remedy that is only available to a deserving party at the discretion of the Court.
 - c. A party seeking extension of time bears the burden of laying a basis to the satisfaction of the Court.
 - d. Whether the Court should exercise its discretion to extend time, is a consideration to be made on a case-to-case basis.
 - e. Whether there is a reasonable reason for the delay and that such a delay has to be explained to the satisfaction of the Court.
 - f. Whether there will be any prejudice suffered by the other party.
18. The Claimant/Respondent submits that the Respondents/Applicants were guilty of laches. He submits that whereas the Applicant was under duty to explain sufficiently and satisfactorily the reason for such delay, a causal perusal of the affidavit sworn in support of the Application clearly demonstrates that the same has not proffered any excusable and plausible reason explaining the delay in lodging the notice of appeal. He submits that in his view, the allegation by the Respondents that their current advocate on record had allegedly been transferred to Nairobi and thus inadvertently forgot to file a Notice of Appeal is not a plausible reason at all. In any event, no evidence has been tabled and or exhibited to their affidavit to support that their said advocate was ever transferred as alleged. The Claimant submitted that be it as it may, such an allegation cannot be a good reason as to their delay in filing and or lodging a Notice of Appeal in good time, particularly considering that the Respondents were being represented by the office of the Attorney General and not a single advocate in her personal and/or private capacity.
19. It was submitted that it is not in dispute that the Judgment by the Court rendered on 19th March 2025 in the presence of Ms. Orege. Consequently, it was submitted, she knew and or ought to have known that a Notice of Appeal had to be filed within a period of Fourteen (14) days in case the Respondents were keen and or intent of challenging it at the Court of Appeal. It was argued that in any case, if at all Ms. Orege had gone on transfer, it is ironical on how she would still file the instant application on behalf of the Applicants, almost 1½ months later. The Claimant thus argues that the Applicants have not satisfactorily explained the reason for the delay and thus not entitled to the exercise of the discretion of this Court.
20. On the second issue which is the merit for an order of stay of execution, the Claimant submits that in an application for grant of stay of execution pending appeal, an Applicant is under a duty to demonstrate inter alia; that substantial loss will be occasioned on him unless stay is granted; that the application



has been made timeously and without undue delay and that he has offered appropriate security for the due performance of the decree. The Claimant submits that this was reiterated succinctly in the recent decision of the Court in the case of *Odhiambo v Kisang & 3 others* [2025] KEELRC 1587 (KLR). Je submitted that the Applicant has not satisfactorily explained to reason for filing this application almost 45 days later from the date the Judgment of the Court was rendered and that besides, the Applicant has not demonstrated the nature of substantial loss it is bound to suffer in the event stay is not granted.

21. In his view, it is not enough to assert that learners will be prejudiced in the event stay is not granted. The Claimant submits that the Applicants have not led any evidence to demonstrate that there are not enough funds to settle the decretal amount and that there is no connection that has been established on how payment of the said decretal amount will paralyze learning in the school. The Claimant submits that the Applicants have not demonstrated that if they settle the said decretal amount, the Claimant will not be in a position to refund in the event the appeal succeeds. The Claimant submits that the Applicants have not established the first two limbs to warrant stay.
22. On the third aspect, it submitted that it is notable that the Decree herein which forms the subject of the intended appeal is in the nature of a monetary award. The Applicant herein has not made any offer at all on the furnishing of security and instead, the same has argued that being Government, it is not bound to offer any security. The Claimant placed reliance on the case of *Board of Governors, Friends School Kaimosi Boys v Shikoli T/A Mildred Ms Stores* (Civil Appeal 22 of 2022) [2023] eKLR, the Court after laying out the provisions of Paragraph 1 of the Fourt Schedule of the *Basic Education Act*, held that the school was not Government and thus could not therefore benefit from the exemptions in the *Government Proceedings Act*.
23. The Claimant submits that it therefore follows that the Applicants have failed to surmount the hurdles for grant of stay pending appeal. However, should the Court find merit in the application for stay, the Claimant submits that the same should be on condition that they be compelled to pay the assessed costs in the tune of Kshs. 165, 725/- only together with half of the decretal amount as security, with the balance being deposited in a joint interest earning account, pending their said appeal.

Disposition

24. The factors to consider are as set out by both the Applicants and the Respondent. These are encapsulated under subrule (2) of Rule 6 of Order 42 of the *Civil Procedure Rules*, 2010 which provides that 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;
 - b. that the application has been made without unreasonable delay; and
 - c. that 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.
25. In the application before the Court, there is an accusation that there was indolence in making the application for stay and that there is no offer of security. The Respondents offer the reason of a transfer to Nairobi of the Principal State Counsel Ms. Orege. The Claimant asserts this is not a reason for the arguing that there was no indolence. The Respondent is represented by the largest law firm in the country and it is a stretch to assert the Applicants could not file their Notice of Appeal as the State Counsel was on transfer. In any event, there was no transfer exhibited. The second accusation is that the Applicants did not offer security. It was argued that the Applicants were attempting to benefit from the provisions of the *Government Proceedings Act* yet the School is not Government. The School is undoubtedly a public school. Whereas the law makes provision for exemption to Government giving



security, it is clear the Applicants could have offered some security. The lack of an offer of security is one that does not sit well with the Court given the parameters under Order 42 Rule 6 of the *Civil Procedure Rules*.

26. There is also the issue of arguability of the appeal, not in the sense of an appeal that must succeed, but whether the appeal is arguable. There were no grounds advanced as to the arguability of the appeal. The foregoing is ample proof that the motion is incapable of success. As such the motion is dismissed with costs to the Claimant/Respondent.

Orders accordingly.

DATED AND DELIVERED AT KISII THIS 18TH DAY OF JUNE 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

