



**Kenya Union of Commercial Food and Allied Workers v Aksher Hardware Limited
(Cause E009 of 2023) [2025] KEELRC 1762 (KLR) (13 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1762 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E009 OF 2023
MA ONYANGO, J
JUNE 13, 2025**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**

AND

AKSHER HARDWARE LIMITED RESPONDENT

RULING

1. The application before me for determination is dated 22nd January, 2025 and has been brought by the Respondents under the provisions of Order 42 rule 6 of the Civil procedure Rules, Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all enabling provisions on law. The Applicant seeks orders that:
 - a. Spent.
 - b. That court be pleased to grant a stay of execution of the judgment delivered in this instance case on 19th December, 2024 and dated 16th January 2025 by Hon. Justice Maureen Onyango together with all consequential orders pending the hearing and determination of this application.
 - c. The court be pleased to grant a stay of execution of the judgment delivered in this instant case on 19th December 2024 and dated 16th January 2025 by Hon. Maureen Onyango together with all consequential orders pending the hearing and determination of the appeal.
 - d. The costs of this application be provided for.
 - e. Any other orders that meets the ends of justice.
2. The application is supported by the affidavit of Panda Dillip, a Director of the Applicant sworn on 22nd January, 2025.



3. The grounds upon which the application is made are contained at the foot of the application and in the supporting affidavit as follows:
 - a. That judgement was delivered against the applicant herein on 19th December 2024.
 - b. That the applicant is aggrieved by the said judgement intends to appeal the same in the court of appeal-
 - c. That the respondent herein is likely to execute the judgement at any time unless the court orders a stay of execution since a positive outcome of the appeal would have a direct impact on the judgement in this matter.
 - d. That the appeal herein has a reasonable chance of success.
 - e. That if the judgement herein is executed, then the appeal herein will be rendered nugatory if it succeeds, as the appellant is unlikely to recover the aforesaid amounts as the grievant herein is a man of straw.
 - f. That being a company with assets and investments in the country exceeding over Kshs. 1 billion, it is more than able to satisfy the decree herein should its said appeal not succeed.
 - g. That if a stay of execution is not granted substantial loss may result to the appellant as once the said money is paid to the grievant, it may not be recoverable.
 - h. That the appeal herein has a reasonable chance of success and if execution is carried out it will render the appeal nugatory.
 - i. That there has been no delay in bringing this application.
 - j. That the applicant is willing to abide by any conditions and terms as to security as the court may deem fit to impose.
 - k. That it is in the interest of justice that a stay of execution be granted pending the hearing and determination of the appeal.
4. In reply to the application, the Claimant filed a Replying Affidavit sworn on 3rd February, 2025 by Rogers Momanyi Ombati, Eldoret Branch Secretary of the Claimant. The deponent avers that the application is incompetent, an abuse of court process, lacks merit, is grossly misconceived and should be dismissed. He further deposes that the Applicant is guilty of laches, the application is an afterthought and that there are no compelling grounds to grant the same.
5. That the Applicant has not demonstrated that it is entitled to the orders sought at the expense of denying the Claimant the fruits of its judgement.
6. It is deposed that should the application be granted the Applicant should deposit the decretal sum in a joint interest earning account in the names of the parties or deposit the same in court failing which execution to issue.
7. The Applicant filed a Further Affidavit of Panda Dillip, its director sworn on 3rd March, 2025 in which he deposes that the slight delay in filing the application was occasioned by the Christmas break and the delay by the court to supply typed judgment to enable it prepare grounds of appeal. He further deposes that the Applicant is willing to offer security as may be ordered by the court.
8. The Application was disposed of by way of written submissions. The Applicant submitted that the principles for grant of orders for stay of execution pending appeal are provided for in Order 42 Rule



- 6(2) as summarized in *Matata & another v Rono & another* (Civil Appeal E034 of 2024) [2024] KEHC 2799 (KLR) (9th March, 2024) (Ruling) being: proof of substantial loss should the orders of stay not be granted; that the application is brought without unreasonable delay; and, that security for the due performance of the decree is supplied by the Applicant.
9. The Applicant further submitted that substantial loss was defined in the case of *Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi (Milimani)* HCMCA No. 1561 of 2007.
 10. The Applicant submitted that it has filed a Notice of Appeal dated 20th January, 2025, that the Respondent is likely to execute the judgment delivered on 19th December, 2024 and that unless the court grants orders of stay the appeal will be rendered nugatory as it will not be possible to recover the decretal sum from the Complainant Ms. Jelagat Ronoh who is a person of straw, a fact which the Respondent did not rebut in the Replying affidavit. That neither did the Respondent file an affidavit of means.
 11. Relying on the decision in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR, the Applicant submitted that it had proved substantial loss.
 12. It is further submitted that the application has been brought without unreasonable delay, judgment having been delivered on 19th December, 2024 and issued on 16th January, 2025, Notice of Appeal filed on 20th January, 2025 and the application filed on 22nd January, 2025.
 13. On security for due performance the Applicant submitted that it is a company with assets and investments in excess of Kshs. 1 Billion and is ready to abide by any reasonable conditions and terms as to security as may be ordered by the court. For emphasis it relied on the decision in *Matata & another v Rono & another* (supra).
 14. On costs the Applicant relied on section 27 of the *Civil Procedure Act* which provides that costs follow the event and that the successful party should be awarded costs.
 15. For the Respondent/Claimant it is submitted that the Applicant has not complied with Order 42 Rule 6 of the Civil Procedure Rules, relying on the decision in *Machira t/a Machira & Co. Advocates v East African Standard* (No. 2).
 16. The Applicant submitted that the issues raised in the Memorandum of Appeal are frivolous and therefore not arguable, that the Applicant is guilty of laches, that the appeal is an afterthought, that it is a principle of law that courts will not grant stay of execution of judgment unless there are compelling reasons, which the application lacks.
 17. It is further the submission of the Respondent/Claimant that the Applicant has approached the court with misleading information, that those who come to equity must come with clean hands and that the Applicant slept on its rights and equity does not aid the indolent.
 18. Relying on the decision in *Arun Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR, the Respondent/Claimant submitted that the Applicant does not deserve the orders sought in the application.
 19. The Respondent/Claimant submitted that litigation must come to a stop citing the decision of the Supreme Court in *Kenya Revenue Authority v Habimana Sued Hemed & another* [2017] eKLR.
 20. On costs the Respondent/Claimant submitted that it is entitled to the same.



Determination

21. I have considered the application and the response as well as the submissions of the parties. The issues that present themselves for this court's determination are;
 - a. Whether or not the orders of stay of execution orders should issue;
 - b. Who should pay costs of this application.
22. Order 46 Rule 6 (2) Civil Procedure Rules of the Civil Procedure Rules provides for the principles for grant of stay pending appeal. Order 42 rule 6(2) of Civil Procedure Rules provides as follows: -
 - “(2) No order for stay of execution shall be made under sub rule 1) unless—
 1. 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,
 2. 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.”
23. Rule 5 of the Court of Appeal Rules also provides for stay of execution pending appeal as follows:
 5. Suspension of sentence, injunction and stay of execution and stay of further proceedings
 - a. ...
 - b. Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.
24. Rule 75 of the Court of Appeal Rules provides lodging of Notice of Appeal as follows-
 75. Notice of appeal
 - a. Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
 - b. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.
 - c. Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appelland and shall state the names and addresses of all persons intended to be served with copies of the notice.
 - d. When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.



- e. where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.
 - f. A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant.
25. From the foregoing it is clear that in appeals to the Court of Appeal, stay of execution may only be granted where a notice of appeal has been filed. Rule 75 requires that such notice of appeal is filed within 14 days from date of judgment.
26. Rule 4 of the Court of Appeal Rules provides for computation of time as follows-
3. Computation of time
- Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions—
- i. a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or that act or thing is done;
 - ii. if the last day of the period is a Sunday or a public holiday (which days are in this rule referred to as excluded days) the period shall include the next following day, not being an excluded day;
 - iii. where any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
 - iv. where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time; or
 - v. unless the Court otherwise directs, the period of the Christmas vacation shall not be reckoned in the computation of time.
27. In the instant case judgment was delivered on 19th December, 2024. Christmas vacation commenced on 21st December, 2024 to 13th January, 2025. The Notice of Appeal was lodged on 20th January, 2025. It was therefore lodged within the timelines provided for in Rule 75 as read with Rule 4 of the Court of Appeal Rules.
28. The principles for grant of orders of stay of execution pending appeal were rested by the Court of Appeal in *Principal Secretary, Ministry of Education, Department of Vocational & Technical Training & another v Kenya Union of Post Primary education Teachers (KUPPET) & 2 others (Civil Application E248 of 2022) [2024] KECA 683 (KLR) (14 June 2024) (Ruling) Neutral citation: [2024] KECA 683 (KLR)* as follows-
- “... the applicable principles in an application for stay of execution: the applicants must satisfy the Court that they have an arguable appeal and that unless the order of stay of execution is granted, the appeal will be rendered nugatory if it succeeds. See *Stanley Kangethe Kinyanjui v. Tony Ketter & Others [2013] eKLR*). The applicant is obliged to satisfy both principles



and will not be entitled to the order of stay by satisfying only one of them. (See Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31).

29. The court went further to define what an arguable appeal is thus:

“We further bear in mind that an arguable appeal is not one which must necessarily succeed. It is simply one that is not frivolous or one that raises even a single bona fide arguable point that deserves to be considered and determined by the Court. (See Kenya Tea Growers Association & Another v. Kenya Plantation & Agricultural Workers Union, Civil Application No. Nai. 72 of 2001 and Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 Others [2014] eKLR).”

30. In the instant application, the Applicant has filed grounds of appeal as set out in the Draft Memorandum of Appeal marked as Annexure “ME-3” to the affidavit of Panda Dillip in support of the application. Although it is the appellate court which will determine the appeal, this court has a responsibility to determine that the appeal is not frivolous as a condition for granting stay of execution. As stated by the court in Principal Secretary, Ministry of Education, Department of Vocational & Technical Training & another v Kenya Union of Post Primary education Teachers (KUPPET) & 2 others, an arguable appeal need not be one that will necessarily succeed.

31. It is my considered view that the appeal herein is not frivolous as the grounds of appeal raise issues which ought to be considered by the appellate court.

32. On the second principle for grant of orders for stay that the Applicant must prove that the appeal would be rendered nugatory should the court not grant the orders sought, I am conscious of the fact that the Respondent/Claimant did not contest the averment by the Applicant that the Grievant is not a person of no known means and if paid may not be able to refund the decretal sum in the event that the intended appeal is successful.

33. For the forgoing reasons, I grant the application herein in terms of prayer c) thereof. There shall be stay of execution of the judgment herein together with any consequential orders pending hearing and determination of the intended appeal by the Applicant. This will however be conditional upon the Applicant depositing the entire decretal sum in court within 30 days failing which the Respondent/Claimant will be at liberty to execute.

34. The costs of this application shall in any event be borne by the Applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 13TH DAY OF JUNE 2025

MAUREEN ONYANGO

JUDGE

