



**Vishva Builders Limited v Musindalo (Appeal E002 of 2020)
[2025] KEELRC 1768 (KLR) (13 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1768 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
APPEAL E002 OF 2020
MA ONYANGO, J
JUNE 13, 2025**

BETWEEN

VISHVA BUILDERS LIMITED APPELLANT

AND

ISAAC OMONDI MUSINDALO RESPONDENT

RULING

1. The application before me for determination is dated 14th January, 2025 and has been brought by the Appellant/Applicant under the provisions of Article 22, 48, 50(1) of *the Constitution* of Kenya, 2010, Section 13 of the *Employment and Labour Relations Court Act*, Rule 73(2) of the Employment and Labour Relations Court (Procedure Rules, 2024, Order 42 Rule 6 of the Civil procedure Rules, 2010, and all enabling provisions of law.
2. The Applicant seeks orders that:
 - i. Spent
 - ii. That there be temporary orders of stay of execution and/or further execution of the decree in Eldoret CMELRC No. Cause No. 159 of 2019 pending the hearing and determination of this application inter-parties
 - iii. That there be temporary orders of stay of execution and/or further execution of the decree in Eldoret CMELRC No. Cause No. 159 of 2019 pending the hearing and final determination of the appeal filed by the Respondent against the judgment delivered on 5th December 2024
 - iv. That costs of this application be provided for
3. The application is supported by the affidavit of HARISH VEKARIA, a Director of the Applicant sworn on 14th January, 2025.



4. The grounds upon which the application is made are contained at the foot of the application as reiterated and expounded in the supporting affidavit as follows:

That judgment was delivered on 5th December 2014 dismissing the Applicant's appeal with costs; that the Applicant being aggrieved by the judgment has preferred an appeal to the Court of Appeal and wishes to be heard on the appeal before any monies are released or paid to the Respondent; that the appeal raises very serious and weighty legal issues for determination by the Superior Court hence the instant application ought to be allowed to give the Applicant an opportunity to be heard on their appeal; that there are no stay orders in place and the Respondent is likely to execute the decree in Eldoret CM ELRC Cause No. 159 of 2019 anytime from now unless restrained by an order of this court pending appeal to the Court of Appeal; that should the Respondent proceed with execution of the decree herein, the Applicant stands to suffer substantial loss that cannot be monetarily compensated in the likely event that the appeal succeeds as it has very high chances of success; and lastly, that the Respondent has no known means to recover any amounts that he may have received under the decree issued in his favor in Eldoret CMELRC Cause No. 159 of 2019 herein hence the need to issue the orders sought to save the Applicant from the risk of suffering substantial loss and damage that cannot be monetarily compensated.

5. The application is opposed by the Respondent Isaac Omondi Musindalo who filed a Replying Affidavit sworn on 23rd January, 2025. The Respondent deposes that the application is fatally defective, bad in law and an abuse of court process, is unmerited and a conglomeration of lies, half-truths and concealment of true facts.
6. He deposes that the application is aimed at perpetuating an ancient and untenable injustice by the Applicant of resorting to endless legal maneuvers. That this court lacks jurisdiction to hear and determine the application in view of Rule 21(1) and (2) of the Employment and Labour Relations Court (Procedure) Rules, 2024. That the Court of Appeal is the proper forum to deal with applications for stay of execution of judgment on record pending hearing and determination of the appeal.
7. The affiant further deposes that the Applicant does not meet the 4 principles that a person seeking orders of stay of execution must satisfy being:
 - a. That substantial loss may result to the applicant unless orders sought are made.
 - b. That the applicant has an arguable case to warrant admission.
 - c. That the application has been made by the applicant without unreasonable delay and
 - d. That the applicant has furnished Court with sufficient security of costs as for due performance of the decree and Judgment of the court as may ultimately be binding on the applicant.
8. He further deposes that the court should release funds deposited in court as requested by the Respondents counsel by letters dated 9th December, 2024 and 13th January, 2025 annexed and Marked IOM.1,2 and 3. (sic)
9. The Respondent further deposes that the application is brought in bad faith after unreasonable and inordinate delay thus is an abuse of court process. He prays that the application be struck out with costs.
10. The Respondent further filed a Notice of Preliminary Objection in which he seeks the striking out of the application on the following grounds:



- a. That the honourable court does not have jurisdiction to hear and determine the application date 14th January, 2025 in view of Rule 21 (1) and (2) of the Employment and Labour Relations Court (Procedure) Rules, 2024.
 - b. That the appeal herein was dismissed with costs on 5th December, 2024. The appellant proffered an appeal to the court of appeal vide the Notice of appeal dated 18th December, 2024. The court of appeal is the proper forum to deal with applications for stay of execution of the judgment on record pending hearing and determination of the appeal.
 - c. That the application dated 14th January, 2025 be dismissed with costs to the respondent.
11. 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) of the Civil Procedure Rules.
 12. The Applicant submits that should orders sought herein not be granted the Applicant will suffer substantial loss as the Respondent will be unable to refund the decretal sum should the appeal succeed. It relies on the decision in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018]
 13. On whether the application has been brought without unreasonable delay the Applicant submits that judgment was delivered on 5th December, 2024 and the Notice of Appeal was lodged on 18th December, 2024. That there was no delay on lodging the same.
 14. On security for due performance of the decree the Applicant submits that it is ready and willing to provide the same which should not be punitive and unreasonable as to impede access to justice as guaranteed under Article 22 and 48 of *the Constitution* of Kenya 2010. That funds already held in a joint interest earning account in the names of counsel for both parties on record as ordered by the lower court be used as security in compliance with Order 42 Rule 6 of the Civil Procedure Rules.
 15. The Applicant further submits that all it is required to do is indicate readiness to furnish security as held in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* and in *Arun Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR.
 16. The Applicant submits that no prejudice will be suffered by the Respondent as none has been raised by the Respondent.
 17. On costs the Applicant urges this court to adopt the decision of the Court of Appeal in *Butt v Rent Restriction Tribunal (Nairobi Civil Application No. 6 of 1979)* that:

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory, a stay which would otherwise be granted ought not to be refused because the judgment considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.”
 18. On the preliminary objection the Applicant submitted that section 13 of the *Employment and Labour Relations Court Act* provides for enforcement of this court’s orders as follows:

A judgment, award, order or decree of the court shall be enforceable in accordance with the rules made under the *Civil Procedure Act*.
 19. It is further submitted that Rule 73 of the Employment and Labour Relations Court (Procedure) Rules provides for execution and warrants thus:



- (2) Rules on execution or stay of execution of an order or decree of the Court shall be in accordance with the Civil Procedure Rules.
20. It is further submitted that Order 42 Rule 6(1) provides for grant of stay of execution by the court appealed from as follows:
 - (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.
21. The Applicant further refers this court to Rule 21 of the Employment and labour Relations Court (Procedure) Rules under the heading APPEALS where it is provided:
 21.
 - (1) Where an application for stay of execution pending appeal has been lodged, the applicant shall, in the supporting affidavit, declare whether a similar application has been filed in any other court.
 - (2) An application for stay of execution pending appeal shall be filed in the appeal file.
22. It is submitted that on the basis of the provisions cited, this court has jurisdiction to hear and determine the instant application. that the preliminary objection should therefore be dismissed with costs.
23. For the Respondent it is submitted that its preliminary objection is merited. That the appropriate court for applications for stay of execution is the appeal court file as provided in rule 21(2) of the Employment and labour Relations Court (Procedure) Rules which provides:
 - (2) An application for stay of execution pending appeal shall be filed in the appeal file.
24. It is submitted that the Applicant having filed the appeal, the application should be made in the appeal file which is in the Court of Appeal.
25. It is submitted for the Respondent that Rule 5(b) of the Court of Appeal Rules provides for stay of execution or proceedings and allows a party who has filed an appeal to apply for stay of execution to the Court of Appeal.
26. The Respondent further submits that Rule 42 provides for filing on notice of appeal within 14 days of the High Court decision subject to extension under rule 4 thereof.
27. It is submitted that once an appeal is lodged the High Court's authority to proceed with substantive matters is suspended, and any relief such as an application for stay must be sought in the Court of Appeal. For emphasis the Respondent cites and relies on the decision in *Kamau v Kamau* [1984] KLR 529 where the Court of Appeal referencing the procedural framework (predecessor to the Rules of 2010) held that once a notice of appeal is filed under rule 42 (or its equivalent at the time), the High Court is divested of jurisdiction over the substantive dispute. That the court in such case becomes *functus officio* and any further substantive proceedings must occur at the appellate level. That Rule 5(2)(b) supports this position by vesting the Court of Appeal with authority to manage the case in the interim status, and not the High Court.



28. The Respondent further relies on the decision in *Equity Bank Limited v West Link MBO Limited* [2013] eKLR where the Court of Appeal ruled that filing an appeal under Rule 42 transfers jurisdiction to the appellate court. That the High court cannot entertain applications which would effectively re-litigate or prejudice the appeal, aligning with the procedural intent of Rule 82 (transmission of record) and rule 5(2)(b) (stay applications). It is submitted that the Court emphasized that the High Court's role post-appeal is limited to facilitating the appeal process and not adjudicating the dispute.
29. The Respondent further submits that Article 164(3)(a) establishes the Court of Appeal to hear appeals from the High Court and other courts of the same status as the High Court.
30. The Applicant further cites and relies on the decision in *Chris Munga N. Bichange v Richard Nyagaka Tong'I & 2 others* [2013] eKLR where the Court of Appeal clarified that once an appeal is filed the High Court cannot entertain fresh applications or proceedings on the same matter unless directed by the appellate court.
31. On the application dated 14th January, 2025 the Respondent submits that the principles for grant of stay pending appeal are set out in Order 42 Rule 6 of the Civil Procedure Rules to be substantial loss to applicant should orders of stay not be granted, applicant to demonstrate an arguable case, application is made without unreasonable delay and tender of security for the due performance of the decree or order by the applicant.
32. The Respondent submits that substantial loss was defined by the Court of Appeal in *Vishram Ravji Halai Thornton & Turpin Civil Application No. Nai. 15 of 1990 (KLR)* where the court held:

“Whereas the Court of Appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely establishment of a sufficient cause, satisfaction of substantial loss and furnishing of security ...”
33. It is submitted that in the instant case the applicant has not explained what loss if any, it will suffer should the orders of stay not be granted. That the same is based on mere assumption against the Respondent.
34. The Respondent submits that what amounts to substantial loss was discussed in *James Wangalwa & another v Agness Naliaka Cheseto* in High Court Misc. App. No. 42 of 2012; *Machira t/a Machira & Co. Advocates v East African Standard (No. 2)*; *Equity Bank Limited v Taiga Adams Company Limited* 2006 eKLR and *Kenya Shell Limited v Kibiru* (1986) KLR.
35. It is further the submission of the Respondent that 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 successful party in the appeal other than substantial loss as the applicant has failed to discharge the onus of proof of substantial loss as required by law. The Respondent relied for emphasis on the case of *Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat* [2015] KEHC 3136 (KLR) where the court upheld the decision in *M/S Port Reitz Maternity v James Karanga Kabia Civil Appeal No. 63 of 1997*.
36. It is the submission of the Respondent that the judgment in question is a money decree. That in *Kenya Hotel Properties Limited v Willesden Properties Limited Civil Application No. Nai. 322 of 2006 (UR)* the court held that an 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.



37. It is further submitted that it is not within the province of this court to establish whether or not the appeal has overwhelming chances of success as was held in *Rono Cheruiyot v SBI International Holdings (AG) Ltd* [2020] eKLR and *Celestine Chemutai v Kaimosi Tea Estates Limited* [2021] eKLR.
38. On furnishing security the Respondent relying on the decision in *Gianfranco Mannthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR submits that the Applicant must furnish security as may be ordered by the court.
39. On the issue that the decree holder may not be able to refund the money the Respondent submits that in the case of *Kosmas Kipkoech Sigei v Madrugada Ltd & another* [2010] eKLR the court stated:
- “ ... a stay will not be made on the ground that the decree holder is a pauper and will therefore be unable to refund the decretal sum if paid to him ...”

Determination

40. 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 preliminary objection should be upheld;
 - b. Whether or not the orders of stay of execution orders should issue;
 - c. Who should pay costs of this application.
41. The preliminary objection by the Respondent challenges the jurisdiction of this court to hear the instant application for stay of execution pending appeal to the Court of Appeal. According to the Respondent this court is *functus officio*. In support of its preliminary objection the Respondent refers to Rule 21(2) of the Employment and Labour Relations Court (Procedure) Rules, 2024, Rule 5(2)(b) and 42 of the Court of Appeal Rules
42. Rule 21(2) of the Employment and Labour Relations Court (Procedure) Rules, 2024 provides:
- 21.
- (1) Where an application for stay of execution pending appeal has been lodged, the applicant shall, in the supporting affidavit, declare whether a similar application has been filed in any other court.
 - (2) An application for stay of execution pending appeal shall be filed in the appeal file.
43. My understanding of Rule 21(2) is that it refers to appeals filed in this court. The section is part of PART III—APPEALS which encompasses rule 11 to 22. The rule therefore refers to applications for stay of execution in respect of the decision that is the subject of the appeal in the Employment and Labour Relations court and not appeal from the decisions of the court to the court of Appeal. It is further my understanding that the intention of the provision is to avoid a situation where the appeal is filed in one file as an appeal and the application for stay is filed in a different file as a miscellaneous application.
44. I however agree with the Respondent that the procedure for appeals from the decisions of this court to the Court of Appeal are subject to Rule 5 of the Court of Appeal Rules which provides:
5. Suspension of sentence, injunction and stay of execution and stay of further proceedings



- (1)
- (2) 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—
 - (a) in any criminal proceedings,;
 - (b) 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.

45. Order 46 Rule 6(1) refers to all applications for stay of execution pending appeal at all levels whether it is an application to stay execution of a decision of the subordinate court pending appeal to the High Court and Courts of equal status or appeals from the superior courts to the Court of Appeal. That is why it refers to first or second appeal. The rule reads:

[Order 42, rule 6.] Stay in case of appeal.

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.

46. For this reason I find no merit in the preliminary objection by the Respondent and dismiss the same.

Whether or not the orders of stay of execution orders should issue

47. Order 46 Rule 6 (2) Civil Procedure Rules provides for the principles for grant of stay pending appeal. Under the said provisions, the court is to be guided by the principles set out therein in determining whether or not to grant the orders for stay of execution of the decree pending appeal.

48. Order 42 rule 6(2) of Civil Procedure Rules provides as follows: -

- i. “(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.”

49. Rule 5 of the Court of Appeal Rules also provides for the principles to guide the court when considering an application for stay pending appeal as follows:

Rule 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.
50. Rule 75 of the Court of Appeal Rules further provides-
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 appellant 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.
51. 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 to be filed within 14 days from date of judgment.
52. In the instant case judgment was delivered on 5th December, 2024. The Notice of Appeal was lodged on 18th December, 2024. It was therefore lodged within the timelines provided for in Rule 75 of the Court of Appeal Rules.
53. 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)*
- “... 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*).



54. 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).”

55. In the instant application, it is my view that it is not for this court but the appellate court to determine whether or not an appeal is arguable as this court would be relitigating if it ventures into such an exercise since the appeal is from its decision.

56. On the second principle for grant f orders for stay, I do not believe that not granting the orders would render the appeal nugatory, this being a money decree. I am however conscious of the fact that the Respondent/Claimant did not contest the averment by the Applicant that the Grievant is not a person of known means and if paid may not be able to refund the decretal sum in the event that the intended appeal is successful. I would however agree with the position that the fact that a person is poor alone is not a good ground to deny such person the fruits of his judgement.

57. Judgment in this case was first delivered in favour of the Respondent in the Magistrates Court on 12th May, 2020. The Applicant filed appeal against the judgement and enjoyed stay of execution during the pendency of the appeal which was decided on 5th December, 2024, confirming the decision of the Magistrates' Court. For the Applicant to benefit from further stay pending a second appeal to the court of appeal which is its constitutional right, it must demonstrate the prejudice it will suffer that, as stated in the certificate of urgency, “cannot be monetarily compensated”.

58. The Applicant did not as must as indicate what grounds of appeal it intends to raise against the decision of this court in the second appeal. As was stated in Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat [2015] KEHC 3136 (KLR) where the court upheld the decision in M/S Port Reitz Maternity v James Karanga Kabia Civil Appeal No. 63 of 1997, “... the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgement delivered in his favour. There must be a just cause for depriving the plaintiff of that right ...”

59. It is my view that the Applicant has not given sufficient justification why the Respondent herein should be deprived of the fruits of his judgement that he was granted on 12th May, 2020 as upheld by this court on 5th December, 2024. The Applicant did not convince me that the appeal would be rendered nugatory if the orders sought in its application dated 14th January, 2025 is not granted.

60. I accordingly dismiss the application with costs.

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

MAUREEN ONYANGO

JUDGE

