



REPUBLIC OF KENYA



KENYA LAW
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**Mikisi & 55 others v Butali Sugar Mills Limited & another (Cause
10 of 2023) [2025] KEELRC 1672 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1672 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CAUSE 10 OF 2023
DN NDERITU, J
JUNE 5, 2025**

BETWEEN

MULAMBULA IMBOGO MIKISI & 55 OTHERS CLAIMANT

AND

BUTALI SUGAR MILLS LIMITED 1ST RESPONDENT

FRODAK SERVICES LIMITED 2ND RESPONDENT

RULING

I. Introduction

1. In a judgement delivered on 7th November, 2024 the 52 claimants were each awarded Kshs56,976/= as accrued leave, Kshs18,579/= as service pay, Kshs99,672/= as salary underpayment, certificate of service, and costs and interest against the 1st respondent (the applicant).
2. In a notice of motion dated 28th November, 2024 (the application), the applicant is seeking orders that –
 - i. Spent.
 - ii. There be interim order of stay of execution of the judgement dated and delivered on 7th November,2024 in these proceedings, pending hearing and determination of the present application, inter-partes.
 - iii. There be a stay of execution of the judgment and decree of this court Hon. Lady Justice Keli J. dated and delivered on 7th November,2024 and all its consequential orders and processes, pending hearing and determination of an intended appeal to the court of appeal.



- iv. The court be pleased to issue any further orders in the interest of justice so as to preserve and protect the applicant/1st respondent undoubted right of appeal conferred both by the constitution and statute law.
- v. Costs of this application be in the intended appeal.
3. The application is expressed to be brought under the provisions of Sections 3, 17 & 20 of the Employment and Labour Relations Court(ELRC) Act, Rules 21(1)44, 45, 47, 54, & 68 of the ELRC (Procedure)Rules, 2024 and Order 42, Rule 6 of the Civil Procedure Rules, 2010. It is based on the grounds on the face of it.
4. The application is supported with the affidavit sworn by Fredrick Otieno Onyango, a director of the applicant, on 28th November,2024 with several annexures thereto.
5. In opposition to the application, the claimants filed a replying affidavit sworn by Benjamin Shingoli Iyadi on 20th December, 2024.
6. On 6th February, 2025 the court directed that the application be canvassed by way of written submissions. The 2nd respondent's counsel, Mr. Mattah, indicated that his client was not opposed to the application.
7. The applicant's counsel, Mr. Okong'o, filed written submissions on 11th March, 2025 while the claimants' counsel, Mr. Kagunza, filed on 5th March, 2025.

II. Evidence

8. In the supporting affidavit, it is deponed that Keli J. delivered a judgment alluded above on 7th November, 2024 with which the applicant was dissatisfied.
9. It is deponed that the applicant lodged a notice of appeal and applied for typed certified copies of the proceedings, the impugned judgement, and the decree therefrom (FO1) for purposes of an appeal to the Court of Appeal.
10. It is further deponed that while the court at the time of delivering of the judgement granted an order for 30-days' stay of execution, the said stay shall lapse before the appeal is heard and determined.
11. It is deponed that the applicant intends to raise several triable issues in the appeal such as whether it was right for the court, absent of pleadings or evidence, to convert the claimants' work contracts from piece rate to term contracts. It is asserted that the intended appeal is arguable, not frivolous, and has high chances of success. It is argued that unless the stay orders are issued, the claimants who number over 50, and who did not testify before the court apart from the 1st claimant, may proceed to execute against the applicant for the colossal award.
12. It is further deponed that the application was filed without undue delay soon after the judgment was delivered and the applicant pleads to be allowed to exercise its right of appeal which may be rendered nugatory if the order is denied.
13. It is deponed that the applicant stands to suffer substantial loss if the awarded sums are paid as the claims are incapable of refunding the same as they ceased working for the applicant about eight years ago and are now strangers to the applicant.
14. It is further deponed that the applicant is ready and willing to provide security for the due satisfaction of the decree in the unlikely event that the appeal in the Court of Appeal ultimately fails. It is stated that no prejudice shall be occasioned upon the claimants as both sides shall be heard in the appeal.



15. In the replying affidavit, the claimants argue that the application is defective and incompetent as no appeal lies to the impugned judgement for the reason that the applicant failed to serve upon the claimants' counsel the letter requesting for typed proceedings and the notice of appeal as required under Rule 82(1) of the Court of Appeal Rules.
16. It is deponed that the application is anchored on the wrong provisions of the law and it is thus defective and no urgency is evidenced to entitle the applicant to the reliefs sought.
17. It is deponed that the present application was allegedly filed inordinately late on 28th November, 2024, while the impugned judgement was delivered on 7th November, 2024.
18. It is further stated that the applicant is guilty of material non-disclosure and only intends to delay the conclusion of this litigation. It is further deponed that the applicant has failed to attach the draft memorandum of appeal for the court to discern its viability and thus underserving of this court's audience.
19. It is further deponed that the applicant has not paid the costs arising from the suit in the first instance and has not demonstrated that costs would be inadequate to remedy its alleged substantial loss. It is further argued that the applicant has not met the threshold for the grant of stay of execution and, in the interests of justice, the court should balance the convenience in favour of the claimants who have a right to the fruits of the judgment and the attendant decree.

III. Submissions

20. Counsel for the applicant submitted on two main issues – Whether the court should grant stay of execution of the decree pursuant to the judgement dated 7th November, 2024 and all its consequential orders and processes, pending the hearing and determination of an intended appeal to the court of appeal as sought by the applicant; and What orders should the court issue on costs of the application.
21. It is submitted that under Section 17 of the ELRC Act and Article 164 of the *constitution* a litigant has the right of appeal against a decision to the Court of Appeal, which right the applicant wishes to invoke.
22. It is further submitted that under Order 42, Rule 6 of the Civil Procedure Rules the court in granting a stay of execution should consider whether an applicant has demonstrated substantial loss that could result if the stay orders are not granted, whether the application has been made without delay; and, whether the applicant is willing to avail security for the due satisfaction of the decree on the terms set by the court.
23. It is submitted that the application has been brought without inordinate delay as the application was filed on 28th November, 2024, 21 days after the judgment and 14 days after the notice of appeal was lodged, demonstrating the applicant's intention to appeal the judgment.
24. On substantial loss it is submitted that 52 claimants were each awarded a minimum of Kshs175,000/ = exclusive of interest and costs and unless stay of execution is granted the claimants may individually or collectively execute against the applicant before the appeal is heard and determined. It is argued that if the applicant paid the decretal sums the applicant shall not recover the same if the appeal ultimately succeeds as the claimants have no means and have failed to demonstrate their financial ability and sources of income.
25. It is submitted that none of the claimants has filed an affidavit of means or expressed their ability to repay back into court any sums forming part of the decree in the event the appeal ultimately succeeds.



26. It is further submitted that the claimants, apart from the 1st claimant, never testified before the court, and the 1st claimant has not informed the court of his financial means of income or those of the other claimants. It is submitted that substantial loss is hinged on the inability of decree holders to refund the decretal sum in the event that an appeal succeeds and unless the stay is granted the applicant shall be highly prejudiced.
27. The applicant asserts that it is willing to avail security for the due performance of the decree and on such terms as may be set by the court. Citing *Fokin Motorcycle Co. Limited v Ann Wambui Wangui & another* (2018) eKLR, it is submitted that the applicant's willingness to avail security demonstrates good faith on its part.
28. Further citing *Absalom Dova v Turbo Transporters* (2013) eKLR, the court is urged to exercise its discretion in balancing the applicant's unfettered right to appeal and the claimants' right to enjoy the fruits of the judgment and find and hold in favour of the applicant.
29. On the other hand, the claimants' counsel submitted on a single issue – Whether the applicant has met the threshold for grant of stay orders pending appeal.
30. It is submitted that an applicant seeking a grant of stay of execution orders must meet the threshold set out under Order 42 Rule 6 of the Civil Procedure Rules. It is submitted that the applicant has not demonstrated the nature of any irreparable loss that it shall incur in the event that execution proceeds. It is argued that it has not been demonstrated that the claimants are men of straw and incapable of refunding the decretal sum should the appeal ultimately succeed. Counsel cited *Mutua Kilonzo V Kioko David Machakos* (2008) eKLR in support of that argument.
31. It is submitted that an appeal is not rendered nugatory in a money decree if payments are made in satisfaction of a decree as the applicant can sue for recovery. Counsel cited *Machira T/a Machira & Advocates v East Africa Standard* (no. 2) 2002 KLR 63; & *Caneland Ltd & 2 others v Delphis Bank Ltd* (Civil application No. Nai 344 of 1999 in support of that argument.
32. It is further submitted that the applicant's intended appeal has no merits and that the application was filed after unreasonable delay. Citing *Luxus Woods (K) Limited v Patrick Amugune Kamadi* (2016) eKLR, the court is urged to balance between the competing interests of the parties, on the one hand, the claimant's right to enjoy the fruits of the judgment and, on the other hand, the applicant's right to appeal, and find in favour of the claimants. It is further submitted that the applicant in failing to serve upon the claimants counsel the letter requesting for typed proceedings and the notice of appeal. The applicant lost the right of appeal within the timelines under Rule 42(1), 75, 82(1) & (2), 83, and 84 of the Court of Appeal Rules.
33. It is further submitted that draft memorandum of appeal was not annexed to the application making it ripe for striking out. Counsel cited *Mabel Kibore v National Oil Corporation of Kenya Limited* (2019) eKLR, *In Re Estate of Alice Kahaki Njoka* (2016) eKLR, *Safaricom Limited v Anneth Jerop Tarus & another* (2020) eKLR, & *Njenga v Njeri & 2 others* (2023) KEHC 23991(KLR) in support of that argument.



IV. Analysis & Determination

34. The court has carefully read the application, the affidavit in support, the replying affidavit, and the written submissions by counsel for both parties, alongside all the cited authorities. The following issue commends itself to the court for determination –

Whether the application meets the threshold for grant of an order for stay of execution pending the hearing and determination of an appeal.

Stay of Execution

35. The principles guiding the grant of an order for stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, 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 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.

36. Further, stay of execution may only be granted for sufficient cause, and the Court in deciding whether or not to grant the stay shall consider the overriding objective stipulated in Sections 1A & 1B of the *Civil Procedure Act*. Courts are now enjoined to give effect to the overriding objective in the exercise of their discretionary powers under the *Civil Procedure Act* or in the interpretation of any of the provisions therein.

37. Section 1A (2) of the *Civil Procedure Act* provides that –

The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.

38. Section 1B provides some of the aims of the said objectives to include – the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

39. In deciding an application of this nature, therefore, the court has to go beyond Order 42 Rule 6 and apply a holistic approach to render fairness and justice to both sides. While the applicant is pleading for stay to avoid the appeal being rendered nugatory, the respondents are justly entitled to the fruits of the judgment. The court has to balance those competing interests.

40. In *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) KEHC 1094 (KLR) the court observed that –

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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 the successful party in the appeal ... the issue of



substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. (Emphasis Added).

41. The applicant takes the view that it stands to suffer substantial loss in case over 50 claimants who are each entitled to Kshs175,000/= plus costs and interest were to execute against it, if the stay of execution is denied. The claimants have not filed an affidavit of means to demonstrate that they are capable of refunding the decretal sum plus costs should the appeal ultimately succeed. The applicant is ready and willing to comply with an order issued by the court on the provision of security in satisfaction of the decretal sum plus costs.
42. The claimants assert that the applicant has not demonstrated an arguable appeal for failing to attach a memorandum of appeal. It is argued that the applicant has neither demonstrated the substantial loss that it may suffer if the stay is not granted, nor has it offered security in satisfaction of the decree. The claimants further argue that the applicant inordinately delayed filing this application and object to the grant of stay arguing that the applicant intends to prevent the claimants from enjoying the fruits of a lawful judgment.
43. In *Butt -vs Rent Restriction Tribunal (1982) KLR 417* as cited in *MFI Document Solutions Ltd v Paretto Printing Works Limited (2021) eKLR* the Court of Appeal alluded to the principles applicable in exercise of the discretion by a court in granting stay of execution –
 1. The power of the court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle is granting or reusing 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. (sic) (trial court judgement).
 3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
 4. 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 of costs as ordered with cause the order for stay of execution to lapse.
44. The applicant asserted that the claimants have not provided an affidavit of means as to their ability to repay the decretal sum in case the appeal ultimately succeeds. The claimants have not demonstrated their ability of refunding the sums awarded. In light of the depositions by the applicant that they shall suffer substantial loss if the stay is not granted, the court is persuaded that substantial loss may occur and the appeal rendered nugatory if the stay is denied and the appeal ultimately succeeds.
45. Once the issue of their ability to refund the decretal sum plus costs was raised, it was upon the claimants to demonstrate their sources of income and or their financial ability to refund any monies paid to them. The sources of income of each individual is a personal issue that the appellant is not expected to know for each of the claimants.
46. The claimants assert that the applicant failed to serve upon their counsel the letter requesting for proceedings as to be entitled to the proviso under Rule 84 (2) of the Court of Appeal Rules in computing time when an appeal is to be instituted. The claimants further state that no memorandum of appeal has been availed to demonstrate that there is filed an appeal that is indeed arguable.



47. Under Rule 84(1) of the Court of Appeal Rules, the memorandum of appeal should be filed within sixty days after the date when the notice of appeal was lodged or such period after the proceedings requested are availed. The competency and or merits of the appeal in the Court of Appeal can only be argued in the hearing of the said appeal. It is not within the purview of this court to consider the merits of the same.
48. The judgment appealed was delivered on 7th November, 2024 and the notice of appeal was lodged 14 days later. The court is satisfied that there was no inordinate delay in filing of the notice of appeal. The present application was filed on 28th November, 2024, 21 days after the judgment was delivered. The court finds that the application was not filed after a lengthy or inordinate period. In any event, there is no record demonstrating that the claimants had commenced execution proceedings within the said period. Furthermore, orders for stay of execution do not extinguish a party's entitlements to the fruits of a judgment, but rather only delay the enjoyment thereof to a future date. Delay is not denial.
49. As to security for due performance of the decree, the applicant is ready and willing to comply with any conditions that the court may impose. On the costs referred to by the claimants as not having been paid, the same flow from the judgment sought to be stayed and the same cannot be divorced from the stay of execution proceedings.
50. Taking all factors and considerations into account, and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective for this court to do justice, the court shall grant an order for stay of execution pending the filing, hearing, and determination of the appeal.
51. However, the stay of execution shall be conditional in that the applicant shall within 30 days of this ruling deposit a sum of Kshs500,000/= in court as security. Failure to comply shall render the order for stay of execution to lapse upon expiry of 30 days of this ruling.

V. Costs

52. The costs of the application shall abide with the outcome of the appeal.

VI. Order

53. Consequently, the court orders that –
 - a. The application dated 28th November, 2024 is merited and is hereby allowed upon the applicant meeting the condition in (b) hereunder.
 - b. The applicant shall within 30 days of this ruling deposit a sum of Kshs500,000/= with the court as security.
 - c. In default of (b) above, the order for stay shall expire and lapse.
 - d. Costs of the application shall abide with the appeal.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 5TH DAY OF JUNE, 2025.

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DAVID NDERITU

JUDGE

