



REPUBLIC OF KENYA



KENYA LAW
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**Odhiambo v Kisang & 3 others (Cause E089 of 2023)
[2025] KEELRC 1587 (KLR) (3 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1587 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E089 OF 2023
NZIOKI WA MAKAU, J
JUNE 3, 2025**

BETWEEN

DR. CHARLES OKECH ODHIAMBO CLAIMANT

AND

DR. OBADIAH KISANG 1ST RESPONDENT

MS. DORRIS MWARREY 2ND RESPONDENT

MR. GILBERT KAMANGA 3RD RESPONDENT

WORLD VISION KENYA 4TH RESPONDENT

RULING

1. Through an application dated 14th March 2025 the Respondents/Applicants seek stay of execution of this court's judgment pending hearing and determination of their intended appeal. They contend that they are aggrieved by the judgment delivered on 19th February 2025 in which the Claimant was awarded Kshs. 1,513,924.30. In support of their application, they state that they have already lodged a notice of appeal and requested typed proceedings. The Respondents further avow that the intended appeal raises substantial and arguable issues, as reflected in the notice of appeal, and that granting a stay will not occasion any prejudice to the Claimant. They maintain that the application has been brought in good faith and express their willingness to comply with any conditions the court may impose.
2. In response, the Claimant/Respondent through his sworn affidavit dated 27th March 2025, deposed that the application is a calculated attempt to delay his enjoyment of the fruits of the judgment. He argued that the application should be dismissed on the grounds that the Applicants have not furnished any security. He further declared that he is financially capable of refunding the decretal sum should the appeal succeed, and therefore, the Applicants would not suffer any irreparable loss.



3. Subsequently, on 1st April 2025, the court issued directions regarding the filing of written submissions. Pursuant to those directions, the Applicants filed their submissions on 5th May 2025. However, the Respondent did not file any submissions.

Applicants' Submissions.

4. From the outset, the Applicants urge the Court to grant stay of execution on all pecuniary aspects of the judgment, noting that entitlements such as gratuity and terminal dues were not quantified. The Applicants submit that they have satisfied the three conditions required for the grant of stay of execution under Order 42 Rule 6(2) of the *Civil Procedure Rules*. In respect of the aspect of substantial loss, the Applicants submit that they would suffer immensely if they were to pay the significant amount of Kshs. 1,513,924.30 and the Respondent fails to pay back. They assert that the Respondent has failed to demonstrate his financial capacity to repay the decretal amount in case the appeal succeeds. In support of this argument, they rely on the decision in *National Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR, in which the court held:

“Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”

5. In addition to financial loss, the Applicants submit that paying the amount in the absence of proof of the Respondent's ability to repay would render the appeal nugatory, resulting in judicial futility. Regarding aspects of undue delay, the Applicants submit that they filed the notice of appeal less than two weeks after judgment and the application less than a month after judgment. They maintain that this timeline does not reflect indolence, citing the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] KEHC 7586, where it was observed that:

“The legislative intent under Order 42 is to bind the parties to prosecute their claims without undue delay. A court of equity frowns at stale claimants who sleep on their rights only to approach the court after a long period of time.”

6. Turning to the issue of security, the Applicants submit that they are willing to either deposit a portion of the decretal amount into a joint interest-earning account in the names of both advocates, offer non-monetary undertakings such as guarantees, or abide by any conditional orders imposed by the court. They emphasize that the core objective should be the preservation of the subject matter of the appeal and the protection of their right to be heard. They rely on *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, where the court held:

“It is the court that orders the kind of security the applicant should give as may ultimately be binding on the applicant... This modelling of the law is to ensure the discretion of the court is not fettered.”

7. Additionally, they cite the decision of the Court of Appeal in *Ndubiu Gitabi v Warungongo* [1988] KLR 621 as referenced in *Matata & another v Rono & another* (Civil Appeal E034 of 2024) [2024] KEHC 2799 (KLR), which emphasized that the provision of security should be done in a manner least prejudicial to the party providing it, and that courts must avoid prejudicing issues pending appeal.
8. Lastly on the balance of convenience they submit that it should tilt in their favour. They maintain that the Respondent will suffer no prejudice other than waiting till the appeal is determined, in which case he will still be able to enforce the judgment. Conversely, they affirm that if stay is denied and the appeal



succeeds, they will not be able to recover the amount paid. In light of the foregoing, the Applicants respectfully urge the Court to allow the application.

Disposition.

9. The Court is being asked to grant a stay of execution in the matter. It is asserted there is an appeal that has been preferred against the decision of this Court rendered in February 2025. The factors to consider in such a case fall within the parameters in the case of *RWW v EKW* [2019] KEHC 6523 (KLR) where Ongeru J. stated that

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

10. Additionally, under Order 42, Rule 6(2) of the *Civil Procedure Rules*, 2010 it is provided 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.
11. In the case before the Court, there is an accusation that there is indolence in making the application for stay and that there is no offer of security. In addition to the elaborate steps the applicant must surmount, there must be an arguable appeal. The grounds for the intended appeal are incapable of leading this Court to make the conclusion that there is an arguable appeal. On the aspect of making the motion timeously, there is reason though a bit tenuous to hold the motion was filed timeously despite the lapse of close to a month or so. There is no offer of security. The three conditions for granting stay of execution pending appeal must be met simultaneously and are conjunctive and not disjunctive. It is my considered view that the Applicants herein, though they brought this Application without undue delay, failed to adequately demonstrate the substantial loss that they would suffer, and also failed to furnish security. The upshot of the foregoing is that the Applicants have failed to surmount the hurdles requisite for the grant of the stay sought. Motion by the Respondents/Applicants is dismissed with costs to the Claimant/Respondent. Taxation pending before the Taxing Master may now proceed.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JUNE 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

