News Cafe-Kenya t/a Vibe Nairobi Limited v Hassan (Employment and Labour Relations Appeal E224 of 2023) [2025] KEELRC 2326 (KLR) (30 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 2326 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E224 OF 2023

JW KELI, J

JULY 30, 2025

BETWEEN

NEWS CAFE-KENYA T/A VIBE NAIROBI LIMITED ..... APPELLANT

AND

ABDARANAM UKIRU HASSAN ..... RESPONDENT

RULING

1. The applicant was the judgment holder and respondent in the appeal and filed Notice of Motion application dated 21st February 2025 under to Section 1 A and 3A of the *Civil Procedure Act*, Order 42 Rule 6 of the Civil Procedure Rules, 2010, Sections 12, and 27 of the Employment & Labour Relations Court Act and enabling provisions of law seeking for the following Orders-

    a. The Honourable Court be pleased to order the Appellant to deposit security of Kshs. 2,678,303.46 in an interest-earning joint account to be held by both advocates on record.

    b. Any other further relief that the Honourable Court may deem fit to grant.

Grounds of the application

2. That it is now trite law that the winner of a suit in a money decree should not be denied the opportunity to execute the decree unless the Appellant has satisfied the requirement of depositing security.

3. That the trial court delivered a judgment in which the Appellant was ordered to pay Kshs. 2,678,303.46 plus interest and costs of the suit to the Respondent and 2 of his colleague employees in the MC.ELRC E475 of 2021 which was consolidated with MC. ELRC E 476 of 2021 and MC. ELRC E 477 of 2021.

4. That whereas the Appellant has the right to appeal, the Respondent and his colleagues equally has the right to enjoy the fruits of the judgment.

5. That it is only fair if the Appellant is allowed to appeal after it has deposited security in an interest earning joint account to be held by Counsel for both parties.

6. That Kshs. 2,678,303.46 is sufficient security considering that the sum is not inclusive of interest and costs of the suit which were also awarded by the Court.

7. That based on the foregoing, the Respondent prays that the Application is allowed and the Appellant is ordered to deposit security in an interest earning joint account to be held by both advocates on record.

8. The application was supported by the Affidavit of ABDARAMAN UKIRU HASSAN where he annexed the impugned judgment of the lower court dated 5th October 2023.

Determination

Whether the application was merited

Applicant's submissions

9. Whether the appellant should satisfy the requirement of security- It is now trite law that the winner of a suit in a money decree should not be denied the opportunity to execute the decree unless the appellant has satisfied the requirement of depositing security. To buttress this legal position, in Gianfranco Manenthi & Another vs. Africa merchant Assurance Co. Ltd [2019] eKLR (UNREPORTED) the court observed: The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls. Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal.... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.

10. Similarly in Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others [2014] eKLR (UNREPORTED)the court stated: The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose. 8. What then amounts to sufficient security? The Court in Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR, held as follows: ... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage

just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick."

11. That from numerous rulings of this Honourable Court (the Employment & Labour Relations Court (ELRC)), and in matters involving monetary decrees, the Court has been of the view that sufficient security is equivalent to the entire decretal sum and as such, it has ordered applicants/appellants to deposit the entire decretal sum as sufficient security. For instance, in Lintons Place Limited v Stanley Karanu Kamau [2022] eKLR this Honourable Court (ELRC) ordered the Applicant to deposit the entire decretal sum of Kshs. 1,494,461/- as security within 14 days from the date of ruling as a condition for stay.

12. Similarly, in Delta Point Distributors Limited v Geoffrey Ndichu [2022] eKLR, again this Honourable Court (ELRC) ordered for the entire decretal sum of Kshs. 1,335,263.21 be deposited within 30 days. Subsequently, the Applicant filed an application for review of the order with a view of reducing the amount to Kshs. 650,000. The learned judge in dismissing the application stated as follows: As such since the enjoyment of the Respondent's Judgment has been put on hold pending Appeal, the security by the Applicant ought to be suitable and adequate as to grant him a sense of security during the pendency of the said Appeal. In this case, I (sic)and that the proposed security of Kshs 650,000/= as not being adequate and suitable in terms of Order 42 Rule 6 of the Civil Procedure Rules. Besides, the Applicant has not provided the names and the number of directors who are to act as personal guarantees. There is also no evidence that such directors will be in a financial position to guarantee the due performance of the decree in the event the Appeal does not succeed. In my view, the Applicant has not given any proper reason to justify the review and/ or varying of the order of 24th January 2022. The upshot of the foregoing is that the Application dated 16th February, 2022 July, 2014 is dismissed, thereby affirming the orders of 24th January 2022. Be that as it may, and in the interest of justice, I will extend the time for compliance with the orders of 24th January 2022 by another 30 days from today and in default thereof, the stay of execution shall automatically lapse.

13. Based on the foregoing precedents and the fact that the Applicant/ Appellant is willing to deposit the entire decretal sum, adequate security is equivalent to the decretal sum due which is Kshs. 2,678,303.46. Therefore, that this Honourable Court orders the entire decretal sum of Kshs. 2,678,303.46 be deposited in a joint account to be held by both counsel on record within a specified time. That in addition to the ruling in the instant application, this Honourable Court also issues direction in relation to the expeditious hearing and determination of the Appeal.

Respondent's /appellant's submissions

14. Whether the amount paid is adequate security? Ordinarily prayer for security is discretionary as well as conditional. Stay of Execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows;"(1)No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the ourt 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.(2)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."

15. That it is important to note that the Appellant did not apply or file any application for Stay of Execution to warrant this Court's intervention. The Respondents' application is premature and lacks merit ought to be dismissed.

16. The Appellant's opposition to the application is anchored on the premise that it will suffer serious prejudice if at the conclusion of the Appeal hearing the appeal is allowed. There are three Respondents in this matter and there is no evidence of their ability to pay back the whole decree if this Application is allowed. In the case of National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (2006) eKLR the Court of Appeal held thus; "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. The Respondent did not file an affidavit of means to indeed prove that he is liquid enough to repay the decretal sum if advanced. In the absence of the requisite proof from the Respondent that he is a person of means, I find that the Appellant has satisfied this court that they will suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined."

17. The issue of adequacy of security was dealt with by the Court of Appeal in Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows: "The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

18. In the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR the court expressed itself as hereunder: "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."

19. The Appellant having paid sum of Kes.1,303,000.00 (Kenya shillings One million three hundred three thousand) even before the Applicants' is a sign of good faith based the fact that some parts of the Judgment are not disputed, like unpaid salary but service pay and service charge are strongly disputed.

20. The Appellant did not move this Honourable Court, the Applicant's Notice of Motion Application dated 21/02/2024 lacks merit as the same is merely speculative and meant to cajole the Appellants to succumb to a settlement. In the case of; Cupstone Travels Limited (CT) & another v Tindi & another (Appeal E023 of 2023) [2023] KEELRC 2828 (KLR) (9 November 2023) (Ruling)The Court observed that" 9.The appellant is largely challenging the trial court judgment with regard to notice pay, underpayments and compensation. Order 42 rule 6 of the Civil Procedure Rules requires an applicant seeking stay of execution to demonstrate what loss and damage will be suffered if the judgment award is paid pending appeal. the indigence of a party, though relevant is not the sore consideration as upon the judgment, such a party has a valid order and should be allowed to enjoy the fruits of his claim while on the other hand safeguarding the right of appeal. For the court to be able to hear the appeal on the merits, the offer by the appellant to file the Record of Appeal within 21 days taken into account together with the offer to deposit part of the judgment sum of Ksh. 300,000 such places the appellant in good standing."

21. That the Respondent's application is premature and lacks merit to warrant this Court's intervention to enhance the already paid amounts.

Decision

22. The court finds that there is no application for stay of execution before it. The deposit of security Order 42(6) is a condition for grant of stay. There is no requirement for deposit of the security as a condition for appeal. Stay of Execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows; "(1)No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except 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.(2)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." The appellant/ respondent submitted that it was important to note that the Appellant did not apply or file any application for Stay of Execution to warrant this Court's intervention. That the Respondent's application is premature and lacks merit. The court agreed and found no basis to intervene as its basis to order for security is hinged under Order 42 (6) of the Civil Procedure Rules. The appellant being aggrieved with only part of the decree deposited with advocates for the applicant some monies under the Decree. The respondent says Kshs. 1,303,000 while the applicant says Kshs. 1,100,000. Whatever the amount was deposited with the applicant's advocate under the Decree, the same was done without the intervention of the court and thus whether said deposit is adequate or not is neither here nor there as the court intervention was not invoked.

23. The court finds the application to be without merit for the foregoing reasons. The application dated 21st February 2024 is dismissed with costs to the appellant in the cause.

24. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH JULY DAY OF 2025.

J. W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Applicant – Absent

Respondent: Osiemo

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