



**Chandaria v Mungai (Employment and Labour Relations Appeal
E086 of 2025) [2025] KEELRC 2164 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2164 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E086 OF 2025**

**JW KELI, J
JULY 18, 2025**

BETWEEN

MINESH KESHAULAL CHANDARIA APPELLANT

AND

PETER KIMINGI MUNGAI RESPONDENT

RULING

1. The Appellant/Applicant vide Notice of Motion application dated the 7th of April 2025 brought under the provisions of Order 42 Rule 6 (1) & (3) of the [Civil Procedure Rules 2010](#); Sections 1A,1B and 3A of the [Civil Procedure Act](#); Sections 12(1) and (3) of the [Employment and Labour Relations Court Act](#); and Rules 21 and 73 (2) of [Employment and Labour Relations Court \(Procedure\) Rules, 2024](#), sought the following orders:-
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this appeal, this Honourable Court be pleased to grant a stay of execution of the judgment of Hon. Becky Cheloti (PM) in Nairobi Chief Magistrate's Employment Case No. E470 of 2022 delivered on 28th February 2025.
 - d. That the costs of this application be in the cause of the appeal.
2. Grounds of the application
 - a. That on 28 February 2025, the Honourable Becky Cheloti (PM) delivered judgment in Nairobi Chief Magistrate's Employment Case No. E470 of 2022 in favour of the Respondent awarding a decretal sum of Kshs.1,124,923.45.



- b. Upon delivery of the judgment, the trial court granted a temporary 45-day stay of execution of decree, intended to afford the Appellant reasonable time to obtain a copy of the judgment, evaluate its contents, and provide appropriate instructions to counsel on whether to pursue an appeal.
- c. The Appellant filed a Memorandum of Appeal in the present matter and has taken concrete and timely steps to pursue the Appeal, including formally requesting certified copies of the proceedings, judgment, and decree for purposes of compiling the Record of Appeal.
- d. The temporary stay of execution lapsed on 14 April 2025 yet the Appeal remains pending and unresolved. The expiry of the temporary stay will likely prompt the Respondent to initiate execution proceedings, as they indicated a desire to execute on 15 April 2025.
- e. Unless this Honourable Court intervenes, the Appellant shall be exposed to immediate execution, thereby defeating the substratum of the Appeal and rendering it nugatory, as the Appellant will be compelled to satisfy the judgment while still actively prosecuting the Appeal.
- f. The Appellant was, during the pendency of the trial proceedings, taken seriously ill and underwent major surgery, which significantly depleted his financial resources and business endeavours. The resultant medical expenses have adversely impacted his capacity to promptly satisfy the decretal sum.
- g. Owing to the said financial constraints, the Appellant is not in a position to pay the decretal sum in full without simultaneously jeopardizing his ability to effectively prosecute the pending Appeal. Compelling him to do so would occasion undue hardship and substantially impair his right to a fair and meaningful Appeal process.
- h. Therefore, the execution of the decree prior to the hearing and determination of the Appeal would subject the Appellant to substantial loss, as he would suffer significant financial hardship in satisfying the decretal sum while simultaneously meeting the costs of litigation—an undue hardship upon the Appellant.
- i. Moreover, the Appellant is apprehensive that, should the Appeal ultimately succeed, the Respondent may be unable to refund the decretal amount, having no known sources of income, employment, or attachable assets. Execution at this stage would therefore result in irreparable prejudice and render recovery illusory.
- j. The Appellant is willing to abide by any reasonable conditions or terms that the Court may impose as security for the due performance of the decree, including the provision of a bank guarantee, as the Court may deem fit.
- k. The Appellant has acted expeditiously and in good faith, having lodged the Appeal and moved this Honourable Court for stay orders well within a reasonable time, and without any undue delay or laches.
- l. The continued accrual of interest on the judgment sum during the pendency of the Appeal will further increase the Appellant's liability, occasioning irreversible financial harm and undermining the efficacy of the appellate process hence the necessity of the orders staying the judgement and decree of the trial court.
- m. The Memorandum of Appeal raises serious issues for determination on appeal, and the Appellant's right to appeal is constitutionally guaranteed and should not be unjustly



encumbered or be converted into an academic exercise under the weight of imminent execution.

- n. That the time required by the trial court to compile and avail certified copies of the judgment, decree, and typed proceedings is entirely beyond the Appellant's control. It would therefore be unjust and inequitable to expose the Appellant to the risk of execution while awaiting court documents necessary to prosecute the Appeal.
 - o. That in the circumstances, the Respondent stands to suffer no prejudice whatsoever if the orders sought are granted, whereas the Appellant risks grave prejudice and irreversible harm if a stay is denied.
 - p. It is therefore in the interests of justice, fairness, and equity that this Honourable Court grants the stay of execution pending the hearing and determination of the Appeal and certifies this Application as urgent.
3. The application was opposed by the Respondent through his Replying Affidavit sworn on 22nd April 2025. His position was that the Appellant/Applicant should be ordered to deposit the decretal sum in a joint interest earning account as security, to safeguard him against the Appellant's potential inability to settle the decretal sum due to insolvency or other reasons, by the time the appeal is concluded. He objected to the provision of a bank guarantee as security.

Decision.

4. The application was canvassed by way of written submissions. Both parties complied.
5. The Court identified the issue for determination to as follows:-
 - a. Whether the Court should grant the Appellant/Applicant stay of execution of the Judgment and Decree delivered on 28th February 2025 pending the hearing and determination of the Appeal.

Whether the Court should grant the Appellant/Applicant stay of execution of the Judgment and Decree delivered on 28th February 2025 pending the hearing and determination of the Appeal.

6. The Appellant/Applicant filed a Memorandum of Appeal dated the 25th of March 2025, against the decision that was delivered on 28th February 2025.
 1. On stay of execution pending appeal, the *Employment and Labour Relations Court (Procedure) Rules 2024* state:-
 - “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.”
 2. Since the Rules are silent on the conditions for granting stay then the lacuna is addressed by Order 42 Rule 6 (2) of the *Civil Procedure Rules* to wit:-
 - “(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.”

1. It is not in dispute that the Honourable Court (Hon. Becky Cheloti) in Milimani MCELRC No. E470 of 2022, delivered a Judgment in favour of the Respondent herein on 28th February 2025. An application for stay pending appeal was filed in the Trial Court, but the Appellant/Applicant indicates that the order of stay of execution lapsed on 14th April 2025.
2. This Court’s mandate is to analyze whether the Appellant/Applicant has met the conditions for grant of an order of stay of execution, pursuant to Order 42 Rule 6 (2) of the *Civil Procedure Rules*. Firstly, has the Appellant/Applicant proved that they will suffer substantial loss if the orders are not granted? The Appellant/Applicant insists that they will suffer substantial loss since the Respondent is likely to commence execution proceedings, and has declared his intention to do so through his letter dated 15th April 2025. The foregoing is not denied by the Respondent.
3. Mere commencement or likelihood of commencement of the execution process was found not to amount to substantial loss in the case of *Timsales Limited Vs. Hiram Gichohi Mwangi*, Civil Appeal Number 94 of 2008 (2013) eKLR. The court held that:-

“the mere fact that the process of execution has commenced or is likely to commence does not amount to substantial loss for the reason that execution is a legal process and that the Appellant must establish other factors.

4. In the instant case, the Appellant/Applicant has indicated that execution is likely to commence against them. The Respondent cannot be faulted for wanting to enjoy the fruits of their judgment. In fact, the Honourable Court in the case of *Thomas M. Nguti & 196 Others vs Kenya Railways Corporation* [2022] e KLR emphasized that, in considering whether stay orders ought to be granted, the Court must consider that a successful party should be allowed to enjoy the fruits of their judgment. This position had earlier been affirmed in the case of *Machira T/A Machira & Co Advocates vs East African Standard No. 2* [2002] KLR 63.
5. The Appellant/Applicant has also averred that he is apprehensive that the Respondent may be unable to refund the decretal sum if execution is permitted to proceed, but the appeal is ultimately successful, as he has no known sources of income, employment or attachable assets. The court’s approach where the issue of refund of the decretal sum by the decree holder is raised, was set out in the case of *Century Oil Trading Company Ltd vs. Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where the court held:

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”



6. On the party on whom the burden of proving the Respondent's financial ability falls, in *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike and Another* [2006] eKLR the Court of Appeal stated that:

“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.” (Emphasis Mine)

7. The Appellant/Applicant has expressed a reasonable fear that the Respondent will not be able to repay the decretal sum. The Respondent has not addressed this issue at all. In light of the Respondent's failure to prove that he is able to repay the decretal sum if execution is allowed to proceed and the appeal succeeds, I find and hold that the Appellant/Applicant is likely to suffer substantial loss if stay of execution is not granted.
8. Under Order 42 Rule 6 as aforesaid, the second condition to consider is whether the application been made without unreasonable delay. The present application was brought approximately 1 month and 9 days after delivery of the Judgment. It was therefore brought without unreasonable delay.
9. On the issue of furnishing security, the law contemplates that a litigant who intends to appeal the decision of a court, may be granted stay of execution of the said decision, on condition that they deposit a security for the performance of the decree. In the case of *Michael Ntouthi Mitheu vs Kivondo Musau* [2021] e KLR, the Honourable Court pronounced itself as follows on the reason why security should be given:-

“22. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See *Nduhiu Gitahi vs. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100. (Emphasis Mine)

10. The court is cognizant of the Appellant/Applicant's desire to deposit a bank guarantee with the court, which is vehemently opposed by the Respondent, who takes the view that the Appellant/Applicant should deposit the entire decretal sum in a joint interest-earning account as security. The applicant submitted that the a bank guarantee adequately secures the Respondent's interests without subjecting the Appellant to undue financial prejudice. It thus constitutes a valid and sufficient form of security for the due performance of a decree, which achieves this fair and equitable balance between the interests of both parties. This approach to security aligns with the overriding objective of ensuring that justice is administered fairly and without undue technical or financial impediments, as envisioned under Article 159(2) of *the Constitution* of Kenya and Section 3 of the *Employment and Labour Relations Court Act*. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] KEHC 8358 (KLR), the



Court held that: "Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."

11. In the present case, the Appellant has, in good faith, proposed to furnish a bank guarantee from a reputable financial institution. This guarantee will be valid for the duration of the appeal and subject to terms and conditions that the Honourable Court may impose. It will cover the full decretal sum and any applicable costs, thereby offering the Respondent full assurance of payment while protecting the Appellant's right of appeal. The High Court in *Justin Mutunga David v China Road & Bridge Corporation (K) Limited* [2019] eKLR similarly affirmed that a bank guarantee is an acceptable and sufficient form of security for purposes of stay. The Court of Appeal in *Gitahi & another v Warugongo* [1988] eKLR further clarified the objective of an order for stay pending appeal as follows: "The aim is to ensure, in an even-handed manner, that the appeal will not be prejudiced and that the decretal sum is 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." A bank guarantee achieves this fair compromise by ensuring that the Respondent's entitlement is preserved while the Appellant is not compelled to make an immediate cash expenditure. In this manner, the right of appeal is preserved, and the Respondent is assured of recovery if successful. In *Gitahi* (supra), the Court of Appeal further endorsed the following reasoning by the English Court of Appeal: "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 the least disadvantageous to the party giving that 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." Additionally, Courts have equated a properly issued bank guarantee to actual payment, so long as it is adequate in value. Moreover, courts have exercised discretion to make such guarantees operative at a future date. For instance, in *Jajuha Civil Contractors & Engineering Ltd v ABM Holdings Limited* [2024] KEHC 11194 (KLR), the Court directed that the guarantee be issued within 45 days of the Ruling. It is therefore improper for the Respondent to assert a blanket rejection of bank guarantees as inadequate, as this amounts to an unwarranted limitation on the Court's unfettered discretion to set appropriate terms. This Honourable Court retains the jurisdiction to determine and prescribe the specific conditions of any bank guarantee to be issued in order to ensure its adequacy and effectiveness in securing the decree. 18. 19. 20. 21. Your Ladyship, the purpose of security under the present circumstances in law is to guarantee the due performance of a decree without strangling the Appellant's right of appeal. A bank guarantee fulfils this purpose, and courts have consistently held that it is a legitimate and sufficient alternative to a cash deposit. In view of the foregoing, there is no legal or equitable basis to exclude the Appellant from offering a bank guarantee in place of a cash deposit. This Honourable Court retains full discretion to determine the appropriate terms and conditions of the guarantee to ensure that justice is served to both parties. The overriding consideration is to preserve the appeal and avoid rendering it nugatory, and further not to prejudice a party at the expense of the other. In *RWW v EKW* [2019] eKLR, the court reaffirmed that the purpose of an order for stay of execution is to preserve the subject matter of the dispute, thereby ensuring that the appeal is not rendered nugatory. Requiring a cash deposit or denying a stay altogether risks making the appeal purely academic, particularly where execution would irreversibly impact the Appellant's financial position. A bank guarantee offers a balanced solution-it safeguards the Respondent's entitlement to the fruits of judgment while preserving the Appellant's right to appeal which right ought not to be curtailed as held in *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR.



12. The respondent on other hand submitted that the Applicant never prayed for an order to be allowed to furnish security in form of a bank guarantee. It is trite law that Courts can only grant orders that have been prayed for in the pleadings or make appropriate orders as it deems fit if need arises in the cause of a trial. Among the grounds the Applicant has raised in support of the orders prayed is his willingness to abide by any reasonable condition or terms that the court may impose as security for the due performance of the decree, including the provision of a bank guarantee, as the Court may deem fit. The Applicant has not proved that he lacked mean to provide cash as security. He never provided any bank records to confirm that he lacked money. The Applicant in his supporting affidavit states that he was willing to abide by any condition or term that the court may impose as security. The Respondent submits that a bank guarantee is not a proper mode of security. The Applicant has not filed any bank guarantee agreement. He has not adduced any bank guarantee for this specific matter. He never specified the bank that has offered him the proposed bank guarantee. He has not shown how each party is to benefit from the any bank guarantee. In the case of Nobel Trading co. Itd and others -vs- Peter Odhiambo Marega [2022] eKLR Chemitei J. observed as follows; Paragraph 25 "On the third condition of security, the applicant has offered a bank guarantee. There is an agreement exhibited between Diamond Trust Bank and the directors of Directline Assurance Company Limited who are the insurers of the applicants. The same is for the sum of Kshs. 30 million. It is for a period of 12 months and it is expiring on 30th November 2021. This court takes notes of the fact that applicant is not a party to the said agreement and that there is no evidence that the said guarantee is for the benefit of this matter specifically. Moreover, there is no evidence that as at the time of this ruling the same has been renewed". Paragraph 26 "In the premises, I find that the said bank guarantee is not viable for this matter and it could be available where it specifically stated how each party is to benefit instead. In essence it is a general bank guarantee". The Respondent submits that a bank guarantee introduces a third party to the matter. The Respondent has not been made a part to any bank guarantee. A bank guarantee is for a specific duration as such there is no evidence that at the time of determination of the appeal a bank guarantee will be in force. The Respondent may be forced to institute a case against a third party for payment of the decretal amount which bits the whole essence of enjoying the fruits of his judgment.
13. While I have seen the letter dated 26th February 2024 from the Appellant/Applicant's doctor, one Mr. Naji A.N. Said (exhibit "MC-6" annexed to the Affidavit in Support of Motion dated 7th April 2025), purporting to show that has suffered persistent medical troubles which render him incapable of remitting the decretal sum to the Respondent or depositing security for performance, I note that the letter is dated 26th February 2024 and relates to a surgery performed on 31st January 2024. As such, I am not persuaded by the Appellant/Applicant's averments on his medical condition.
14. The court noted that at paragraph 15 of the supporting affidavit sworn on the 7th April 2025 the applicant stated that he was willing to abide by any reasonable conditions including provision of security in the form of a bank guarantee to preserve the Respondent's interests.
15. In determining whether to grant an order of stay of execution or not, I am guided by the decision of the Court of appeal in Butt -vs Rent Restriction Tribunal (1982) KLR 417 where it held that: -
 - “ 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”.
1. The court finds that there is a high likelihood of the appeal being rendered nugatory in the event the Appellant/Applicant is successful in the appeal, as the execution process is likely to have been completed against him, and there is no certainty that the Respondent will be able to repay the decretal sum.
 2. The court noted that applicant stated he was willing to comply with any reasonable condition. No copy of the purported bank guarantee was placed before the court for merit assessment. Being proportionate in balance of the rights of both parties, I therefore grant stay of execution of the Judgment and Order of the Hon. Becky Cheloti delivered on 28th February 2025 pending the hearing and determination of this appeal, on condition that the Appellant/Applicant deposits the half of the decretal sum in Court within 30 days of this Ruling. In the circumstances the court finds a Deposit of ½ of the decretal sum in court in 30 days of the ruling is a reasonable condition of stay. Cost of the application to the respondent in the cause.
 3. The appellant to file the complete record of appeal together with his written submissions within 60 days and serve and ensure compliance with the Court Rules of 2024. Mention on 17th September 2025 to confirm compliance and issue further directions.
 4. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF JULY, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant/Applicant : - Munene

Respondent: Magonda

