



REPUBLIC OF KENYA



**Canon Aluminium Fabricators Limited v Mulwa (Employment and Labour Relations Appeal E080 of 2025) [2025] KEELRC 2160 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2160 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E080 OF 2025**

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

**BETWEEN  
CANON ALUMINIUM FABRICATORS LIMITED ..... APPLICANT  
AND  
THOMAS NZYUKO MULWA ..... RESPONDENT**

**RULING**

1. The Appellant/Applicant vide Notice of Motion application dated the 25<sup>th</sup> of April 2025 brought under the provisions of Order 42 Rule 6 and Order 51 of the [Civil Procedure Rules 2010](#); and Sections 1A,1B and 3A of the [Civil Procedure Act](#), sought the following orders:-
  - a. Spent
  - b. Spent
  - c. That this Honourable Court be pleased to issue temporary orders staying execution of the judgment of 28<sup>th</sup> February 2025 and resultant Warrants of Attachment dated 25<sup>th</sup> April 2025 pending the hearing and determination of the instant appeal.
  - d. That costs of this application be issued to the Applicant.
2. Grounds of the application
  - a. The impugned Judgment was delivered on 28<sup>th</sup> February 2025 by the Honourable E. Riany in Milimani MCELRC No. 876 of 2022 in favour of the Respondent and against the Appellant for the sum of Kenya Shillings Six Hundred and Twenty-Six Thousand, Six Hundred (Kshs.626,600.00/=) plus costs of suit and interest.
  - b. The Appellant, being dissatisfied with the decision of the Honourable Magistrate, has instituted this appeal.



- c. Execution in respect of the matter is imminent as the Respondent has illegally procured Warrants of Attachment dated 25th April, 2025 towards execution and has proclaimed against the Respondent also as at 25th April, 2025.
  - d. Pursuant to the warrants of attachment, auction is scheduled in seven (7) days' time and such auction would render the Appeal nugatory as it would enforce payment of the decretal sum as described.
  - e. The Appellant has good and arguable grounds on appeal and the same has a high likelihood of success.
  - f. No prejudice shall be suffered on the part of the Respondent if the orders sought are issued, as the same will only be granted to safeguard the ends of justice.
  - g. It is in the interest of justice that the said orders are granted as prayed.
3. The application was opposed by the Respondent through his Replying Affidavit sworn on 13<sup>th</sup> May 2025. He argued that the application is a delaying tactic intended to frustrate the realization of the fruits of the judgement. He reasoned that the applicant has not demonstrated that it would suffer substantial loss if stay is not granted or that the appeal will be irreparably affected or negated, by providing empirical/documentary evidence. Since the decree herein is a monetary decree, execution towards settlement thereof cannot in itself occasion substantial loss.
  4. Further, the Respondent argued that the applicant has not given any evidence to show that it has provided, or is willing to provide security for due performance, or demonstrated ability to settle the decretal sum. He also argued that an appeal does not operate as a stay and security for due performance. It was his view that the appellant/applicant should meet the Auctioneers charges as they never communicated that they had preferred an appeal nor served the memorandum of appeal. The Respondent informed the court that since the delivery of the judgement counsel for the respondent had served the appellant's counsel with two letters, the last one of 2<sup>nd</sup> April 2025, but the said counsel did not intimate the existence of an appeal thus should shoulder the auctioneers costs without any complaint.
  5. He assured the court that he has the ability to make a refund in case the appeal is successful, and stated that he is ready to give the necessary undertakings for refund so that the full decretal sum may be released to him. In the alternative, he requested for half of the decretal sum being Kenya Shillings Three Hundred and Seventy Five Thousand (Kshs. 375,000/=) to be released to counsel for the respondent and the balance be deposited in an interest earning account in the joint names of the counsels on record and the appeal be fast tracked.
  6. In their Further Affidavit sworn on the 23<sup>rd</sup> of May 2025, the Appellant/Applicant explained that the Respondent proclaimed their office equipment and motor vehicles used by the Appellant/Applicant used in its day to day operations. The sale of these assets would paralyze the Appellant/Applicant's critical operations, therefore causing them extreme and substantial loss. They also stated that payment of the decretal sum of Kshs. 751,474.00 would cause them to suffer a substantial loss of operational capital. The Appellant/Applicant dismissed the Respondent's averment that he is willing to give undertakings to refund the decretal sum, on the premise that he is a private citizen with no known place of abode or physical address, no known place of business and no known assets/guarantors/referees.



## Decision

7. The application was canvassed by way of written submissions. Both parties complied. The issues for determination are as follows:
  - a. Whether the Court should grant the Appellant/Applicant stay of execution of the Judgment and Decree delivered on 28<sup>th</sup> 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.**

8. The Appellant/Applicant filed a Memorandum of Appeal dated the 21<sup>st</sup> of March 2025, within 30 days of the decision that was delivered on 25<sup>th</sup> February 2025.
9. 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."

10. 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."

11. It is not in dispute that the Honourable Court (Hon. E. Riany) in Milimani MCELRC No. 876 of 2022, delivered a Judgment in favour of the Respondent herein on 25<sup>th</sup> February 2025. No application for stay pending appeal was filed in the Trial Court.
12. 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). 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 has already commenced execution by obtaining warrants of attachment dated 25<sup>th</sup> April, 2025 and proclaiming against the Respondent on the same day. The foregoing is not denied by the Respondent.



13. In *Timsales Limited vs. Hiram Gichohi Mwangi*, Civil Appeal Number 94 of 2008 (2013) eKLR the Honourable 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.”

14. In the instant case, the Appellant/Applicant has merely demonstrated that execution has commenced 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] eKLR 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.

15. The Respondent is correct in stating that the subject decree, being a money decree, can be refunded if the Appellant/Applicant is successful. He has stated that he is able to re-pay the decretal sum, and assured the court that he is happy to give an undertaking to this effect. The test for whether an Applicant will suffer substantial loss where a money decree is in issue 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.”

16. 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)

17. The Appellant/Applicant has expressed a reasonable fear that the Respondent will not be able to re-pay the decretal sum as he has no known physical address, place of business or assets. Save for expressing his willingness to provide an undertaking that he will refund the decretal sum to the Appellant if the appeal is successful, the Respondent has not produced any evidence before the court that he indeed has the ability to repay the decretal sum so paid, if stay is not granted. To prove his financial ability, the Respondent should have produced bank statements, proof of employment etc. He has failed to do



so. In light of the Respondent's failure to prove that he is able to pay 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.

18. 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 2 months after delivery of the Judgment. It was therefore brought without unreasonable delay.

19. 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] eKLR, 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 Gitabi vs. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100. (Emphasis Mine)

20. I am guided by the decision of the Court of appeal in *Butt -vs Rent Restriction Tribunal* (1982) KLR 417 on how a Court should exercise discretion in an application for stay of execution 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”.

21. 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 their assets are likely to have been sold, and there is no certainty that the Respondent will be able to repay the decretal sum.



22. I therefore grant stay of execution of the Judgment and Order of the Hon. E. Riany delivered on 25<sup>th</sup> February 2025 and the resultant Warrants of Attachment dated 25<sup>th</sup> April 2025 pending the hearing and determination of this appeal, on condition that the Appellant/Applicant deposits the entire judgment sum of Kshs. 626, 600 in Court within 30 days of this Ruling. Costs of the application to the respondent in the cause.
23. The appellant to file a complete record of appeal together with written submissions in 60 days.
24. Mention on 17<sup>th</sup> September 2025 for further directions.
25. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18<sup>TH</sup> DAY OF JULY, 2025.**

**J. W. KELI**

**JUDGE**

In the presence of:

Court Assistant: Otieno

Appellant/Applicant : - Tanui h/b Kagiri

Respondent: Ngala

