



Sheria Mtaani na Shadrack Wambui & another v Muguna & another; Omoke & 10 others (Interested Parties) (Employment and Labour Relations Petition E212 of 2024) [2025] KEELRC 2416 (KLR) (4 September 2025) (Ruling)

Neutral citation: [2025] KEELRC 2416 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E212 OF 2024
HS WASILWA, J
SEPTEMBER 4, 2025

BETWEEN

SHERIA MTAANI NA SHADRACK WAMBUI 1ST PETITIONER

GEORGE OTIENO OLWALO 2ND PETITIONER

AND

ENG NAHASHON MUGUNA 1ST RESPONDENT

NAIROBI CITY WATER & SEWERAGE COMPANY LTD 2ND RESPONDENT

AND

OSCAR OMOKE INTERESTED PARTY

ARNOLD KARANJA INTERESTED PARTY

AISHA ABDI INTERESTED PARTY

ROBOW MOHAMED INTERESTED PARTY

JOHNSTONE MUKABWA INTERESTED PARTY

EMMAH MUKUHI INTERESTED PARTY

CEDRIC ALARO INTERESTED PARTY

ROSE WAMUIYA INTERESTED PARTY

THE SALARIES AND REMUNERATION COMMISSION INTERESTED PARTY

THE PUBLIC SERVICE COMMISSION INTERESTED PARTY

THE ATTORNEY GENERAL INTERESTED PARTY



RULING

1. The Respondents and Interested Parties filed a Notice of Motion dated 23rd May 2025 seeking orders that: -
 1. spent
 2. The following findings, holdings and/or conclusions embodied in the Judgment delivered by this Honourable Court on 22/05/2025 (“the impugned Judgment”) are temporarily stayed pending the service and inter-partes hearing and determination of this Application—
 - a. the finding, holding and/or conclusion that there was “no indication” that the 1st Respondent holds rare knowledge, skills and competencies which are scarce, unique and not readily available in the job market (c.f. para 73 of the impugned Judgment);
 - b. the finding, holding and/or conclusion that the renewal of the 1st Respondent’s contract beyond his mandatory retirement age was “illegal, null and void” because there was “no indication” that he holds rare knowledge, skills and competencies which are scarce, unique and not readily available in the job market (c.f. para 73, 74 and 75 of the impugned Judgment); and
 - c. the finding, holding and/or conclusion that the 2nd Respondent should start the process of recruitment of a substantive Managing Director through a competitive process beyond the retirement of the 1st Respondent in December 2025 (c.f. para 77 of the impugned Judgment).
3. The following findings, holdings and/or conclusions of the impugned Judgment are stayed pending the filing, service, inter-partes hearing and determination of the Respondents’ and the 1st to the 8th Interested Parties’ application for interlocutory relief at the Court of Appeal—
 - a. the finding, holding and/or conclusion that there was “no indication” that the 1st Respondent holds rare knowledge, skills and competencies which are scarce, unique and not readily available in the job market (c.f. para 73 of the impugned Judgment);
 - b. the finding, holding and/or conclusion that the renewal of the 1st Respondent’s contract beyond his mandatory retirement age was “illegal, null and void” because there was “no indication” that he holds rare knowledge, skills and competencies which are scarce, unique and not readily available in the job market (c.f. para 73, 74 and 75 of the impugned Judgment); and
 - c. the finding, holding and/or conclusion that the 2nd Respondent should start the process of recruitment of a substantive Managing Director through a competitive process beyond the retirement of the 1st Respondent in December 2025 (c.f. para 77 of the impugned Judgment).
4. The costs of an incident to this Application shall be in the cause.
5. Such other, further, incidental or alternative order(s) as this Honourable Court may deem fair and just.



Applicants' Case

2. The Applicants aver that they intend to appeal this court's judgment delivered on 22nd May 2025 to the Court of Appeal. The impugned Judgment:
 - a. upheld the 1st Respondent's eligibility to be re-appointed for a second term without going through a fresh competitive recruitment process;
 - b. upheld the process and performance analysis that the 2nd Respondent followed in renewing the 1st Respondent's contract;
 - c. held that there was "no indication" that the 1st Respondent holds rare knowledge, skills and competencies which are scarce, unique and not readily available in the job market;
 - d. held that the renewal of the 1st Respondent's contract beyond his mandatory retirement age was "illegal, null and void" because there was "no indication" that he holds rare knowledge, skills and competencies which are scarce, unique and not readily available in job market.
3. It is the Applicant's case that the intended appeal raises a prima facie and arguable case on grounds that: grounds (c) and (d) of the impugned judgment alluded above are contradictory and incompatible with the holdings alluded to in grounds (a) and (b); grounds (c) and (d) are vitiated by an error apparent on the face of the record and errors of fact and law; and that this court omitted to determine all the issues raised by the parties including whether the petition met the basic threshold established by the decision in *Anarita Karimi Njeru v Republic* [1979] KECA 12 (KLR)
4. The Applicants aver that they expeditiously filed and served the requisite Notice of Appeal and Request for Typed Proceedings to facilitate the preparation and filing of their appeal and application for interlocutory relief at the Court of Appeal.
5. The Applicants aver that they will suffer substantial and irreparable loss, harm and damage including severe leadership disruption and the untimely loss of an invaluable Managing Director who possesses rare knowledge, skills and competencies which are scarce, unique and not readily available in the job market, unless the interim relief sought in the application is granted.
6. The Applicants aver that the intended appeal will be rendered nugatory unless the interim relief sought in the application is granted.
7. The Applicant undertake that that they will expeditiously file and prosecute the intended Application for interlocutory relief at the Court of Appeal; expeditiously file and prosecute the intended Appeal at the Court of Appeal; and faithfully comply with all such conditions as this court may impose in relation to the grant of the relief sought in the application.

Petitioners/Respondents' Case

8. In opposition to the application, the Petitioners/Respondents' filed a replying affidavit dated 28th May 2025.
9. The Petitioners/Respondents aver that the court's holding was far from being contradictory, but reflects a coherent and faithful application of established statutory dictates and public employment policy, which mandate retirement upon attaining the age of sixty (60), save in demonstrable and exceptional circumstances.
10. The Petitioners/Respondents aver that the court correctly observed that no such exceptional circumstances were evident in the Applicants' case. A self-prepared curriculum vitae, unverified and



unauthenticated, is plainly inadequate to satisfy the evidentiary burden required to justify an extension of tenure beyond the mandatory retirement threshold.

11. The Petitioners/Respondents aver that this court is functus officio. It pronounced its final Judgment on 22nd May 2025, thereby conclusively determining the matter before it. It is well established that a court that has rendered final judgment cannot reopen, reconsider, or entertain applications for stay of execution arising from that judgment. This is further codified under Rule 21(2) of the Employment and Labour Relations Court (Procedure) Rules, 2024 (Legal Notice No. 133 of 2024), which provides in categorical terms:

“An application for stay of execution pending appeal shall be filed in the appeal file.”

12. It is the Petitioners/Respondents’ case that this application is fatally incompetent and an impermissible invitation to this court to arrogate unto itself a jurisdiction it does not possess. It is trite that jurisdiction is everything, and where a court lacks it, it must down its tools at once. Therefore, the application ought to be struck out in limine for want of jurisdiction.
13. The Petitioners/Respondents aver that the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR), articulated the tripartite criteria for interlocutory relief as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

- (a) establish a prima facie case with a probability of success; (b) demonstrate irreparable injury if a temporary injunction is not granted; and
- (c) where doubt exists as to (b), show that the balance of convenience tilts in their favour.”

14. The Petitioners/Respondents’ aver that the Applicants failed to demonstrate the existence of a prima facie case with any probability of success. The underlying dispute, far from being complex, involved a straightforward application of clear public service employment policy: that officers in public service retire upon attaining sixty (60) years of age unless, in demonstrably exceptional circumstances, their engagement is extended owing to rare, verifiable, and indispensable competencies. The mere annexation of an unauthenticated, self-prepared curriculum vitae was incapable of meeting the requisite evidentiary threshold.
15. The Petitioners/Respondents aver that the Applicants failed to establish that he stands to suffer irreparable injury if the orders sought are not granted. Vide its judgment, the court does not direct the Managing Director’s immediate removal from office. It merely prohibits any extension of his tenure beyond December 2025, when he will have attained the statutory retirement age. Accordingly, no present or imminent harm arises.
16. The Petitioners/Respondents aver that the alleged injury in the nature of loss of remuneration and employment benefits is, in law, a pecuniary loss; a form of harm the courts have repeatedly affirmed is adequately remediable by an award of damages in the event of a successful appeal as held in *Nguruman Limited* ‘s case.
17. It is the Petitioners/Respondents’ case that the Applicants neither asserted nor demonstrated that the Respondents lacks the financial capacity to meet any legitimate pecuniary claim that might, in the fullness of time, be decreed against it. The claim of irreparable harm is, therefore unsustainable.



18. The Petitioners/Respondents aver that the balance of convenience plainly and decisively tilts in their favour and the public interest. The heart of this matter lies not the personal interests of an individual, but the governance and operational stability of a vital public utility whose efficient and uninterrupted functioning directly affects the wellbeing of millions of Nairobi residents.
19. The Petitioners/Respondents aver that the 1st Interested Party purporting to support this application has boldly asserted authority to act on behalf of others without producing any documentary proof of such mandate. This is a material misrepresentation, and its design to mislead the Court renders his intervention untenable in law.
20. It is the Petitioners/Respondents' case that the application represents a transparent, ill-advised attempt to relitigate a matter finally settled and the application is designed to subvert lawful governance processes under the guise of appellate recourse.

Applicants' Submissions

21. The Applicants' submitted that the legal framework governing stay of execution pending appeal is set out in Rule 73 (2) of the Employment and Labour Relations Court (Procedure) Rules, which adopts Order 42, Rule 6, Sub-rules (1) and (2) of the Civil Procedure Rules as the governing standard. Where this court's rules are insufficient, the Civil Procedure Rules should apply as held in *Advani v Aspen Pharmacare Holdings Limited* [2024] KEELRC 13363 (KLR).
22. The Applicants submitted that stay of execution is a discretionary remedy and to merit its grant, the applicant must demonstrate:
 - (i) an arguable appeal;
 - (ii) a real risk of substantial loss if the stay is denied; and
 - (iii) prompt filing of the application without undue delay.
23. It is the Applicants' submission that this court has jurisdiction to hear and determine the motion on merits and the Petitioners' challenge to that jurisdiction is therefore without substance.
24. The Applicants submitted that the intended appeal presents an arguable appeal with real and substantial prospect of success because this court's Judgment is challenged on substantial grounds, including inconsistency; patent error on the face of the record; error of fact and law; and omission of critical issues raised by the parties.
25. The Applicants submitted that it is trite law that an arguable appeal is not necessarily one that must succeed but one that warrants consideration by the appellate court, there is every sufficient cause to allow the application in so far as arguability is concerned.
26. The Applicants submitted that unless the motion is granted they will suffer substantial and irreparable loss, harm and damage including severe leadership disruption, institution instability, halting of the ongoing projects headed by the MD, and the untimely loss of an invaluable MD who possesses rare knowledge, skills, and competencies which are scarce, unique, and not readily available in the job market. They argue that substantial is not a mathematical formula; rather, it is a qualitative concept that refers to any loss, great or small, that is a real worth or value as distinguished from a loss without value or a loss that that is merely nominal, as held in *Antoine Ndiaye v African Virtual University* [2015] KEHC 6783 (KLR).



27. The Applicants submitted that without immediate temporary stay orders, the intended appeal will be rendered nugatory, given the time it typically takes to file, hear, and determine appeals and applications at the Court of Appeal.
28. It is the Applicant's submission that Rule 73(2) of the ELRC Rules and Order 42, Rule 6(1) and (2) confers this court the power to mitigate the risk of an intended appeal being rendered nugatory, as would happen in this case if the Applicants were to reach December 2025 without a determination of their application for interlocutory relief at the Court of Appeal.
29. They relied in the decision of F. Gikonyo J. in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR), which explained that the jurisdiction such as conferred under Rule 73(2) of this court's Rules exist to preserve the right of appeal, access to justice and protection and equal benefit of the law, which are otherwise violated when an appeal is rendered nugatory.
30. The Applicants submitted that they acted with promptness and without delay as the application was filed the same day this court's judgment was delivered and the Notice of Appeal and Request for Typed Proceedings were filed and served, evidencing a clear and timely intention to pursue the intended appeal.

Petitioners/Respondents' Submissions

31. The Petitioners/Respondents submitted on two issues: whether this court has jurisdiction by dint of Rule 21(2) & the doctrine of *functus officio*; and whether the application is merited.
32. The Petitioners/Respondents submitted that the now repealed Employment and Labour Relations Court (ELRC) (Procedure) Rules, Legal Notice No. 146 of 2016, contained a solitary provision addressing appeals; in contrast, to the ELRC Procedure Rules, Legal Notice No. 133 of 2024, which dedicates Part III on appeals. This marked legislative shift is a deliberate restructuring of procedure in appeal related matters before this Court, leaving no room for ambiguity as to the framework applicable to matters such as the present application.
33. It is the Petitioners/Respondents' submission that the ELRC Procedure Rules, 2024 were meticulously crafted as a specialized procedural code bespoke to the Employment and Labour Relations Court established under Article 162(2)(a) of *the Constitution*. By their design, they supersede the general Civil Procedure Rules in matters falling within this Court's exclusive jurisdiction. The ELRC Procedure Rules constitute the primary, binding, and authoritative framework. Recourse to the Civil Procedure Rules is permitted only where the ELRC Rules are silent or otherwise insufficient, which is manifestly not the case here.
34. The Petitioners/Respondents submitted that Rule 21 of the ELRC Procedure Rules, 2024, provides for stay of execution in case of appeal; 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; and an application for stay of execution pending appeal shall be filed in the appeal file.
35. The Petitioners/Respondents submitted that the application was required to be filed within the appeal file, in strict accordance with Rule 21(2) of the ELRC Procedure Rules, 2024. The Rules are unambiguous that a party seeking stay pending appeal must lodge the application within the appeal file.
36. It is the Petitioners/Respondents submission that the Applicants reliance on Rule 73 is wholly misplaced and demonstrably flawed as it is a general provision governing execution procedures and



incidental applications for stay unrelated to an appeal. It does not, and cannot, purport to regulate applications for stay pending appeal. That specific jurisdiction is exclusively conferred by Rule 21, which directly and precisely governs stays in the context of pending appeals.

37. The Petitioners/Respondents submitted that it is a cardinal principle of statutory and procedural interpretation that a specific provision overrides a general one. Accordingly, any attempt by the Applicants to bypass the mandatory and exclusive dictates of Rule 21 by sheltering under the generalized canopy of Rule 73 is untenable, irregular, and procedurally improper.
38. The Petitioners/Respondents submitted that this court is *functus officio*. The doctrine of *functus officio* dictates that once a court has rendered its final judgment, it is stripped of jurisdiction to reopen, revisit, or alter its decision, save in strictly delimited circumstances expressly sanctioned by statute or rule. The principle exists to safeguard the finality of litigation, preserve the integrity of judicial authority, and preclude perpetual uncertainty in the resolution of disputes.
39. The Petitioners/Respondents submitted that having delivered its final judgment, this Court's jurisdiction over the substantive dispute ceased. Any post-judgment application seeking to affect the operation of that final judgment including this application for stay is jurisdictionally incompetent and falls afoul of the doctrine *functus officio*.
40. On whether the application lacks merit, the Petitioners/Respondents in their submissions relied on the principles laid down in *Butt v Rent Restriction Tribunal* [1982] KLR 417 and *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR.
41. The Petitioners/Respondents submitted that the Applicants have not demonstrated a *prima facie* case with any reasonable prospect of success. The dispute before this Court was neither complex nor novel as it involved the application of a longstanding, well-defined public service policy mandating retirement at sixty (60) years, absent proof of rare, indispensable competencies warranting lawful extension.
42. The Petitioners/Respondents submitted that the Applicants have not shown irreparable harm. This Court's Judgment does not direct the Applicant's immediate removal. It merely affirms the policy position that his tenure cannot lawfully extend beyond December 2025 upon reaching the statutory retirement age. No immediate or imminent prejudice therefore arises. In any event, the alleged harm being the potential loss of office and emoluments is inherently pecuniary in nature; whereas it is settled law that monetary loss is fully compensable through damages should the Applicant succeed on appeal.
43. It is the Petitioners/Respondents' submission that the Applicant has neither alleged nor demonstrated that the Respondent lacks the financial capacity to meet any legitimate monetary claim that might subsequently arise.
44. The Petitioners/Respondents submitted that the balance of convenience overwhelmingly favors them and the public interest. The governance, operational continuity, and administrative stability of a critical public utility serving millions of Nairobi residents cannot be imperiled or subordinated to the personal interests of a single officer whose tenure has, in accordance with binding law and policy, naturally reached its conclusion.
45. On costs, the Petitioners/Respondents reliance on Section 27 of the *Civil Procedure Act*, which provides that costs follow event and the same can be granted at the discretion of the court, which discretion should be exercised judiciously.
46. I have examined all the averments and submissions of the parties herein. The applicants have sought stay orders in relation to this court's judgment delivered on 22/5/2025. The applicants have submitted



that they have preferred an appeal to the Court of Appeal in relation to this court's judgment and hence this application.

47. Order 42 rule 6 (2) of the Civil Procedure Rules state as follows:

(2) No order for stay of execution shall be made under sub rule (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.

48. The rules set out condition that would warrant the court allowing stay orders. The condition set therein are that the applicant be field timeously and that the applicant demonstrates that they will suffer substantial loss unless the order is granted and lastly on issue of security that the court can allow if need be.

49. The applicants indeed filed the application timeously. They have submitted that they have filed an appeal before the Court of Appeal. The applicants having filed an appeal as demonstrated, for this court to proceed and ignore this fact would be to proceed and render the intended appeal nugatory if determined otherwise. The filing of an appeal demonstrates likelihood of substantial loss in case the appeal succeeds. The issue of security does not arise at this stage, the application being basically for injunctive reliefs with no monetary value attached.

50. It is my finding that based on the averments of the parties and on that order 42 rule 6(2) this court has jurisdiction to grant stay orders pending appeal. The court thus allows the application for stay as prayed. The costs will abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF SEPTEMBER 2025.

HELLEN WASILWA

JUDGE

