



**Victonel Academy v Njuguna (Employment and Labour Relations Appeal  
E013 of 2021) [2022] KEELRC 1638 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1638 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E013 OF 2021**

**HS WASILWA, J**

**JUNE 9, 2022**

**BETWEEN**

**VICTONEL ACADEMY ..... APPELLANT**

**AND**

**JOHN NJUGUNA ..... RESPONDENT**

*(Arising from the judgment of Honourable L Arika (CM) in  
Nakuru CMC ELRC 348 of 2019 delivered on November 22, 2021.)*

**RULING**

1. Before me for determination is the appellant/ applicant's notice of motion dated December 15, 2021 filed under certificate of urgency on the December 17, 2021 and brought pursuant to rule 3,8 & 17 of the *Employment and Labour Relations Court Procedure Rules* and all other enabling provisions of law seeking the following orders;-
  1. Spent.
  2. That this honorable court be pleased to grant stay of execution of the Honourable Magistrates Court's judgement and all consequential orders given on the November 22, 2021 pending hearing and determination of this application.
  3. That this honorable court be pleased to grant stay of execution of the Honourable Magistrates Court's judgement and all consequential orders given on the November 22, 2021 pending hearing and determination of the appeal already filed.
  4. That costs of the application be provided for.
2. The application is supported by the following grounds; -



- a. That the Honourable L Arika (CM) delivered judgement in Nakuru CMC ELRC 348 of 2019, in favour of the claimant/respondent herein on the November 22, 2021 ordering the applicant herein to pay the respondent Kshs 675,243.80.
  - b. The appellant/applicant herein is aggrieved with the said judgement and has filed this appeal on the December 17, 2021, which is pending for determination.
  - c. At the time of judgement, the court granted 30 days stay of execution which lapsed on the December 22, 2021 and now the applicant is exposed to execution. During that period the applicant obtained judgement on the December 9, 2021 and is yet to receive proceedings.
  - d. It is contended that the appeal raises triable issues with high chances of success that if stay is not granted, they are bound to suffer financial loss when execution is levied and their appeal will be rendered nugatory.
  - e. He states that in the event the appeal is unsuccessful, they will compensate the respondent by way of costs.
3. The application is also supported by the affidavit of John Waweru Wanyoike, the respondent's human resource manager, deposed upon on the December 15, 2021.
  4. This application is opposed by the respondent who filed a replying affidavit sworn on the January 18, 2022 and based on the following grounds; -
    - a. That the appellant's application is scandalous, vexatious and amounts to an abuse of court process as its aimed that delaying the respondent from enjoying his fruits of judgement.
    - b. The affiant avers that the applicant was granted 30 days stay within which he ought to have filed an appeal and this stay application, but that the applicant waited till the lapse of the 30 days to file this application and also that there is no proper appeal lodge as alleged as such nothing will be rendered nugatory if the orders are denied.
    - c. The respondent avers that the applicant has not satisfied any of the conditions contemplated under order 42 rule 6 of the [Civil Procedure Rules](#) to warrant issuance of the orders sought. He added that the applicant has not demonstrate the loss it will incur if the orders are not granted.
    - d. The respondent avers that he is willing to pay back the decretal sum if the appeal goes in favour of the applicant.
    - e. He avers that the applicant has not offered any security for cost to persuade this court to grant the orders of stay sought. Nevertheless, that if the court is inclined to grant the orders then half of the decretal sum to be surrendered to him and the other half be deposited in joint interest earning account.
  5. The application was heard by way of written submissions with the applicant filing on the March 29, 2022 and the respondent filed on the April 19, 2022.

### **Applicant's Submissions**

6. The applicant submitted on one main issue; whether the applicant is entitled to the orders of stay of execution pending hearing of the appeal. It was submitted that order 42 rule 6(2) of the [Civil Procedure Rules](#) states the requirements that must be met before stay of execution orders are granted.



7. On the first issue, the applicant submitted that the application has been brought without unreasonable delay since the judgement was delivered on the November 22, 2021 and this application filed on the December 15, 2021 barely a month later.
8. On the issue of substantial loss, it was submitted that if stay orders are not granted, the Respondent will proceed with execution and obtained the decretal sum which will render their appeal nugatory if the same succeeds and decretal sum once paid might not be recovered. In support of this position the applicant relied on the case of *Mukuma v Abuoga* [1988] KLR 645 where the Court of Appeal held that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”
9. It also relied on the case of *Consolidated Marine v Nampijja and another*, Civil Appeal No 93 of 1989 (Nairobi) where the court held that; -

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
10. It was submitted that the respondent has not demonstrated his financial worth even in his replying affidavit as was held in *National Industrial Credit Bank Limited v Aquinas Francis Wasike and another* [2006] eKLR where the court held 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 an 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.”
11. On the security requirement, the applicant submitted that its willing to abide by any condition the court may deem fit to grant.
12. On whether the appeal raised triable issue, it was submitted that the appeal dated December 15, 2021 raises issue that need to be adjudicated by this court. He therefore urged this court to allow the application and stay execution till this appeal is heard and determined.

### **Respondent’s Submissions**

13. The respondent on the other hand submitted on one issue; whether the application merit the conditions of stay of execution. It was submitted that the applicant has not demonstrated any loss that it is likely to incur if the stay orders are not granted. In support of his argument the respondent relied on the case of *Republic v Commissioner For Investigations and Enforcement Ex parte Wananchi Group Kenya Limited* [2014] eKLR where Odunga J held that;

“In my view the issue of substantial loss is such a crucial issue in such applications that it ought to come out clearly in the supporting affidavit rather than to be dealt with in the submissions... It is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this



nature, the applicant should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be done if the applicant has not given to the Court sufficient cause to enable it to exercise its discretion in granting the order of stay.”

14. The respondent maintain that there is no proper appeal filed herein and this application has been filed outside the timelines as such ought to be dismissed.
15. The respondent also submitted that the applicant has not offered any security for performance of the decree, which security is a requirement before a stay order is granted.
16. I have examined the averments of the parties herein.
17. Order 42 Rule 6(2) of the [Civil Procedure Rules](#) states as follows;

“6. Stay in case of appeal [order 42, rule 6.]

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings 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.”

18. Judgment in the lower court was delivered on November 22, 2021. This application was filed on December 15, 2021.
19. In relation to time, I find that the application for stay pending appeal was filed timeously.
20. The applicants have proceeded to file an appeal which appeal may be rendered nugatory if the stay orders are not granted.
21. I therefore find that the application for stay pending appeal is merited.
22. The same is allowed on the condition that the applicant deposits the entire decretal sum in a joint interest earning account held in joint names of counsels on record within 60 days in default execution may proceed.
23. Costs to abide the outcome of the appeal.

**RULING DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF JUNE, 2022.**

**HON LADY JUSTICE HELLEN WASILWA**



## **JUDGE**

In the presence of:-

Ndichu for appellant - present

Opar for respondent – present

Court assistant - Fred

