



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 28 OF 2013

(Originally Nairobi High Court Petition No. 239 of 2011)

IN THE MATTER OF ARTICLES 27(4), 28, 29, 39(1), 49(1)(a) AND (f), 50(1) AND 51(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS SECURED AND GUARANTEED UNDER ARTICLES 27(4), 28,29,39(1),49(1)(a) AND (f), 50(1) AND 51(1) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

FRANCIS MARANGA MATU.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

RULING

1. In a judgment delivered on 22 October 2018, the Court found and held that the Petitioner's constitutional rights were violated by the Respondent and awarded him Kshs 3,000,000/- as general damages.
2. The Respondent was aggrieved and filed a *Notice of Appeal* on 23 October 2018 and the *Notice of Appeal* was followed up with a motion seeking orders
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 2. **THAT** this Honourable Court be pleased to order a stay of execution of the Judgment in this suit pending the hearing and final determination of this application inter partes.
 3. **THAT** this Honourable Court be pleased to order a stay of execution of the Judgment and decree issued pending the hearing and final determination of the Applicant's Appeal at Court of Appeal.
 4. **THAT** costs of this application be provided for.
3. The grounds in support of the application were, in brief, that the Respondent had a serious and arguable appeal with overwhelming prospects of success; that the Appeal would be rendered nugatory if stay was not granted; that the Respondent would suffer irreparable loss and damage; that the application had been brought in good faith and without any inordinate delay and that the Respondent was ready to furnish security.
4. Upon service of the application, the Petitioner filed a replying affidavit in opposition to the application wherein he contended that the Respondent had not met the test for grant of order of stay pending appeal; that it had not been demonstrated he was a person of straw and that were the order sought to be granted, the Respondent should be ordered to furnish security in the decretal sum.
5. The Court took submissions on 22 January 2019.
6. The test which a party seeking stay of execution pending appeal in this Court should meet is anchored in Order 42 rule 6 of the Civil

Procedure Rules.

7. A serious and arguable appeal with overwhelming chances of success is not a factor to be considered at this level of the judicial hierarchy. Such factors would apply were a party to approach the Court of Appeal under its own Rules.
8. What the Respondent was expected to satisfy were that it would suffer substantial loss, that the application was made without undue delay and furnishing of security (furnishing of security is not a condition where government is the applicant).
9. The High Court discussed what would amount to substantial loss in *James Wangalwa & Another vs Agnes Naliaka Cheseto* (2012) eKLR as follows

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. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein vs. Chesoni**. 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*

10. In *Equity Bank Ltd v Taiga Adams Co Ltd* (2006) eKLR, the Court held

The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse— as/he is a person of no means. Here, no such allegation is established by the appellant

11. In the instant case, the Respondent made no attempt whatsoever to demonstrate the substantial loss it would suffer if the order of stay sought was not granted, or suggest that the Petitioner would not be capable of refunding the decretal sum were the same to be paid out to him.
12. The applicant having failed to satisfy the substantial loss ingredient, the Court has no hesitation in concluding that the application dated 16 November 2018 lacks merit.
13. The application is dismissed with costs to the Petitioner.

Delivered, dated and signed in Nairobi on this 1st day of March 2019.

Radido Stephen

Judge

Appearances

For Petitioner	Mr. Mueke instructed by Wamae & Allen, Advocates
For Respondent	Mr. Chemas, State Counsel, Office of the Attorney General
Court Assistant	Lindsey