

KENYA / JUDGMENT

University of Nairobi v M [2025] KEELRC 2031 (KLR)

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COURT

Employment and Labour Relations Court

BEFORE

JW Keli

CASE / FILE NUMBER

Employment and Labour Relations Appeal E071 of
2025

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University of Nairobi v M (Employment and Labour Relations Appeal E071 of 2025) [2025]
KEELRC 2031 (KLR) (4 July 2025) (Ruling)

Neutral citation:

[2025] KEELRC 2031 (KLR)

Republic of Kenya

In the Employment and Labour Relations Court at Nairobi

Employment and Labour Relations Appeal E071 of 2025

JW Keli, J

July 4, 2025

Between

University of Nairobi

Applicant

and

Shianzira Gadi M

Respondent

Ruling

1. The applicant having filed a memorandum of appeal against the decision of the lower court, together with a Notice of Motion 14th March 2025 brought under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and all enabling provisions of the law seeking for the following orders –1. Spent .2. There be an interim stay of execution of the judgment and decree entered on 28th February 2025 in MCELRC No. E360 of 2022, Shianzira Gadi M -Vs- University of Nairobi and/or further proceedings in MCELRC No. E360 of 2022, Shianzira Gadi M -Vs University of Nairobi pending the interpartes hearing and determination of this application.3. That the judgment and execution of decree entered orders made on 28th February 2025 in MCELRC No. E360 of 2022, Shianzira Gadi M -Vs- University of Nairobi be stayed pending the hearing and determination of this Appeal.4. Costs of this application be provided for.

Grounds of the application

2. That the Appellant was aggrieved by the judgment and orders made by the Trial Court on 28th February 2025 in MCELRC No. E360 of 2022, Shianzira Gadi M-Vs- University of Nairobi and has filed this appeal against the said decision. This appeal raises arguable issues and has high chances of success.
3. The Appellant is apprehensive that the Respondent herein may proceed to commence execution against the Appellant thus defeating the substratum of this appeal and rendering the consequent judgment a mere paper.
4. It is therefore necessary that the judgment and or decree issued in MCELRC No. E360 of 2022 between the parties be stayed pending determination of the application and appeal.
5. The application was supported by the affidavit of Kenneth Sawe dated 14th March 2025 who annexed a copy of the impugned judgment dated 28th February 2025(KK-1), case precedent of 2 judgments by various judges of the court to the effect that the CBA in question was not applicable retrospectively (KK2 and KK3), and a copy of the filed memorandum of appeal.

Response

6. The application was opposed by the respondent through his replying affidavit dated 27th March 2025 to the effect that the Notice of Motion Application as filed herein is a non-starter and an abuse of this Honourable Court's process and should therefore be struck out in limine with costs to the Respondent.
7. That the Applicant has not advanced any valid reasons justifying a stay of the Honourable Court's judgment which was entered regularly and after taking evidence, reviewing the filed documents and correctly applying the provisions in the Employment Act and the Labour Relations Act.

8. That apart from allusions of substantial loss the deponent has not demonstrated that substantial loss would be occasioned if stay is not granted, as such remains mere allegations.
9. That the factual matrix of each case is different and payment of gratuity in this case cannot be termed to be retrospective.
10. That this application has not been brought in good faith as it is tactic by the Appellant to further stretch litigation as nothing has been presented to demonstrate that the Applicant will be prejudiced if the orders sought a orders sought are not granted.
11. That no offer for security has been offered by the applicant thus disentiing her of the orders sought.
12. ☐ THAT this court should not only entertain the Applicant but also safeguard his interests as he had waited for this judgment since 16th June 2019 when he retired and entitled to payment of due gratuity as per the Collective bargaining agreement 2013-2017.
13. That it is unfair for the Applicant to continue actively discriminating on payment of gratuity where else other employees were paid at the rate of 31% upon retirement.
14. That he was a successful litigant entitled to enjoy the fruits of judgement and decree but is being restricted while in pursuit for the same for no good reason. (attached marked SGM1 is a copy of the honourable court's decree)
15. The application was canvassed by way of written submissions.

Decision

Whether the application was merited.

16. It is instructive to note that the impugned Judgment is dated 28th February 2025. The Employment and Labour Relations Court (Procedure) Rules 2024 on stay of execution in case of appeal states:-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.” The applicant filed a memorandum of appeal dated 11th March 2025 received in court on even date, thus within the statutory timeline of 30 days.
17. 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.”

18. The application dated 14th March 2025 received on even date was filed without delay. The respondent submitted there was no demonstration of substantial loss and relied on *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR where the court expressed itself as hereunder: "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 ... 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." Conversely, the applicant submitted that it is a public institution fully funded by the Treasury and shall readily abide the orders of this Honourable Court.
19. The Applicant submitted that the Respondent has not discharged the evidential burden of proof of means in their Replying Affidavit by failing to demonstrate financial capability of refunding the substantial decretal sum in the event that the appeal succeeds. The Respondent has not adduced any evidence to demonstrate ownership and value of any assets that she owns; nor has she provided any statement of her accounts with any financial institution. There is thus nothing on record to show that the Respondent is possessed of sufficient means to refund the decretal sum were the appeal to succeed. In *Cooperative Bank of Kenya -Vs- Taramusi Francis Ongoki* [2019] eKLR it was observed "the petitioner has failed to prove that he is in a position to reimburse the decretal amount if the appeal succeeds and in that regard the applicant may suffer substantial loss".
20. The Court noted that the judgment sum of Kshs 2,813 981. 77 plus interest and costs was substantial. The Respondent is correct in stating that the subject decree, being a money decree, can be refunded if the Intended Appellant is successful. However, he has not demonstrated his ability to re-pay the decretal sum. 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."

21. On the third condition of security under 46(2)b it is true that the applicant has not offered security and submitted as follows:- This is further exacerbated by the fact that the Applicant is a public university and is funded from the Exchequer.” In *Ethics & Anti-Corruption -Vs- Peter Mangiti & 17 Others* [2016] eKLR, the High Court finding no dispute that a "colossal sum" constituting "public money" was involved in the suit held that provided that hearing and determination of the Appeal would be expedited, "it is in the public interest that the public coffers money be protected until this suit is heard and determined." In the case of *Lemanken Aramat-Vs- Harun Meitamei Lempanka & 2 Others* [2014] eKLR, the Supreme Court upon weighing similar competing claims as in the present case against the background of the public cause focused its perception on the public interest in Article 201 of the Constitution which require that public funds be utilized in a prudent and responsible way and held that "the Applicant has made a proper case for grant of interlocutory orders pending the hearing and determination of the appeal".
22. The applicant urged for an identical finding and submit that to commit substantial public funds by effecting payment while it is most probable that the Award will be set aside in entirety or substantially varied will not be in accord with Article 232 (1) (b) of the Constitution which demand prudent use of public resources. That the Court to issue an order of stay of execution without making a security deposit as a condition for grant of stay. In the unlikely event the Appeal fails, the Applicant being a public university shall be in a position to make immediate payment of the decretal sum to the Respondent. In *Teachers Service Commission-Vs- Benson Kuria Mwangi* [2020] eKLR the court observed that "a public institution" such as the 1st Respondent herein "is not required to deposit security by virtue of Order 42 Rule 8 of the Civil Procedure Rules" and urge this Honourable Court to allow the Respondent's Motion dated 1st September 2020 as prayed.
23. Conversely, the respondent submitted as follows on the condition of security-As stated in paragraph 9 of the Respondent's Replying Affidavit, the Appellant has not offered any security for costs, which is a fundamental requirement for grant of stay of execution pending appeal. The applicant seeking stay must demonstrate willingness to safeguard the decretal amount by offering suitable security. This has been the case in a myriad of instances before courts In *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, stated: "The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation..." In *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, it was said: "... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words 'ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at

the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick." To this end the Respondent noted that the Applicant despite being a huge institution with the financial muscle to offer security. They have avoided the issue of security altogether by arguing that they are part of government. This is a critical condition which has not been addressed in the application. In ELRC Cause No. 1191 of 2018 Reuben Ondigu Orodó vs University of Nairobi the court observed as follows; "The University of Nairobi is not an organization of the Government as contemplated under the government proceedings act. The Respondent/Applicant must therefore meet its debts and in particular satisfy any decretal sums made against it pursuant to civil litigation by its employees as in the matter to avoid any execution proceedings being made against it be it by way of attachment or issuance of mandamus against its officials. The Respondent/Applicant must satisfy the judgment debt herein accordingly." In *Muthui v Kasivu* (Civil Appeal E268 of 2023) [2024] KEHC 9627 KLR, where the court observed: "On the ability of the Respondent financial incapability of paying back the decretal sum being one of the reasons the orders should be granted as submitted by the applicant, I beg to differ. The onus of proving the Respondent's inability goes beyond throwing an allegation without evidence. It is upon the Applicant who alleges the same to go ahead and prove it. Nonetheless, the court has settled this matter and stated that this should not be the reason an order of stay is granted."

24. The court established that it was not in dispute the applicant was a public body funded by the exchequer. Indeed even the awarded gratuity would be paid by public monies. The court in the application is concerned about whether the applicant fits under order 46(8) of the Civil Procedure Rules to wit:- '8. No security to be required from the Government [Order 42, rule 8] No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity." The act does not define what government is. However public office is defined under the constitution as "public office" means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament; "There is no doubt that the respondent is a public university. Section 45 of the Universities Act provides for funding of the public universities as follows:- '45. Funds of a public university (1) The funds of a public university shall comprise of— (a) such sums as may be provided by Parliament; (b) such monies or assets as may accrue to or vest in the public university in the course of the exercise of its powers or the performance of its functions under this Act or under any other written law; and (c) all monies from any other source provided for or donated or lent to the public university. (2) There shall be made to the public university, out of monies provided by Parliament for that purpose, grants towards the expenditure incurred in the exercise of its powers or in performance of its functions under

this Act.” Section 47 of the same Act provides for audit of the university as follows:- “47.

Accounts and audit (1) A public university shall cause to be kept all proper books of records of accounts of the income, expenditure and the assets of the university. (2) Within four months from the end of each financial year, a public university shall submit to the auditor general corporations the accounts of the university together with— (a) a statement of the income and expenditure of the university during the financial year; and (b) a balance sheet of the university on the last day of the year. (3) The accounts of a public university shall be audited and reported upon in accordance with the provisions of the Public Audit Act, 2003 (Cap. 412B)”The court is persuaded to find that the applicant fits to be under government for the purposes order 46 (8) of the Civil procedure Rules hence exempt from deposit of security of costs. The court found the decision ELRC Cause No. 1191 of 2018 Reuben Ondigu Orodo vs University of Nairobi related to the application of Government Proceedings Act hence distinguished.

25. In the upshot, the court found it is in public interest to allow the application for stay of execution noting that the money decree is to be settled from public funds and if paid the respondent did not demonstrate financial capacity to refund noting he is retired. That further there is a real danger of the appeal being rendered nugatory. The court being the court of first appeal was persuaded that the appeal raised arguable points taking into account the decision of the court on the subject matter of the said CBA in Nairobi Cause No. E722 of 2022, The university of Nairobi v KUDHEIHA and others.
26. In the upshot the application is allowed. A temporary order of stay of execution is issued against the judgment and decree dated 28th February 2025 in MCELRC No. E360 of 2022, Shianzira Gadi M -Vs- University of Nairobi pending the hearing and determination of this Appeal. The court to fast-track the appeal in the interest of justice and not to prejudice the decree holder.
27. Costs of the application in the cause.
28. The applicant is directed to obtain proceedings of the lower court and file the record of appeal in 30 days. Mention on 16th September 2025 to confirm status and issue further directions.
29. It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF JULY 2025. J.W. KELI, JUDGE. In the presence of: Court Assistant: Otieno Appellant – Ms Nyaga Respondent: Achila h/b Onenga

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