



**Encore Lounge & Grill Ltd v Quadco Two Hundred and Thirty Two Ltd & another
(Environment and Land Appeal E024 of 2022) [2022] KEELC 2565 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E024 OF 2022**

SO OKONG'O, J

JULY 5, 2022

BETWEEN

ENCORE LOUNGE & GRILL LTD APPELLANT

AND

QUADCO TWO HUNDRED AND THIRTY TWO LTD 1ST RESPONDENT

KENYA HARLEQUINS RUGBY CLUB 2ND RESPONDENT

RULING

1. This appeal is against the decision of Hon. H. M. Nyaga CM made on 29th March 2022 in CMCC No. MCRTC 002 of 2021, Quadco Two Hundred and Thirty Two Limited v Kenya Harlequin Rugby Limited and Encore Lounge & Grill Limited (hereinafter referred to as “the lower court case”). The appellant has not made any attempt to highlight the salient features of the proceedings that gave rise to the lower court case. I will try my best to do that briefly from the material before me.
2. At all material times, the 1st respondent was a tenant of the 2nd respondent in respect of business premises situated at RFUEA grounds along Ngong Road, Nairobi (hereinafter referred to as “the suit property”). On 3rd March 2020, the 2nd respondent served the 1st respondent with a notice terminating its tenancy with effect from 1st June 2020. On 4th May 2020, the 1st respondent filed a reference at the Business Premises Rent Tribunal in Tribunal Case No. 473 of 2020 (hereinafter referred to as “the tribunal case”) challenging the termination of its tenancy. In a judgment delivered on 4th December 2020 in the said tribunal case, the tribunal dismissed the 2nd respondent’s notice and allowed the 1st respondent’s reference with the effect that the 1st respondent’s tenancy was to continue. Sometimes in October 2021, the 1st respondent made an application to the tribunal to compel the 2nd respondent to give it access to the suit property. The application was brought on the ground that the 2nd respondent had locked up the suit property and denied the 1st respondent access to the same.



3. On 18th October 2021, the tribunal gave an interim order directing the 2nd respondent to reopen the suit property so that the 1st respondent could access the same pending the hearing of the 1st respondent's application inter-partes. The tribunal gave further orders on 9th November 2021 and 11th November 2021 all aimed at enforcing the judgment of 4th December 2020. On application by the 1st respondent dated 16th November 2021, the said orders of the tribunal were adopted by the lower court as orders of that court on 1st December 2021. Sometimes in September 2021 after the said judgment of the tribunal, the appellant and the 2nd respondent entered into a lease in respect of the suit property under which the appellant was to operate a club on the property pursuant to which lease the appellant commenced intensive renovation and construction works on the suit property. The appellant's activities aforesaid denied the 1st respondent access and use of the suit property.
4. Through an application dated 3rd March 2022 made in the lower court, the 1st respondent sought orders that the appellant be joined in the lower court suit as 2nd respondent and that the orders given by the tribunal on 16th February 2022 be recognised and adopted as a decree of the lower court for the purposes of enforcement. The orders of 16th February 2022 from what I can gather from the record gave the 1st respondent liberty to break into and take possession of the suit property if the 2nd respondent refused to grant it access to the premises. The OCS Jamhuri Police Station was ordered to ensure compliance with the order.
5. In the said application dated 3rd March 2022, the 1st respondent sought a further order that a Notice to Show Cause be issued to the chairman of the 2nd respondent and a director of the appellant to appear in court and show cause why they should not be committed to civil jail for wilful disobedience of the orders given by the lower court on 4th December 2020, 19th October 2021, 9th November 2021 and 11th November 2021. On 11th March 2022, the lower court ordered that the said application dated 3rd March 2022 be served. In the meantime, the court adopted the order issued by the tribunal on 16th February, 2022 as an order of the court subject to clarification, directed that a Notice to Show cause be issued upon the officials of the appellant and the 2nd respondent to appear in court and show cause why they should not be committed to jail for contempt and restrained the appellant and the 2nd respondent from continuing with construction on the suit property pending the hearing of the application and further orders by the court.
6. The appellant was served with the application. In response, the appellant filed an application to set aside the ex parte orders made by the lower court on 11th March 2022 and a preliminary objection to the 1st respondent's application dated 3rd March 2022. In its preliminary objection, the appellant contended that the lower court had no jurisdiction to join the appellant in the proceedings before it in that the appellant was not a party to the tribunal proceedings and that no order was made against it which the 1st respondent could enforce pursuant to section 14(1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 Laws of Kenya.
7. The other objection raised by the appellant was that the lower court had no jurisdiction to punish the appellant's officer for contempt. The appellant contended that only the High Court has jurisdiction to punish for contempt and that even for the High Court, appropriate procedure has to be followed in instituting the proceedings which includes applying for leave. The appellant contended further that the lower court had no jurisdiction to grant an injunction. The appellant contended that the lower court's role was restricted to adopting the order or decree of the tribunal. The appellant argued that the lower court had no power to add or subtract from the decision of the tribunal. The appellant averred that since the tribunal had not given an injunction order, the lower court had no jurisdiction to issue such order. The appellant averred further that the order of the tribunal the alleged breach of which the



- appellant was sought to be punished was not extracted and served upon the appellant. The appellant averred further that the value of the development that it was carrying out on the suit property was beyond the pecuniary jurisdiction of the lower court.
8. The appellant's preliminary objection was heard by way of written submissions. In a ruling delivered on 29th March 2022, the lower court dismissed the objection and ordered that the 1st respondent's application proceeds to hearing. The lower court held that it had power under section 34 of the Civil Procedure Act to deal with all the issues arising during the execution of a decree and as such it was within its power to add parties to the execution proceedings before it. On the issue of contempt, the court held that section 10 of the Magistrates' Court Act 2015 gave it unlimited power to punish for contempt. On the issue of its pecuniary jurisdiction *vis-a-vis* the value of the developments being carried out by the appellant on the suit property, the court held that the powers conferred on the court by section 14(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya (hereinafter referred to as "Cap.301") is not limited by the value of the subject matter in dispute. On whether it had power to grant an injunction, the court stated that the order was necessary to deal with the appellant's acts of contempt that were continuing.
 9. The appellant was aggrieved by the said decision of the lower court on its preliminary objection and preferred this appeal in which it has challenged the decision on various grounds. Together with the Memorandum of Appeal, the appellant filed an application by way of Notice of Motion dated 5th April 2022 in which it sought; a stay of further proceedings in the lower court pending the hearing and determination of the application and stay of the orders made in the lower court pending the hearing of the application and the appeal. The application that was supported by the affidavit of Shadrack Oriah sworn on 5th April 2022 was brought on several grounds.
 10. The appellant averred that it was aggrieved with the ruling and decision made by the lower court on 29th March 2022 and had lodged an appeal against the same. The appellant averred that the lower court had directed the parties to proceed with the 1st respondent's application that was the subject of its objection that was dismissed by the lower court. The appellant averred that it would be seriously prejudiced if the proceedings before the lower court were not halted pending the hearing of the present application and the appeal. The appellant averred that there were serious issues raised in the Memorandum of Appeal which required consideration by the court. The appellant averred that the application was brought without undue delay and that the appeal had high chances of success.
 11. The application was opposed by the 1st respondent through a replying affidavit sworn by Lemi Mwendar on 27th April 2022 and a Notice of Preliminary Objection of the same date. The 1st respondent averred that this court had no jurisdiction to entertain the appellant's appeal which should have been filed in the High Court. The 1st respondent averred further that under section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, the appellant had no right to appeal against the decision of the lower court unless it obtained leave for that purpose. The 1st respondent contended that the appeal before the court and the application accompanying the same were incompetent, fatally defective and should be struck out.
 12. The 1st respondent averred that even after being restrained by the lower court from continuing with construction on the suit property, the appellant was continuing with construction in defiance of the said order. The 1st respondent averred that the application before the court was intended to aid the appellant to continue with construction to completion thereby preventing the 1st respondent from accessing the suit property and using the same. The 1st respondent averred that the appellant should be denied audience by the court until it purged its acts of contempt. The 1st respondent averred that the contempt application was yet to be heard and as such there was no way in which the appellant's appeal



would be rendered nugatory if the stay sought was not granted. The 1st respondent averred further that the order made on 29th March 2022 was a negative order incapable of enforcement and as such the same could not be stayed. The 1st respondent averred that the court could only stay the order the subject this appeal and as such the appellant's prayer that any order issued by the lower court be stayed could not be granted. The 1st respondent averred that the orders made by the lower court on 11th March 2022 had not been appealed and the time of appeal against the same had expired. The 1st respondent averred that the construction that was being undertaken by the appellant had paralysed the 1st respondent's operations on the suit property.

13. The appellant's application was heard by way of written submissions. The appellant filed its submissions dated 12th April 2022. The appellant submitted that if the stay sought was not granted, the appellant would suffer substantial loss. The appellant contended that the lower court was proceeding on the misconceived premise that it could commit the appellant's director to jail for up to 6 months while the law allows it to detain a contemnor for a period that does not exceed 5 days. The appellant submitted that the proceedings before the lower court were unlawful, null and void. The appellant reiterated that the lower court had no jurisdiction to punish for contempt and that the value of developments that were being carried out by the appellant on the suit property exceeded the pecuniary jurisdiction of the lower court. The appellant argued further that the orders that could be given by the lower court under section 14 of Cap. 301 were limited to the orders that had been granted by the tribunal and to the parties that were before the tribunal. The appellant cited several authorities in support of its submissions.
14. The 1st respondent filed submissions dated 27th April 2022. The 1st respondent reiterated the contents of its Notice of Preliminary Objection and replying affidavit. The 1st respondent submitted that the appellant's appeal and application were incompetent and should be struck out. The 1st respondent submitted further that the appellant's application did not meet the threshold for stay of proceedings. The 1st respondent submitted that since the appellant had defied the orders given by the tribunal and the lower court, the appellant should be denied audience by the court. The 1st respondent urged the court to strike out or dismiss the appellant's application with costs.

Determination.

15. I have considered the appellant's application together with the affidavit filed in support thereof. I have also considered the affidavit and Notice of Preliminary objection filed by the 1st respondent in opposition to the application. I have similarly considered the submissions that were made before me by the respective advocates for the parties. The appellant's application was brought principally under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(2) of the Civil Procedure Rules provides that:

"(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 ultimately be binding on him has been given by the applicant."



16. In *Kenya Shell Limited v Karuga* (1982 – 1988) I KAR 1018 the court stated that:
- "It is usually a good rule to see if order IXL Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money."
17. In *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* [20008] eKLR, the Court of Appeal stated as follows:
- "The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only."
18. The same reasoning was adopted by Makhandia J. (as he then was) in *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, where he stated as follows:
- "The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order."
19. The appellant has sought stay of proceedings of the lower court and stay of execution of any order that may be issued by the lower court. The principles that the court apply in applications for stay of proceedings and stay of execution are the same. I am in agreement with the 1st respondent that the appellant's application has no merit. The appeal before the court is against the order that was made by the lower court on a preliminary objection that was taken by the appellant to the 1st respondent's application. I am in agreement with the 1st respondent that pursuant to the provisions of section 75 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 43 of the *Civil Procedure Rules*, the appellant could only appeal the decision of the lower court with leave. The appellant did not respond to this aspect of the 1st respondent's objection to its application. There is no evidence that the appellant sought and obtained leave to file the present appeal. In the absence of such leave, the appeal is incompetent and cannot sustain an application for stay of proceedings or execution.
20. I am also in agreement with the 1st respondent that since the appeal before the court is against the orders made by the lower court on 29th March 2022, the stay of execution sought pending the hearing of the appeal can only be directed at that order. The order of 29th March 2022 merely dismissed the appellant's preliminary objection. I am in agreement with the 1st respondent that a dismissal order is a negative order not capable of being executed. The same cannot therefore be stayed.
21. On the merit of the application, the appellant has not persuaded me that it is likely to suffer substantial loss if the stay sought is not granted. What the lower court dealt with was a preliminary objection. The 1st respondent's application before the lower court is yet to be heard. Most of the issues raised by the appellant before this court such as the fact that it was not bound by the decision of the tribunal as it was not a party to its proceedings and the fact it was not served with the orders of the tribunal and the lower court should be raised before the lower court. The appellant still has a right of appeal in the



event that the lower court rules against it. The appellant also has a right of appeal in the event that it is found in contempt of court. I am therefore not satisfied that the appellant stands to suffer irreparable loss if the orders sought are not granted.

22. The upshot of the foregoing is that the appellant's Notice of Motion application dated 5th April 2022 is not for granting. The application is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Okeyo for the Appellant

Ms. Kethi Kilonzo for the 1st Respondent

Mr. Ntogaiti h/b for Mr. Ngarua for the 2nd Respondent

Ms. C. Nyokabi - Court Assistant

