



**Thistle Limited Formerly t/a Sai Rock Beach Hotel v Chief
Magistrate, Mombasa; Kombe (Interested Party) (Civil Application
E020 of 2022) [2023] KECA 256 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 256 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E020 OF 2022
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
MARCH 17, 2023**

BETWEEN

THISTLE LIMITED FORMERLY T/A SAI ROCK BEACH HOTEL APPLICANT

AND

CHIEF MAGISTRATE, MOMBASA RESPONDENT

AND

PETER MWAKUNJE KOMBE INTERESTED PARTY

(Being an application for stay pending appeal against the judgment of the Employment and Labour Relations Court at Mombasa (Byram Ongaya, J.) delivered on 1st April 2022 in ELRC Judicial Review Application No. E008 of 2021 Republic vs. the Chief Magistrate, Mombasa as Respondent, Peter Mwakunje Kombe as Interested Party and Thistle Limited T/A Sai Rock Beach Hotel as Exparte Applicant)

RULING

1. In its application dated 5th April 2022, the applicant, Thistle Limited formerly trading as Sai Rock Beach Hotel seeks an order that execution of the decree of the Chief Magistrate in Mombasa Chief Magistrate's Employment and Labour Relations Cause No. 119 of 2018 (Peter Mwakunje Kombe vs. Sai Rock Beach Hotel) be stayed pending the filing, hearing and determination of an intended appeal against the whole of the judgment delivered by the Employment and Labour Relations Court (ELRC) on 1st April 2022.
2. Peter Mwakunje Kombe, the interested party, successfully sued the applicant before Chief Magistrate in connection with his employment and was awarded judgment in the amount of Kshs. 409,869.65 in a judgment delivered by that court in the absence of the parties on 9th July 2021. According to the



- applicant, by the time it became aware of that judgment, the period permitted under the rules for appealing against it had lapsed.
3. By its application for judicial review dated 15th October 2021 and subsequently amended on 18th November 2021, the applicant moved the ELRC at Mombasa seeking an order of certiorari to quash the said judgment of the Chief Magistrate’s Court as well as an order of prohibition to prohibit execution of that judgment. The applicant asserted in that application that it was not open to the Chief Magistrate’s court to deliver judgment without notifying the parties and delivering the judgment without notice violate the Fair Administrative Action Act, and was against the legitimate expectation of the parties.
 4. In his judgment dismissing the application for judicial review, the learned judge of the ELRC found that the judgment of the Chief Magistrates’ court was “duly delivered but in the absence of both parties”; that because the parties had been advised by the court to be checking every Friday for the judgment, “it appears that the parties had notice to be checking every Friday but they failed to do so of their own accord.”
 5. Learned counsel for the applicant Miss. Muyaa urged in support of the application that the intended appeal is arguable, that it will be demonstrated during the hearing of the appeal as set out in the draft memorandum of appeal that the learned Judge of the ELRC assumed without evidence that the Chief Magistrate had requested the parties to be checking for the judgment every Friday; that the Judge should have held that it is not the obligation of the parties to attend court every Friday to inquire whether judgment is ready but rather an obligation of the judicial officers to inform the parties when judgment is expected to be ready.
 6. On the nugatory aspect, counsel for the applicant submitted that the decretal amount is already secured by a cash deposit of Kshs. 410,000 deposited in court on 22nd September 2021 and that if the same is released to the interested party who is a former employee of the applicant, “he has no means of repaying the decretal amount.”
 7. Learned counsel for the respondent Mr. Mwanjeje in opposing the application pointed out that the time for filing the memorandum and record of appeal had lapsed and the applicant has not shown any serious intention of appealing.
 8. Mr. Mokaya, learned counsel holding brief for Miss. Katu learned counsel for the interested party referred to the replying affidavit sworn on 19th April 2022 by the interested party. He submitted that the application is only intended to delay justice whereas the intended appeal may be arguable, it has not been demonstrated that the same will be rendered nugatory; that should the appeal succeed, the amount in question can be paid by the interested party.
 9. Having considered the application, the affidavits and submissions, we are satisfied that the intended appeal is not frivolous. It is arguable. There is for instance the question whether the learned Judge of the ELRC was right in concluding as he did that the parties had notice of delivery of judgment and that the same was duly delivered on the basis that the parties were directed by Magistrate’s Court to “to keep checking every Friday if judgment is ready”.
 10. As to whether the appeal will be rendered nugatory unless the orders sought are granted, even though the applicant has asserted that the interested party does not have the means to repay the decretal amount in the event the appeal succeeds, the interested party has not rebutted that claim by demonstrating he has the means to do so. See *Attorney General vs. James Hoseah Gitau Mwara* [2014] eKLR. Earlier, in



National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another [2006] eKLR, this Court expressed that:

“...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. Moreover, the decretal amount is secured by a cash deposit in court.
12. We are inclined, therefore to allow the application in terms of prayers (b) and (c) of the application dated 5th April 2022. In the event that the applicant will not have filed a competent appeal within 30 days of delivery of this ruling, the orders granted herein shall automatically lapse and the amount deposited in court shall be released to the interested party without further ado.
13. Cost of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

