



REPUBLIC OF KENYA



**Oseme v Swahili Beach Resort Ltd (Cause 42 of 2019)
[2024] KEELRC 114 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 114 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 42 OF 2019
AK NZEI, J
FEBRUARY 1, 2024**

BETWEEN

DAVID OMONDI OSEME CLAIMANT

AND

SWAHILI BEACH RESORT LTD DEFENDANT

RULING

1. The application before me is the Respondent/Applicant's Notice of Motion dated 1/8/2023. The Respondent/Applicant seeks the following orders, at this stage:-
 - a. that the Court be pleased to order stay of execution of the judgment delivered on 8/12/2022 pending hearing and determination of the Applicant's appeal.
 - b. that the Court be pleased to grant any further relief and/or order as it may deem fit and just to grant in the circumstances.
 - c. that costs of the application be provided for.
2. The application is predicated on a supporting affidavit of Amer Kalsi sworn on 1/8/2023, whereby it is deponed that being dissatisfied with this Court's judgment delivered on 8/12/2022, the Respondent/Applicant lodged an appeal in the Court of Appeal against the whole decision, and that the appeal is in danger of being rendered nugatory if the orders sought are not granted. That costs of the suit herein were on 30/6/2023 assessed at kshs. 252,155 and that given the fact that the thirty (30) days' stay granted has lapsed, the Applicant is apprehensive that execution will proceed unless stay is granted.
3. The application is opposed by the Claimant/Respondent vide a statement of grounds of opposition dated 25/9/2023, whereby it is stated:-
 - a. that the application is a delaying tactic, incompetent, a non-starter, frivolous and an abuse of the Court's process, and does not meet the threshold for granting the orders (sought).



- b. that the judgment allegedly appealed from was delivered on 8/12/2022 while the application herein was filed on 1/8/2023; long after the 30 days' stay of execution granted by this Court on delivering the decree, and that the Respondent/Applicant never bothered to either satisfy the decree or to make a formal application seeking to extend the stay period that had been granted.
 - c. that the respondent/application has not demonstrated what substantial loss or prejudice it will suffer that cannot be compensated by way of costs, should the application be dismissed.
 - d. that the Applicant's intention is clearly to deny the Claimant the fruits of litigation, as it has, in two incidents, been granted stay of execution orders and never showed an effort to satisfy the Court's decree.
 - e. that the Court's power to stay execution, though discretionary, has to be exercised judiciously.
 - f. that the Respondent/Applicant has not explained the inordinate delay in bringing the present application.
4. On 4/10/2023, this Court granted an interim stay of execution of its decree herein on condition that the Respondent/Applicant deposited the entire decretal sum in this Court within a specified period of time. The deposit is shown to have been made on 20/11/2023.
 5. Both parties filed written submissions on the application pursuant to this Court's directions in that regard, which I have considered.
 6. Section 13 of the *Employment and Labour Relations Court Act* provides that this Court's decrees shall be enforceable in accordance with the rules made under the *Civil Procedure Act*. The *Civil Procedure Rules* are the rules made under the *Civil Procedure Act*, and Order 42 Rule 6 thereof provide as follows:-
 - “(1) No appeal or second appeal shall operate as a stay of execution of 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 if 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 made by the Applicant.”
 - (3)
 - (4) For the purpose of this rule, an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.



(5)

7. Upon delivery of this Court's judgment on 8/12/2022, Counsel for the Respondent/Applicant orally applied for 30 days' stay of execution and sought an order that he be furnished with certified copies of this Court's proceedings and judgment. I ordered a 30 days' stay of execution and further ordered that the Respondent/Applicant be furnished with typed and certified copies of the Court's proceedings. I have noted from the Court's record that the Court's proceedings have since been typed and proof-read.
8. A notice of appeal is shown to have been lodged in this Court on 13/12/2022, but the Respondent/Applicant has never given any indication to this Court on whether or not a record of appeal was ever lodged in the Court of Appeal within the time stipulated by the Court of Appeal Rules. It is to be noted that the present application was filed on 1/8/2023, over seven (7) months from the date of delivery of the decree/judgment herein. The inordinate delay has not been explained by the Respondent/Applicant. I state this while alive to the provisions of Order 42 Rule 6(4) of the Civil Procedure Rules, which I have set out in paragraph 6 of this Ruling.
9. The Respondent/Applicant is seeking a stay of execution of this Court's decree pending hearing and determination of an appeal, an appeal shown to have been instituted vide a Notice of Appeal filed on 13/12/2022. The application was filed over seven (7) months from the date of lodging the Notice of Appeal. Under the Court of Appeal Rules, Rule 82(1), to be specific, an appeal shall be instituted within sixty days of lodging the notice of appeal, by lodging in the appropriate registry the documents set out in that rule.
10. The Court of Appeal stated as follows in Mae Properties Limited v Joseph Kibe & another [2017] eKLR:-

“Failure to comply with the timelines set invites sure consequences. In the case of failure to lodge an appeal within 60 days after filing of the notice of appeal, Rule 83, which is invoked by the Applicant herein, provides thus:-

“83. ...if a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, he shall be deemed to have withdrawn his notice of appeal and the Court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”
11. The Court of Appeal went further to state as follows in the Mea Properties case (supra)

“...We still hold the view we expressed in Martin Kibaya v David Mungania Kiambi – Nyeri Civil Application No. 12 of 2015;

“The need for Judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tapid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive



but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog.”

12. While it may and will be, for the Court of Appeal to decide on the fate of the Notice of Appeal filed over a year ago, this Court is obligated under Order 42 Rule 6(2) of the *Civil Procedure Rules* to satisfy itself that the application for stay of execution pending appeal was made without unreasonable delay. As already stated in this Ruling, the delay of more than seven (7) months was inordinate, and has not been explained. Further, the Respondent/Applicant has not made an attempt to explain what substantial loss or damage, will result on its part if the stay order sought is not granted. The Applicant not having demonstrated, or even alleged, inability by the Claimant/Respondent to refund the decretal sum if the same is paid to him and the intended appeal succeeds, I am not convinced that the intended appeal will be rendered nugatory if the stay order sought is not granted.
13. Before this Court can exercise discretion in favour of an Applicant in an application for an order of stay of execution pending appeal under Order 42 Rule 6 of the *Civil Procedure Rules*, the Applicant must establish sufficient cause by meeting all the requirements set out in sub-rule (2) thereof. This Court’s discretion to grant a stay of execution pending appeal is fettered by the conditions set out in the said sub-rule.
14. It was stated as follows in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR:-

“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 v Chesoni* [2002] eKLR 867, and also in the case of *Mukuma v Abuoga* quoted above.

.....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.”
15. The Respondent/Applicant not having stated and demonstrated that it stands to suffer substantial loss if the stay orders sought are not granted, there is nothing more for this Court to consider. Depositing in Court of the decretal sum as a condition for interim stay of execution pending determination of the application herein cannot be the sole basis on which the application succeeds.
16. In sum, I find no merit in the Respondent/Applicant’s Notice of Motion dated 1/8/2023; and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1ST FEBRUARY 2024

AGNES KITIKU NZEI

JUDGE

ORDER



This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable

Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

