



**Seun Real Estate Company Limited & another v Thoya (Appeal E173 of 2024) [2024] KEELRC 2465 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2465 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E173 OF 2024  
M MBARŪ, J  
OCTOBER 11, 2024**

**BETWEEN**

**SEUN REAL ESTATE COMPANY LIMITED ..... 1<sup>ST</sup> APPELLANT**

**SWALEH & CO. ADVOCATES ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ALBERT IHA THOYA ..... RESPONDENT**

**RULING**

1. The appellants filed an application dated 22 August 2024 under the provisions of Article 159 of the *Constitution*, Sections 3 and 12 of the *Employment and Labour Relations Court Act*, Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules* seeking orders that there be stay of execution of the judgment dated 15 August 2024 and the resultant decree pending the hearing and determination of the intended appeal.
2. The application is supported by the affidavit of Ali Amir Ali the manager of the 1<sup>st</sup> appellant who avers that judgment in Mombasa MCELRC No.E640 of 2023 was delivered on 15 August 2024 and the 2<sup>nd</sup> appellant was notified through a letter dated 16 August 2023 by the respondent's advocates. The appellant was not aware of the judgment date and no hearing was conducted for the matter since they entered an appearance, filed a response and filed an application seeking to strike out the 2<sup>nd</sup> appellant from the suit.
3. Ali Amir Ali avers in his affidavit that the respondent has threatened to execute the judgment following a judgment that was delivered without the knowledge of the appellants. If the judgment is executed, the appellants will suffer loss and damage and render the appeal nugatory and in the interests of justice, the applicant be allowed.
4. In reply, the respondent filed his Replying Affidavit and aver that he filed his claim in Mombasa MCELRC E640 of 2023 on 19 October 2023 and served the appellants. A mention notice was also



served for 23 November 2023. The matter was on the cause list for the day and a further mention date was allocated for 27 November 2023 which was served upon the appellants. When the matter came for mention, a hearing date was allocated for 16 April 2024 and the appellants were served.

All the served notices were received by the appellant.

5. When the matter came up for hearing on 16 April 2024, the same concluded and the court directed parties to file submissions. The respondent served the appellants on 3 June 2024 and a mention Notice of 6 June 2024 and the court allocated a date for judgment on 15 August 2024 when the matter was mentioned and Judgment Notice for 16 August 2024 was issued.
6. The respondent avers that all the court attendances were brought to the attention of the appellants but they failed to file responses or attend hearing. The appellants have alleged that they filed a Memorandum of Appearance on 14 November 2013 and a response on 23 November 2023 which records were not served. The alleged Notice of Motion seeking to strike out the 2<sup>nd</sup> respondent dated 6 December 2023 was not served and there is no Affidavit confirming the same.
7. The appellants have come to court with unclean hands and without full disclosure of the fact that they failed to serve the alleged responses. At the time the matter went for hearing before the trial court, the respondent was not aware of any responses and none have been submitted in these proceedings. The application is filed in bad faith and abuse of the court process and should be dismissed with costs.

Both parties attended court and made oral submissions.

### **Determination**

8. The appellants filed the Memorandum of Appeal on 22 August 2024 following the judgment of the trial court on 15 August 2024.
9. Under Section 17 of the *Employment and Labour Relations Court Act* and Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules*, a party dissatisfied with a judgment or orders of the court is allowed to file an appeal. This is lawful and when applied within the rules, the court should hear the appeal on the merits.
10. However, a party seeking orders of stay of execution of the judgment is bound under the principles and conditions under Order 42 Rule 6 of the *Civil Procedure Rules*, an applicant must satisfy that;
  - a. The application has been made without unreasonable delay.
  - b. The applicant will suffer substantial loss.
  - c. The applicant has offered security for the due performance of the decree.
11. Indeed, there was an expedited process in filing the Memorandum of Appeal and instant application from 16 August 2024 to 22 August 2024.
12. On the condition that the applicant must satisfy and demonstrate the substantial loss to be suffered if an order of stay is not granted, in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR the court held that;

Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a 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.



13. The appellant's case is that they filed a response before the trial court which was not considered while the respondent's case is that there was no service of a Memorandum of Appearance of Response to his claim. The appellants attached the filed response to the application. The Judgment of the trial court is that there was no response or appearance filed.

This calls for interrogation.

14. The third condition is that of security for the due performance of the decree of the court. The appellants in the oral submissions offered to abide by any conditions issued by the court.

There is a valid judgment and decree of the trial court.

15. To allow the appellants to enjoy their right of appeal and to secure the respondent on the fruits of his judgment, the appellant is to deposit 50% of the decretal sum of Ksh.1, 070,385.65 in court within 14 days. To secure these rights, the appellants are to file the Record of Appeal within 14 days and where there is no compliance, the respondent is at liberty to proceed with execution.

16. In the circumstances, the notice of motion application dated 22 August 2024 is hereby allowed on the condition that;

- a. The appellants/applicants deposit 50% of the decretal sum of Ksh.1,070,385.65 in court within 14 days of this ruling closing on 28 October 2024;
- b. File the Record of Appeal in the next 14 days and serve;
- c. Failure to comply with condition (a) above, the order on stay of execution shall stand discharged;
- d. The costs of the application shall be in the cause.
- e. Mention on 31 October 2024 for taking hearing directions.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 11<sup>TH</sup> DAY OF OCTOBER 2024.**

**M. MBARŪ**

**JUDGE**

