



**Ebisa Hotel v Musyoka (Appeal E139 of 2023)
[2024] KEELRC 2768 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2768 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E139 OF 2023
AK NZEI, J
NOVEMBER 8, 2024**

BETWEEN

EBISA HOTEL APPELLANT

AND

JOHN MUSYOKA RESPONDENT

RULING

1. The appeal herein was instituted vide a Memorandum of Appeal dated 14th December, 2023 and filed herein on even date, and is expressed to be against the Judgment of Hon. D.O. Mbeja (Principal Magistrate) delivered on 16th November, 2023. Subsequently, the Appellant filed an urgent Notice of Motion dated 27th February, 2024 seeking the following orders:-
 - a. That the application be certified urgent, and be heard ex-parte in the 1st instance.
 - b. That the Court be pleased to grant an order of stay of execution of the trial court's Judgment pending the hearing and determination of the appeal herein.
 - c. That Prayer No. 2 be granted in the interim.
 - d. That costs of the application be provided for.
2. The application, expressed to be brought under Sections 1A, 1B, 3A of the *Civil Procedure Act* and Order 42 Rule 6 of the Civil Procedure Rules, is predicated on the supporting affidavit of Lawrence Mutie, a Director of the Appellant/Applicant. Documents annexed to the said affidavit include a proclamation of attachment dated 23rd February, 2024, listing movable properties which the said deponent refers to as the Appellant's business assets. Also annexed to the supporting affidavit is a letter/notice dated 23rd November, 2023 from the Respondent's Advocates to the Appellant's Advocates herein informing them that the trial court had delivered Judgment in favour of the Respondent on 16th November, 2023, for a total sum of Kshs.718,424/=.



3. The application is opposed by the Respondent vide his replying affidavit sworn on 7th March, 2024. It is deponed in the said affidavit that the Appellant/Applicant should be compelled to deposit the entire decretal sum of Kshs.739,174/= pending hearing and determination of the appeal, and to pay the Auctioneer's charges amounting to Kshs.98,822/=.
4. Documents annexed to the replying affidavit include copies of the trial court's Judgment delivered on 16th November, 2023, a decree, certificate of costs and warrants of attachment and warrants of sale in execution of a decree; all of which I have perused.
5. Rule 73(1) and (2) of the Employment and Labour Relations Court (Procedure) Rules 2024 provide that execution of this Court's decrees and orders shall be in accordance with the Civil Procedure Rules. Order 42(6)(2) of the Civil Procedure Rules provides as follows:-
 - “(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 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.”
6. The decree appealed against herein is a money decree. There is on record a valid appeal against that money decree. If a stay of execution is not ordered as sought by the Appellant/Applicant, the appeal will be rendered nugatory. The Court of Appeal stated as follows in the case of Kenya Shell Limited – vs – Benjamin Karuga Kibiru & another (1986) eKLR:-

“It is also true to say that, in consideration of an application for a stay, the Court doing so must address its collective mind to the question of whether to refuse it would, as Mr. Kwach argues, render the appeal nugatory. This is shown by the following passage from the Judgment of Cotton LJ in Wilson – vs – Church (No. 2) (1879) 12 ch D 454 at P 458 where he said:-

“I will state my opinion that if a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not rendered nugatory.”
7. The Court of Appeal further stated as follows in the Kenya Shell Limited case (Supra):-

“... Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a Judgment in his favour without a just cause.”
8. In my view, the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules are meant to hold the delicate balance of ensuring that the rights of an appealing party are not compromised, while at the same time securing the rights of a successful litigant should the appeal and/or intended appeal fail or fall by the way side.
9. Having said that, and having perused the trial court's Judgment and submissions filed by counsel, I allow the Notice of Motion dated 27th February, 2024 in the following terms:-
 - a. There will be a stay of execution of the Court's decree in Mombasa CMC ELR Case No. 606 of 2019 pending hearing and determination of the appeal herein, on condition that the



Appellant/Applicant deposits the Judgment sum of Kshs.386,680/= in this Court within fourteen (14) days of this Ruling.

b. The Appellant/Applicant shall also pay the Auctioneer's lawful charges, to be agreed upon or taxed.

c. Costs of the application shall be in the appeal.

10. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 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:

.....Appellant

.....Respondent

