



**Hill Side Grill v Mwangeli (Appeal E030 of 2024)  
[2024] KEELRC 13388 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13388 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E030 OF 2024  
NJ ABUODHA, J  
DECEMBER 6, 2024**

**BETWEEN**

**HILL SIDE GRILL ..... APPLICANT**

**AND**

**IRENE MWONGELI ..... RESPONDENT**

**RULING**

1. By an application dated 27<sup>th</sup> February, 2024 the applicant sought orders inter alia that:
  - a. That the Honorable Court be pleased to stay orders issued on 26<sup>th</sup> January, 2024 in the Subordinate Court in CMEL No. 1576 of 2019 pending the hearing and determination of the appeal herein.
2. The application was supported by the Affidavit of one Mwaniki Gachomo who deponed among others that:
  - i. That the matter proceeded ex parte on the 17<sup>th</sup> January, 2023
  - ii. That I experienced power outage leading to the loss of internet and could not consequently be admitted to the call.
  - iii. That failure to attend was not intentional and we pray that the ex parte proceedings and judgment be stayed pending the hearing and determination of the application
  - iv. That upon learning the matter was slated for judgment the applicant/appellant moved the Court by way of an application to arrest the judgment and to be granted an opportunity to be heard.
  - v. That the trial court thereafter delivered a ruling striking out the application.



- vi. That the appellant being dissatisfied with the outcome and ruling of the subordinate court has appealed against the same.
  - vii. That the respondent has intimated intentions to commence execution.
  - viii. That the appellant is willing to expeditiously fast track the hearing of this matter and to give a suitable security for the performance of the decree.
3. The respondent filed a replying affidavit on 13<sup>th</sup> March, 2024 and deponed among others that:
- a. That the appellant has failed to fulfil the requirements of Order 42 rule 6(2) as they had not demonstrated that substantial loss may result if this application was not allowed, further it has not provided any security to the respondent.
  - b. That the appellant's aim is to cause prolonged delay in satisfying the Court's judgment in CMEL No. 1576 of 2019 and the same has caused hardship to myself and thus the court should impose conditions for security to prevent prolonged delay of the appeal that may be used as a tactic by the appellant to cause hardship to myself in the unlikely event that this application is successful.
  - c. That the appellant failed to attend Court for hearing on 17<sup>th</sup> July, 2023 and on 30<sup>th</sup> August, 2023 for mention and was thus guilty of laches.

#### **Applicant's Submissions**

4. Mr. Waweru for the applicant submitted that the appeal before the Court was for the setting aside of the dismissal orders and further that the appellant be granted an opportunity to defend the suit in the subordinate court. Counsel relied on Order 42 rule 6(2) on the principles which govern the Court in an application for stay pending appeal. Counsel further relied on the case of *Century Oil Trading Company Ltd vs. Kenya Shell Limited* on the issue of what constitutes substantial loss. According to Counsel, the applicant for stay is required to show that substantial loss would be occasioned if the orders sought are not granted. The matter is an ex parte judgment passed against the applicant for a colossal sum of Kshs. 287,400 together with costs and interest. The appellant will be highly prejudiced if the execution is to be commenced as it would lead to closure of the applicant's restaurant business causing her substantial loss. The applicant is further apprehensive that if stay is not granted the respondent will not be in a position to refund the decretal sum paid out in the event the appeal succeeds.
5. Counsel further submitted that the respondent was employed as a waitress earning a monthly salary of Kshs. 15,000/- hence the huge judgment sum coupled with the fact that the respondent has not given evidence of being in any gainful employment is a very high possibility that she cannot refund the said sum if the appeal was successful. In that regard Counsel cited the case of *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Anor* [2006]eKLR.
6. Counsel further submitted that the applicant made the application timeously without unreasonable delay. The application for stay was filed on 27<sup>th</sup> February, 2024 hardly a month after the ruling was delivered.

#### **Respondent's Submissions.**

7. The respondent on its part submitted in the main that the applicant had not satisfied all the conditions that must be met in order to be granted a stay as stipulated under Order 42 rule 6(2) of the *Civil Procedure Rules*. According to Counsel, the memorandum of appeal as filed does not demonstrate that



the applicant has an arguable appeal with high chance of success. The application upon which the appeal is based was dismissed over the fact that the applicant failed to attend court twice, on the hearing date and on the mention date to confirm filing of submissions. The applicant was not interested in the matter despite service.

8. Counsel further submitted that the applicant has not demonstrated that it will suffer irreparable loss if the stay order is not granted. However the respondent continues to suffer loss by not being granted the fruits of her judgment. Counsel relied on the case of *Kenya Shell Ltd v Kibiri & Another* [1986] KLR 410 on the issue of substantial loss. The appellant has made mere averments with no proof.
9. Counsel for the respondent further submitted that the *Civil Procedure Rules* at Order 42 rule 6(2) requires the furnishing of security as a precondition for stay of execution pending appeal. It was therefore submitted that the Court should impose such condition to prevent prolonged delay of the appeal that may be used as a tactic by the applicant to cause hardship to the respondent.

### Determination

10. The grounds upon which this Court exercises the discretion to grant a stay of execution are well governed by the *Civil Procedure rules* under Order 42 Rule 6 which stipulates as follows;
  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 given by the applicant.
11. In *Joseph Odide Walome v David Mbadi Akello* [2022] eKLR the court in support of the above provision held as follows;

An applicant needs to satisfy the court on the following conditions before they can be granted the stay orders:

  - i. Substantial loss may result to the applicant unless the order is made,
  - ii. The application has been made without unreasonable delay, and
  - iii. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
12. On the issue of substantial loss, this has been ably explained by Gikonyo J in the case of *James Wangalwa & Anor v Agnes Naliaka Cheseto* [2012] eKLR. Where the learned Judge observed:

“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.
13. In this matter, the applicant has alleged that the decretal sum is colossal and if the execution was to proceed, it could cause the closure of the restaurant business it is involved in. Further that the



respondent who used to work for it as a waitress has not demonstrated any means of restoring the decretal sum once paid to her, in the event the appeal became successful. The Court notes that the respondent never rebutted these allegations against her. The respondent has on the other hand expressed its willingness to furnish any security the Court may order as a condition for stay.

14. The Court therefore grants a stay of execution on condition that the applicant deposits half the decretal sum in a joint interest earning account in the name of the advocates within 30 days of this ruling.
15. The matter is set for mention on 27<sup>th</sup> January, 2025 for purposes of ascertaining compliance and giving directions the hearing and disposal of the appeal.
16. Costs shall be in the cause.
17. It is so ordered.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER, 2024 DELIVERED VIRTUALLY THIS 6<sup>TH</sup> DAY OF DECEMBER, 2024**

**ABUODHA NELSON JORUM**

Presiding Judge-Appeals Division

