



REPUBLIC OF KENYA



**KENYA LAW**  
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**New Buxton Inn Ltd v Stephen (Appeal E009 of 2021)  
[2023] KEELRC 159 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 159 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E009 OF 2021  
AK NZEI, J  
JANUARY 26, 2023**

**BETWEEN**

**NEW BUXTON INN LTD ..... APPELLANT**

**AND**

**OKELLO OJIAMBO STEPHEN ..... RESPONDENT**

**RULING**

1. The appeal herein was instituted on March 8, 2021 vide a Memorandum of Appeal dated March 5, 2021 and filed by the Appellant. The memorandum of appeal is not shown to have been accompanied by copies of proceedings, all documentary evidence relied on and a copy of the judgment from proceedings of the matter being appealed against as mandatorily provided in Rule 8(4) of the *Employment and Labour Relations Court (Procedure) Rules 2016*.
2. On July 28, 2022, the appellant filed a Notice of Motion dated July 26, 2022 seeking:-
  - a. stay of execution of the Judgment passed on 18/2/2021 and all consequential orders pending hearing of the application.
  - b. stay of execution of the judgment passed on 18/2/2021 and all consequential orders herein pending the hearing and determination of the appeal.
  - c. costs of the application be provided.
3. The application is based on the supporting affidavit of Michael Mondri sworn on July 26, 2022. It is deponed in the said affidavit:-
  - a. that the appellant was the respondent in Mombasa ELR Case No. 296 of 2018, filed by the Respondent herein.



- b. that the case was heard and a judgment was entered against the appellant on 18/2/2021, and being dissatisfied, the appellant filed the appeal herein.
  - c. that vide its Ruling dated 14/7/2022, the (lower) court dismissed with costs the appellant's application for stay of execution.
  - d. that the appeal (herein) is arguable with overwhelming chances of success, and no prejudice will be suffered by the Respondent which cannot be compensated in costs if orders sought are granted.
  - e. that the Respondent is not a man of means and will not be able to refund the decretal sum in the likely event of the appeal succeeding.
  - f. that the appellant is ready to abide by the Court's reasonable terms and conditions which are justifiable in the circumstances of the case.
4. On September 19, 2022, the respondent filed a Preliminary Objection dated September 12, 2022, stating that the appellant's application herein is res judicata on grounds:-
- a. that the orders sought herein were sought in an application dated March 11, 2021 and filed in the trial Court, and which the trial Court dismissed.
  - b. that issues raised in the present application are the same as those raised in the application which the trial court dismissed, and cannot be revisited by this court.
  - c. that the appellant ought to have filed an appeal, not another application.
5. On September 19, 2022, I directed both parties to file written submission on the said Preliminary Objection, which is now before me for determination.
6. Rule 32 of the *Employment and Labour Relations Court (Procedure) Rules* provides that the provisions of the *Civil Procedure Rules* on execution of orders or decree shall apply to proceedings in this court. Order 42 Rule 6 (1) of the *Civil Procedure Rules* provides 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 is preferred may apply to the appellate court to have such order set aside.”
7. It is quite clear from the foregoing provision that an Appellant whose application for stay of execution of a trial court's decree pending hearing of an appeal is dismissed by the trial court has an unfettered right to apply for stay of execution of the same decree in the court appealed to, which in the present case is this court. The principle of res judicata cannot be invoked in the present case, or in any other similar case.
8. The preliminary objection lacks merit, and is hereby overruled with costs.



9. The Notice of Motion dated July 26, 2022, on which interim orders of stay pending appeal were granted by this Court on July 28, 2022, shall be fixed for hearing forthwith.
10. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

N/A for Appellant

N/A Respondent

