



Kenya Hotels And Allied Workers Union & another v Mayfair Holdings Ltd (Imperial Hotel) (Cause 35 of 2019) [2023] KEELRC 295 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 295 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 35 OF 2019
CN BAARI, J
FEBRUARY 9, 2023**

BETWEEN

KENYA HOTELS AND ALLIED WORKERS UNION 1ST CLAIMANT

DANIEL OCHIENG OGAYI 2ND CLAIMANT

AND

MAYFAIR HOLDINGS LTD (IMPERIAL HOTEL) RESPONDENT

RULING

1. Before court is the respondent's motion dated December 8, 2022, brought pursuant to order 21 rule 8 and order 42 rule 6 of the *Civil Procedure Rules*, and sections 1A, 1B, and 3A of the [Civil Procedure Act](#). The respondent seeks orders that: -
 - i. Spent
 - ii. Spent
 - iii. The this honourable court be pleased to grant an order for stay of execution of the judgment herein, pending the appeal to the Court of Appeal.
 - iv. The costs of this application be provided for.
2. The application is supported by grounds on the face of the motion and the affidavit of Pals Wagenaar sworn on December 8, 2022. The crux of the motion is that a judgment was delivered on November 17, 2022 in favour of the claimant, and that there is a likelihood that the claimant will move to execute the decree therein against the respondent before the appeal filed against the judgment is heard and determined.
3. The 2nd claimant opposed the motion vide a replying affidavit sworn on January 17, 2023. The 1st claimant did not oppose the application.



4. The court granted *ex parte* stay orders on December 15, 2022, and further directed that the respondent deposits the decretal sum in court within 30 days of the order.
5. The application was heard interparties on February 1, 2023. Counsel for the respondent submitted that the respondent had complied with the earlier orders of the court having deposited the decretal sum in court on December 21, 2022.
6. Counsel further urged that they have lodged an appeal against the judgment herein before the Court of Appeal, and there is a likelihood that the 2nd claimant may proceed to execute the judgment before the appeal is heard and determined.
7. It is the respondent's further submission that the claimant is currently jobless and may not be in a position to refund the decretal sum should the appeal succeed.
8. It is the respondent's further argument that the instant application was filed timeously and pray that it be allowed.
9. The claimant on his part argued that he does not intend to execute the judgment herein for reason that he had lodged an application for review of the said judgment.
10. The 2nd claimant asked the court to stay the instant application pending hearing and determination of his review application. It is his further argument that there is no evidence showing that the respondent deposited the decretal sum in court as directed.

Determination

11. Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules*, provides for stay of execution as follows:

"(1) No appeal or second appeal shall operate as a stay of execution or 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.

(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 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."

12. The grant of an order of stay is an equitable remedy and which is given at the discretion of the court. The general rule however, is that if there is no overwhelming hindrance, a stay of execution ought to be



granted so that an appeal, if successful, may not be rendered nugatory. Cotton L J in Wilson v Church (No 2) 12 Ch D (1879) 454 held:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

13. The court’s exercise of discretion in staying execution of a judgment, is guided by the grounds set out in the case of Stephen Wanjohi v Central Glass Industries Ltd Nbi HCCC No 6726 of 1991 where the court emphasized that:

“For the court to grant stay of execution there must be:

- (a). Sufficient cause.
- (b). Substantial loss.
- (c). No unreasonable delay and security offered for due performance of the decree.”

14. Without a doubt, the 2nd claimant being the successful litigant in this matter, and in possession of a valid court judgment, is entitled to the fruits of his judgement unless there exist exceptional circumstances to warrant the stay of that judgment.

15. The first question is whether the respondent stands to suffer substantial loss if an order for stay is not granted. The respondent has submitted that the claimant is currently not employed and they stand to lose the decretal sum should their appeal succeeds and where stay is not granted.

16. The claimant did not controvert or in any way show his ability to refund the decretal sum, which confirms the respondent’s fears. In Century Oil Trading Company Ltd vs Kenya Shell Limited Nairobi (Milimani) HCMCA No 1561 of 2007, the court stated: -

“.....The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

17. Secondly, the judgment herein was rendered on November 17, 2022, and the instant application filed on the December 8, 2022. This is less than a month after the delivery of the judgment sought to be stayed. It is thus true that the application was filed without undue delay.

18. It is also evident from the court record that the notice of appeal was filed on November 23, 2022, just six days after the delivery of the judgment now impugned.

19. On the issue of costs, the court ordered the respondent/applicant to deposit the decretal sum in court within 30 days of the grant of the *ex parte* stay order. Contrary to the claimant’s argument, the court record confirms that the respondent complied with the court’s directions on costs on December 21, 2022.

20. In view of the foregoing, the respondent/applicant has met the conditions set out under order 42 rule 6 (1) and (2) of the *Civil Procedure Rules* for grant of stay orders, and the application succeeds.

21. In the upshot, an order for stay of execution of the judgment herein, is hereby granted pending hearing and determination of the appeal before the Court of Appeal.



22. The costs of this application shall abide the appeal.

23. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 9TH DAY OF FEBRUARY, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Daniel Ogayi the 2nd Claimant/Respondent present in person

Ms. Namusubo present for the Respondent/Applicant

N/A for the 1st Claimant/Respondent

Christine Omollo – C/A

