



Bruce Odeny & Co. Advocate v Scottish Tartan Hotel Ltd & another (Miscellaneous Application E088 of 2021) [2023] KEELRC 564 (KLR) (8 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 564 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS APPLICATION E088 OF 2021**

**S RADIDO, J
MARCH 8, 2023**

BETWEEN

BRUCE ODENY & CO. ADVOCATE ADVOCATE

AND

SCOTTISH TARTAN HOTEL LTD 1ST RESPONDENT

WILLIAM ROMAN MCTOUGH 2ND RESPONDENT

RULING

1. For determination is a motion under a certificate of urgency dated 6 March 2023, by the respondents seeking orders:
 - (1) ...
 - (2) That this honourable court do stay execution of the decree issued on January 23, 2023 pending the hearing and determination of this application inter-partes.
 - (3) That the honourable court do stay the execution of the decree issued on January 23, 2023 pending the hearing and determination of the reference.
 - (4) That no execution can issue herein, the applicant/respondent having elected to record the debt in Kisumu High Court Commercial Case No E005 of 2022.
 - (5) That the honourable court do exercise its jurisdiction to permit the respondents/applicants to liquidate this decretal sum in Kisumu High Court Commercial Case No E005 of 2022.
 - (6) That the costs of this application be in the cause.
2. The primary grounds in support of the application were that the parties had entered into a consent before the High Court in Kisumu High Court Commercial Case No E005 of 2022, that the respondents pay the advocate Kshs 5,000,000/- in full settlement of all pending legal fees and that Kshs



- 280,000/- had been made; that having entered into the consent, it was not open to the advocate to move to execute and there was an application dated 19 September 2022, pending determination by the court on 19 April 2023.
3. The advocate filed a replying affidavit in opposition to the motion on 7 March 2023, and the court took oral submissions on 8 March 2023.
 4. In the affidavit, the advocate deponed that the respondents had failed to comply with the terms of the consent to pay Kshs 5,000,000/- within 90 days and therefore, the default clause on execution became implicated; that with the default, taxation of individual fee bills was to continue with attendant execution; that mpesa payments which had been made related to other causes and that the application was a mischievous attempt to frustrate him.
 5. The court has considered the motion, affidavits and submissions and come to the following findings.
 6. One, the respondents have not demonstrated that they complied with the terms of the consent entered before the High Court within 90 days.
 7. Two, it is not open to this court to attempt to vary or alter the terms of the consent entered before the High Court in case of default. The jurisdiction belongs to the High Court and, therefore, it would be remiss of this court to allow or vary the consent and allow settlement in instalments.
 8. Three, this court allowed the respondents interim stay of execution on 29 September 2022, on a condition which they have not complied with.
 9. The respondents have not placed any sufficient material before the court to show any difficulty in complying with the condition.
 10. Four, the respondents application dated 19 September 2023, in which ruling has been scheduled for 19 April 2023, sought a stay of execution.
 11. Since the court is yet to determine the application with finality, it was legally improper for the respondents to file another application seeking stay of execution.
 12. Before concluding, the court once again reiterates to the respondents to approach the advocate in good faith, if at all they have difficulties in meeting the terms of the consent. Engaging in further litigation to vary or stop the consent without meeting the legal threshold would not be of any assistance, but would only serve to increase the costs.

Conclusion and Orders

13. The court finds no merit in the respondents' motion dated 6 March 2023. It is dismissed with costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF MARCH 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For advocate Ms Mwangi instructed by Bruce Odeny & Co. Advocates

For Respondents Mr Kasamani instructed by Kasamani & Associates

Court Assistant Dennis Wafula

