



**Kenya Hotel & Allied Workers Union v Hotel Rastopark (Cause 15 of 2019) [2023] KEELRC 1739 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1739 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 15 OF 2019**

**JW KELI, J  
JULY 14, 2023**

**BETWEEN  
KENYA HOTEL & ALLIED WORKERS UNION ..... CLAIMANT  
AND  
HOTEL RASTOPARK ..... RESPONDENT**

**RULING**

1. This Ruling determines the Applicant's Notice of Motion dated May 23, 2023 and filed on the June 15, 2023 brought under the provisions of Sections 1, 1B, 3 and 3A of the [Civil Procedure Act](#), order 40 rules 1,2,3, order 42 rule 5 and 6 of the [Civil Procedure Rules](#) as well as Articles 159(2) of [the Constitution](#) by the judgment debtor, the Respondent/Applicant.
2. The applicant seeks the following orders:
  - a. Spent
  - b. Spent.
  - c. That the Court be pleased to grant a stay of execution of judgment and decree of this court pending hearing and determination of the appeal filed.
  - d. That in any event the Honourable Court be pleased to issue any conservatory orders pending hearing and determination of this appeal
  - e. That costs of this application be provided for.
3. The applicant's case is that they are aggrieved by the decision of Court delivered on the September 22, 2022 and have since lodged an appeal challenging the judgment and decree.



4. The Applicant avers that the Respondent/judgment holder has instituted decree execution proceedings and have since proclaimed the Applicant's property; and attachment and subsequent selling of the Applicant's property is imminent should the stay not be issued.
5. The Applicant states that they have never been served with Notice of taxation of any costs and the proclamation costs raised by the auctioneers are not applicable in this case and should the execution proceed, they stand grossly affected.
6. The Applicant asserts that the identity of the supposed Plaintiff/Decree Holder is in issue and should any sum be paid; it cannot be recovered from an unknown entity.
7. The Applicant argues it has satisfied the ground for award of stay of execution having filed its appeal within reasonable time.
8. It is the Applicant's case that pending the appeal a stay of execution be issued to preserve the status quo.
9. The applicant avers that they are ready and willing to comply with the conditions imposed for stay of execution including depositing security pending the determination of the appeal.

### **Response**

10. Opposing the application for stay pending appeal, the Respondent filed a replying affidavit dated May 29, 2023.

### **Submissions**

11. The court on May 30, 2023, directed parties to canvass the application by way of written submissions. The parties complied.
12. In their written submissions, the applicant avers that its application for stay is unopposed and the same should be granted based on the principles available in law pending determination of their appeal which they filed on time. Reliance was placed on the case of *Kileleshwa Service station Ltd v Kenya Shell Ltd* [2008] eKLR where the court considered that a stay does not reverse or undo what has been done but only suspends the time required for performance of particular mandate to preserve a *status quo* pending appeal.
13. It is further reiterated by the applicant that the Respondent having commenced execution steps and having since proclaimed the Applicant's property there is a looming threat of attachment and subsequent sale of its property, and they stand to suffer should the stay not be issued.
14. The Applicant asserts that the identity of the supposed plaintiff/Decree Holder is in issue and should any sum be paid; it cannot be recovered from an unknown entity and the Applicant will grossly suffer. To buttress these assertions The Applicant has relied on the decisions in *Halai & another v Thornton & Turpin (1963) Ltd* [1990] KLR 365 and *Kenya Shell Ltd v Benjamin Kibiru* [1982-881] KAR 1018 [1986] KLR 410.
15. It is the Applicant's further assertion that it is ready to pay security into court, which is a requirement for granting stay of execution and there is urgent need for a stay of execution to be issued to maintain the status quo.



## Response submissions

16. The Respondent in its submissions opposing the application submits that the applicant has not pursuant to Order 42 rule 6(2) of the [Civil Procedure Rules](#), demonstrated that it will suffer substantial loss if the orders sought are not granted.
17. The Respondent argue that the Applicant’s application has been brought following inordinate delay and no valid reason has been given save for the assertion that the applicant was waiting for typed proceedings, which the Respondent argues are not necessary for an application for stay.
18. The Respondent argue that the Applicant has not demonstrated that its appeal is arguable and has not attached any draft memorandum of appeal. The Respondent has relied on the case of [Joseph Odede Walome v David Mbadi Akello](#) [2022] eKLR which relates to annexation of a memorandum of appeal to be considered whether there is an arguable appeal.
19. The Respondent points out that the assertion by the Applicant that it does not know the Decree holder is false as the Applicant had previously offered to settle the claim albeit on unreasonable instalments.
20. The Respondent asserts that the application is a waste of judicial time brought in a bid to delay justice and should be dismissed with costs.
21. In the alternative, the Respondent prays that in the event the stay is issued the Applicant be ordered to deposit the entire decretal amount, interest in court and costs of the suit be paid.

## Determination

22. I have considered the application for stay, grounds thereof, supporting affidavit and annexures. I have also considered the Replying affidavit and submissions together with case law cited by both counsel for their respective clients.
23. The main issue for determination is whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.
24. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides: -
  - “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.
25. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objectives in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.
26. Section 1A(2) of the [Civil Procedure Act](#) provides that “the Court shall, in the exercise of its powers under tits Act or the interpretation of any of its provisions, seek to give effect to the overriding



objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

27. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:-

“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. It 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

28. In the instant case, the applicant avers that they stand to suffer 0gross loss of over Kshs. 189,000 as well as costs, interest and auctioneer’s costs, if stay of execution is not granted.
29. The applicant avers that the identity of the supposed Plaintiff/Decree Holder was in issue and should any sum be paid; it cannot be recovered from an unknown entity if the appeal succeeds. The applicant has also pleaded that they are able to comply with any order as to security of costs.
30. On its part, the Respondent has argued that the Applicant has not demonstrated the availability of an arguable appeal having failed to attach one and argues that the Applicant has not demonstrated the substantial loss that it may suffer if the order herein is not issued. It is the considered opinion of this court that the issue of whether there exists an arguable appeal before court is an irrelevant factor in determination of the application for stay by the trial court as it invites the court to sit on appeal on its own decision.
31. The Respondent further asserts that the Applicant has inordinately delayed in coming before tits court and objects to the grant of stay on the Applicant’s pretext that the it does not know who its employee is, having previously offered to settle the suit in instalments.
32. The Applicant prays that should stay be granted, then the Applicant be ordered to pay the decretal sum, interest and costs of the suit. The Respondent’s position is evident from a scrutiny of the authorities it has relied on.
33. The Court of Appeal has settled the principles for stay of execution in the case cited by Justice Ongudi in *MFI Document Solutions Ltd v Paretto Printing Works Limited* [2021] eKLR of *Butt v Rent Restriction Tribunal* [1982] KLR 417 where the Court of Appeal gave guidance on how a court should exercise discretion in an application for stay of execution and held that:-

“1. the power of the court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle is granting or reusing a stay is : If there is no other overwhelming hindrance , a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge ‘s discretion. (sic)( trial court judgement).



3. A judge should not refuse a stay if there is a good grounds for granting it merely because in its opinion a better remedy may be available to the applicant at the end of the proceedings.

4. The court in exercising its powers under order XLI rule 4 (2) (b) of the civil procedure Rules can order security upon application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse". I do uphold the said decision and the principles enunciated in the Butt decision."

34. The Respondent has not given any material as to its ability to repay the decretal sum in case the appeal succeeds and in light of the depositions by the applicant that they shall suffer substantial loss if stay is not granted. Accordingly, I am persuaded that possibility of suffering substantial loss has been proved by the applicant on balance of probabilities.
35. I am also satisfied that there has been no inordinate delay in bringing the instant appeal as the judgment and decree being appealed against was delivered on the September 22, 2022 and the Memorandum of Appeal filed two days later.
36. As to security of costs, the Applicant stated it was able and willing to comply with that condition on security for the due performance of the decree appealed from.
37. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the Civil Procedure Act, I find and hold that the applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under order 42 rule 6 of the Civil Procedure Rules.
38. Accordingly, I hereby allow the applicant's application dated May 23, 2023 and grant stay of execution of judgment and decree dated September 22, 2022 on the following conditions: -
- a. The applicant shall deposit the entire decretal sum in court, within 30 days of this ruling and order. Failure to deposit the entire decretal amount in court within 30 days as ordered execution to proceed.
  - b. Costs of the application to the Claimant.
39. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS DAY OF 14TH DAY JULY 2023.**

**JEMIMAH KELI**

**JUDGE**

**IN THE PRESENCE OF:**

**Court Assistant: Lucy Macheso**

**Applicant: absent**

**Respondent: absent**

