



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MALINDI

ELRC APPEAL NO E003 OF 2022

AVC MANAGEMENT COMPANY T/A

MNARANI CLUB.....APPLICANT/RESPONDENT

VERSUS

DAVIDSON WASHE.....CLAIMANT/RESPONDENT

RULING

1. This is the application dated 1<sup>st</sup> February 2022 seeking stay of execution of the decree in ***Kaloleni PMCC E001 of 2021*** pending the hearing and determination of the current appeal. It is filed, inter alia, under Order 42 of the Civil Procedure Rules.
2. It is the Applicant's case that the trial court in ***Kaloleni PMCC E001 of 2021*** entered judgment against the Applicant against the grain of the evidence on record. As a result, the current appeal seeks to overturn the impugned decision.
3. The Applicant is apprehensive that the Respondent may go ahead and coercively recover the decretal sum notwithstanding the pendency of the appeal. This, in the Applicant's view, will unnecessarily be disruptive of its activities and occasion the Applicant loss and damage since any execution against the Applicant's business is likely to negatively impact its clientele.
4. Further, the Applicant posits that it has a strong appeal that has high chances of succeeding on the merits. Yet, if this were to be the case after execution of the decree by the Respondent, the Applicant has fear that the possibility of the Respondent refunding the sum in the decree is slim as he has no means to do so. Such an eventuality will inevitably render the appeal an academic exercise. It is against this background that the Applicant seeks the orders in this application.
5. The Respondent is opposed to the grant of the orders sought. He has filed a replying affidavit dated 14<sup>th</sup> February 2022.
6. In the Respondent's view, the appeal is unmerited as the trial court's judgment is well founded in law. The Respondent sees no justification in the Applicant's decision to appeal except to frustrate the Respondent's attempts at enjoying the fruits of a favourable judgment.
7. The Respondent has suggested that should the court consider issuing orders for stay of execution of the trial court's decree, then it should make these orders conditional on the Applicant depositing the decretal sum in court. This, the Respondent argues will protect him from the prospects of losing the benefits of the judgment. In the Respondent's view, the Applicant's financial stability is not assured following some redundancy declarations by the Applicant in the recent past.
8. At the hearing of the motion, I asked the parties to consider relying on written submissions, a proposal they acceded to. Therefore, this decision is premised on both the affidavits on record that relate to the application and as well the submissions by the parties.
9. The conditions for grant of an order for stay of execution pending appeal under Order 42 of the Civil Procedure Rules are self evident from the statute. They are that: -
  - a) ***The applicant must apply for the orders without unnecessary delay;***
  - b) ***The applicant must furnish the court with security for the performance of the decree; and***
  - c) ***The applicant must demonstrate that he/she is likely to suffer substantial loss should the orders not issue.***
10. That this application has been presented promptly is not in doubt. From the decision annexed to the affidavit in support of the application,

the impugned judgment was read on 18<sup>th</sup> January 2022. And this application was filed on 1<sup>st</sup> February 2022 some few days down the line. In my view and having regard to the foregoing, I think that the condition that an application for stay of execution pending appeal ought to be filed without undue delay has been met.

11. On the question of likelihood of substantial loss should the court not grant the orders sought, the Applicant pleads the likelihood of disruption of its hospitality business should execution against it occur. The Respondent does not seem to contest this fear. At least, there is no averment by the Respondent that this fear is farfetched. The hospitality sector is fairly sensitive and any disruptions to it through events such as forced recovery of property can have the unintended consequence of collapsing the business. This would occasion substantial loss to the affected party. I therefore find that the Applicant, especially in the absence of contestation by the Respondent on this issue, has demonstrated that execution of the current decree has the potential of occasioning it substantial loss.

12. Notwithstanding that the Applicant did not offer to secure the performance of the decree in the application before me, I note that this has been done in the submissions to court. The Applicant is ready to furnish the Respondent with a bank guarantee or abide by any other condition that the court may impose regarding security as to performance of the decree. The Respondent appears comfortable with an order that the decretal sum be deposited in a joint account over which both parties have control as a condition for granting stay of execution pending appeal. I find this form of security desirable in the circumstances.

13. I will therefore order as follows: -

*a) That the Applicant's prayer for stay of execution pending processing of its proposed appeal is granted subject to the Applicant depositing the entire decretal sum in a joint account in the names of the Advocates on record for the parties.*

*b) That the deposit aforesaid be made within 21 days of this decision.*

*c) That in the event of failure to comply with orders a) and b) above, the Claimant is granted the liberty to execute the decree.*

*d) That the costs of this application are granted to the Claimant.*

**DATED, SIGNED AND DELIVERED ON THE 17TH DAY OF MARCH, 2022**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

Khalwale for the Applicant/Appellant

Opolo for the Respondent

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M. MANANI**

**JUDGE**