



REPUBLIC OF KENYA



KENYA LAW
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**Owiti v Salama Hotel Limited (Cause 293 of 2015)
[2022] KEELRC 1534 (KLR) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1534 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 293 OF 2015
MA ONYANGO, J
JULY 26, 2022**

BETWEEN

EDWARD ODOYO OWITI CLAIMANT

AND

SALAMA HOTEL LIMITED RESPONDENT

RULING

1. By an application dated 15th July 2021 the Applicant seeks the following orders –
 - i. Spent.
 - ii. That there be a temporary stay of execution of the order issued by this Honourable Court on 8th July 2021 and all consequential orders thereto pending the hearing and determination of this Application.
 - iii. That there be a stay of execution of the order issued by this Honourable Court on 8th July 2021 and all consequential orders thereto pending the hearing and determination of the Appeal filed at the Court of Appeal.
 - iv. That the costs of this Application be in the Cause.
2. The grounds in support of the application as set out on the face of the application and the affidavit of Susan Ann Karanja are that the Applicant is dissatisfied with the ruling of this Court lifting the corporate veil and allowing the Claimant to execute the decree herein against the Directors of the Respondent. That the Applicant intends to appeal to the Court of Appeal against the ruling and has lodged a notice of appeal and applied for certified copies of proceedings and judgment.
3. It is the averment of the Applicant that the appeal has high chances of success and it is in the interest of justice to grant the orders sought.



4. The Decree holder opposes the application through the replying affidavit of Edward Owiti, the Claimant in which he states that the application is frivolous and an abuse of Court process and that the grounds in the application do not justify the appeal. It is further the Claimant's position that the Applicant has not deposited the entire decretal sum as directed by the Court as a condition for granting stay of execution pending appeal
5. The application was disposed of by way of written submissions. In the Applicant's submissions she states that the relief of stay of execution is provided for under Order 42 Rule 6(1) of the [Civil Procedure Rules](#).
6. That it is settled law that an appeal to the Court of Appeal is commenced by lodging a notice of appeal. For emphasis the Applicant cites the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* as quoted with approval in *Equity Bank Limited v West Link MBO Limited* [2014] eKLR.
7. The Applicant further submits that Order 42 Rule 6(1) gives the Court wide discretion to be exercised judiciously. That in determining whether to grant orders the Court is to consider whether the application has been brought without undue delay, whether substantial loss will result unless the orders for stay of execution are granted and that the Applicant deposits or provides such security for the due performance of the decree as is ultimately binding on the Applicant.
8. It is submitted that the application was filed timeously. That the ruling was delivered on 8th July 2021, the notice of appeal lodged on 12th July 2021 and the instant application filed on 15th July 2021.
9. On substantial loss, the Applicant submits that if stay orders are not granted the Claimant will proceed to execute the decree yet there was no summons issued to cross examine the directors of the judgment debtor to explain the judgment debtor's credit worthiness.
10. The Applicant relies on the decision in [Transport Workers Union \(K\) v Lochab Brothers Limited](#) [2016] eKLR in an on the decision in [Hellen Waseka v Middle East Bank Kenya Limited](#) [2019] eKLR. The Applicant further relies on the decision in [Nicholas Kinyili v Mocca Lounge and Bistro](#) [2018] eKLR and the case or [Justine Nyambu v Jaspa Logistic](#) [2017] eKLR.
11. Lastly the Applicant submits that she has offered security as ordered by the Court. That the application dated 15th July 2021 has merit and the same should be granted as prayed.
12. For the decree holder it is submitted that the rationale for notice being required before execution was restated by Odunga J. in [Reuben Nyanginja Ndolo v Dickson Wathika Mwangi & 3 Others](#) [2012] eKLR thus:

“The requirement for Notice to Show Cause serves two purposes in my view: First, it serves to give notice to the Judgement- debtor to pay the decretal sum in cases where as a result of the lapse of time, he may have forgotten about the existence of the decree altogether; secondly, the requirement for notice to show cause is also meant to put the decree holder on notice that if he delays in pursuing his rights, the process of execution will be subjected to the said notice.”
13. The decree holder wonders for what purpose the Applicant wanted cross examination of debtors when the means of the judgment debtor has been demonstrated by payment of the decretal sum in Court.
14. It is submitted that judgment herein was delivered on 10th February 2017 and there has been no appeal against the same. That the judgment debtor filed a notice of appeal in respect of the judgment which lapsed without any appeal being filed. That the current appeal is therefore an abuse of Court process.



Analysis and Determination

15. Conditions for grant of stay of execution pending appeal are set out in Order 42 Rule 6(2) of the Civil Procedure Rules as follows –
- (2) 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.
16. In the instant case, the application and notice of appeal were lodged within the prescribed period. The Court further directed deposit of decretal sum in Court which the Applicant has complied with. The only issue to be decided is therefore whether the Applicant will suffer irrepealable loss. This has not been demonstrated.
17. There is therefore sufficient security for the Applicants should the appeal fail as the Applicant has deposited the money in Court.
18. The Court however takes note that after delivery of the judgment, the Respondent filed a notice of appeal which lapsed without any appeal being filed.
19. In view of the foregoing, the application is granted conditionally. There shall be a stay of execution pending appeal against this Court's ruling dated 8th July 2021 provided that the appeal is filed within 60 days from today's date.
20. The costs of the application in any event be borne by the Applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JULY 2022

MAUREEN ONYANGO

JUDGE

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

