



**South Tetu Hotels Limited v Wangu (Miscellaneous Application
E008 of 2022) [2022] KEELRC 13113 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13113 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
MISCELLANEOUS APPLICATION E008 OF 2022
DKN MARETE, J
OCTOBER 31, 2022**

BETWEEN

SOUTH TETU HOTELS LIMITED APPLICANT

AND

JANE WANDIA WANGU RESPONDENT

RULING

1. This is an application dated June 6, 2022 and seeks the following orders of court;
 1. This application be certified as urgent and its service be dispensed with and the same be heard *ex parte* in the first instance.
 2. The honourable court be pleased to stay execution of decree pursuant to the judgment delivered on November 25, 2021, vide Nyeri CM ELRC No E017 of 2021 and all consequential orders arising therefrom pending the hearing and determination of this application and or intended appeal or further orders of this court.
 3. The honourable court be pleased to grant leave for enlargement of time within which to file the annexed draft memorandum of appeal and or appeal out of time against the whole of the judgment of the principal magistrate's court delivered on November 25, 2021 and the same be deemed as properly filed upon payment of requisite fees with leave of court.
 4. The honourable court be pleased to exercise its inherent power and issue any other further orders in the interest of justice.
 5. costs and incidental to this application be costs in the intended appeal.
2. It is grounded as follows;
 1. Judgment was delivered on November 25, 2021.



2. Leave of court is necessary to enlarge time that the period of delay is not memorandum of appeal out of time save that the period of delay is not inordinate since the delivery of the judgment on November 25, 2021.
 3. The reason for the delay is that the applicant was down financially as a result of the pandemic.
 4. There is a likelihood that the respondent may execute the decree issued in this matter hence the same would be prejudicial to the hearing and determination of the intended appeal unless execution thereof is stayed.
 5. The annexed memorandum of appeal raises arguable grounds of appeal with chances of success and needs to be heard on merit.
 6. Unless this honourable court issues an order of stay the decree appealed shall be rendered nugatory and further the applicant shall suffer irreparable damage as the assets of the applicant are in jeopardy of being sold to the detriment of the intended appellant and hence be deprived the right to the beard on appeal, right to natural justice thereby causing irreparable damage not compensable by damages.
 7. This court has jurisdiction to issue orders of stay to obviate hardship likely to be caused to the applicant pending hearing of appeal and no prejudice shall be occasioned to the respondent.
 8. The applicant is ready to abide by any reasonable conditions to be set by this court for grant of the orders sought.
 9. It is in the wider interest of justice that the orders sought be granted to enhance right to fair trial.
 10. No prejudice which shall be suffered by the respondent if the intention of time and stay of execution is granted.
3. The respondent in a Replying Affidavit sworn on June 29, 2022 opposes the application on the following grounds.
5. That I have been advised by my advocates on record, and I verily believe the same to be true, that a stay of execution cannot be issued when no appeal has been filed.
 6. That there is an inordinate delay of 7 months in bringing this application which delay has not been explained.
 7. That I have been advised by my advocates on record and I verily believe the same to be true, that the present application has not fulfilled the requirements for grant of stay of execution or enlargement of time.
 8. That I have been advised by my advocates on record, and I verily believe the same to be true, that the cost of filing a memorandum of appeal is nominal and should not be given as the reason for not filing the appeal in time especially by a corporate body like the respondent.
 9. That I have been advised by my advocates on record, and I verily believe the same to be true, that the intended appeal is not an arguable appeal.
 10. That the decree in this matter is a money decree and the respondent has not demonstrated that it will suffer substantial loss if the prayers sought are not granted by this court.



11. That the respondent has not offered security for the performance of the decree amounting to Kshs 868,938. Annexed hereto and marked “JWW 1” is a copy of the decree and certificate of costs dated March 2, 2022.
10. That the application is an abuse of court process as the respondent was served with the notice of entry of judgment on March 7, 2022. Annexed hereto and marked “JWW 2” is a copy of the affidavit of service by Julius Kariuki Mundia in Nyeri CM ELRC E017 of 2021 plus the notice of entry of judgment dated March 4, 2022.
4. The applicant in a written submissions dated September 16, 2022 submits a case for grant of stay of execution pending appeal as provided for by order 42 rule 6 of the *Civil Procedure Rules*. She basis this and relies on the authority of *James Wangalwa & Another vs Agnes Naliaka Cheseto* (2012) eKLR where the court observed thus;

“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. This 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.”

5. The applicant further submits a case of security for costs an arguable case which all come out in his favour. She discounts the issue of inordinate delay and submits that this as yet not been set down by any rule.
6. The respondent in a written submission dated August 1, 2022 reiterates her case. She submits that the application has not met the threshold for both stay of execution and enlargement of time. This is because all this time the applicant was aware of the judgment but did not file an appeal. This application comes six months down the line and the only reason given for the delay is financial disability. This is fatal to the application and therefore renders it material for dismissal. On enlargement of time the Respondent seeks to rely on order 50 rule 6 of the *Civil Procedure Rules* which provides as follows;

“where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

7. Again, section 79G of the *Civil Procedure Act*, chapter 21 Laws of Kenya provides as follows;

“Every appeal from a subordinate court to the high court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparing and delivery to the applicant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal out of time.”



8. The respondent's case is the laudable of the two. It overwhelms that of the applicant. Simply speaking, the applicant does not meet the threshold for issue of the orders sought. This is because he has not offered any justification for her dalliance and lack of compliance with the procedural and legal requirements for the orders sought.
9. The respondent has not awarded this court any chance or opportunity to consider or exercise its discretion in her favour. This for lack of credible support for her case.
10. I am therefore inclined to dismiss the application with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER, 2022.

D K NJAGI MARETE

JUDGE

Appearances

1. Mr Muthoni Kibara instructed by Muthoni Kibara & Advocates for the respondent/applicant.
2. Mr Macharia instructed by Waweru Macharia & Co Advocates for the claimant/respondent.

