



Nyali International Beach Hotel v Bundi and 145 others; Nyali Sun Africa Beach Hotel and Spa Limited (Interested Party) (Cause 960 of 2016) [2022] KEELRC 13273 (KLR) (25 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13273 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 960 OF 2016
B ONGAYA, J
NOVEMBER 25, 2022

BETWEEN

NYALI INTERNATIONAL BEACH HOTEL CLAIMANT

AND

MPE SHINDO BUNDI AND 145 OTHERS RESPONDENT

AND

NYALI SUN AFRICA BEACH HOTEL AND SPA LIMITED INTERESTED PARTY

RULING

1. The interested party (applicant) filed an applicant on October 12, 2022 through Odhiambo M T Adala advocate. The application was by way of the notice of motion dated October 11, 2022 brought under order 51 rules 1 and 3, and, order 22 rule 22 of the *Civil Procedure Rules, 2010*; sections 1A, 1B and 3A, *Civil Procedure Act, 2010*; and all enabling provisions of law. The interested party prayed for orders as follows:
 1. (spent).
 2. (spent).
 3. (spent).
 4. That the honourable court be pleased to set aside the order made on June 28, 2022 in so far as the same relates to the interested party and also to clarify and confirm that such order is only applicable as between the claimant and the respondents and has no application as against the interested party.



5. That the honourable court be further pleased to grant extension of time to the interested party to appeal against the said consent order of June 28, 2022 in so far as the same concerns or affects the interested party.
 6. That the honourable court be pleased to stay execution of the order made on June 28, 2022 pending appeal by the interested party against the said order and against other related orders in the suit.
 7. That the honourable court be further pleased to make such further or other orders as the substantial interests of justice may demand.
 8. That the costs of and incidental to the application be provided for and be costs in the cause.
2. The application was based on the supporting affidavit of Sanjay Kishorekumar Mashru, the applicant's director, and upon the following grounds:
1. On October 7, 2022 the respondents have served on the interested party a decree issued by this honourable court on September 30, 2022 relating to the order of the court made on June 28, 2022. There is a real and present danger of the respondents making an application for execution of the decree against the interested party, the applicant.
 2. The applicant has applied for certified copies of related orders made in the suit on June 28, 2022 and on April 1, 2022. The applicant will suffer substantial and irreparable loss unless the decree and all consequential orders herein are stayed or set aside as regards the applicant.
 3. It is fair and just that the orders made on June 28, 2022 be stayed and set aside as against the interested party and that the said clarification be issued to be understood by all the parties in the suit.
 4. If orders sought are not granted it will result into a serious miscarriage of Justice to the detriment of the interested party.
 5. It is fair, just and expedient that the orders sought are granted.
3. The respondents in the suit have opposed the application by filing on November 7, 2022 the replying affidavit of Hezron Onw'onga, the Chief Industrial Relations Officer for the respondent's trade union, the Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers. By court order, the trade union was granted leave to represent the respondents in the present suit. It is urged that the applicant was enjoined in the suit as an interested party on February 16, 2018. The cause of action in the suit is different from that in cause 920 of 2017 and cause 49 of 2020. Further, as at the time the interested party (applicant) took over the management of the hotel from the claimant it had the full knowledge of the respondents' claims subject of the instant suit. The application is therefore made in bad faith to delay justice to the respondents and should be dismissed with costs. It was urged that the court orders the claimant and the applicant to file in court the agreement they entered at the time of taking and handing over the business.
4. Despite service the claimant did not attend court or file a replying affidavit. The court has considered the applicant's and the respondents' respective positions and makes findings as follows.
5. First, the court has revisited the proceedings of June 28, 2022. Mr Adala advocate attended for the applicant herein; Mr Onw'onga for the respondents; and Ms Wambui held brief for Mr Waweru for the



claimant. The matter had been listed for hearing of the respondents' application dated July 20, 2017 being an application for summary judgment. Mr Onw'onga informed the court that the conciliator had determined the amount payable and if the application was entered the matter would stand concluded. Ms Wambui stated that she did not object the application being allowed. Mr Adala stated that he was not interested in that application though he had attended court. The court then ordered as follows:

1. By consent of the respondents (applicants) and the claimant the application dated July 20, 2017 as amended on July 28, 2020 is hereby allowed in terms of prayers three (3) and two (2) accordingly.
 2. The orders being costs in the cause the claimant to pay applicants' costs of the suit to be agreed upon or taxed in the usual manner.
 3. A decree to issue accordingly as suit is marked completely determined.
6. A decree was issued on September 30, 2022. The court has perused the decree and it sets out the orders as directed to the claimant. The court reiterates that the consent was between the claimant and the respondents in the suit and the consent orders were clearly directed at the claimant and not the interested party, the current applicant. A clarification is made that the orders in the decree by consent of the claimant and the respondents is directed at the claimant to be satisfied by the claimant accordingly. The parties are bound by the terms of the decree by consent accordingly. The terms of the decree are such that the orders were not directed at the interested party which is not liable to satisfy the decree and in absence of court orders given against the interested party.
7. Second, the respondents appear to suggest that the claimant transferred the business to the interested party under an agreement for the interested party to take over the liability to pay the amounts now ordered in the decree. The details of such an agreement are at large and not before the court. In any event, such view by the respondents is inconsistent with the claimant's already admitted or agreed liability to pay in terms of the decree by consent of the claimants and the respondents.
8. Third, there being no order directed against the applicant, it would be misconceived for execution to issue against the interested party in satisfaction of the decree herein unless so ordered by the court. Further, with that clarification, it appears to the court that the prayer for leave to appeal out of time is redundant as no order in the decree is directed at the applicant.
9. Fourth, no justification has been established on the part of the applicant to justify the setting aside of the consent decree as validly entered into between the claimant and the respondents. In particular, fraud, mistake or such other factor that may vitiate or void a contract have not been established at all to justify the prayer for setting aside the consent decree.
10. Fifth, taking into account the history of the case and that execution against the applicant had not issued, each party to meet own costs of the application.
11. In conclusion the application for the interested party by the notice of motion dated October 11, 2022 and filed on October 12, 2022 is hereby determined with orders:
1. It is clarified that the terms of the orders in the decree herein given on June 28, 2022 and issued on September 30, 2022 are such that the orders were not directed at the interested party which is not liable to satisfy the decree unless otherwise ordered by the court.
 2. The claimant has admitted or agreed liability to pay in terms of the decree by consent of the claimants and the respondents so that, in absence of any other court order, the claimant to satisfy the decree in favour of the respondents, accordingly.



3. Each party to meet own costs of the application.
4. The deputy registrar to cause transfer of the court file to Mombasa Registry.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 25TH NOVEMBER, 2022**

BYRAM ONGAYA

PRINCIPAL JUDGE

