



**Swahili Beach Resort Limited v Osewe (Civil Application
E087 of 2024) [2024] KECA 1312 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1312 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E087 OF 2024
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
SEPTEMBER 27, 2024**

BETWEEN

SWAHILI BEACH RESORT LIMITED APPLICANT

AND

DAVID OMONDI OSEWE RESPONDENT

(Being an application for stay of execution pending appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Mombasa (A. K. Nzei, J.) delivered on 8th December 2022 in E.L.R.C Cause No. 42 of 2019)

RULING

1. The applicant, Swahili Beach Resort, seeks stay of execution of the judgment and decree of the Employment and Labour Relations Court at Mombasa (A. K. Nzei, J.) delivered on 8th December 2022 in ELRC Cause No. 42 of 2019 in determination of which the learned Judge allowed the respondent's claim and awarded him Kshs. 1,916,000 as compensation for unlawful termination of his employment with the applicant; and the unpaid balance of one month's salary in lieu of notice. In addition, the learned Judge awarded the respondent, David Omondi Osewe, costs of the suit.
2. Aggrieved by the learned Judge's decision, the applicant moved to this Court on appeal in Civil Appeal No. E102 of 2024 on the grounds, inter alia, that the learned Judge erred in law and in fact: by failing to find that, under sections 45(3) of the *Employment Act*, the respondent was not entitled to claim compensation for unfair termination, having worked for the appellant for a period of 6 months and 12 days; by awarding the respondent Kshs. 1,916,000 on account of unfair termination; and by ignoring the evidence that the respondent had executed a discharge voucher (in the nature of a certificate of settlement) dated 20th February 2019 absolving the applicant of all claims by the respondent.
3. The applicant's Notice of Motion dated 18th July 2024 is anchored on a legion of 16 grounds set out on the face of the Motion and substantially deposed to in the supporting affidavit of Amir



Kalsi, the applicant's General Manager. In addition to restating the grounds of appeal contained in the applicant's memorandum of appeal dated 20th May 2024, the applicant contends that it has an arguable appeal, and that it would be rendered nugatory if the stay orders sought were not granted. The applicant's Motion was buttressed by written submissions, case digest, a list and bundle of authorities dated 1st August 2024 filed by M/s. Cootow & Associates, and in respect of which learned counsel, Mr. Ndambuki, made oral highlights citing 3 authorities and urging us to allow the application.

4. Opposing the Motion, the respondent filed a replying affidavit sworn on 29th July 2024 stating, among other things, that the applicant does not merit the stay orders sought in that it has not demonstrated that it has an arguable appeal; that the applicant has failed to show that it would suffer irreparable harm if stay was not granted; that the appeal would not be rendered nugatory if stay was not granted; and that the applicant has not provided any evidence to show that the respondent was incapable of refunding the decretal amount in the event that the appeal succeeded. Highlighting their written submissions, case digest and list of authorities dated 5th August 2024, learned counsel for the respondent, Ms. Wataka, cited 4 judicial authorities and urged us to dismiss the Motion.
5. The applicable principles in exercise of the Court's unfettered discretion under rule 5(2) (b) of the [Court of Appeal Rules, 2022](#) to grant an order of stay are well settled. Firstly, an applicant has to satisfy the Court that he or she has an arguable appeal. Secondly, an applicant has to demonstrate that, unless an order of stay is granted, the appeal or intended appeal (if successful) would be rendered nugatory. These principles have been restated and enunciated by this Court in [Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others](#) [2013] eKLR. That said, it is also imperative to point out that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous and merits to be argued fully. Further, it is sufficient even if the appeal raises only one triable issue.
6. On the 2nd limb of the twin principle, namely the nugatory aspect, it was held in [Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others](#) (supra) that, whether or not an appeal will be rendered nugatory, depends on whether or not what is or ought to be stayed or restrained by way of injunctive relief, if allowed to happen, is reversible; or, if not reversible, whether damages would reasonably compensate the aggrieved party. We are also guided by the observations made in [Reliance Bank Limited v Norlake Investment Limited](#) [2002] 1 EA 227 that factors which render an appeal nugatory are to be considered within the circumstances of each case and, in so doing, the Court is bound to consider the conflicting claims of both sides.
7. On the issue as to whether the appellant's appeal, which is already filed, is arguable, counsel for the applicant cited the case of [Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others](#) (supra) and drew our attention to the 6 grounds of appeal which, according to counsel, are arguable and deserving of the Court's interrogation.
8. On their part, counsel for the respondent contend that the appeal is substantially founded on the 1st ground in respect of which section 45(3) of the [Employment Act](#) was declared unconstitutional in the High Court decision in [Samuel G. Momanyi v Attorney General & Another](#) [2012] eKLR. Whether or not this decision sets out the applicable law is for the Bench tasked with the hearing and determination of the appeal to say.
9. To our mind, the grounds advanced in the appeal cannot, with all fairness, be wished away as undeserving of scrutiny by this Court. Put differently, they are not frivolous. However, whether or not the appeal will succeed is not for us to judge. All we need to say for the moment, as we hereby find, is that the appeal is arguable and, therefore, the applicant has satisfied the 1st limb of the twin principle for grant of stay orders under rule 5(2) (b) of the [Court of Appeal Rules](#).



10. Turning to the 2nd limb, the applicant's case is that, if the decretal amount already deposited in the ELRC was to be released to the respondent, the same would be irrecoverable in consequence of which its appeal would be rendered nugatory. According to the applicant, "... the respondent has no known disclosed assets or place of abode from which the applicant can recover the decretal sum in the event its appeal is successful." Learned counsel cited this Court's decision in *NIC Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR where it granted orders of stay of execution on the basis that the respondent's financial ability to refund the decretal amount was unknown.
11. It is noteworthy that the respondent has not made any attempt to demonstrate his ability to refund the decretal amount in the event the appeal succeeds. We are not persuaded by counsel's argument that the applicant did not provide any evidence of such inability; or that "the applicant is a large hotel that receives guests both locally and internationally and is therefore able to pay the decretal amount from its revenue ..." and that "the amount payable ... cannot be said to be colossal".
12. We need to point out, though, that it behoves the respondent to discharge the burden of proof that, if the decretal amount is released to him, he will be able to refund it in the event the appeal succeeds. We need not overemphasise this Court's decision in *NIC Bank Ltd v Aquinas Francis Wasike & Another* (*supra*) held that:

"Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge..."
13. As to the alleged paucity of the sums in contention, we hasten to observe that whether or not the amounts in issue are colossal is immaterial. What matters is the decree holder's ability (or lack thereof) to repay the decretal amount in the event the appeal succeeds. This Court in *G. N. Muema P/A Mt. View Maternity & Nursing Home v Miriam Maalim Bisbar & Another* [2018] eKLR had this to say on the matter:

"It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful."
14. Having carefully considered the applicant's Motion, the grounds on which it is made, the affidavits in support and in reply thereto, the rival submissions of the respective counsel, the cited authorities and the law, we find that the applicant has satisfied the conjunctive twin principles for grant of the orders sought. Accordingly, we hereby order and direct that:
 - a. Execution of the judgment and decree of the ELRC (A. K. Nzei, J.) delivered on 8th December 2022 be and is hereby stayed pending hearing and determination of Civil Appeal No. E102 of 2024;
 - b. The sum of Kshs. 1,916,000 deposited in the trial court shall not be released to the respondent except on further orders on final determination of the appeal; and
 - c. That the costs of the application do abide the outcome of the appeal.Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF SEPTEMBER, 2024.



D. K. MUSINGA, (P)

JUDGE OF APPEAL

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DR. K. I. LAIBUTA CArb, FCIArb.

JUDGE OF APPEAL

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G. W. NG'ENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

