



Dhanjal Investments Limited t/a Travellers Beach Hotel & Club v Odindo (Appeal E107 of 2024) [2024] KEELRC 13373 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13373 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E107 OF 2024
AK NZEI, J
DECEMBER 6, 2024**

BETWEEN

DHANJAL INVESTMENTS LIMITED T/A TRAVELLERS BEACH HOTEL & CLUB APPELLANT

AND

ELIZABETH PHOEBE ATIENO ODINDO RESPONDENT

RULING

1. The application before me is the Appellant’s Notice of Motion dated 31st May, 2024 and expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules, among other provisions of the law. The Appellant/Applicant seeks the following Orders:-
 - a. That there be an interim order of stay of execution of the Judgment and decree of the Hon. Maureen Nabibya (SPM) delivered on 16th May, 2024 in Mombasa CMC ELR Case No. 401 of 2019 (Elizabeth Phoebe Atieno Odindo – vs – Dhanjal Investments Ltd t/a Travellers Beach Hotel and Club) pending hearing and determination of the application inter partes.
 - b. That there be an order of stay of execution of the Judgment and decree of the Hon. Maureen Nabibya (SPM) delivered on 16th May, 2024 in Mombasa CMC ELR Case No. 401 of 2019 (Elizabeth Phoebe Atieno Odindo – vs – Dhanjal Investments Ltd t/a Travellers Beach Hotel and Club) pending hearing and determination of the appeal.
 - c. That costs of the application be in the cause.
2. The application is predicated on the supporting affidavit of Nirmal Singh Dhanjal, a director of the Appellant/Applicant, sworn on 31st May, 2024. It is deponed in the said supporting affidavit that if execution proceeds, the appeal herein will be rendered nugatory, that the appeal is meritorious, and that the Appellant/Applicant will suffer substantial loss of over Kshs.1,828,962.40 unless the stay sought is granted.



3. The application is opposed by the Respondent vide a replying affidavit sworn by her on 10th June, 2024.
4. Rule 73(2) of the Employment and Labour Relations Court (Procedure) Rules, 2024 provides that execution or stay of execution of this Court's orders or decrees shall be in accordance with the Civil Procedure Rules. On the other hand, execution of the lower courts orders and decrees is basically governed by the Civil Procedure Rules. Stay of execution of this Court's orders and decrees, and those of the lower court pending hearing and determination of appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(1) provides as follows:-

“No appeal or second appeal shall operate as a stay of execution of proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

5. It ought to be appreciated that execution of a Court's decree is not an unlawful process or occurrence. It is a lawful process initiated by a successful litigant towards realization of a right that is already determined by a court of competent Jurisdiction. At the same time, the rights of an appealing litigant ought to be considered while protecting the rights of a successful litigant. In my view, the provisions of Order 42(6)(2) of the Civil Procedure Rules on provision of security are meant to hold the delicate balance of ensuring that the rights of an appealing party are not compromised, while at the same time securing the rights of a successful litigant, should the appeal and/or intended appeal fail or fall by the way side.
6. The appeal herein is against a money decree. There is on record a valid appeal against that money decree. If a stay of execution of the decree is not ordered as sought by the Appellant/Applicant, execution will proceed and the appeal will be rendered nugatory. The Court of Appeal stated as follows in the case of Kenya Shell Limited – vs – Benjamin Karuga Kibiru & Another [1986] eKLR:-

“It is also true to say that, in consideration of an application for a stay, the Court doing so must address its collective mind to the question of whether to refuse it would, as Mr. Kwach argues, render the appeal nugatory. This is shown by the following passage from the Judgment of Cotton L J in Wilson – vs – Church (No. 2) [1879] 12 ch D 454 at P 458 where he said:-

“I will state my mind that if a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not rendered nugatory.”

7. The Court of Appeal further stated as follows in the Kenya Shell Limited case (Supra):-

“... Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a Judgment in his favour without a just cause.”

8. Having said that, and having perused the trial Court's Judgment appealed against and considered the submissions filed, I allow the Appellant/Applicant's Notice of Motion dated 31st May, 2024 in the following terms:-



- a. There will be a stay of execution of the Court's decree in Mombasa CMC ELR Case No. 401 of 2019 pending hearing and determination of the appeal herein on condition that the Appellant/Applicant pays to the Respondent a sum of Kshs.344,335.40 being part of the Judgment sum, and deposits in this Court Kshs.500,000/=, all within fourteen (14) days from the date of this Ruling; failing which the stay herein granted shall automatically lapse.
- b. The Appellant/Applicant shall compile and file a complete record of appeal within 90 days of this Ruling, failing which the stay herein granted shall lapse.
- c. Costs of the application shall be in the appeal.

9. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER 2024

AGNES KITIKU NZEI

JUDGE

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

