

**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)**

**CIVIL APPLICATION NO. E019 OF 2025**

**BETWEEN**

**DOCK WORKERS UNION.....APPLICANT**

**AND**

**THE DIRECTOR OF OCCUPATIONAL SAFETY**

**AND HEALTH SERVICES.....1<sup>ST</sup>  
RESPONDENT**

**NATIONAL POLICE COMMISSION.....2<sup>ND</sup>  
RESPONDENT**

**THE INSPECTOR GENERAL  
OF NATIONAL POLICE SERVICE.....3<sup>RD</sup>  
RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LABOUR  
AND SOCIAL PROTECTION.....4<sup>TH</sup>  
RESPONDENT**

**CABINET SECRETARY, MINISTRY OF  
INTERIOR AND COORDINATION  
OF NATIONAL GOVERNMENT.....5<sup>TH</sup>  
RESPONDENT**

**THE ATTORNEY GENERAL.....6<sup>TH</sup>  
RESPONDENT**

**MARGARET BOSIBORI NYAMWAYA (*sued on  
behalf of the estate of SAMUEL ONYANCHA  
KINAGA*  
(Deceased).....7<sup>TH</sup>  
RESPONDENT**

***(An application for stay of proceedings in Mombasa  
Employment and Labour Relations Court Miscellaneous  
Application No. E016 of 2024***

*in*  
**Mombasa Employment and Labour  
Relations Court Petition No. E004 of  
2024)**

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## **RULING OF THE COURT**

By a Notice of Motion dated 21<sup>st</sup> February 2025 brought  
pursuant to

**rule 5 (2 ) (b)** of the **Court of Appeal Rules, the Applicant,  
Dock Workers Union**

, seeks stay of the proceedings in *Mombasa ELRC Miscellaneous Application No. E016 of 2024* pending the lodging and determination of the intended appeal to challenge the whole of the Judgment delivered by the Employment and Labour Relations Court at Mombasa (Mbaru, J.) on 23<sup>rd</sup> January, 2025 in the *Employment and Labour Relations Court Petition No. E004 of 2024 - Dock Workers Union vs The Director of Occupational Safety and Health Services & 7 Others*, and that the cost of the application be provided for.

The motion is brought pursuant to the grounds on its face, and on the affidavit in support thereof sworn on 21<sup>st</sup> February 2025 by Simon Kiprono Sang, the General Secretary of the Applicant, in which he contended that the motion arises from an incident that caused the death of the deceased employee, Samuel Kinaga Onyancha, represented by the 7<sup>th</sup> Respondent, and which incident led to the filing of *Misc. Application No. E016 of 2024* and, subsequently, to the filing of *Employment and Labour Relations Court Petition No. E004 of 2024 - Dock*

*Workers Union vs The Director of Occupational Safety and Health Services & 7 Others*, and the ensuing Judgment of 23<sup>rd</sup> January 2025.

He deposed that the deceased, an employee of the Applicant, was fatally shot by unknown assailants on 29<sup>th</sup> January 2020 while outside the

Applicant's workplace. Following the incident, he completed a DOSH Form dated 8<sup>th</sup> February 2022 and filed it with the 1<sup>st</sup> Respondent in strict compliance with **Sections 21** and **22** of the **Occupational Safety and Health Act (OSHA)**, and in furtherance of the 1<sup>st</sup> Respondent's statutory mandate as set out under **Sections 23, 24** and **25** of the same Act. He asserted that the DOSH Form was not, in law, intended to be a report under **Sections 21** and **22** of the **Work Injury Benefits Act (WIBA)**, and that the 1<sup>st</sup> Respondent acted outside its statutory authority by wrongfully treating the OSHA report as a WIBA claim, on which it purported to assess and award compensation to the deceased's beneficiaries in the sum of Kshs. 16,482,336 on 11<sup>th</sup> March 2022 under **Sections 28** and **30** of WIBA.

He further deposed that, when the 7<sup>th</sup> Respondent was of the view that enforcement of the compensation award was frustrated, he filed *Misc. Application No. E031 of 2023*, which was dismissed by the trial court on 30<sup>th</sup> November 2023 for the reason that the enforcement was premature since the 1<sup>st</sup> Respondent had not issued the Dependency Certificate as required by **Sections 6** and **34** of WIBA; that, despite the earlier ruling and the defects identified by the court, the 7<sup>th</sup>

Respondent re-instituted a fresh enforcement suit in *Misc. Application No. E016 of 2024* on 30<sup>th</sup> January 2024 before the same Judge; that the Judge thereafter listed the application for mention on 24<sup>th</sup> February 2025; and that, by the court entertaining *Misc. Application No. E016*

of 2024 without reviewing its decision in *Misc. Application No. E031 of 2023*, was tantamount to the court sitting on appeal on its own decision.

As a consequence, this prompted the Applicant to file *Employment and Labour Relations Court Petition No. E004 of 2024* dated 6<sup>th</sup> May 2024 seeking: i) a declaration that the order issued by the 1<sup>st</sup> Respondent regarding DOSH/WIBA Form 4 and dated 11<sup>th</sup> March 2022 was unlawful as it was not issued by the office established under **Section 53** of WIBA; ii) a declaration that, under the 1<sup>st</sup> and 2<sup>nd</sup> schedule of the OSHA, the accident which occasioned the death of the deceased person did not arise from work injury and could not constitute an occupational accident; iii) a declaration that the compensation did not arise from an accident due to occupational safety as provided under the OSHA; iv) a declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were liable for accidents caused by criminals and other unlawful groupings and organisations and their networks, as they have the power and authority to provide security to the property and lives of Kenya citizens; v) an order of certiorari do issue to quash the order dated 11<sup>th</sup> March 2022 issued pursuant to **Sections 28** and **30** of the OSHA and contained in DOSH/WIBA Form 4; and v) an order of prohibition to stop the

proceedings in *Mombasa Miscellaneous Application No. E016 of 2014*.

It was deponed that, on 23<sup>rd</sup> January 2025, the trial court rendered its judgment and dismissed the Applicant's petition; and that the Applicant was aggrieved by the decision and intends to file an appeal to this Court, and has

filed a Notice of Appeal dated 24<sup>th</sup> January 2025. Annexed to the application is the Notice of Appeal dated 24<sup>th</sup> January 2025.

It was deposed that the grounds of appeal are that: the trial Judge was in error in finding that the 1<sup>st</sup> Respondent who is appointed as Director of Occupational Safety and Health Services under OSHA, is simultaneously the Director of Work Injury Benefits under **Section 53** of WIBA, and that this interpretation does not accord with Parliament's intention and the statutory distinction between the two offices; in concluding that the fatal shooting constituted an occupational disease under OSHA, whereas occupational diseases arise from workplace exposures enumerated in the First and Second Schedules to OSHA, and involving controlled substances or hazardous conditions such as chemicals, gases, extreme temperatures or mechanical systems, and cannot include criminal attacks; in failing to properly interpret **Articles 165(6)** and **(7)** in relation to **Article 162(2)(a) of the Constitution** in so far as that the Employment and Labour Relations Court, being a superior court of equal status to the High Court, lacks original jurisdiction to enforce decisions of tribunals or quasi-judicial persons such as the 1<sup>st</sup> Respondent; that allowing enforcement through *Misc. Application No. E016 of 2024* would

lead to a constitutional violation; in dismissing the Applicant's petition for reasons of defective representation, even though the Applicant's representation was regularized; and in relying on unpleaded matters and making adverse remarks about their representative's employment status,

thereby showing bias and descending into the arena contrary to **Articles 1** and

**159 of the Constitution**, among other issues.

It was finally deponed that, if the trial court proceeds with *Misc. Application No. E016 of 2024* and orders the Applicant to pay the award of Kshs. 16,482,336 to the beneficiaries, recovery would be impossible since they would have no capacity to refund the amount paid, thereby rendering the intended appeal nugatory and exposing the Applicant to irreparable loss and damage.

In a further affidavit sworn on 1<sup>st</sup> April 2025, the Applicant's General Secretary deposed that the trial court had fixed the ruling of the impugned *Miscellaneous Application No E016 of 2025* for 17<sup>th</sup> July, 2025; and that, if the ruling is delivered before this application is determined, the intended appeal would be rendered nugatory.

When the application came up for hearing on a virtual platform, Mr. Ochieng appeared in person for the Applicant while learned counsel **Mr. Kemei** appeared for the 1<sup>st</sup> to 6<sup>th</sup> Respondents. There was no appearance for the 7<sup>th</sup> Respondent even though they were served with the hearing notice.

The Applicant filed written submissions dated 1<sup>st</sup> April,

2024 which were relied upon. In their written submissions, the Applicant submitted that the intended appeal raises weighty and triable issues. The applicant fundamentally disagreed with the finding of the trial Judge that the

Employment and Labour Relations Court, being a court of the same status as the High Court, could enforce the decision of the 1<sup>st</sup> Respondent, a quasi-judicial person, despite the express constitutional limitations contained in **Article 165(6)** and **(7)** of **the Constitution**, which divests superior courts of supervisory jurisdiction over such bodies. It was further submitted that the learned Judge dismissed the Applicant's petition on the basis that the Applicant's representative had not received written authority to act on behalf of the General Secretary as contemplated in **section 2(e)** of the **Labour Relations Act (LRA)**, yet the section does not impose a requirement that such authority be filed contemporaneously with the initial pleadings. In view of the grounds sought to be canvassed in the appeal, it was argued that, unless stay of the proceedings in *Miscellaneous Application No E016 of 2024* is granted, the appeal will be rendered nugatory because the learned Judge has already pronounced, in her Judgment of 23<sup>rd</sup> January 2025, that the Employment and Labour Relations Court has jurisdiction to entertain an application for enforcement of the 1<sup>st</sup> Respondent's decision and, consequently, *Misc. Application No. E016 of 2024* is set to proceed to its conclusion, with ruling already reserved for 17<sup>th</sup> July 2025.

For their part, the Respondents did not file a reply to the motion nor did they file written submissions. But, orally opposing the motion, counsel for the Respondents submitted that the Applicant had not demonstrated that the appeal was arguable since the Supreme Court has pronounced itself on

the matters raised in the grounds of appeal. It was further submitted that, although the Applicant claims that the beneficiaries will not be in a position to repay the amount awarded, this did not mean that the orders staying the proceedings should be granted; that, in any event, the Applicant should deposit the awarded amount as security for costs.

This Court derives its jurisdiction to entertain the present application under **Rule 5(2) (b)** of the **Court of Appeal Rules**. Under this provision, the Court is empowered to grant orders of stay of execution, stay of proceedings, or an injunction, pending the hearing and determination of an appeal or intended appeal. The principles governing the grant or refusal of such relief have long been settled. In summary, two considerations stand paramount, the first is whether the appeal or intended appeal is arguable, meaning that it raises even at least one *bona fide* point worthy of judicial consideration and is not frivolous; and the other is whether the appeal, if ultimately successful, would be rendered nugatory if the stay sought is not granted.

Both limbs must be satisfied before the Court exercises its discretionary jurisdiction in favour of an applicant under **Rule**

**5(2) (b).**

In the case of **Teachers Service Commission v Kenya National Union of**

**Teachers & 3 others (Application 16 of 2015) [2015] KESC 29 (KLR) (24 August**

**2015) (Ruling).**, the Supreme Court considering the nature and scope of this Court's jurisdiction under **Rule 5(2)(b)** observed thus:

**“(23) It is clear to us that Rule 5(2)(b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years. Rule 5(2)(b) of the Court**

**of Appeal Rules of 2010 is derived from Article 164 (3) of the Constitution. It illuminates the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal. Although we would not go as far as describing such discretionary jurisdiction as ‘original’ (the term ‘inherent’ more accurately in our view captures the nature of that jurisdiction), the Court of Appeal has nonetheless defined the contours of this discretion succinctly and consistently and has employed it effectively to aid the conduct of its appellate jurisdiction.”**

The authors of **Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332** also denoted principles to be considered as to whether or not a court should stay proceedings thus:

**“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.**

***This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.***

***It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”***

In addition, it is settled that granting of stay of proceedings is a discretionary power that should be exercised sparingly as it interrupts the normal court process, and is a serious remedy that should only be granted in exceptional circumstances. See the Supreme Court decision in the case of **James Nthuku Kithinji v. The Director of Public Prosecutions & Chief Magistrate's Court at Nairobi (Kibera Law Courts), Petition (Application) No. 29 (E033) of 2022 (KSC).**

That said, when we consider the present matter, the Applicant is seeking an order of stay of proceedings in *Miscellaneous Application No. E016 of 2022* also referred to in the motion as *Miscellaneous Application No. E016 of 2024*, and also as *Miscellaneous Application No. E016 of 2025* where an order was issued by the 1<sup>st</sup> Respondent on 11<sup>th</sup> March 2022 awarding the 7<sup>th</sup> Respondent Kshs. 16,482,336. However, an interrogation of the record does not disclose whether an appeal was lodged against the impugned order, and none was placed before us. However, what is for determination before us is an application against a judgment in *Employment and Labour Relations Court Petition No. E004 of 2024 - Dock Workers Union vs The Director of Occupational Safety and Health Services & 7 Others* in which the Applicant seeks amongst other orders to

stay the proceedings in *Miscellaneous Application No. E016 of 2022*. We reiterate that the latter application is not what is before us. As a consequence, our jurisdiction is restricted to determining whether a stay of proceedings should issue against the decision of the trial Judge in respect of

*Employment and Labour Relations Court Petition No. E004 of 2024 - Dock Workers Union vs The Director of Occupational Safety and Health Services & 7 Others.*

As to whether the orders of stay of proceedings sought are capable of being granted, it is of significance that the trial court merely dismissed the Applicant's petition thereby rendering a negative order. Upon dismissal, there was no requirement that any person do anything, or refrain from doing anything or taking any step either way.

In the case of **Western College of Arts and Applied Sciences vs EP Oranga**

**& 3 others [1976] KECA 15 (KLR)**, this Court considered the nature of

negative orders thus:

***“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. — In Wilson v Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application***

And in the case of **Republic vs Kenya Wildlife Service**

**& 2 Others [2007] KECA 26 (KLR)**, this Court stated:

***“Lastly, it would appear to us that we have no jurisdiction to grant any order for injunction or stay in the terms sought or at all for the reason that Aluoch J. neither granted nor refused the application for stay. The superior court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore, no positive and enforceable order made by the superior court which can be the subject matter of the application for***

***injunction or stay. Prima facie, the superior court has not ordered any party to sign the lease. The application for injunction or stay is apparently extraneous to the orders made by the superior court.”***

In view of the negative order, it becomes apparent that there is nothing that we have been called upon to stay.

In sum, the Notice of motion dated 21<sup>st</sup> February 2025 is without merit and is hereby dismissed with costs in the appeal.

***It is so ordered.***

***Dated and delivered at Mombasa this 19<sup>th</sup> day of December, 2025.***

**A. K. MURGOR**

.....  
**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb**

.....  
**JUDGE OF APPEAL**

**G.W. NGENYE-MACHARIA**

.....  
**. JUDGE OF APPEAL**

*I certify that this is the true copy of the original*

***Signed***  
**DEPUTY**  
**REGISTRAR**