REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

ELRC APPEAL NO. E002 OF 2026

(Before D. K. N. Marete)

VISHELECTRIC LIMITED.…………………………………….…..APPELLANT/APPLICANT

VS

FRANCIS MUTANIA KITHUKU……………………………….………...…RESPONDENT

RULING

This is an Application a Notice of Motion dated 21st January 2026 and seeks the following orders of court;

1. *Spent*

2. *THAT pending the hearing and determination of this Application, this Honourable Court be pleased to arrest the Judgment in CMEL No. E1130 of 2023 Francis Mutania Kithuku vs Vishelectric Limited to be delivered on 28th January 2026.*

3. *THAT pending the hearing and determination of this Appeal, this Honourable Court be pleased to arrest the Judgment in CMEL No. E1130 of 2023 Francis Mutania Kithuku vs Vishelectric Limited to be delivered on 28th January 2026.*

4. *THAT pending the hearing and determination of this Application and Appeal, this Honourable Court be pleased to call for and take custody of the physical file in CMEL No.E1130 of 2023 Francis Mutania Kithuku vs Vishelectric Limited.*

5. *THAT costs of this Application be in the cause.*

The Respondent in a Replying Affidavit sworn on 26th January, 2026 avers that their application lacks merits and should be dismissed forthwith.

The Applicant avers that the Respondent instituted proceedings against it in CMEL No. E1130 of 2023 alleging unlawful termination of employment. The suit was heard before the trial court and

was scheduled for hearing on 30th July 2025. On the that date, owing to an unfortunate and regrettable mistake arising from miscommunication on the part of its Advocates, the matter proceeded without any participation by the Applicant and or its Counsel. The Respondent testified, closed their case, and the Court thereafter issued directions on the filing of submissions.

The Applicant avers that it was not aware that the matter had been fixed for hearing on 30th July 2025. Its Advocates on record were under the belief that a specific Counsel within the firm, who has since left, had attended to the matter on the hearing date. According to the Applicant, this mistaken belief persisted until 5th September 2025 when the Advocates realised that no appearance had been made on behalf of the Applicant. It was learnt that the Respondent's case had already been heard and closed, and that the Respondent had filed their submissions.

The Applicant avers that upon discovery of this omission, its Advocates promptly filed an Application dated 5th September 2025 seeking, *inter alia*, leave to cross-examine the Respondent and permission for the Applicant to present its defence. It is the Applicant's case that through Counsel, it candidly acknowledged the error, apologised to the Court and to opposing Counsel, and expressed willingness to pay throw-away costs. The Applicant raised no objection to the Respondent filing supplementary submissions, should the need arise.

It is the Applicant's case that notwithstanding the foregoing, the trial Court delivered a ruling on 9th December 2025 dismissing the said Application and fixing the matter for Judgment on 28th January 2026. Dissatisfied with that Ruling, it lodged a Memorandum of Appeal dated 6th January 2026 seeking to set aside the decision of the subordinate court.

The Applicant avers that unless the orders sought herein are granted, the trial Court will proceed to deliver Judgment on 28th January 2026, thereby condemning the Applicant unheard. This would

also render the pending Appeal nugatory and otiose. The Applicant further avers that the failure to attend court was not but arose from an excusable mistake of its counsel and that the interests of justice and fairness demand that it be accorded an opportunity to be heard on the merits of the dispute.

The Respondent's case is that this application is incompetent, devoid of merit, and ought to be struck out *in limine* There exists no known provision in law for the arrest or suspension of a judgment that is due for delivery.

The Respondent further avers that the present application was filed after inordinate and unexplained delay, noting that judgment in the subordinate court was scheduled for delivery on 28th January 2026. The Applicant only moved this Court on 21st January 2026, a mere seven days to the judgment date thereby occasioning prejudice to the Respondent. It is their case that allowing the application would occasion undue delay in the final determination of the suit, contrary to the principle of expeditious disposal of cases as enshrined under Article 159(2)(b) of the Constitution. Besides, they have suffered prolonged financial hardship since his verbal suspension on 29th April 2023 as the Applicant has neither paid his salary for the month of April nor settled his terminal dues. He is currently unemployed and an award of the orders sought would further aggravate the prejudice and financial strain he continues to endure.

The Respondent further avers that the trial court has already used considerable judicial time and effort in preparing the judgment, and that it would be extremely prejudicial and unjust to arrest the judgment at such an advanced stage. Again, the ruling delivered on 9th December 2025 dismissing the Applicant's application dated 5th September 2025 was sound in law and fact and that there exists no basis upon which this Court should interfere with the trial court's exercise of discretion.

This is coupled with the Applicant's style of approaching this court with an unclean hand as the present application is riddled with falsehoods and is therefore undeserving of the court's discretion.

The Respondent avers that the matter came up for mention on 24th June 2025 before the Hon. Magistrate, at which time the suit was fixed for hearing on 30th July 2025. On that mention date, the Applicant's Advocate failed to attend court, prompting the court to direct that they be served with a hearing notice. In compliance with the said directions, the Respondent's Advocate duly served the Applicant's Counsel with a hearing notice dated 26th June 2025, fixing the matter for hearing on 30th July 2025. The hearing notice was physically served and duly stamped as received by the Applicant's Advocate on 30th June 2025, as evidenced by an affidavit of service.

The Respondent avers that on the hearing date, his Advocate logged into the court session in which the matter was listed and, when the suit was called out, neither the Applicant nor its Advocate was present. His Advocate informed the court that the Applicant had been duly served with the hearing notice and that an affidavit of service had been filed. Upon satisfying itself that service had been affected, the court allocated the hearing time at 10.00 a.m.

The Respondent's other case is that following the allocation of the hearing time, their Advocate, at 935 hours and in the Respondent's presence, telephoned the Applicant's Advocate using the contact details appearing on the Applicant's pleadings and informed them that the matter had been fixed for hearing at 1000 hours, requesting them to log into the session. Despite this reminder, neither the Applicant nor its Advocate appeared when the matter was called out at the scheduled time. The Respondent's Advocate duly appraised the court of this fact, whereupon the Respondent's case proceeded to hearing and was concluded in the absence of the Applicant.

The Respondent avers that following the close of his case, the court directed him to file written submissions, which were duly filed, and thereafter fixed a mention date for purposes of taking a judgment date. Once the Respondent filed his submissions, the Applicant filed the application dated 5th September 2025, four days before the scheduled mention, seeking leave to cross-examine the Respondent and to present its defence on the basis of alleged miscommunication within its Advocate's office.

The Respondent avers that the explanation advanced by the Applicant is without merit, as it is not disputed that the Applicant's Advocate was personally served with the hearing notice, nor is it disputed that the Applicant's Advocate was reminded of the hearing time on the material date. They further posits that the Applicant tendered no evidence to substantiate the alleged miscommunication, nor did it explain how or when such miscommunication arose so as to warrant the exercise of judicial discretion in its favour. It was mandatory upon the Applicant to diligently follow up its case, and that the alleged mistake of Counsel cannot, in the circumstances, excuse the Applicant's failure to attend court.

The Applicant's submitted dated 2nd February, 2026 are two folds whether this Honourable Court has jurisdiction to arrest the Judgment in *CMEL No. E1130 of 2023* pending the hearing and determination of the Appellant/Applicant's Appeal; and whether this Honourable Court should grant the orders sought in the Notice of Motion dated 21st January, 2026.

On the first issue, the Applicant submitted that this Court is properly clothed with jurisdiction to arrest the delivery of judgment in CMEL No. E1130 of 2023 pending the hearing and determination of its Appeal. This Court is vested with inherent jurisdiction to make such orders as may be necessary to meet the ends of justice and to prevent abuse of the court process.

The Applicant submitted that Section 12(3) of the Employment and Labour Relations Court Act, empowers the Court to grant a wide range of reliefs, including interim preservation orders and any other appropriate relief that the Court may deem fit. This provision is broad and purposive and is intended to enable the Court to effectively safeguard the subject matter of disputes pending appeal.

It is the Applicant's submission that the Court's inherent jurisdiction and the statutory powers under section 12(3) of the Employment and Labour Relations Court Act clothe this Court with sufficient authority to arrest the delivery of judgment in the trial court pending the determination of the Appeal.

On the second issue, the Applicant submitted that it has already lodged an Appeal challenging the decision of the subordinate court dismissing its application dated 5th September 2025 by which it had sought leave to cross-examine the Respondent and to present its defence. The impugned decision effectively shut out the Applicant from being heard on the merits of the dispute. Further, the decision of the trial court was unduly harsh, particularly in light of the fact that the Applicant had not been informed by its Advocates that the matter was coming up for hearing. The failure to attend court on 30th July 2025 arose principally from miscommunication among Counsel within the Applicant's advocates' firm, the particulars of which were fully set out in the Certificate of Urgency dated 21st January 2026 and the supporting affidavit accompanying the Notice of Motion.

It was submitted that the prejudice occasioned by the events of 30th July 2025 is curable through the award of throw-away costs and the imposition of strict timelines and conditions as the Court may deem fit. In support of this position, the Applicant relied on the decision in ***Kurji & 4 others v Kurji & 3 others [2024] KECA 882 (KLR)*** where the court observe as follows;

"'We note that the learned judge weighed the prejudice to be served by the appellants against the prejudice to be suffered by respondents in the event she refused the reinstatement, and specifically weighed the two against right to be heard on merit and correctly concluded that greater prejudice would be suffered by the respondents if the suit was to be dismissed and not heard on merits. In our considered view and in the interest of justice, the court cannot be faulted in exercising its discretion in favour of the respondents, who even though had been indolent, deserved a last opportunity to have their claim heard and determined on merit."

The Applicant further submitted that its Appeal is arguable and that any prejudice to be suffered by the Respondent is compensable by an award of costs. Secondly, the Applicant has already filed all its documents and pleadings, and parties being bound by their pleadings, no tactical advantage would be gained by allowing the Applicant to participate, contrary to the finding of the subordinate court; the factual background of the dispute would remain unchanged. Thirdly, the Applicant would not oppose any request by the Respondent to file supplementary submissions, should the Court so direct.

Again, the Applicant submitted that it had sought an order for this Honourable Court to take custody of the physical lower court file, on the ground that it has been unable to access the typed proceedings as the file remains in chambers at the subordinate court, thereby impeding the expeditious prosecution of the Appeal.

It is the Applicant's submission that in light of the foregoing matters, the interests of justice and fairness strongly favour the granting of the orders sought in the Notice of Motion dated 21st January 2026.

The Respondent submitted on two issues: whether the Application dated 21st January 2026 is competent; and assuming that the Application is competent, whether the Application is merited.

On the first issue, the Respondent submitted that the Application dated 21st January 2026 is fatally defective and incompetent. There exists no provision in law permitting the arrest of a judgment that is due for delivery in civil proceedings. Thus, the relief sought by the Applicant is unknown in law and cannot be granted by this Court. This is enunciated in the authority of ***Musa & 6 others (Suing on the own behalf and on behalf of Mwakirunge Residents upon the suit property/Plot No CR 345 numbering 366 Individuals) v Hassan & 4 others [2025] KEELC 7299 (KLR)*** where the Environment and Land Court observed thus;

> *“Having critically combed through the law, there is no express provision that exists in the Civil Procedure Act, Cap. 21'or its Rules for the arrest of Judgment in civil suits”… “As stated, in civil matters, arrest of Judgment is not expressly provided for. Instead, litigants are to apply for review (Section 80 of Cap. 21 and Order45) or to amend pleadings under Order 8, before judgment is delivered. If judgment has already been read, the proper recourse is through an appeal, not by attempting to-arrest or stay the judgment at the trial court.”*

The Respondent submitted that this court lacks jurisdiction to arrest judgment in civil proceedings. And where a court lacks jurisdiction, it must down its tools immediately, as affirmed by the Supreme Court in ***Republic v Manyeso [2025] KESC 16 (KLR.)***

In response to the Applicant’s reliance on Section 12(3)(i) of the Employment and Labour Relations Court Act, the Respondent submitted that the said provision merely empower the Court to issue interim preservation orders, including injunctions, in cases of urgency. The instant application does not seek interim preservation or injunctive relief but rather seeks to arrest a judgment pending delivery. Section 12(3)(i) does not expressly confer upon this Court the power to arrest judgment,

and had this been the intentional of Parliament, to donate such power, it would have expressly done so.

It is the Respondent's submission that Parliament expressly provided for arrest of judgment in criminal proceedings under section 324 of the Criminal Procedure Code, thereby demonstrating that arrest of judgment is a remedy confined to criminal practice and is not applicable to civil matters. On this basis, the Application is incompetent and ought to be dismissed for want of jurisdiction.

On the second issue, the Respondent submitted that arresting a judgment pending delivery constitutes a grave and fundamental interruption of the normal conduct of proceedings and is similar to an application for stay of proceedings. Further, it is trite law that stay of proceedings is a radical remedy which should be granted sparingly and only in exceptional circumstances. On this the Resppondent sought to rely on authority of ***Kenya Wildlife Service v James Mutembei [2019] eKLR***, where the Court, citing ***Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332***, held as follows;

> *"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."*

The Respondent submitted that the trial court has already used considerable judicial time and effort in preparing the judgment, and that arresting it at this stage would occasion extreme prejudice. The Applicant ought to await the delivery of the judgment and if aggrieved, pursue an appeal in the ordinary manner rather than pre-empting the outcome through an application to arrest judgment.

The Respondent further submitted that the Applicant has no arguable appeal. Reliance was placed on Rule 66 of the Employment and Labour Relations Court (Procedure) Rules, 2024 which provides that once a hearing is closed, it shall not be re-opened unless sufficient reason is demonstrated. It was submitted that the burden lay on the Applicant to prove, on a balance of probabilities that it was unaware of the hearing date due to miscommunication within its advocates' office.

It is submitted that the Applicant failed to discharge this burden. It was not disputed that the Applicant's Advocate was personally served with a hearing notice, as evidenced by the Affidavit of Service dated 30th June 2025 and was reminded of the hearing time on the hearing date itself, as evidenced by sworn affidavits and call logs. No evidence was tendered to demonstrate how or when the alleged miscommunication arose, or who was responsible for it.

The Respondent further submitted that in the absence of a satisfactory explanation, the Court's discretion cannot be exercised in the Applicant's favour as was observed in the authority of **F W N M v S M M [2017] eKLR** where the Court held that a party seeking discretionary relief must offer a convincing explanation for non-attendance, failing which the court should not look upon such a party kindly.

The Respondent further submitted that the application was brought after inordinate and unexplained delay. Judgment was scheduled for delivery on 28th January 2026, yet the application was filed on

21st January 2026, only seven days prior. No explanation was offered for this delay, rendering the Applicant indolent and undeserving of the Court's discretion. This is illustrated in the authority of **johanna Muturi Njogo V Joseph Njogo Mathenge & 2 Others [2008] KEHC 1623 (KLR)**, where the Court declined to grant relief on account of unexplained and inordinate delay.

It was also submitted that arresting the judgment would occasion undue delay in the determination of the suit, contrary to Article 159(2)(b) of the Constitution, and would also infringe the Respondent's right to a fair hearing under Article 50 of the Constitution. The Respondent reiterated that stay or interruption of proceedings gravely interferes with a litigant's right of access to justice as emphasized in the authority of **Kenya Wildlife Service v James Mutembei [2019] eKLR.**

The Respondent submitted that they have suffered substantial prejudice, having been verbally suspended on 29th April 2023 and having gone unpaid for his salary and terminal dues for over three years. He is currently unemployed and that granting the Application would only perpetuate his financial hardship.

The Respondent further submitted that the Applicant cannot shift blame entirely to its Advocate. A civil case belongs to the litigant, who bears the duty to follow up its progress. Reliance was placed on **alice Mumbi Nganga V Danson Chege Nganga & Another [2006] eKLR** and **Edney Adaka Ismail v Equity Bank Limited [2014] eKLR**, where the courts held that mere blame of counsel is insufficient, absent proof of diligence by the litigant.

It is the Respondent's submission that there is no justification for the prayer seeking this Court to call for and take custody of the subordinate court file, as the Applicant has not demonstrated any legal or factual basis warranting such an order.

Jurisdiction is everything and that without it, a court has no power to make one more step; that a court's jurisdiction flows from either the Constitution or legislation or both; and that jurisdiction cannot be expanded through judicial craft or innovation as held in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR.**

The Applicant's case on jurisdiction rests on two limbs: the inherent jurisdiction of this Court to prevent abuse of process and to meet the ends of justice; and Section 12(3) of the Employment and Labour Relations Court Act.

The Respondent, however, contends that there exists no provision in civil law permitting the arrest of a judgment pending delivery, and that such relief is unknown in civil proceedings.

The Court begins by observing that the concept of "arrest of judgment" is not a term of art in civil procedure. As correctly submitted by the Respondent and as held in **Musa & 6 others (Suing on the own behalf and on behalf of Mwakirunge Residents upon the suit property/Plot No CR 345 numbering 366 Individuals) v Hassan & 4 others [2025] KEELC 7299 (KLR)** the court observed thus;

> *"26. As stated, in civil matters, arrest of Judgment is not expressly provided for. Instead, litigants are to apply for review (Section 80 of Cap. 21 and Order 45) or to amend pleadings under Order 8, before judgment is delivered. If judgment has already been read, the proper recourse is through an appeal, not by attempting to arrest or stay the judgment at the trial court.*
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> *27.The Applicants pray that judgment scheduled for 13th June 2025 be "arrested." In the case of:- "**Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others [2015] eKLR**", the Court of Appeal affirmed that a trial court has inherent jurisdiction under the provision*

of Section 3A of the Civil procedure Act, Cap. 21to arrest delivery of Judgment where justice so demands.

28.Similarly, in the case of:- "Patel v EA Cargo Handling Services Limited [1974] EA 75", the Court stressed that discretion exists to prevent injustice, but must be exercised judiciously.

*29.In the case of "**Njihia v Mwangi (ELC Appeal E012 of 2021) [2024] KEELC 3303 (KLR)**" it was the opinion of the Court that:"The trial court found and held that the court lacked jurisdiction to adopt the said Award. Further, the trial court found and held that the subject Award was statutorily time-barred...The Appellant submitted that the instant Chamber Summons Application for adoption of the Award...was lodged before the Court timeously...relying on Practice Directions issued by the Hon. Chief Justice, Kenya Gazette Notice No.1617…"*

30.Further in the case of "Omache v Republic (Misc. Crim. App. E059 of 2025) [2025] KEHC 5617 (KLR)" the Court held that: -"...the Criminal Procedure Code provides for motions in arrest of judgment in the High Court...it does not have a similar provision for trials in the lower courts...the High Court generally has the power to stay proceedings at any stage...however...the applicant must show that there exist exceptional and compelling reasons..."

31.The Supreme Court in "Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR)" reaffirms the settled principle:"Jurisdiction is everything. Without it a court has no power to make one more step...Jurisdiction must be acquired before judgment is given."

32.Therefore, I dare state and reiterate that research indicates that the so-called 'arrest of judgment' in civil practice is a misnomer; the court's inherent jurisdiction allows it to control its own process, including recalling or staying its own judgment in rare, exceptional circumstances prior to delivery, where clear injustice would otherwise result. See also Order 21 Rule 4 of the Civil Procedure Rules on the format and timing of judgments.

33.This court has only limited, residual jurisdiction to stay its own hand and "arrest" the delivery of judgment prior to pronouncement, usually in the rarest of cases to prevent manifest injustice, typically involving fraud or gross error coming to light before pronouncement. Review and appeal remain the primary routes for challenging a judgment. Jurisprudence leans against the abuse of the process by 'arresting' judgment to defeat finality, except for strong and justifiable grounds shown by affidavit evidence.

34.This Court is not vested with general jurisdiction to 'arrest' judgment in civil practice under the ELC Act or the Civil Procedure Act. Only in the rarest of circumstances—where manifest injustice or fraud arises before pronouncement—will the court stay its own judgment. Otherwise, the proper recourse is through review, appeal, or under expressly provided rules."

Again, section 12(3)(i) of the Employment and Labour Relations Court Act empowers this Court to grant interim preservation orders, including injunctions, in cases of urgency. The Applicant urges the Court to interpret this provision broadly and purposively. However, the Court is not persuaded that an order of arresting a judgment pending delivery fits within the scope and terrain of interim preservation or injunctive relief. Preservation orders are designed to safeguard the subject matter of a dispute, not to halt the exercise of a judicial function already at its terminal stage. Arresting a judgment does not preserve a right or property; it interrupts the judicial process itself.

Notably, where Parliament intended to provide for arrest of judgment, it did so expressly, as is the case under section 324 of the Criminal Procedure Code. The absence of a similar provision in civil law and procedure is the legislature's design and not accidental. It is therefore not enforceable against the letter and spirit of the law.

In the Court's considered view, neither the inherent jurisdiction of the Court nor Section 12(3) of the Employment and Labour Relations Court Act donates to this Court the power to arrest the delivery of a judgment in civil proceedings.

I am therefore inclined to dismiss the application with costs to the Respondent.

Delivered, dated and signed this **25th** day of **February** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Ms Masaba instructed by Patrick Rono & Company Advocates for the Appellant/Applicant.
2. Mr. Otieno instructed by Lesinko Njoroge & Gathogo Advocates for the Respondent.