



**Reliable Electrical Engineers (M) Limited v Amalgamated Union of Kenya Metal Workers
(Civil Appeal (Application) E041 of 2023) [2023] KECA 703 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 703 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E041 OF 2023
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JUNE 9, 2023**

BETWEEN

RELIABLE ELECTRICAL ENGINEERS (M) LIMITED APPELLANT

AND

AMALGAMATED UNION OF KENYA METAL WORKERS RESPONDENT

(Being an application for stay of execution in Mombasa ELRC No. E102 of 2021 pending the hearing and determination of the appeal filed in Civil Appeal Cause No. E041 of 2023 and for stay of any execution proceedings in relation to the judgment delivered on 13th October 2023 (should be 2022) in ELRC No. E102 of 2021 and all consequential orders emanating from the said judgment)

RULING

1. In its application dated 24th March 2023 made under Sections 3, 3A of the [Appellate Jurisdiction Act](#) and Rule 5 of the Court of Appeal Rules, the applicant, Reliable Electrical Engineering (M) Limited seeks orders against the respondent, Amalgamated Union of Kenya Metal Workers, for: stay of execution in Mombasa ELRC No. E102 of 2021 be granted pending the hearing and determination of the appeal filed in Civil Appeal Cause No. E041 of 2023; and for stay of any execution proceedings in relation to the judgment delivered on 13th October 2023 (should be 2022) in ELRC No. E102 of 2021 and all consequential orders emanating from the said judgment.
2. The background is that the respondent, a worker's union, filed suit on behalf of its members before the ELRC against the applicant. The suit was undefended. Following formal proof, the ELRC delivered judgment on 13th October 2022 in favour of the respondent in which it held that the termination of employment by the applicant of 14 employees (grievants) was procedurally and substantively unfair and awarded a total of Kshs. 6,204,180.00 comprising, among other heads of awards, 6 months' salary as compensation for each grievant.



3. On 24th November 2022, the applicant filed an application before the ELRC dated 23rd November 2022 seeking an order of stay of execution of the decree and for setting aside the judgment/decree. That application was dismissed by the ELRC in a ruling dated 9th March 2023.
4. Aggrieved by the ruling of 9th March 2023, the applicant lodged a notice of appeal dated 10th March 2023 on which the present application is based. In effect, there is therefore no appeal against the judgment of the ELRC delivered on 13th October 2022 with respect to which the orders of stay of execution are sought in the present application. We will advert to this later in this ruling.
5. Based on the affidavit sworn in support of the present application by Manoj Shah, a director of the applicant and on the submissions by learned counsel Mr. Kelvin Njoroge for the applicant, the orders of stay sought are merited because the judgment of the ELRC is irregular because the same matter had previously been litigated in ELRC Case No. 478 of 2018 and judgment rendered, thereby conclusively determining the dispute and the matter was therefore res judicata. Counsel submitted that consequently, there are two conflicting judgments of the ELRC over the same matter.
6. It was submitted that the requirements regarding service of process were not complied with prior to the respondent obtaining default judgment; that the judgment in favour of the respondents is therefore irregular and the trial court erred in declining to set it aside; and that the respondent will suffer irreparable damages if the present application is not allowed and if the applicant is permitted to proceed with execution.
7. In opposing the application, Mr. John Simiyu, an Industrial Relations Officer who appeared for the respondent, referred to a replying affidavit by the respondent's General Secretary, Rose Omamo, in which it is deposed that the suit was not defended despite the applicant having been duly served; that the issue of res judicata cannot be raised at this late stage on appeal; and that in contrast with ELRC Case Number E102 of 2021 which is a suit based on unfair termination, the previous suit ELRC Case No. 478 of 2018 was purely an economic dispute and the doctrine of res judicata does not apply.
8. Mr. Simiyu further submitted that there is no basis for granting the orders sought; that the applicant did not take steps to defend the suit before the ELRC; that should this Court be inclined to allow the application, it should do so on condition that the applicant secures the entire decretal sum.
9. We have considered the application and the submissions. As already indicated, what the applicant seeks in the present application are orders of stay of execution of the judgment delivered on 13th October 2022. As we have already stated, there is however no appeal against that judgment. The subject of the applicant's appeal is the negative order of the ELRC dated 9th March 2023 declining to set aside or stay execution of that judgment.
10. Without a notice of appeal in relation to the judgment of 13th October 2022, the Court is bereft of jurisdiction to stay its execution. See *Equity Bank Ltd v West Link MBo Ltd*, Nbi C.Application No. NAI 78 of 2011. In *Safaricom Limited v Ocean View Beach Hotel Limited and two others* Civil Application No. 327 of 2009 [2010] eKLR Omolo JA explained that under Rule 5(2)(b) of the Court of Appeal Rules:

“If there is no notice of appeal lodged, one cannot get an order under Rule 5 (2) (b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal the Court of Appeal would have no business to meddle in the decision of the High Court.”



11. In *Nguruman Limited v Shompole Group Ranch & Another* [2014] eKLR, this Court affirmed the position that there is no provision allowing a notice of appeal lodged in a later decision being used in an application for stay of execution of an earlier decision. In effect, without a notice of appeal against the judgment of the ELRC delivered on 13th October 2022 we have no jurisdiction to grant a stay of execution of that judgment.

12. In the result, the application fails and is dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE 2023.

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

