



**Rajesh Patel t/a Akshar Ventures v Mabinda (Employment and Labour Relations Appeal E007 of 2023) [2024] KEELRC 1331 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1331 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E007 OF 2023**

**MA ONYANGO, J**

**MAY 24, 2024**

**BETWEEN**

**RAJESH PATEL T/A AKSHAR VENTURES ..... APPELLANT**

**AND**

**MICHAEL ANDIBA MABINDA ..... RESPONDENT**

**RULING**

1. Vide an application dated 10<sup>th</sup> January 2024 the Appellant seeks the following orders:
  - i. This Application be certified urgent, its services dispensed with and heard on priority basis in the first instance.
  - ii. Pending the hearing and determination of this application interparty, the court be pleased to stay any further proceedings and/or execution in Eldoret ELRC CMCC No. E155 of 2021 Michael Andiba Mabinda vs Rajesh Patel T/A Akshar Ventures and in particular stay execution of the judgment issued on 23<sup>rd</sup> January 2023.
  - iii. Pending the hearing and determination of this application interparty, the Court be pleased to set aside judgment issued on 23<sup>rd</sup> January 2023 in Eldoret ELRC CMCC No. E155 of 2021, Michael Andiba Mabinda vs Rajesh Patel T/A Akshar Ventures and direct that the matter proceed interparty until its final determination.
  - iv. The Court be pleased to stay any further proceedings and/or execution in Eldoret ELRC CMCC No. E155 of 2021 Michael Andiba Mabinda vs Rajesh Patel T/A Akshar Ventures and in particular stay execution of the judgment issued on 23<sup>rd</sup> January 2023
  - v. The court be pleased to set aside judgment issued on 23<sup>rd</sup> January 2023 in Eldoret ELRC CMCC No. E155 of 2021 Michael Andiba Mabinda vs Rajesh Patel T/A Akshar Ventures and direct that the matter to proceed interparty until its final determination.



- vi. Costs for the application be provided for
2. The grounds in support of application are that:
    - i. The Respondent filed Eldoret ELRC CMCC No. E155 of 2021 Michael Andiba Mabinda vs Rajesh Patel T/A Akshar Ventures on 28<sup>th</sup> October 2021 claiming against the Respondent but at no point in time did the then Claimant's counsel serve the Respondent now with pleadings to enable him respond.
    - ii. The Respondent now Appellant only came to know of the existence of this case when he was served with a mention notice dated 15<sup>th</sup> November 2022 via mail but apart from the said notice, he has never been served with any document from the Claimant.
    - iii. Upon being served with the document, he immediately sought for their advocate now on record who upon visiting the registry noted that the matter was scheduled for judgement on 23<sup>rd</sup> January 2023 hence the file was in the magistrate's chamber hence nothing in terms of applications and/ or proceedings could be done in the file at that time.
    - iv. Upon obtaining a copy of the judgment, the Appellant herein filed an application dated 18<sup>th</sup> February 2023 and the trial court did not certify it urgent on the face of it. Since execution was imminent, the Appellant herein elected to appeal the said decision to this Court and the appellate court issued a conditional stay which the appellant complied with. That the court further directed that the initial application for stay and setting aside the ex parte judgment in which no stay had been granted be determined by the trial court and the determination was issued on 2<sup>nd</sup> November 2023 in which the trial court failed to set aside the ex parte judgment or allow the appellant to file his response and ventilate on the case.
    - v. The appellant therefore aggrieved with the ruling of the said court wishes to appeal it to this court.
  3. The application is supported by an undated affidavit of Rajesh Patel, the Appellant herein, who reiterates the contents of the grounds on the face of the application.
  4. The Respondent opposes the application by his Replying Affidavit sworn on 18<sup>th</sup> January 2024 in which he states that this appeal was instituted on 6<sup>th</sup> March 2023 seeking to challenge the decision of the Magistrate's court made on the 18<sup>th</sup> February 2023 in which the trial magistrate declined to admit the Appellant's motion for stay of execution to urgency and grant ex-tempore orders to halt execution. That the appeal was considered by this court and in its decision delivered on the 13<sup>th</sup> July 2023, it held that the appeal could not be sustained as leave had not been obtained from the trial court prior to instituting it, and the court also affirmed the decision of the trial court in so far as he had found that no urgency had been demonstrated to warrant grant of ex-tempore orders. That the court ordered the appeal and motion for stay were premature and costs were to be in cause. That the parties were referred to the trial court to ventilate the motion by the Appellant seeking to set aside ex-parte judgment, which motion was heard and a ruling delivered on the 2<sup>nd</sup> December 2020 dismissing it. That if the Appellant herein is aggrieved by the order arising from the ruling of the trial magistrate of the 2<sup>nd</sup> November 2023, he was bound to institute a new appeal with a new appeal file number detailing his grievance as against the impugned decision within 30 days. That the court has no jurisdiction to entertain the application dated 10<sup>th</sup> January 2024 which was filed in this matter as no appeal exists upon which it can be impugned based on order 42 rule 6 of the Civil Procedure rules. That the superior court has no original jurisdiction to entertain an application to set aside the judgment delivered by the trial court on 23<sup>rd</sup> January 2023 as any grievance arising from it ought to constitute an appeal duly



lodged accompanied with the impugned certified decree and the record of proceedings together with the requisite documents filed in a separate file from this matter which has been concluded save for the Claimant's motion seeking the release of the deposited funds in court. Lastly, that the notice of appeal and memorandum of appeal annexed to this application has been filed without jurisdiction as the former is only applicable in respect to appeals from the decision of the superior courts to the court of Appeal under Rule 75 of the Court of Appeal rules, 2022.

5. The application was canvassed by way of written submissions as directed by the court on 21<sup>st</sup> January 2024.

### **Appellant's Submissions**

6. In his submissions filed in court on 5<sup>th</sup> February 2024, the appellants urged this court to consider special circumstances and the unique fundamental principles laid out under order 42 of the Civil Procedure Rules in exercising its discretion on whether or not to grant an order for stay.
7. The Appellant also submitted that this court has jurisdiction to hear and determine the appeal arising from the trial court. It is the appellant's submissions that he has met all the conditions that warrant grant of stay pending appeal. He thus urged the court to allow the application as prayed.

### **Respondent's Submissions**

8. The Respondent filed his submissions on 29<sup>th</sup> January 2024 and reiterated that this court has no jurisdiction to entertain the application dated 10<sup>th</sup> January 2024 as no appeal exists upon which the decisions sought to be impugned can be predicated upon.
9. According to the Respondent, if the Appellant herein was aggrieved by the order arising from the ruling of the trial magistrate of 2<sup>nd</sup> November 2023, he was bound to institute a new appeal with a new file number detailing his grievance against the impugned decision within 30 days. It is the Respondent's case that in the absence of a new appeal seeking to impugn the decision of the 2<sup>nd</sup> November 2023, this court is bereft of jurisdiction to entertain the motion for stay of execution. It is therefore the Respondent's submission that the lodging of the appeal goes to the root of the matter and cannot be termed as a procedural lapse. In support of this position, the cases of *Benson Ngugi Muiruri vs Kenya National Capital Corporation Limited*, Nbi HCCC No. 1981 of 1993 and *Abraham Lenauia vs Charles Katekeyo Nkaru*(2016)eKLR were cited.
10. In the end, the court was urged to down its tools in the absence of jurisdiction and dismiss the application with costs to the Respondent.

### **Determination**

11. I have carefully considered the application dated 10<sup>th</sup> January 2024 together with the grounds on the face thereof and the affidavit in support of the same. I have further considered the Replying affidavit and the submissions made by counsel for the parties.
12. The only issue for determination in my view is whether this court has jurisdiction to entertain the said application.
13. The Appeal herein ELRC no. E007 of 2023 was filed on 5<sup>th</sup> March 2023 vide a Memorandum of Appeal dated 25<sup>th</sup> February 2023 by the Appellant/Applicant. Contemporaneously with the Memorandum of Appeal, the Appellant filed the Application dated 25<sup>th</sup> February 2023 seeking for orders of stay of execution and also orders setting aside the judgment of the trial court delivered on 23<sup>rd</sup> January 2023.



14. The said application was canvassed by written submissions and the court in its ruling delivered on 13<sup>th</sup> July 2023 held as follows:
- “ 16. Further, for this court to grant stay of execution, it must be satisfied that there is an arguable appeal. In the instant case, it is my view that the appeal is not sustainable as it does not fall as or right. The Applicant ought to have obtained leave from the trial court before moving to this court on appeal...”
15. From the above excerpt of the court’s ruling, it is clear that as that time, there was no appeal as leave had not been sought.
16. The Court of Appeal in the case of *Nyutu Agrovet Ltd v Airtel Networks Ltd* [2015] eKLR, held that where there was no automatic right of Appeal stipulated under Section 75 of the *Civil Procedure Act* and Order 43 of the *Civil Procedure Rules*, then the Appellate Court has no jurisdiction to hear and determine an Appeal unless leave of the court from which the order was made is sought and obtained.
17. From the above, considering that the instant application is pegged on the Memorandum of Appeal dated 5<sup>th</sup> March 2023 where the court as mentioned rendered itself in the ruling dated 13<sup>th</sup> July 2023 that there was no appeal on record, it follows this court has no jurisdiction to determine the application dated 10<sup>th</sup> January 2024 since no appeal lies without leave.
18. The application dated 10<sup>th</sup> January 2024 is therefore dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 24<sup>TH</sup> DAY OF MAY, 2024.**

**MAUREEN ONYANGO**

**JUDGE**

