



**Brollo Kenya Limited v Wawire (Appeal E169 of 2024)
[2024] KEELRC 13479 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13479 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E169 OF 2024
M MBARÚ, J
DECEMBER 18, 2024**

BETWEEN

BROLLO KENYA LIMITED APPELLANT

AND

CALEB KUFUU WAWIRE RESPONDENT

RULING

1. The appellant filed an application dated 25 October 2024 under the provisions of Order 45 Rule 1, 2, 3, 5, Order 51 Rule 1 and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules and seeking;
 1. The court do issue a stay execution in the judgment dated 1st August 2024 in Mombasa MCELRC No.E765 of 2023 pending the hearing and determination of this application.
 2. The court be pleased to review and set aside its ruling and order issued on 24th October 2024 dismissing the appeal without hearing.
 3. The court be pleased to reinstate the appeal herein and the appellant be granted leave to file its amended Record of Appeal;
 4. Costs be in the cause.
2. The application is supported by the affidavit of Janet Katsiya Advocate, who avers that the appellant filed the appeal on 13 August 2024 seeking to challenge the judgment in Mombasa MCELRC E765 of 2023 dated 1 August 2024. There was a deposit of Ksh.810, 000 as security. The court expunged the Record of Appeal and dismissed the appeal without a hearing. The appeal was dismissed on a technicality that was based on the form of the Record of Appeal and was not dismissed based on substantive grounds and merits. The appellant was not allowed to prosecute the appeal and will suffer irreparable loss if the application is not permitted.



3. In the supporting affidavit, Katisya Advocate avers that the court should not rely on technicalities but address the substantive merits of the appeal and allow the instant application.
4. In reply, the respondent filed his Replying Affidavit averring that the application before the court is an abuse of the court process. The appeal was dismissed upon the oral application by Ms Memia Advocate, whose application was not objected to by the appellant's advocate, Mr Mulu, who conceded but could not turn around and allege that the right to be heard was not allowed. The notice of motion is res judicata, having been conclusively addressed, and orders were issued on 27 August 2024.
5. The respondent aver that the application seeking review does not meet the threshold of Order 45 of the Civil Procedure Rules as the appellant seeks a stay of execution. Having addressed the application for a stay of execution, the court cannot sit on appeal simultaneously and revisit a similar application. The order dismissing the appeal was proper and justified. No affidavit by Mulu Advocate was in court at the material time, 24 October 2024. The application is improperly supported by Janet Katisya, who was not in court and has not attended this appeal.
6. The appellant cannot justify reliance on Article 159(2) (d) of *the Constitution* as the appeal was dismissed upon proper application, not a technicality. The application is without merit and should be dismissed with costs.
7. Both parties attended court and made oral submissions. These submissions are analyzed, and the issues for determination are;
 - Whether the court should set aside its ruling and order issued on 24 October 2024;
 - Whether the court should reinstate the appeal;
 - Who should pay the costs?
8. A background to this application is imperative.
9. The parties attended court on 24 October 2024, following court directions on 3 October 2024. The appellant was to address the security deposit as directed on 27 August 2024, file the Record of Appeal, serve within 14 days, and attend court on 24 October 2024 to take hearing directions.

Mr Mulu Advocate attended for the appellant.

Ms Memia attended for the respondent.
10. Ms Memia submitted that the Record of Appeal needed to be corrected since it was filed contrary to Rule 15 of the Employment and Labour Relations Court (Procedure) Rules and should be expunged.

Mulu Advocate conceded and stated that;

The record of Appeal can be expunged.

We can take a hearing date.
11. On the advocate's statement for the appellant, the court allowed and expunged the Record of Appeal. Effectively, there is no appeal. The appeal herein is dismissed with costs to the respondent.

That is the record and foundation of the dismissal of the appeal.

Each party was heard on the merits.
12. The appellant's advocate present was Mulu Advocate, not Janet Katisya Advocate, who has supported the instant application and avers that the appellant was denied a hearing and that the court relied on



technicalities. These averments are not correct. The attending advocate, Mulu, was present in court and conceded to the Record of Appeal being expunged.

13. What then remained? With the Record of Appeal expunged, no appeal upon which the orders sought could stand.
14. This is not a technicality that can be cured by a review or be set aside on the basis that the court relied on a technicality. Moving the court seeking a stay of execution means avoiding considering the above mentioned matters.
15. The application dated 14 August 2024 addressed the issue of stay of execution.
16. With the appeal dismissed, revisiting matters already addressed in a previous application is an abuse of court process. The application for review must take into account new matters, errors on the face of the record, the need for clarification, and all principles addressed under Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024, which principles the appellant has failed to address.

74.

- (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may, within reasonable time, apply for a review of the judgment or ruling—
 - (a) if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) on account of some mistake or error apparent on the face of the record ;
 - (c) if the judgment or ruling requires clarification or
 - (d) for any other sufficient reason.

17. The court must address these conditions to find a matter for review.
18. The attending advocate for the appellant should have rendered a proper account of the proceedings on 24 October 2024. This is the missing link to the instant application. The veracity of Janet Katsiya's Supporting Affidavit needs to be recovered.
19. The court finds no merit in the instant application dated 25 October 2024. It is an abuse of the court process and is hereby dismissed with costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

