



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Scrub and Surf Cleaning Services v Alivitsa (Appeal 31 of 2019)
[2023] KEELRC 474 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 474 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 31 OF 2019
MN NDUMA, J
FEBRUARY 23, 2023**

BETWEEN

SCRUB AND SURF CLEANING SERVICES APPELLANT

AND

CAROLINE ALIVITSA RESPONDENT

RULING

1. The applicant in the Notice of Motion application dated March 10, 2021 prays for an Order in the following terms:-
 1. That this Honourable Court be pleased to review the Ruling delivered herein on December 9, 2021.
 2. That the Appeal herein be admitted for hearing and directions do issue as to the hearing of the Appeal.
 3. That the Orders of stay issued on December 6, 2019 be reinstated pending hearing and determination of this appeal.
2. The application is premised on grounds set out on the face of the Notice of Motion and in the supporting affidavit of Migui Mungai; advocate for the applicant the nub of which is that there is an error on the face of the record as the Appellant had already filed the Record of Appeal way back on September 15, 2021. That the Court reviews its Ruling and give directions on the Appeal.
3. The application is opposed vide a replying affidavit of Caroline Alivitsa the respondent who deposes that the appeal is non-existent having been dismissed by the Ruling of the Court.
4. That the appellant filed a Memorandum of Appeal on August 21, 2019 following a judgment delivered on August 5, 2019 and obtained stay orders on December 6, 2019 but has since failed, neglected and or refused to set up the appeal for directions or hearing.



5. That application for review has been brought three months after the Ruling delivered in December, 2021.
6. That there is no error apparent on the face of the record of the Ruling dated December 9, 2021 since the applicant did not inform the Court before the Ruling was delivered that the record of appeal had been filed.
7. That there is no explanation why that information was not given to the judge then and why this application has been filed so late in time.
8. That the application is an abuse of Court process and it be dismissed with costs.

Determination

9. At the time the Ruling of the Court was delivered on December 9, 2021, the record of appeal stamped by the Court registry on September 15, 2021 and dated September 13, 2021 was not in the Court file.
10. During the pendency of the previous application dated February 22, 2021, in which the respondent herein sought for an order:-

“That this Honourable Court be pleased to dismiss the Appeal filed herein August 21, 2019, for want of prosecution,”

the applicant filed a replying affidavit sworn to on April 8, 2021 by Migui Mungai Advocate for the applicant in which he deposed at paragraph 5 thereof:-

“That on diverse dates as the advocates on record for the Appellant, we wrote letters to the Executive Officer of the Chief Magistrate’s Court Milimani seeking to be furnished with certified typed copies of the proceedings and judgment to enable us prepare and file the Record of Appeal but the same never elicited any response. Annexed hereto and marked “MM1” are copies of the said letters.”

11. The deponent further stated at paragraph 6 of the replying affidavit as follows:-

“6. That a record of appeal is yet to be filed in this matter and we have been unable to prepare a record of appeal due to the absence of certified typed proceedings from the lower Court matter and the lower Court file.”

12. The Ruling of the Court was informed by the above deposition by Migui Mungai, advocate, Counsel for the applicant.
13. The applicant then filed the record of Appeal on September 15, 2021 which record is dated September 13, 2021.
14. Clearly, there is no error on the face of the Ruling of the Court dated December 9, 2021 because it was never brought to the attention of the Court before the ruling was delivered, that the appeal had been filed before the Ruling was delivered on December 9, 2021.
15. This was a clear omission on the part of the applicant and is not candid with the Court regarding this failure on its part and that of the advocate.
16. That notwithstanding, it is apparent that the record of Appeal had been filed before the Ruling was delivered.



17. Accordingly, the Court reviews the Ruling in terms of Rule 33 of the *Employment Act and Labour Relations Court Rules, 2016* and admits the appeal grudgingly since the applicant has been economical with truth.
18. The ends of justice demands that Parties be heard on the pending appeal. The stay orders pending Appeal are reinstated. The applicant to pay the costs of this application despite the orders of the Court in its favour before the Appeal is heard and determined.
19. Court to give directions on the Appeal on the date of delivery of this Ruling.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 23RD DAY OF FEBRUARY, 2023.

MATHEWS NDERI NDUMA

JUDGE

Appearances

Mr. Mungai for Appellant/Applicant

Mr. Lumalla for Respondent

Ekale – Court Assistant

