



REPUBLIC OF KENYA



KENYA LAW
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**Corrugated Sheets Limited v Oganyo (Appeal E036 of 2023)
[2023] KEELRC 3144 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3144 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E036 OF 2023
AK NZEI, J
NOVEMBER 30, 2023**

BETWEEN

CORRUGATED SHEETS LIMITED APPELLANT

AND

VICTOR MUNDIA OGANYO RESPONDENT

*(Appeal from the judgment of the Chief Magistrate's Court at Mombasa by Hon.
D. O. Mbeja delivered on 30th March 2023 in CM ELR Cause No. E222/2021)*

RULING

1. On 26th April 2023, the Appellant herein filed an evenly dated Notice of Motion seeking a stay of execution of the lower Court's decree in Mombasa CM ELRC cause No. E222 of 2021 pending hearing and determination of appeal. This Court considered the application and dismissed the same vide a Ruling delivered on 10th July 2023. The Court rendered itself as follows:-

"5. Rule 8(4) of the *Employment and Labour Relations Court (Procedure) Rules* 2016 provides as follows

"(4) A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against."

6. None of the documents mentioned in the foregoing Rule has been placed before this Court. Indeed, other than an alleged party and party bill of costs that was annexed to the Appellant's further affidavit filed herein as already stated in this Ruling, nothing has been placed before this Court relating to the lower Court suit.



7. Parties and/or their counsel should take this Court's proceedings with the seriousness that they deserve. This Court cannot be called upon to stay execution of a decree and/or judgment that it has not seen. The application before me is hollow and therefore incompetent, and must fail. The same is hereby dismissed with costs."
2. On 17th July 2023, the Appellant filed another application, dated 13th July 2023, seeking the following orders:-
- a) that this Court reviews its Ruling delivered on 10th May 2023 to the extent that by failure to provide a copy of the judgment sought to be stayed in the application dated 26th April 2023, the Appellant/Applicant violated rule 8(4) of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#).
 - b) that this Court reviews its orders via the Ruling delivered on 10th July 2023 and grant the Appellant/Applicant an order of stay of execution pending appeal.
 - c) that the Court gives any other orders it deems fit.
 - d) that costs of the application be provided for.
3. The foregoing is the application before me, and is shown to be brought under rule 33 of the [Employment and Labour Relations Court \(procedure\) Rules 2016](#), order 45 rules 1,2, and 3 of the [Civil Procedure Rules](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#). The application is premised on a supporting affidavit of Evans Muigai, the Appellant/Applicant's Human Resource Officer, sworn on 17th July 2023. It is deponed in the said supporting affidavit, *inter-alia*, that as at the time the application for stay of execution was being made on 26th April 2023, the Appellant/Applicant had not been supplied with copies of typed proceedings or the judgment, and that this was deposed under paragraph 6 of the supporting affidavit which had annexed letters requesting for the said documents.
4. It is to be noted that proceedings in this Court are guided by the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#), save where the said Rules are silent on any particular procedural issue. Under such circumstances, the Court has, over the years, looked outside its said rules and has, more often than not, been guided by the [Civil Procedure Act](#) and the rules made thereunder.
5. This [Court's Rules](#), and in particular rule 8(4) thereof are very clear on what documents must accompany a memorandum of appeal. Rule 32 saves provisions of the [Civil Procedure Rules](#) on execution of decrees in this Court's aforesaid [Rules](#). Section 13 of the [Employment and Labour Relations Court Act](#) provides that a judgment, award, order or decree of this Court shall be enforceable in accordance with the [Rules](#) made under the [Civil Procedure Act](#).
6. Order 42 Rule 6, which is the provision of the [Civil Procedure Rules](#) governing grant of stay of execution pending appeal, provides as follows:-
- “(1) No appeal or second appeal shall operate as a stay of execution of proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from



whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

“(2) No order for stay of execution shall be made under subrule (1) unless:-

(a) The Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay, and

(b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

(3)

(4)

7. Both Rule 8(4) of this *Court's Rules* and order 42 rule 6 of the *Civil Procedure Rules* do not contemplate a situation whereby this Court considers an appeal and /or an application for a stay of execution pending hearing and determination of an appeal without having seen the decree and/or judgment appealed against. A decree and/or order appealed against is the very foundation of any appeal, and without it an appellate Court cannot be called upon to determine an application for stay of execution of the decree or order in issue pending hearing and determination of an appeal. This Court stated as much in its Ruling delivered on 10th July 2023.

8. The single issue that falls for determination in the application before me is whether the prayer for review of this Court's said Ruling delivered on 10th July 2023 I deserved.

9. Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules* 2016 provides as follows:-

“ 33.

(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 new and important matter or evidence which, after 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.”

10. In my view, the reasons advanced by the Appellant/Applicant in support of the application for review do not fall within the purview of the foregoing rule. If the Appellant/Applicant was aggrieved



by this Court's Ruling delivered on 10th July 2023, it ought to have appealed against it. Allowing the application herein on the basis of the reasons advanced by the Appellant/Applicant would be tantamount to this Court sitting on appeal over its own orders.

11. The Court of Appeal stated as follows in the case of *Muyodi v Industrial And Commercial Development Corporation & Another* [2006] E A 243:-

“In *Nyamongo & Nyamongo v Kago* [2001] EA 174, this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefinites inherent in its very nature, and it must be left to be determined judicially on the facts of each case.

There is real distinction between a mere erroneous decision and an error apparent on the face of record.

Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear error apparent on the face of record would be made out. An error which has to be established by long drawn process of reasoning or on the points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view, is certainly no ground for review, although it may be for an appeal.”

12. The Notice of Motion dated 13th July 2023 does not meet the threshold for grant of review orders, and must fail. The same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH NOVEMBER 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

