



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 105 OF 2014**

*(Before Hon. Justice Mathews N. Nduma)*

**KENYA UNION OF PRINTING, PUBLISHING, PAPER**

**MANUFACTURERS AND ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**HIGHLAND PAPER MILLS LIMITED.....RESPONDENT**

**RULING**

1. On 19<sup>th</sup> October 2017, Hon. Maureen Onyango J struck-off application dated 17<sup>th</sup> October, 2017 and a notice of appeal filed thereof on the basis both were filed by an advocate who was not on record contrary to order 9 Rule 9 of the Civil Procedure Rules, 2010.
2. Respondent/Applicant filed application dated 11<sup>th</sup> December, 2017 to set aside and/or review the order of the Judge made on 19<sup>th</sup> October, 2017 on grounds that –  
  
Judgment against the Respondent/Applicant was entered by the court on 22<sup>nd</sup> September, 2017 for the decretal sum set out in judgment and the notice of motion.
3. That the Respondent/Applicant dissatisfied with the judgment, instructed M/s Nyairo & co. Advocates to file an appeal to the Court of Appeal which was done on 3<sup>rd</sup> October, 2017.
4. That the firm of M/s Nyairo & co. Advocates filed an application dated 17<sup>th</sup> October, 2017 seeking stay of execution of the judgment pending appeal.
5. The Application was struck-out on 19<sup>th</sup> October, 2017 for being irregular since M/s Nyairo & Co. Advocates were not properly on record. The court also struck-off the Notice of Appeal.
6. On 2<sup>nd</sup> November 2017, Respondent/Applicant instructed M/s Kisilu & co. Advocates to file the correct application for stay of execution.
7. The applicant seeks review of the orders issued on 19<sup>th</sup> October, 2017 striking-out the Notice of Appeal on the basis that the orders of 19<sup>th</sup> October, 2017 were irregularly and/or erroneously issued.
8. That the Respondent/applicant stands to suffer substantial loss if the orders for stay pending appeal are not issued.
9. The Application is supported by an affidavit of Sameer Sanghrajka, a director of the Respondent/Applicant who concedes in the affidavit that, the initial application filed by M/s Nyairo & Co. Advocates was brought irregularly, and he proceeded to instruct the advocate on record M/s Kisilu & company Advocates to file a correct application on 2<sup>nd</sup> November, 2017.

**Reply**

10. The Application is opposed by a Replying Affidavit of Rajabu W. Mwondi stating in the main that no grounds known in law for review of a ruling or judgment of court have been advanced by the Applicant.
11. That the court was justified in striking out the Notice of Appeal admittedly filed by an advocate not on record. That this is not a mere

technicality. That it was open to the Applicant to pursue any further orders regarding the matter before the court of appeal.

12. That the application amounts to an appeal through the back door and it be dismissed with costs.

**Determination**

13. Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides –

*“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.*

14. The applicant sought to rely on Rule 33(b), that there is mistake or error apparent on the face of the record.

15. No such apparent error or mistake was shown to exist the trial judge having correctly struck off the application for stay of judgment and the notice of appeal filed by an advocate who was not part of the trial whilst the advocate who conducted the trial on behalf of the Respondent was on record.

16. This mis-step is admitted by the Respondent/Applicant and no grounds have been provided for the court to set aside its order. There is currently no valid Notice of Appeal filed by the Respondent/Applicant within stipulated time and the question for stay pending appeal remains a moot point.

17. The fresh application for stay filed on 11<sup>th</sup> February, 2017 was made in absence of any valid notice of appeal.

18. Accordingly, this application is not properly before this court. The Respondent/Applicant ought to canvass this matter before the court of appeal, which may reinstate the notice of appeal properly struck-out by the trial Judge. There is not to my knowledge a fresh notice of appeal, properly filed. The application is dismissed with costs.

**Ruling Dated, Signed and delivered this 3<sup>rd</sup> day of May, 2018**

**Mathews N. Nduma**

**Judge**

**Appearances**

M/s Njeri for the Claimant

M/s Oduor for Respondents

Chrispo – Court Clerk