



REPUBLIC OF KENYA



KENYA LAW
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**Mathenge v Dlr Group Africa Limited (Cause E942 of 2021)
[2025] KEELRC 2447 (KLR) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2447 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E942 OF 2021
BOM MANANI, J
SEPTEMBER 18, 2025**

BETWEEN

PATRICK MUNENE NJOGU MATHENGE CLAIMANT

AND

DLR GROUP AFRICA LIMITED RESPONDENT

RULING

1. The Respondent/Applicant (hereafter referred to as the Applicant) has filed the instant application seeking the following orders:-
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That the court be pleased to enlarge and or extend the time within which the Applicant is to comply with the conditional stay orders issued on 2nd April 2025 by a further period of fourteen (14) days or such other period as the court may deem fit upon the nomination of a Bank either by the court or the Deputy Registrar of the court.
 - e. That costs of the application be provided for.
2. The application is brought pursuant to various provisions of law cited therein including sections 3 and 12 of the *Employment and Labour Relations Court Act* and rules 45 and 80 of the Employment and Labour Relations Court (Procedure) Rules, 2024. It is further anchored on the grounds set out therein and the affidavit and further affidavit sworn by the Applicant's director dated 17th July 2025 and 28th July 2025 respectively.



3. The Applicant contends that the court issued an order for stay of execution of its decree on 2nd April 2025 conditional upon the decretal sum being deposited into a joint interest earning account in a reputable bank in the names of the advocates on record for the parties within forty five (45) days. The Applicant further avers that the court directed the parties to agree on the bank to house the account within seven (7) days of the ruling failing which, the court's Deputy Registrar was to nominate a bank for them.
4. The Applicant avers that the parties were not able to agree on the bank to house the joint account. As such, the Claimant/Respondent (hereafter called the Respondent) wrote to the court's Deputy Registrar to nominate a bank for them.
5. The Applicant avers that despite the aforesaid request, the Deputy Registrar did not appoint a bank for the parties. It contends that the time for depositing the decretal sum eventually lapsed before the Deputy Registrar acted on the matter thus rendering it impossible for the parties to comply with the conditions for stay of execution pending appeal.
6. The Applicant avers that when it became apparent that the time for setting up the joint account was running out without the court's Deputy Registrar having acted on the matter, it filed the application dated 17th May 2025 seeking that this court directs the Deputy Registrar to nominate a bank for the parties and enlarges the time within which to set up the joint account. It contends that the said application was however not acted on as the court file was said to have been missing.
7. The Applicant avers that as a result of this state of affairs, the Respondent commenced execution proceedings. It contends that if the Respondent is allowed to proceed with execution of the decree, it (the Applicant) will suffer irreparable harm.
8. The Respondent has opposed the application. He has filed a replying affidavit dated 25th July 2025. In addition, the Respondent's counsel made oral submissions through which he raised three issues which he asked the court to address in objection to the motion.
9. First, the Respondent contends that there is no valid appeal to anchor the request for stay of execution. According to him, although the parties filed their respective Notices of Appeal, neither of them subsequently filed the Memorandum and Record of Appeal within the timelines provided by the Court of Appeal Rules for filing the two documents. As such, he contends that the appeal has since collapsed since the Notices of Appeal are deemed to have been withdrawn.
10. The Respondent argues that the Notices of Appeal having been deemed as withdrawn by operation of law, there is no valid appeal before the Court of Appeal. As such, the motion to enlarge time to comply with the conditions for stay of execution pending appeal should not be granted.
11. Respondent further contends that the Applicant has approached the court with unclean hands and is undeserving of its discretion. He avers that the order for stay of execution which issued on 2nd April 2025 was conditional on two things thus:-
 - a. The parties agreeing on a bank which was to host the joint account to hold the decretal sum within seven (7) days failing which the Deputy Registrar of the court to nominate the bank.
 - b. The Applicant depositing the decretal sum into the joint account within forty five (45) days of the ruling.
12. The Respondent contends that the Applicant did not take steps to propose a bank to host the joint account. He contends that it is him who took the initiative to write to the Applicant to propose two



banks for the above purpose. He further contends that even after writing to the Applicant as aforesaid, the Applicant did not make any proposals on the bank to host the joint account.

13. The Respondent contends that the Applicant intended to procrastinate compliance with the court order of 2nd April 2025 by triggering an administrative crisis through the court. As such, he submits that the Applicant is undeserving of the orders sought.
14. The Respondent submits that the Applicant has improperly relied on correspondence which were exchanged between the parties on without prejudice basis to anchor its request for extension of time. It is his case that such letters are not admissible in evidence and should be struck off the court record.
15. In response, the Applicant reiterates that it has always been ready and willing to comply with the conditions for stay of execution as pronounced by the court on 2nd April 2025. However, it contends that this desire was hampered by the unexplained disappearance of the court file which rendered it impossible for the court's Deputy Registrar to nominate a bank that was to host the joint account into which the decretal sum was to be deposited.
16. The Applicant contends that the obligation to file the Memorandum and Record of Appeal at the Court of Appeal lay with the Respondent since it is him who was the first in time to lodge a Notice of Appeal against the court's decision which effectively constituted him into the Appellant in the appeal. It contends that it would have been contrary to the Court of Appeal Rules for it to lodge the two documents.
17. The Applicant further submits that a party who wishes to withdraw a Notice of Appeal must do so in writing. It contends that the Respondent has not written to the Court of Appeal to withdraw his Notice of Appeal. As such, it contests his submission that the appeal before the Court of Appeal has been withdrawn.

Analysis

18. The Respondent has objected to the instant application on the ground that there is currently no competent appeal before the Court of Appeal to anchor the motion. The basis of this contention is that the Applicant did not lodge the Memorandum and Record of Appeal with the Court of Appeal within sixty (60) days of filing its Notice of Appeal as required by rule 84 of the Court of Appeal Rules. As such, he contends that the Notice of Appeal the Applicant filed in the cause is deemed to have been withdrawn in terms of rule 85 of the aforesaid rules.
19. The Respondent contends that the Applicant's Notice of Appeal having been withdrawn by operation of law, its (the Applicant's) intended appeal to the Court of Appeal has effectively collapsed. As such, there is no appeal or intended appeal to anchor the instant application for enlargement of time to comply with the conditions for stay of execution of this court's decree pending appeal to the Court of Appeal.
20. I agree with the Respondent's position that rule 84 of the Court of Appeal Rules requires that a party who has filed a Notice of Appeal ought to lodge the Memorandum and Record of Appeal within sixty (60) days of lodging the Notice of Appeal. I also agree with him that rule 85 of the aforesaid rules provides that if the Memorandum and Record of Appeal are not filed within the foresaid timelines, the Notice of Appeal shall be deemed as withdrawn.
21. However, a further reading of 85 of the Court of Appeal Rules suggests that once the time for filing the Memorandum and Record of Appeal has lapsed, the Court of Appeal, either on its own motion or on the application of the parties should issue an order to the effect that the impugned Notice of



Appeal has been withdrawn. In my view therefore, until this is done, the Notice of Appeal remains on record and the trial court has no jurisdiction to adjudicate on its validity.

22. This observation was made by this court in the case of *Republic v Oigara, CBS, Chief Executive Officer, KCB Bank Kenya Limited & 3 others; Commission on Administrative Justice (Interested Party); Inyangu (Ex parte Applicant) [2025] KEELRC 1935 (KLR)* where the court observed as follows:-

“The Ex-Parte Applicant asserts that the 4th Respondent has withdrawn its Notice of Appeal in terms of rule 85 of the Court of Appeal Rules. As such, it has no pending appeal before the Court of Appeal. Under the aforesaid rule, a party who has lodged a Notice of Appeal will be deemed to have withdrawn it if he does not file the intended appeal within the appointed time (sixty (60) days of lodging the Notice of Appeal as per rule 84 of the rules). However, the abated Notice of Appeal must be removed from the court’s record by either the Court of Appeal on its own motion or upon an application by the Respondent to the appeal. The Ex-Parte Applicant has not tabled evidence to demonstrate that the Court of Appeal has struck out the impugned Notice of Appeal either on its own motion or on his application. As such, this court has no basis upon which it can declare that the Notice of Appeal has been withdrawn.”

23. In the instant case, although the parties did not lodge the Memorandum and Record of Appeal within sixty (60) days of lodging their respective Notices of Appeal, there is no evidence that either of them has moved the Court of Appeal to declare the said Notices of Appeal as withdrawn. There is also no evidence that the Court of Appeal has issued such order on its own motion. This being the case, this court has no jurisdiction to pronounce itself on whether the respective Notices of Appeal filed by the parties have been withdrawn.
24. Under Order 42 rule 6 (4) of the Civil Procedure Rules, an appeal to the Court of Appeal is deemed as filed once a Notice of Appeal is issued. As such, until the Notices of Appeal that were lodged by the parties to this action are struck out by the Court of Appeal either on its own motion or on the application of either of the parties, this court is obligated to hold that an appeal still subsists before the Court of Appeal. The foregoing being the case, this court is obligated to presume the instant application as validly filed.
25. The court is alive to rule 80 of the Employment and Labour Relations Court (Procedure) Rules, 2024 which empowers it to enlarge time for doing an act which is prescribed by either the rules or a court order. The court may extend such time either on its own motion or on the application of a party.
26. The genesis of the instant application, as appears from the affidavit evidence before the court, is that the court’s Deputy Registrar did not nominate a bank for the parties to deposit the decretal sum after they failed to agree on one. The Applicant contends that because of this, it was not able to deposit the decretal sum as ordered by the court.
27. On its part, the Respondent contends that the failure to set up the account was not entirely due to the failure by the court’s Deputy Registrar to nominate a bank for the parties. The Respondent argues that the Applicant was not keen to have a bank agreed on between them or nominated by the court. It points to the Applicant’s failure to address this matter as proof of its reluctance to secure a bank to house the joint.
28. I have considered the contrasting positions expressed by the parties on the subject. It is apparent that the Applicant’s conduct in addressing the issue of the bank to house the joint account was less than satisfactory. It is evident that the Applicant did not unequivocally propose a bank to host the joint



account. It is also evident that it (the Applicant) did not actively move the court to nominate a bank for the parties.

29. That said, there is evidence from both parties that the court file was misplaced at some point with the consequence that even if they (the parties) had actively pursued the matter of nomination of a bank by the court's Deputy Registrar, this quest would have been hampered by the fact of the missing file. Taking this fact into account, I find some merit in the Applicant's contention that it was unable to deposit the decretal sum into a joint account as ordered by this court because the court's Deputy Registrar did not nominate a bank for this purpose after the court file went missing.
30. I note from the correspondence and affidavits filed by the parties that the issue of the missing court file was raised by both of them but there was no explanation given to them by the court's Deputy Registrar. This state of affairs is undesirable and must be deprecated. The court owes the parties a clear explanation regarding where the court file was after the ruling of 2nd April 2025 was delivered.

Determination

31. Having regard to the foregoing, I find that the request by the Applicant to enlarge time to deposit the decretal sum into a joint account in the names of the Advocates for the parties is merited. In the premises, I allow the application dated 17th July 2025 on the following terms:-
 - a. The time for depositing the decretal sum into a joint account in the names of the advocates on record for the parties is enlarged by a period of fourteen (14) working days from the date of this order.
 - b. The court's Deputy Registrar is directed to, within one (1) day of this order, nominate a bank for the parties to enable them set up the joint account into which the decretal sum will be deposited.
 - c. If the Applicant does not deposit the decretal sum into the joint account to be opened by the parties within fourteen (14) working days hereof, the orders for stay of execution which were issued on 2nd April 2025 and which have been sustained through this ruling will automatically lapse.
 - d. The court's Deputy Registrar is directed to, within five (5) working days of this order, write to the parties to account for the whereabouts of the court file after the court delivered its ruling on 2nd April 2025.
 - e. Having regard to the circumstances that informed the failure by the court to nominate a bank for the parties, I make no order as to costs of the application.

DATED, SIGNED AND DELIVERED ON THE 18TH SEPTEMBER, 2025

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived



compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

