

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
MOMBASA**

APPEAL NO. E136 OF 2024

PARAPET LIMITED APPELLANT

VERSUS

JULIANA WAKESHO MWANGOYA RESPONDENT

AND

APPEAL NO. E120 OF 2025

PARAPET LIMITED APPELLANT

VERSUS

JULIANA WAKESHO MWAGOYA RESPONDENT

RULING

The appellant filed the two appeals, **ELRCA E136 of 2024 and ELRCA E120 of 2024**. They both relate to the same parties. The appellant asserts that ELRCA No. E136 of 2024 was withdrawn; however, there is no order under the subject file indicating it was closed or withdrawn. The matter was struck out on 31 October 2024. However, there are written submissions relating to what would ordinarily apply in ELRCA E120 of 2024 that are filed in the ELRCA E136 of 2024.

On 31 October 2024, the court delivered a ruling in ELRCA E120 of 2024, and the matter was struck out from the court's records. This appeal does not exist.

To avoid further duplication, the ruling herein shall apply in both files.

The ruling herein relates to the application dated 28 June 2025 filed under **ELRCA E120 of 2025**. The application is filed under the provisions of Order 51 rule 1 and Order 42 rule 6 of the Civil Procedure Rules and Rule 18 and 21 of the Employment and Labour Relations Court (Procedure) Rules and articles 48 and 159 of the Constitution. The appellant is seeking orders:

1. *Spent.*
2. *Spent.*
3. *This court be pleased to enlarge and extend the time within which to file the Memorandum of Appeal against the judgment delivered by Hon. Sogomo on 17 May 2024 in MCELRC No. E754 of 2021, and that the Memorandum of Appeal filed herein be deemed as duly filed in time.*

4. *Pending hearing and determination of the appeal, this court be pleased to order a stay of execution of the warrants dated 18 August 2024 emanating from the judgment delivered by Hon. Sogomo on 17 May 2024 in MCELRC No. E754 of 2021.*
5. *Costs be in the cause.*

The application is supported by the affidavit of Stephen Nyamu, the regional manager of the appellant, who avers that on 17 May 2024, the lower court in MCELRC E754 of 2021 delivered judgment, and the appellant filed Appeal No. ELRCA No.E136 of 2024 on 3 June 2024. An invoice was raised therefore, but the filing fees were inadvertently paid on 1 July 2024. This was due to the advocate's oversight.

Pending the hearing of ELRCA E136 of 2024, the respondent moved to execute the decree dated 28 August 2024. Under ELRCA No. In 2024, the court issued interim orders stopping the execution. The appellant was labouring under the mistaken belief that the memorandum of Appeal had been filed until the court raised the non-payment on 1 July 2024.

Nyamu avers in the affidavit that upon discovering the error, the appellant has filed the instant application seeking a stay of execution and time to be enlarged to file the appeal out of time. The appellant will suffer prejudice, loss, and damage if the orders sought are not granted.

In reply, the respondent filed her Replying Affidavit and opposed the application.

Both parties filed written submissions, which are analysed, and the twin issues for determination are whether the court should enlarge time to file an appeal out of time and whether there should be a stay of execution of the judgment of the trial court delivered on 17 May 2024 in Mombasa CMELRC E754 of 2021.

An applicant seeking to enlarge the time to file an appeal out of time is regulated under Rule 12 of the Employment and Labour Relations Court (Procedure) Rules (the Court Rules). These provisions must be read together with the Civil Procedure Act and the Rules thereto.

An applicant seeking the court's discretion to extend time to file an appeal out of time must move the court through a miscellaneous application. Once granted time, proceed to file an appeal in terms of Section 79G of the Civil Procedure Act.

The motions of Section 79G only set in when the time to file an appeal has lapsed, and on good cause, an intended appellant can move the court to enlarge time. Section 79G of the Civil Procedure Act provides that;

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time. [Emphasis added].

The practice of filing an appeal first and then seeking more time to file the appeal should not be allowed to take root. Such would negate the purpose of Section 79G of the Civil Procedure Act. To file a draft Memorandum of Appeal and the Record of Appeal would well support a miscellaneous application seeking to enlarge time to file an appeal out of time. See **Makori v Barasa; Faulu Microfinance Bank Limited (Third party) (Environment and Land Appeal E017 of 2023) [2023] KEELC**. See also Supreme Court in application No. 16 of 2014 **Nicholas Kiptoo Arap Korir Salat v the Independent Electoral and Boundaries Commission & 7 others**.

In the case of **D I M v F W M (Misc. Application 33 of 2017) [2018] eKLR**, the court held that through a miscellaneous application, a party is allowed to explain the reasons leading to the delay in filing an appeal in time. The court has the chance to allocate more time, limited or unlimited. However, it must be borne in mind that leave to appeal out of time is not a matter of right. The applicant must demonstrate to the court that the application is meritorious for the court to exercise its unfettered discretion. An applicant must therefore satisfy the court that the delay is justified and excusable in the circumstances.

To file an appeal first, then proceed to seek an enlargement of time to file it is simply an abuse of process. Given that such matters are well-regulated under the Court Rules, the Civil Procedure Act, and the Rules, one cannot cite the application of Articles 50(1) and 159 of the Constitution and escape responsibility.

The Court Rules and practice operate for the orderly conduct of proceedings. To allow a procedure like that invoked by the appellant would negate such practice.

The appellant has since filed MERCA No.136, which is addressed and struck out. A ruling delivered on 31 October 2024.

In this case, the appeal is invalid. It is filed out of time before the appellant can take advantage of the court's discretion to grant more time to file the appeal.

For the appellant to raise an application dated 28 June 2025 under this file is an abuse of the court process.

The application dated 28 June 2025 is hereby dismissed. Costs to the respondent.

Under **ELRCA E136 of 2024**, the appellant filed the Memorandum of Appeal on 1 July 2024, against the judgment in Mombasa CMELRC No. E754 of 2021 delivered on 17 May 2024.

Under Rule 12(2) of the Employment and Labour Relations Court (Procedure) Rules the ELRC Rules), the appellant had 30 days to file the appeal.

The time to file the appeal lapsed on 28 June 2024.

The Record of Appeal was filed on 2 July 2024, which falls within the provisions of ELRC Rule 15. However, an appeal must be valid for the appellant to file the Record of Appeal within the allowed 60 days from the date the subject judgment was delivered, i.e., 17 May 2024.

Under ELRCA E136 of 2024, the appellant filed an application dated 12 September 2024 seeking orders;

Pending hearing and determination of the intended appeal, this court be pleased to order a stay of execution of warrants of attachment dated 28 August 2024 of the decree emanating from the judgment delivered by Hon. Sogomo on 17 May 2024 in MCCELRC No. E754 of 2021.

Stephen Nyamu supported the application on the grounds that, following the trial court's judgment on 17 May 2024, the respondent had obtained a decree for Ksh. 416,300, which is substantial. The appellant has filed an appeal that is likely to succeed and, therefore, should be allowed to proceed with it.

As noted above, a ruling was delivered on **31 October 2024**, striking out both the application and the appeal.

As outlined above, the multiple filing of appeals by the appellant without regard to the distress and prejudice now visited against the respondent is without any reasonable cause.

Duplication of suits is a matter defined as an abuse of the court process. It should not be encouraged to take root.

For the above reasons, the following orders are issued;

- a) ELRCA E136 of 2024 has since been struck out.**
- a) ELRCA E120 of 2024 is hereby dismissed with costs to the respondent.**
- b) A note to be placed in both files to avoid further duplication of applications.**

Delivered in open court at Mombasa, this 16th day of October 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Japhet

..... and

