

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CIVIL APPEAL NO. E259 OF 2024

NYALI GOLF AND COUNTRY CLUB
LIMITED.....APPELLANT

VERSUS

CLARA ACHIENG
MBEDA.....RESPONDENT.

RULING

1. By an application dated 26th September 2024, expressed to be under Order 42 Rule 6, Order 50 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 1A, 1B, 3A, and 79G of the Civil Procedure Act, CAP 21 Law of Kenya, the Appellant /applicant sought;

a) THAT this Honourable Court be pleased to extend the time within which the appellant shall file its

Memorandum of Appeal and further be pleased to grant leave to file the Memorandum of Appeal out of time.

- b) THAT upon the grant of Order No. 1 above, the Memorandum of Appeal dated 26th September 2024 be admitted into the Court's record and deemed as proper.
 - c) THAT pending the hearing and determination of this Application, this Honourable Court be pleased to stay and/or suspend all proceedings herein.
 - d) THAT pending the hearing and determination of the intended appeal, this Court be pleased to stay and/or suspend all proceedings herein.
 - e) THAT the Appellant/Applicant bear the costs of this application.
2. The Application is premised on the grounds set out on the face thereof, and the supporting affidavit sworn by the Applicant on the 26th September 2024.

3. The Applicant stated that the lower Court, via its ruling in Mombasa CMELRC No. E 279 of 2023, delivered on 27 June 2024, dismissed the Appellant/Applicant's Preliminary Objection dated 7 June 2027, through which he raised the issue of sub judice. The objection was, therefore, based on a pure point of law.
4. Aggrieved by the decision, the Appellant instructed his advocate to appeal against the same. Although the ruling was delivered on 27th June 2024, a copy of it was only received on 13th September 2024.
5. Before receiving the stated copy, his Counsel wrote to the subordinate on 23rd July 2024 and 31st July 2024 to enquire about the Ruling but was unsuccessful in obtaining a certified copy. Without the certified copy of the ruling, he could not file the appeal. The ruling was not available on the judiciary e-filing portal or physically accessible to the parties.
6. When he obtained the copy of the ruling on the date specified above, the period for lodging an appeal against the

decision contained therein had already expired. Therefore, the failure to file the appeal within the statutory period was deliberate but due to a factor beyond his control.

7. That the lower Court, as a matter of fact, correctly found that the ground raised of *sub judice* was a pure point of law, but fell in error when it nonetheless dismissed the preliminary objection.
8. The learned trial Magistrate failed to consider the fact that the Respondent had admitted the existence of Mombasa Cmcelrc No. E66 of 2022, in which costs awarded therein in favour of the Appellant were outstanding and unpaid. The Magistrate ought to have upheld the Appellant's preliminary objection and stayed proceedings in the latter suit, pending settlement of the costs in the earlier suit.
9. If the proceedings in Mombasa CMELRC E 279 of 2023 are not stayed and the intended appeal succeeds, it could result

in an embarrassing situation where different courts, such as the subordinate court, issue conflicting decisions on the same issue concerning the same parties.

10. The Application has been filed timeously, without unreasonable delay.

11. The Appellant/Applicant will be immensely prejudiced if the instant application is not granted. The Appellant will be driven off the seat of justice, a hearing of its appeal.

12. The Respondent opposed the application on the grounds of opposition filed herein dated February 2025. The prime grounds set out being;

a) On 7th February 2024, the appellant did not raise a preliminary objection at the trial court but sought judicial interpretation.

- b) The appellant had not given a compelling reason on the misapplication of the law or disregard of a particular principle as the ruling was in the discretion of the trial court, informed by the subject matter before it.
- c) The appellant has not given any explanation of how the trial court derogated from exercising its discretion judiciously.
- d) The applicant has not demonstrated a prima facie appeal with a sufficient cause that is arguable to warrant staying of proceedings in the subordinate court.
- e) It is in the interest of justice that the proceedings in the Chief Magistrate's Court MCELRC No. 279 of 2023 which is pending pre-trial direction, hearing and determination proceed.

13. The Appellant /applicant, in rejoinder to the grounds of opposition, filed a supplementary affidavit dated 14th May 2025, and stated that on 27th September 2024, on his instructions, his Counsel, on 28th September 2024, filed an appeal [E 320 of 2024], side by side with an application similar to the instant one, in the High Court. However, the same was withdrawn for the reason that it was inadvertently filed in the wrong forum. Following a notice of withdrawal dated November 27, 2024, the appeal was marked as withdrawn by the High Court on February 19, 2025.

14. He asserted that in the previous suit [E066 of 2022], the Respondent voluntarily withdrew the suit on 16th February 2023. The same was marked as withdrawn on 23rd February 2023, and costs were awarded to him.

15. On 18th May 2023, the Respondent filed a fresh suit, Mombasa CMELRC No. E 279 of 2023 between the same

parties, raising the same issues in the previous suit, and upon filing its defence, the Appellant filed the preliminary objection on which the ruling was issued.

16. On 16th August 2024, the lower Court assessed the costs payable to the Appellant at KShs. 74,600. Instead of settling the costs, the Respondent filed an application seeking to set aside the certificate of costs. The application is pending a hearing.

Determination

17. I have carefully considered the application, the supporting affidavit, and the grounds of opposition, the supplementary affidavit, and the submissions filed herein, and a single issue emerges for determination -whether the application has merit.

18. Undoubtedly, the earlier suit, [Mombasa CMELRC No. E 066 of 2022], was a suit that had been marked withdrawn by the lower court, following a Notice of Withdrawal of Suit

dated 15th February, 2023. It follows, therefore, that any litigation on the substantive issues under the earlier suit was wholly discontinued. The proceedings on the disputation before the trial Court on the manner in which the party and party costs had been presented, and taxed before the Court, in my view, were not on a substantive issue in the withdrawn suit, which would be held an outstanding issue for determination, to attract the applicability of the doctrine of *sub judice* against the latter suit.

19. The application, which was placed before the trial Magistrate, rightly or otherwise, after the withdrawal of the earlier suit, cannot be seen in any manner as one that was intended to affect the discontinued litigation on the substantive issues.

20. In the circumstances, it is difficult to determine what the Appellant/Applicant aimed to achieve with the preliminary objection he raised before the lower Court. If his goal was to obtain a stay of proceedings in that suit, as stated in his supplementary affidavit, then his proper course

of action would have been to apply to that court for the order. Therefore, any lower Court examining the preliminary objection from my perspective would not uphold the objection.

21. In sum, I am saying that the intended appeal raises no arguable appeal. With this view, it would be remiss of the Court to award any of the orders sought in the Applicant's application dated 9th December 2024. Consequently, the application is dismissed. The Appeal herein is struck out with costs.

22. It is essential to point out that I did consider the elaborate and well-crafted submissions by the Appellant's Counsel, and the fact that I have not summarized them in the body of this ruling does not mean that they weren't meaningful.

Read Signed and Delivered this 30th Day of October 2025.

OCHARO KEBIRA

JUDGE.

ORIGINAL