



**Seneca East Africa Limited v Mudaki (Appeal E013 of 2025)
[2025] KEELRC 2884 (KLR) (16 October 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2884 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E013 OF 2025
K OCHARO, J
OCTOBER 16, 2025**

BETWEEN

SENECA EAST AFRICA LIMITED APPELLANT

AND

BRIAN MUGARO MUDAKI RESPONDENT

RULING

1. Before this Court is an application dated 18th February 2025, in which the Applicant seeks orders that: this Court be pleased to admit the Memorandum of Appeal filed herein against the Judgment of Hon. Akee delivered on 23rd September 2024 in Mombasa MCELRC 554 of 2021- Brian Mugaro Mudaki v Seneca East Africa Limited; pending the hearing this Court be pleased to issue an order of stay of execution of the decree of the lower Court pending appeal; and the warrants of attachment and sale dated 10th February 2025 and the proclamation of the Applicant's property, be set aside.
2. The Application is anchored on the grounds set out on the face of the application and the supporting affidavit sworn on 17th February 2025, thus;
 - a. That Judgment was on the 23rd September 2024, entered for the Respondent in the above-stated matter for a sum of KShs. 380, 262.20, on the foot of his claim for unfair termination of employment.
 - b. The Applicant's appeal possesses a significant probability of success. It presents compelling and arguable grounds. The Applicant would suffer substantial injustice, as permitting the execution of the decree to continue would result in enforcement based on a contested judgment. A favourable outcome in the appeal would render it a purely academic exercise.
 - c. That as soon as the Applicant was informed of the delivery of the Judgment on 26th September 2024, they instructed their Counsel on record to proceed on the same day to lodge an appeal against the decision.



- d. Whilst the appeal was in the process of being prepared, the Applicant’s Human Resources Manager commenced her maternity leave. She inadvertently failed to remit the fees for the memorandum of appeal filed on 23rd October 2024. Due to an inadvertent error during her handover process to the successor, “a mistake occurred.”
 - e. The delay in appealing was caused by an inadvertent mistake during the change of guard process.
 - f. The Application has been lodged promptly without unnecessary delay. The Respondent would not be prejudiced in any way by a grant of the orders sought.
3. The Respondent opposes the application on the premises set out in his replying affidavit that he swore on 19th February 2025. He states that immediately the Judgment was delivered, his Counsel on record issued a Judgment notice to the Applicant, which was served on 25th September 2024.
 4. The Human Resource Manager of the Applicant commenced her leave on 25th October 2024. There was enough time for her to ensure the filing of the appeal within time.
 5. When the Notice of Judgment failed to prompt any response from the Respondent, his Counsel was compelled to instruct Auctioneers to execute the lower Court’s decree. Warrants were issued for the Auctioneers to execute, but the execution didn’t bear fruit because no attachable properties belonging to the Applicant were traced for seizure.
 6. On 5th February 2025, his Counsel wrote to the lower court requesting the re-issuance of the warrants of attachment and sale. Upon receiving the warrants, the auctioneers realised that the Applicant had no attachable property in Mombasa. They then proceeded to Nairobi, located some property, and proclaimed the same in execution of the decree.
 7. Throughout, the Applicant was aware of the lower court judgment. They did not move to appeal because they knew they had no attachable property in Mombasa. The instant application is solely aimed at unjustly delaying him from enjoying the fruits of his judgment.
 8. The Applicant identifies two issues for determination: whether this Court should admit the Applicant’s appeal out of time, and, subject to the answer to this first issue, whether the Court should order a stay of execution of the impugned Judgment pending the hearing and determination of the appeal.
 9. The Applicant contends that a careful reading of the proviso to section 79G of the Civil Procedure Rules reveals that an application for an extension of time, such as the present one, can be correctly lodged within an existing appeal. To buttress this submission, reliance is placed on *Evans Kiptoo v Reinhard Omwoyo* [2021] eKLR.
 10. He further submits that the power to extend time for lodging of an appeal out of time is discretionary, as contemplated under Rule 18 of the Employment and Labour Relations Court [Procedure] Rules 2024.
 11. The Court of Appeal in the case of *Paul Musili Wambua vs Attorney General & 2 others* [2015] eKLR, elaborately set out the factors that a Court should consider when tasked to interrogate an application for leave to file an appeal out of time, thus;

“..... it is settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal, the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason[s] not based



on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are: the length of delay, the reasons for the delay, the chances of the appeal succeeding if the application is granted, and the degree of prejudice to the respondent if the application is granted.”

12. While acting on their instructions, their Advocates promptly filed an appeal against the lower Court’s Judgment on 23rd October 2024, within the statutory 30 days for the right to appeal. However, and regrettably, the Human Resources person went on maternity leave, and the change of guard resulted in an inadvertent failure to pay for the appeal.
13. Upon realising the mistake, the Applicant moved with speed to file the instant application within four months of the delivery of the Judgment. Not an unreasonable delay considering the stalling of time during Christmas recess.
14. The Applicant’s mistake was unfortunate and not deliberate. It ought not cause them to lose access to their right of appeal. Blunders would continue to be made from time to time. Where they are inadvertent, a party should not suffer the penalty of having their case determined on merit. To fortify this submission, reliance was placed on the case of Philip Kelpto Chemwoto & Another V Augustine Kubende [1986] KLR 492.
15. The Applicant has, in the circumstances of this matter, satisfactorily explained the reason for the delay in filing the appeal within time. The appeal filed herein should be deemed duly filed. The Respondent would not suffer any prejudice if the orders sought in the application are granted.
16. The Court shouldn’t unnecessarily hinder the Appellant’s right of access to justice guaranteed under Article 48 of *the Constitution*. To support this point, reliance has been placed on the case of Steel Corporation Limited v Susan Awour Mudemb [2021] eKLR.
17. Order 42 Rule 6[2] sets out the conditions that an applicant has to establish to attract the exercise of the court’s discretionary power to grant a stay of execution of a decree pending appeal. Unless a stay of execution of the lower court’s decree is not granted, the Respondent will execute. That will occasion a substantial loss to the Appellant, as the appeal shall be rendered nugatory because the Respondent will not be able to refund the decretal sum if the Appeal is allowed.
18. The Appellant is willing to provide security pending appeal. In fact, pending this application, the Court directed that one hundred fifty thousand Kenyan Shillings be deposited. The Appellant obliged the order. The deposited sum should be deemed security for the due performance of the decree, pending appeal.
19. The Respondent, in his submissions, identified two issues for determination: whether the Appellant’s application dated 18th February 2025 is defective and bad in law or not, and whether the orders sought should be granted or not.
20. It was argued that Rule 12 [2] of the Employment and Labour Relations Court [Procedure] Rules 2024 sets out the statutory period within which an appeal against a decision by a Magistrate should be made. It provides for 30 days. The appeal herein, having been filed on 18th February 2025, was filed out of time without leave of the Court. The instant application is thus premised on an incompetent appeal; it should be struck out. The Appeal too. To support this position, reliance has been placed on the decision in West Kenya Sugar Co. Ltd v Angulu [2024] KEELRC 1698 [KLR], which cited the Supreme Court decision in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission 7 others [2014] eKLR.



21. It is further argued that the Applicant has not offered any sufficient cause for the delay in filing the appeal. Yet, the delivery of the lower Court's Judgment was brought to their attention as early as 25th September 2025.

Analysis and Determination.

22. I have carefully considered the Applicant's Notice of Motion application herein, the response thereto and the submissions presented by the Parties' respective Advocates, and the following issues commend themselves for determination:

- a. Whether the Applicant has made a case for extension of time.
- b. Whether the order sought by the Applicant for a stay of execution pending appeal can be availed to him.

23. This Court's authority to entertain an application for an extension of time to file an appeal out of time derives from section 79G of the *Civil Procedure Act* and Rule 18 of the Employment and Labour Relations Court [Procedure] Rules 2024.

24. Section 79G reads;

“Time for filing appeals from the subordinate courts.

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 good reason and sufficient cause for not filing the appeal in time.”

25. Rule 18 of the Employment and Labour Relations Court [Procedure] Rules 2024, reads;

“Extension of time

The Court may, if the circumstances justify, extend the time prescribed for filing of an appeal or any document relating to an appeal.”

26. The question that this Court finds imperative to answer at this point, before I delve further into the first identified issue for determination, is whether an application for extension of time for filing of an appeal can be appropriately filed within an existing appeal. Put in another way, can an appeal be filed out of time without leave of the court first being sought, and be deemed duly filed upon the court granting an extension of time for its filing?

27. The parties herein have taken diametrically opposite directions on this issue, with the Appellant asserting that what the proviso to section 79G contemplates, and in support of the position, cites the case of *Evans Kiptoo v Reinhard Omwoyo Omwoyo* [2021], where the Court held;

“I agree entirely with the submissions of Mr. Mwinamo for the respondents that the proviso to the above provision envisages that a substantive appeal be filed first, and that an application such as the one before the Court ought to be made in that appeal, seeking orders for the admission of the appeal out of time. This position was well explicated by Hon. Emukule J. in *Gerald M'limbine vs. Joseph Kangangi* [2008] eKLR, thus:



“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must, in effect, file such an appeal, and at the same time seek the court’s leave to have such an appeal admitted out of time of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court’s process under section 79B, which says:

“79B Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of the decree, or order appealed against, he may, notwithstanding section 79C, reject the appeal summarily.”

It seems to me, therefore, that it is not open to the court to exercise its discretion under the proviso of Section 79G of the *Civil Procedure Act* except upon the existence and perusal of the appeal to be “admitted”, not to be “filed out of time.” Admission for presupposes that the appeal has been filed and will be “admitted” for hearing after a judge has established under Section 79B that there is “sufficient “ground for interfering with the decree, part of the decree or order appealed against.”

28. The Respondent contended that an appeal filed outside the prescribed time without prior leave from the Court remains incompetent throughout, and cannot serve as a basis for an application for an extension of time for its filing or admission. To support this point, he cited the case of *West Kenya Sugar Co. Ltd v Angulu* [supra], where the Court stated;

“The Court holds that the Memorandum of Appeal dated 27th February 2024, filed on an even date to challenge the judgment date 24th January 2024, was filed out of time and without leave of the Court of extension of time outside the 30 days within which an appeal is to be filed against a judgment from the lower court under Section 79G of the *Civil Procedure Act*. There is still no application before the court to extend the time.

The court applying the decision of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR [supra] holds the said memorandum of appeal dated 27th February 2024 as a nullity and of no legal consequence.”

29. A reading of the provisions of Section 79 G, not in isolation from the other provisions of the law that relate to the extension of time, but in conjunction with them, would demonstrate that the position advanced by the Respondent, supported by the two persuasive decisions he cites, cannot be the correct position. To be specific, the stipulations of Order 51 of the Civil Procedure Rules and Rule 18 of the Employment and Labour Relations Court [procedure] Rules 2024.

30. Order 50 rule 6 of the Civil Procedure Rules provides;

“Power to enlarge time [Order 50, rule 6]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or summary notice or by order of the court, the court shall have power to enlarge time upon such terms [if any] as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:



Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

31. No doubt Rule 18 of the Employment and Labour Relations Court [Procedure] Rules 2024, whose provisions I have elaborately set out hereinabove, largely addresses the matter of enlargement of time, in the same way that Order 50 Rule 6 of the Civil Procedure Rules does. In my view, the provisions allow three scenarios: prospective enlargement [seeking an extension of time before the time set lapses]; proactive enlargement [seeking an extension before filing the document]; and retrospective enlargement/regularisation [filing the document together with an application for leave for late filing].
32. Based on the foregoing premises, I am convinced that the action undertaken by the Appellant in filing the Memorandum of Appeal concurrently with the application for an extension of time, thereby seeking the enlargement retrospectively, was executed in accordance with proper procedure.
33. Having found as I have hereinabove, I now turn to consider the conditions necessary for the grant of an order for enlargement of time, and whether the Appellant/ Applicant has met the same.
34. 34 The Court’s authority to issue an order for an extension of time is entirely at its discretion. This discretion is unfettered and exercised based on the requirements of justice in each individual case. Nevertheless, it is essential to emphasise that such discretion must be exercised judiciously, in accordance with established judicial principles. The considerations would include: the length of the delay; the reasons for the delay; the conduct of the parties; the chances of success of the intended appeal; and whether the extension will prejudice the Respondent.
35. There is no doubt that the judgment of the lower court was delivered on 24th September 2024, and that no appeal was filed against this judgment within the statutory period of 30 days. Both the appeal and the application for extension of time were filed on 18th February 2025, which is four months and twenty four days after the judgment. The appellant was required to explain this delay and the reasons thereof. Upon reviewing the application and the supporting affidavit, it is evident that they were aware of this obligation.
36. I have carefully considered what the Appellant has presented in explaining the delay, and as the reason for the delay. I, without hesitation and with great respect, must conclude that the same is too unintelligible to form a sufficient explanation and reason for purposes of favourable orders in an application for extension of time.
37. The Appellant contended that there was a memorandum of appeal that was filed on the system on 23rd October 2024, thus within time. What happened with the appeal, along with the alleged notice of motion application filed on the same day, is barely understandable from the instant application and the supporting affidavit. What is the connection between the Human Resources person who proceeded on leave on 25th October 2024, and the inaction on the documents? If it were that her proceeding for maternity leave occasioned non-payment of the fees, why wasn’t an application made for leave to pay the Court fees and an order that the documents be deemed duly filed?
38. The Appellant kept mentioning a mistake by the Human Resources person, which should not be visited on them prejudicially. However, one cannot clearly see and understand this mistake. In essence, this Court is invited to venture into a realm of speculation, an invitation it readily declines.
39. It is clear that the person was aware of the judgment by the lower court, was at work throughout the 30 days of the appellant’s right of appeal, but did nothing to ensure the appeal was filed.



40. Even if one were to assume for a moment that there was some mistake caused by the alleged handover [which has not been proved anyway], the question that arises is, why did the Advocate who allegedly presented the documents to the system not pursue his client promptly to ensure that the filing of the documents was properly completed?
41. 41. In the circumstances of this matter, I am convinced that the filing of the current application was an afterthought and was merely prompted by the execution process initiated against them. Accordingly, they have approached this Court with unclean hands.
42. In conclusion, the delay has not been adequately explained. I consider the duration of four months and twenty-four days to be an inordinate delay.
43. Having found as I have hereinabove, I'd have no reasonable reason to venture into interrogating the second identified issue of stay of execution pending appeal.
44. In the upshot, the Appellant's application is without merit. It is hereby dismissed. The Appeal herein is struck out with costs to the Respondent.
45. Orders accordingly.

READ, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 16TH OCTOBER 2025.

OCHARO KEBIRA

JUDGE

