

**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL COURTS**

**EMPLOYMENT AND LABOUR RELATIONS APPEAL NO. E201 OF 2025**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....APPLICANT**

**VERSUS**

**RICHARD PKEMEI TOPILA.....RESPONDENT**

*(Being an Application for Stay of Proceedings in MCELRC/E1512/2025: RICHARD PKEMEI TOPILLA ETHICS AND ANTI-CORRUPTION COMMISSION pending hearing and determination of the Appeal herein from the Orders Issued by Honourable Magistrate Tom Mark Orlando (PM)(DR) on the 22nd day of May, 2025 in MCELRC/E001/2025: Richard Pkemei Topila V Ethics and Anti-Corruption Commission)*

**RULING**

1. The applicant being aggrieved with the Orders Issued by Honourable Magistrate Tom Mark Orlando (PM)(DR) on the 22nd day of May, 2025 in MCELRC/E001/2025: Richard Pkemei Topila V Ethics and Anti-Corruption Commission filed application dated 11<sup>th</sup> July 2025 brought under Sections 3 of the Employment and Labour Relations Court Act, Rule 68(1)(g) & (3) of the Employment and Labour Relations Court (Procedure) Rules, 2024 inherent jurisdiction of the Court and all other enabling provisions of law) seeking for the following Orders-

(a) Spent.

(b) Spent.

(c) This Honourable Court be pleased to stay proceedings **in MCELRC/E1512/2025: RICHARD PKEMEI TOPILLA ETHICS AND ANTI-CORRUPTION COMMISSION** pending the hearing and determination of the Appeal.

(d) This Honourable Court be pleased to make such other order ex debito justitiae.

(e) The costs of this Application be provided for.

**Grounds of the application**

2. The Respondent herein is time-barred in instituting an employment claim against his employer, the Applicant in accordance with section 89 of the Employment Act.
3. However, the Respondent was erroneously granted leave to appeal out of time by an order of the lower court issued on 22nd May, 2025 in MCELRC/E001/2025: Richard Pkemei Topila V Ethics and Anti-Corruption Commission.
4. The Applicant lodged the Memorandum of Appeal herein on 20th June, 2025.
5. This Appeal herein seeks to set aside the erroneous order of extension of time on the grounds that the lower court did not have jurisdiction to grant the extension.

6. It is trite that if an act is void, it is a nullity in law and any proceeding founded on such act is also a nullity in law.
7. The Respondent has proceeded to lodge MCELRC/E1512/2025: RICHARD PKEMEI TOPILLA ETHICS AND ANTI-CORRUPTION COMMISSION pursuant to the order extending to file the claim out of time which order was made without jurisdiction.
8. The Applicant was served with summons to Enter Appearance and the Statement of Claim on 9th July, 2025.
9. This appeal goes to the root of the suit in MCELRC/E1512/2025: RICHARD PKEMEI TOPILLA ETHICS AND ANTI-CORRUPTION COMMISSION.
10. The appeal herein has a serious effect on the suit in MCELRC/E1512/2025: RICHARD PKEMEI TOPILLA ETHICS AND ANTI-CORRUPTION COMMISSION.
11. The appeal herein may upset the proceedings and/or judgment in the lower court.
12. The Applicant contends that Learned Magistrate erred in law and fact in failing to find that where a statute limits time for bringing an action, no court has the power to extend that time, unless the statute itself allows extension of time.
13. The Applicant further contends in this Appeal that the Learned Magistrate erred in law in failing to find that section 89 of the Employment Act provides that Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or

be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

14. The Applicant also contends that Learned Magistrate erred in law in ignoring the decisions in Attorney General & another v Andrew Maina Githinji & another [2016] KECA 817 (KLR) Civil Appeal 21 of 2015 and Rift Valley Railways (Kenya) Ltd v Hawkins Wagonza Musonye & another [2016] KECA 213 (KLR) Civil Appeal 39 & 40 of 2016.
15. The appeal herein is arguable and has prima facie merits.
16. The issues raised in this appeal have a bearing on the merits of the case at the lower court.
17. The appeal herein is likely to render the proceedings in the lower court unnecessary.
18. The appeal herein will be rendered nugatory should the stay of proceedings be noted granted.
19. This Application has been lodged expeditiously.
20. It is just and fair that the stay of proceedings be granted.
21. It is in the interest of optimum utilization of judicial resources that the scarce judicial time be saved by granting the stay of proceedings in **MCELRC/E1512/2025: RICHARD PKEMEI TOPILLA v ETHICS AND ANTI-CORRUPTION COMMISSION** instituted pursuant to an order granted without jurisdiction.

22. It is in the interest of justice that the Application sought be granted.
23. The application was further supported by affidavit sworn on the 11<sup>th</sup> July 2025 by John Kisaka Advocate (internal counsel of the applicant) who annexed pleadings and documents before the lower court namely the statement of claim(JK1), a notice of preliminary objection dated 22<sup>nd</sup> October 2024(JK2), and Notice of withdrawal of suit dated 10<sup>th</sup> December 2024 in MCELRC/E1940 OF 2024(JK3). The deponent averred that MCELRC/E1940 OF 2024 has since been marked as closed. Annexure JK4 was application dated 11<sup>th</sup> December 2024 (MCELRC /E001/2025 seeking leave of the court to file sui out of time for unlawful termination. The applicant responded to the application vide replying affidavit dated 10<sup>th</sup> March 2025(JK 6). On the 22<sup>nd</sup> May 2025 the lower court issued Orders allowing the application (JK10). The deponent contended that the order was made without jurisdiction and allowed the filing of MCELRC /E11512/2025(JK12 was the suit). The deponent averred that the suit was filed outside the time limit of such claims under section 89 of the Employment Act the termination of the respondent's service having been on 12<sup>th</sup> June 2019.

### **Response**

24. The application was opposed by the respondent vide filed grounds of opposition dated 3<sup>rd</sup> september 2025 as follows-
- a. The court has inherent jurisdiction to ensure that the ends of justice are not defeated by giving undue regard to legal technicalities.
  - b. Article 159 of the Constitution of Kenya 2010 grants the court this inherent jurisdiction to determine matters without giving unnecessary regard to legal technicalities.

c. That trial court rightly invoked the inherent jurisdiction granted to the court in extending time to the respondent to file suit against the appellant/ applicant.

### Decision

25. The application was canvassed by way of written submissions (only the applicant filed) and the pleadings.

26. The issue for determination was whether the application was merited with 2 sub issues, whether there is an arguable appeal and 2 whether the failure to order stay of proceedings would render the appeal nugatory.

### **Whether there is an arguable appeal**

27. The Respondent was dismissed from employment on June 12, 2019, as per the statement of claim before the lower court and dated June 20, 2025. The cause of action arose when the Respondent was terminated on June 12, 2019. The Respondent filed the suit more than five (5) years after his employment was terminated, following the leave of the lower court to do so. The appellant submitted that the lower court did not have jurisdiction to extend the time limited by section 89 of the Employment Act, which states as follows: ‘89. Limitations’

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.’

28. The applicant submitted that it is well-established law that a dismissed employee need not wait for the outcome of any criminal proceedings that may be initiated concurrently with internal disciplinary processes that could result in the dismissal in question. If the employee chooses to do so, it is at their own risk should the statute bar them, as occurred in this case. It is well-known that when a statute limits the time for bringing an action, no court has the power to extend that period unless the statute explicitly allows for an extension. The applicant relied on a decision delivered on August 13, 2025, by Makau J in *Riva Petroleum Dealers Limited v Ndumia* (Employment and Labour Relations Appeal E018 of 2024) [2025] KEELRC 2376 (KLR) (August 13, 2025), which is clear on this point. The court stated: 18. The binding precedent is that a court cannot extend the limitation period set by the statute for filing suits based on contract, including employment contracts. The court has neither jurisdiction nor discretion in such matters. Even parties cannot confer jurisdiction through consent to hear a suit that is time-barred. Therefore, I find that the trial court erred in not allowing the preliminary objection raised by the appellant.

29. The court holds that the issue of lack of jurisdiction is not a technicality issue that can be remedied by the provisions of Article 159 of the Constitution. The court's jurisdiction stems from the Constitution and written law. The court has a duty to examine and ensure that the lower court had jurisdiction to extend time under section 89 of the Employment Act. The court finds that the intended appeal raises issues concerning the jurisdiction of the lower court under section 89 of the Employment Act to hear the pending proceedings.

30. On whether the failure to order a stay of proceedings would make the appeal useless. The applicant stated that the intended appeal would become useless if the stay is not granted. The issues raised in this appeal relate to the merits of the case in the lower court. The

appeal is likely to make the proceedings in the lower court unnecessary. The appeal will be rendered useless if the stay of proceedings is not granted. Mbaru J at paragraph 11 in Michael Njai v Juan Torres & another [2015] KEELRC 1054 (KLR) held as follows: “In this regard, consideration must be given to the fact that where the appeal is heard and decided, it may have serious effects on the entire case, so that if a stay of proceedings is not granted, the result of the appeal could nullify the entire process, and therefore, the stay of proceedings in the lower court should be granted.” I agree with the decision to apply in this case. The court recognizes that any proceeding or decision without jurisdiction is null and void. It is wise to grant the stay to ensure the appeal is not rendered nugatory if successful.

31. In conclusion, the application dated July 11, 2025, is allowed. This Honourable Court is pleased to stay proceedings in MCELRC/E1512/2025: RICHARD PKEMEI TOPILLA ETHICS AND ANTI-CORRUPTION COMMISSION pending the hearing and determination of the Appeal. Costs to be in the cause.
32. Mention on 16<sup>th</sup> December 2025 to issue directions in the appeal.
33. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13<sup>TH</sup>  
DAY OF NOVEMBER, 2025.**

**J.W. KELI,  
JUDGE.**

**IN THE PRESENCE OF:**

Court Assistant: Otieno

Appellant /applicant – Kisaka

Respondent- absent

ORIGINAL