



REPUBLIC OF KENYA



**Ali v Grain Industries Limited (Civil Application E139 of 2024)
[2025] KECA 1840 (KLR) (7 November 2025) (Ruling)**

Neutral citation: [2025] KECA 1840 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E139 OF 2024
P NYAMWEYA, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
NOVEMBER 7, 2025**

BETWEEN

ISMAIL AHMED ALI APPLICANT

AND

GRAIN INDUSTRIES LIMITED RESPONDENT

(An application to strike out the Memorandum of Appeal and Record of Appeal dated 3rd December 2024 lodged in this court on 10th December 2024 in Civil Appeal Number E240 of 2024 in an appeal against the judgment of the Employment and Labour Relations Court at Mombasa (B. Ongaya, J.) delivered on 13th May 2022 in ELRC No. 3 of 2020)

RULING

1. The applicant herein is seeking two orders from this Court, namely that this Court strikes out the Memorandum of Appeal and Record of Appeal in Grain Industries Limited vs Ismail Ahmed Ali - Mombasa Court of Appeal Civil Appeal No. E240 of 2024; and that the applicant (sic) has no right of appeal having pursued a review of the judgement and decree in Ismail Ahmed Ali vs Grain Industries Limited - Mombasa Employment and Labour Relations Court Cause No. 3 of 2020, hence the record of appeal herein should be struck out and the appeal dismissed with costs.
2. These prayers are in an application brought by a Notice of Motion dated 20th December 2024, which is supported by an affidavit of even date sworn by the applicant. The grounds for the application as set out therein in summary are that leave to file the record of appeal lapsed on 6th December 2024, hence the same were filed out of time without leave of court. The applicant avers that the appellant obtained orders from this Court on 22nd November 2024 in Grain Industries Limited vs Ismail Ahmed Ali in Mombasa Civil Appeal Application No.E050 of 2024 to file a notice of appeal and the record of appeal within fourteen (14) days, and subsequently filed a Notice of Appeal on 22nd November 2024 , which



was served on 11th December 2024, and a record of appeal on 10th December 2024, which was also served on 11th December 2024.

3. In view of the foregoing, the applicant contends that the record of appeal was filed after eighteen (18) days instead of the fourteen (14) days given by the court; that the delay in filing the appeal is in addition to the appellant's previous delay which caused its appeal in Grain Industries Limited vs Ismail Ahmed Ali, Mombasa Civil Appeal Number E043 of 2023 to be struck out; and that the delay in filing the record of appeal is inordinate, considering that the judgement being challenged was delivered on 13th May 2022; that, in addition, the appellant filed an application to review the decree and judgement in the ELRC, which is pending ruling; that the application was on the ground that there was an arithmetic error by the said Court in awarding Kshs. 2,808,871 instead of Kshs. 2,566,935.50 to the applicant, which needed to be corrected, and which is also one of the arguable grounds for the appeal by the appellant in this Court; and that, accordingly, the appellant is abusing the court process and has lost the right of appeal against the same decree he is challenging through review.
4. The appellant, in reply, filed an affidavit sworn on 14th March 2023 by one Micheal Asonga, a court clerk in the firm of Ndegwa & Sitonik Advocates LLP, the appellant's advocates on record. The deponent averred that he lodged the Record of Appeal dated 3rd December 2024 for filing on 6th December 2024 at the Court of Appeal's registry through the e-filing system, and that the Record of Appeal was marked "pending approval" and the fee payable indicated as court filing of Kshs. 3,000 and security of costs of Kshs. 6,000, and the invoices generated on the same day. However, that he was not able to pay the filing fees because the matter was still "pending approval" and the invoices did not have the payment reference numbers, and the Record of Appeal was not approved until 10th December 2024 at around 16:27hrs when the Deputy Registrar of the court re-assessed further court fees of Kshs. 98,500.
5. Further, that in the intervening period between 6th December 2024 and 10th December 2024, he made reasonable efforts to have the appeal approved for filing by physically visiting the registry on 6th December 2024, 9th December 2024, and 10th December 2024 to fast-track the approval, and that he filed the appeal immediately after the approval on 10th December 2024. Lastly, that this Court has jurisdiction under paragraph 8(6) of the Court of Appeal (Electronic Case Management) Practice Directions 2021 to deem documents as duly filed on the day the e-filer makes the first attempt to file the document, but is prevented to so file by the e-filing system. The deponent attached excerpts of the e-filing portal demonstrating the aforesaid facts.
6. We heard the application on the Court's virtual platform on 9th April 2025, and learned counsel Mr. Mcmillan Jengo appeared for the applicant and informed the Court that he would rely on his written submissions dated 1st April 2025. Learned counsel Mr. Masila appeared for the appellant and highlighted his written submissions dated 14th March 2025.
7. Mr. Jengo's submissions in this regard were that the appellant's defence that the Judiciary's e-filing system was not working or was unavailable cannot hold, as it is not supported by any evidence, nor has the appellant demonstrated that they filed an application for extension of time expeditiously after the first attempt of filing the record failed as held in Anthony Burugu & Company Advocates vs Electrowatts Limited (2022) KECA 415 (KLR), and the application the appellant relies upon was filed 58 days after the filing of the application for striking out the appeal, and 73 days after filing the appeal out of time. Mr. Jengo also cited the decisions in Mary Wambui Njuguna vs William Ole Nabala & 9 Others (2018) eKLR; and Gerald Kithu Muchanje vs Catherine Muthoni Ngare & Another (2020) eKLR for the submission that an appellant cannot pursue a review and appeal simultaneously.



8. Mr. Masila, on his part, submitted that the appellant has since filed Mombasa Civil Appeal (Application) No. E012 of 2025 - Grain Industries Ltd vs Ismail Ahmed Ali seeking to have the appeal deemed as duly filed under Paragraph 8 (6) of the Court of Appeal (Electronic Case Management) Practice Directions 2021, and which is pending ruling. Further, that Paragraph 8 (6) of the Directions empower this Court with the discretion to deem documents as duly filed on the day an e-filer makes the first attempt to file documents but is otherwise prevented from so filing by unavailability of the e-filing system.
9. Furthermore, that its impugned application in the ELRC was not an application for review, but an application to correct arithmetic errors under section 99 of the *Civil Procedure Act*, and that, therefore, the provisions of section 80 and Order 45 of the *Civil Procedure Act* and Rules that prohibit the filing of an appeal and review simultaneously were not applicable; and that there is no corresponding provisions in section 99 of the *Civil Procedure Act* prohibiting a party from filing an appeal merely because the party was seeking correction of arithmetic error.
10. We have considered the arguments made by the parties. On the issue as to whether the appeal is incompetent on account of the appellant's application for review filed in the ELRC, we are of the view that this is a question which goes to the substance of the appeal, and to be taken up during the hearing of the appeal, if any. This view has been informed by the fact that the appellant's memorandum of appeal raises additional grounds which have not been demonstrated as having been the subject of the application for review.
11. On the second issue as to whether the record of appeal was lodged out of time, under Rule 84 of the Court of Appeal Rules of 2022, an appeal is instituted by lodging a Memorandum of Appeal and the Record of Appeal in the appropriate registry within sixty (60) days of the date when the Notice of Appeal was lodged, "together with the prescribed fee and security for the costs of the appeal" (emphasis ours). In the present application, it is not contested by the parties that the appellant was on 22nd November 2024 granted leave to file a notice of appeal and the record of appeal within fourteen (14) days thereof, in a ruling delivered by this Court (Lesiit JA) in Grain Industries Limited vs Ismail Ahmed Ali. Mombasa Civil Appeal Application No. E 050 of 2024. The said 14 days lapsed on 6th December 2024.
12. From the account given by the appellant as to the events that occurred upon filing of the record of appeal, it is evident that the appellant was unable to pay the prescribed fees until 10th December 2024 when the Deputy Registrar of the court re-assessed further court fees of Kshs. 98,500/-. We accordingly find that the Record of Appeal was properly lodged on 10th December 2024 when the fees were paid as is required by the rules of this Court, and that it was accordingly lodged out of time.
13. We also note that the appellant had the option and opportunity as at this date of applying for extension of time under Rule 4 of the Court of Appeal Rules of 2022, or of making the necessary application under Paragraph 8 (6) of the Court of Appeal (Electronic Case Management) Practice Directions 2021, but did not take any steps in this regard until the filing of Mombasa Court of Appeal Civil Appeal (Application) No. E012 of 2025 - Grain Industries Ltd vs Ismail Ahmed Ali, and the appellant in this regard did not indicate the date of filing of this application or make reference to it in its replying affidavit, nor provide a copy of the application. The appellant likewise did not controvert the averments by the applicant that the said application was filed 58 days after the instant application.
14. In this regard, it has been emphasised by this Court that the timelines for taking of certain steps are indispensable to the proper adjudication of the appeals that come before us, and that the Rules are expressed in clear and unambiguous terms and command obedience. We accordingly find that the



applicant's Notice of Motion application dated 20th December 2024 is merited to the extent that the appellant's Record of Appeal lodged on 10th December 2024 is defective for having been lodged four days out of time.

15. We accordingly strike out the Memorandum of Appeal and Record of Appeal lodged in Grain Industries Limited vs Ismail Ahmed Ali - Mombasa Court of Appeal Civil Appeal No. E240 of 2024. The applicant shall have the costs of the application dated 20th December 2024.
16. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF NOVEMBER, 2025

P. NYAMWEYA

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JUDGE OF APPEAL

Dr. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

