



REPUBLIC OF KENYA



**West Kenya Sugar Company Limited v Olak (Miscellaneous Application
E003 of 2025) [2025] KEELRC 3139 (KLR) (10 November 2025) (Ruling)**

Neutral citation: [2025] KEELRC 3139 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
MISCELLANEOUS APPLICATION E003 OF 2025
DN NDERITU, J
NOVEMBER 10, 2025**

BETWEEN
WEST KENYA SUGAR COMPANY LIMITED APPLICANT
AND
JARED OCHIENG OLAK RESPONDENT

RULING

I. Introduction

1. In a notice of motion (the application) dated 14th April 2025 filed through O & M Law LLP Advocates the applicant is seeking for the following orders –
 1. That this application be certified urgent and be heard ex parte in the 1st instance.
 2. That there be stay of execution of judgment in Kakamega Chief Magistrate’s Court Elrc Claim NO. E073 OF 2021 pending the hearing and determination of the application herein.
 3. That the Honorable court be pleased to grant leave to the applicant to file an appeal out of time against judgment delivered in Kakamega Chief Magistrates Court Elrc Claim No. E073 Of 2021 On 01.08.2024.
 4. That the said leave out of time do operate as stay of all proceedings and execution in case No. Kakamega Chied Magistrates Court Elrc Claim No. E073 Of 2021.
 5. That any other order as shall meet the ends if justice be granted in the circumstances.
 6. That the costs of this application be provided for.
2. The application is expressed to be brought under Section 12 of the Employment and *Labour Relations Act* (sic!), Sections 1A, 1B, 3A, 79G, & 95 of the *Civil Procedure Act*, Order 42 Rule 6 of the Civil



Procedure Rules, & Article 159(2) of *the Constitution*, and all other enabling powers of the court and provisions of the law.

3. The application is based on the grounds stated on the face of it and supported with the affidavit of Dorca E. Olucheli Advocate with three annexures thereto.
4. The application was filed under a certificate of urgency and when the same came up in court on 14th June 2025 for directions, in presence of counsel for both parties, it was ordered and directed that there be a stay of execution in Kakamega Chief Magistrate's Court ELRC No. E073 of 2021 pending the hearing and determination of the application.
5. Upon service of the application the respondent through Onyango Otunga & Company Advocates filed a replying affidavit sworn by the respondent on 30th May 2025 with several annexures thereto.
6. By consent, it was agreed that the application be canvassed by way of written submissions. Miss Olucheli for the applicant filed written submissions dated 9th June 2025 while Miss Onyango for the respondent filed submissions dated 7th July 2025. Counsel for both parties attached the authorities cited to their respective submissions.

II. Evidence

7. In the supporting affidavit to the application it is deposed that the impugned judgment in the lower trial court by Hon. Ndururi (SPM) in Kakamega CMC ELRC No. E073 of 2021 was delivered on 1st August 2024 in favour of the respondent herein. A copy of the judgment is attached wherein the lower trial court awarded the respondent as follows –

In conclusion, I find that the claimant has to a large extent proved his claim on a balance of probabilities, and I hereby enter judgment in his favour, and make the following awards: -

- a. Payment of salary for one month in lieu of notice – Ksh. 47,185.00
- b. Compensation for unfair termination (one month for each year worked): -
24th May 2013 to 30th June 2017 (four months)-Ksh. 114,000.00
1st July 2017 to 30th June 2018 - Ksh. 44,938.00
1st July 2018 to 30th June 2019 - Ksh. 47,185.00
1st July 2019 to 30th June 2020 - Ksh. 47,185.00
Total Ksh.253,308.00
- c. Payment of salary underpayments: -
1st May 2017 to 30th June 2017 (Ksh.44,938.00–28,500 x 2) = Ksh.12,062.00
1st July 2017 to 30th June 2018 (Ksh.44,938.00-28,500.00 x 12) = Ksh.297,062.00
1st July 2017 to 30th June 2018 (Ksh.44,938.00-28,500.00 x 12) = Ksh.297,062.00
1st July 2018 to 30th June 2019 (Ksh.47,185.00-28,500.00 x 12) = Ksh.294,818.00
1st July 2019 to 30th June 2020 (Ksh.47,185.00-28,500.00 x 12) = Ksh.294,818.00



Total underpayments Ksh.898,760.00

d. Unpaid House Allowance: -

1st May 2017 to 30th June 2017 (Ksh.44,938.00 x 15% x 2 -4,275.00 x 2) =
Ksh.4,930.00

1st July 2017 to 30th June 2018 (Ksh.44,938.00 x 15% x 12 -4,275.00 x 2) =
Ksh.29,580.00

1st July 2018 to 30th June 2019 (Ksh.44,938.00 x 15% x 12 -4,275 x 12) =
Ksh.33,633.00

1st July 2019 to 30th June 2020 (Ksh.47,185 x 15% x 12 - 4,275 x 12) =
Ksh.33,633.00

Total Ksh.101,776.00

e. Interest at court rates;

f. Provision of certificate of service;

g. Costs of the claim.

8. It is deposed that the lawyers of the applicant were not instructed promptly as the applicant was undergoing some internal administrative reorganization especially in human resources which caused delay in issuance of instructions to appeal. It is further deposed that the counsel who was handling the matter in the lower trial court resigned from the law-firm representing the applicant causing further delay in filing of the appeal.
9. It is deposed that the two factors above caused the delay and in the meantime the time for filing an appeal expired. It is deposed that the delay is not inordinate and the same is highly regretted.
10. It is deposed that the applicant has now instructed on the appeal on the grounds in the annexed draft memorandum of appeal. It is further deposed that the applicant has applied for a certified copy of the proceedings from the lower trial court and is now ready to lodge an appeal. The draft memorandum of appeal states the following grounds of appeal –
 1. That the learned trial magistrate erred in law and in fact misinterpreting the ruling delivered by Hon. Mathews N. Nduma J on 16th April 2020 in Kisumu ELRC No. 258 of 2018 on the membership of the KUSPAW
 2. The learned trial magistrate erred in law and in fact in failing to consider that despite the trial court having ruled itself to have no jurisdiction on handling the issue of unfair termination awarded compensation for unfair termination amounting to Kshs253, 308. For the period 24th May 2013 to 30th June 2020.
 3. The learned trial magistrate erred in law and in fact by failing to consider and appreciate the fact that the appellant did not underpay the respondent for the period from 1st May 2017 to 30th June 2020 and that the respondent was entitled to recover the underpayment from the appellant.
 4. The learned trial magistrate erred in law and in fact in awarding the respondent payment of salary underpayments of the sum of Kshs898,760.00 which was included in the decretal sum.



5. The learned trial magistrate erred in law and in fact in misinterpreting clause 22 of the CBA for the provision of house allowance and awarding the respondent unpaid house allowance of the sum of Kshs101,776 which was included in the decretal sum.
6. The learned trial magistrate erred in law and in fact in disregarding the evidence tendered by the appellant and/or failing to consider the said evidence in totality/as a whole.
7. The learned trial magistrate failed to determine the issues before him properly and correctly and his decision arrived in a cursom and per functionary manner and was contradicting, unsupported, unjust and indefensible and has occasioned a serious miscarriage of justice.
11. It is deposed that the applicant has good grounds for an arguable appeal with high chances and probability of success and that the same may be rendered nugatory if this application is denied.
12. It is deposed that the respondent shall not be prejudiced if this application is allowed as he will have an opportunity to defend the appeal. It is further deposed that in the interest the justice it is only fair that the application be allowed.
13. In the replying affidavit by the respondent the application is opposed. It is deposed that the impugned judgment was delivered on 1st August 2024 and the applicant herein failed to appeal within the allowed statutory period of 30 days.
14. It is deposed that the two reasons advanced in an attempt to justify the delay in filing of appeal are insufficient to compel the court to exercise its discretion in favour of the applicant. It is in particular emphasized that the purported internal reorganization of the applicant is irrelevant as it is a corporate body with a board of management. Likewise, it is deposed that the alleged resignation of the counsel who was handling the matter in the lower trial court from the law-firm representing the applicant is irrelevant as the applicant as a litigant was legally obligated to follow up to ensure that its instructions for appeal were acted on.
15. It is deposed that the alleged resignation of counsel is not supported by any evidence and further there is no evidence of the purported reorganization of the applicant or when the decision to appeal was made and when the instructions to appeal were given to counsel.
16. It is deposed that on 15th January 2025 counsel for the respondent wrote to the law-firm representing the applicant to have the decretal sum paid and yet no action was taken notwithstanding that the said letter was served on 19th February 2025.
17. It is further deposed that the inordinate delay in filing the appeal and this application has not been satisfactorily explained and that the respondent stands to suffer prejudice if the application is allowed as he has a lawful judgment and decree against the applicant.

III. Submissions By Counsel

18. Counsel for the applicant identified two issues for determination by the court – whether the court should grant the applicant leave to appeal out of time; and, whether the court should grant stay execution of the decree and judgment pending the hearing and determination of the intended appeal.
19. On the first issue, it is submitted that Article 159(2) of *the Constitution* calls upon this court to consider the overriding interest of justice rather than technicalities. It is submitted that in an application such as this one the reasons for the delay need not be sufficient. It is urged for the court to consider the period of delay, the reasons therefor, the chances of success of the intended appeal, and the degree of prejudice to the respondent.



20. In support of the foregoing, counsel for the applicant cited *County Government of Mombasa V Kenya Ferry Services & Another* (2019) eKLR wherein the court listed the factors that ought to be considered by a court in extending time for filing an appeal. Further, counsel cited *Vishva Stone Suppliers Company Limited V RSR (2006) Limited* (2020) eKLR and *Philip Kiptoo Chemwolo V Augustine Kubende* (1986) KLR amongst other decisions in an attempt to persuade the court that the delay herein was neither intentional nor inordinate.
21. On the second issue, counsel cited *Butt V Rent Restriction Tribunal* (1982) KLR 417 alongside Order 42 Rule 6(2) of the Civil Procedure Rules illuminating on the law and principles applicable in an application for stay of execution of a decree, order, or judgment.
22. Although not deposed to in the affidavit filed by the applicant, counsel submitted that the respondent is a man of straw who has no means of refunding the decretal sum plus costs if the same is paid and the appeal ultimately succeeds. It is further submitted that the applicant is ready and willing to comply with any orders, terms, and conditions that the court may impose.
23. On the other hand, counsel for the respondent identified the issues for determination to be – Whether the applicant has demonstrated good and sufficient cause for the delay; and, whether the delay is excusable and prejudicial to the respondent.
24. Counsel cited *Nicholas Kiptoo Korir Arap Salat V IEBC & 7 Others* (2014) eKLR in identifying the factors that the court should consider exercising its discretion in extending time for the applicant to file the intended appeal.
25. Further, citing *Diplack Kenya Limited V William Muthama Kitonyi* (2018) eKLR it is submitted that the reasons given by the applicant for the delay in filing of the appeal do not constitute a good-cause. It is submitted that no evidence has been supplied in support of the alleged internal reorganization of the applicant. It is submitted that the delay is inordinate and inexcusable as it is in excess of nine months.
26. It is submitted that in *County Government of Garissa V Mohamed Omar Adan* (2021) eKLR it was held that reorganization is not an excuse for a corporate body that is expected to at all times maintain operational capacity including legal representation for failing to take an expected action.
27. It is submitted that the other reason given being resignation of counsel who was handling the matter from the law-firm holds no water. It is submitted that no evidence at all was adduced of the alleged resignation. It is submitted that resignation, absenteeism, negligence, or departure of counsel is no reason or excuse for a litigant to do what it is expected of it. Counsel cited *Mwangi Kamutu & 3 Others V Joyce Wangui Karagu* (2020) eKLR and *Bi-Mach Engineers Ltd V James Kahoro Mwangi* (2011) eKLR in support of the foregoing submission. It is submitted that a litigant should not sit back and blame its counsel for inaction yet it took no steps to ensure that it meets its statutory obligation to do that which ought to be done.
28. It is further submitted that the delay is inordinate and unexplained and or unsupported with sufficient reasons. It is submitted that the applicant had 30 days from 1st August 2024 -date of delivery of judgment- to file an appeal. It is submitted that the applicant filed this application nine months late without any reasonable or logical explanation to support and substantiate the delay. Counsel cited *Paul Wanjohi Mathenge V Duncan Gichane Mathenge* (2013) eKLR arguing that the delay herein is illogical, unreasonable, unexplained, inordinate, and inexcusable.
29. Moreover, it is submitted that any further delay in settlement of the decree shall cause great prejudice to the respondent who is entitled to the fruits of a lawful judgment. It is submitted that litigation has



to come to an end and it is about time that this matter was settled – counsel cited *Kenya Airports Authority V Mitubell Welfare Society & Another* (2016) eKLR in this regard.

IV. Issues For Determination

30. In the considered view of the court, there is only one main issue for determination in this application – Has the applicant demonstrated that it is deserving of the two main prayers/orders sought in the application.

V. Analysis & Disposal

31. Truly speaking, the two main orders sought by the applicant go side by side and hand and hand. The applicant is seeking for stay of execution and leave to appeal out of time. The stay of execution is sought to shield the applicant from execution awaiting the outcome of the intended appeal if leave is granted for an appeal to be filed out of time.
32. Order 42 Rule 6(2) of the Civil Procedure Rules is clear on the conditions and terms upon which a stay of execution may be granted. This fundamental law, in my view providing the minimum and elementary conditions, has been expounded and interpreted in many a decision. A *causa classica* on this is *Butt V Rent Restriction Tribunal* (supra) which has been cited and recited in many of the subsequent decisions on this issue.
33. Fundamentally, an applicant should demonstrate that substantial loss is likely to occur if the application is denied; that the application has been made without unreasonable delay; and, that the applicant is ready and willing to provide security in satisfaction of the decree and abide with such terms and conditions as the court may set and or order.
34. Therefore, while the court shall consider such other factors and circumstances - such as prejudice that may be visited upon the respondent if the application is allowed and interest of justice - an applicant should meet the three fundamental factors set out above. Of course, the court's discretion in this regard is unfettered and hence each case shall be considered and determined on its own peculiar and particular circumstances.
35. While the applicant did annex a draft memorandum of appeal to the application, the court may at this point not wish to consider the value and weight of the grounds therein as there is a risk of the court *prima facie* prejudging the appeal. However, the draft memorandum has some intrinsic value in demonstrating that the applicant is ready to lodge the intended appeal as soon as this ruling is rendered.
36. Further, while not so stated in the supporting affidavit, counsel for the applicant submitted that the applicant is ready and willing to provide security in satisfaction of the decree and comply with such terms and conditions as the court may order.
37. However, the court is of the considered view that the reasons advanced for the delay in lodging of the appeal within the time allowed are neither convincing nor sufficient. There is no evidence presented to court to confirm that indeed there was some reorganization that was ongoing within the applicant at the material time. The supporting affidavit to the application was sworn by a person who does not work with the applicant and as stated above no evidence was submitted in support of the alleged reorganization process - When was it done? What was it about? How long did it take? How did it affect the capacity of the applicant to give instructions for the filing of the appeal within the statutory period? These questions and many relevant others find no answer in the application as presented.
38. On the other reason advanced of the alleged resignation of counsel who was handling the matter, again, no evidence was availed in support thereof. Even the basic information on the name of the counsel, date



of resignation, and manner of resignation, was not provided. This leaves the court with the reasonable apprehension and presumption that the intended appeal is purely an afterthought and or intended to buy more time and delay the settlement of the decretal sum and costs.

39. It is now over one year since the judgment of the lower trial court was delivered on 1st August 2024. No efforts have been made by the applicant to either settle the decree or make proposals on settlement of the same. As correctly submitted by counsel for the respondent, litigation must come to an end. The applicant should not be allowed to keep and sustain this litigation in court forever.
40. Therefore, on the two reasons advanced by the applicant the court discerns neither good nor sufficient reason or cause for the delay in filing of the appeal. Mutatis mutandis, if the stay of execution was intended to safeguard the intended appeal, as not to be rendered nugatory, the said reasons are neither convincing nor sufficient for the court to prima facie make an order for stay of execution.
41. However, counsel for the applicant submitted that the applicant is willing to deposit security and abide by such terms as the court may order for stay of execution. It was also submitted that the respondent is a man of straw and incapable of refunding the decretal sum in case the intended appeal ultimately succeeds. While this was not stated on oath, there was no response whatsoever from the respondent on the two issues.
42. As applied in Order 42 Rule 6(2) of the Civil Procedure Rules substantial loss does not necessarily connote involvement of a substantial or huge amount of money. If, for example, an applicant cannot recover the amount paid in settlement of the decree - no matter how much it was - and the appeal ultimately succeeds, that outcome of the appeal is merely academic and hence nugatory. In my considered view, this is where the court ought to consider interest of justice. Justice is all about fairness and that is what the court should at all times safeguard.
43. For all the arguments in the foregoing paragraphs, the court shall reluctantly allow the application but on stringent terms as hereunder.

VI. Orders

44. The court makes the following orders –
 - a. The applicant is hereby granted leave to appeal out of time and the intended appeal shall be lodged within 30 days of this ruling and a record of appeal filed and served within the said period.
 - b. A stay of execution of the decree in Kakamega CMC ELRC No. E073 of 2021 be and is hereby granted provided that the applicant shall deposit the entire decretal sum plus costs in court within 30 days of this ruling.
 - c. One-half (1/2) of the amount so deposited in (b) above shall be released to the respondent forthwith.
 - d. Failure to comply with any of the above cumulative orders shall lapse the leave and the stay of execution.
 - e. Costs of this application to the respondent in any event.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 10TH DAY OF NOVEMBER, 2025.

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DAVID NDERITU
JUDGE

