

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**MISC. APPLICATION NO. E122 OF 2025**

**HESBON MACHOKA GICHANA.....APPLICANT**

**VERSUS**

**SANA INDUSTRIES CO.**  
**LIMITED.....RESPONDENT**

**RULING**

1. Before this Court for determination is a Notice of Motion dated 5<sup>th</sup> May 2025, in which the Applicant seeks leave to file an appeal out of time against the judgment delivered on 4<sup>th</sup> February 2025 by Hon. Patrick Olengo in the Chief Magistrates Court, Milimani Commercial Court, MCELRC No. E856 of 2024.
2. The Application is premised on the averments stated on its face and in the Supporting Affidavit of the Applicant, **Hesbon Machoka Gichana**. It is averred that the judgment in MCELRC No. E856 of 2024 was scheduled for 4<sup>th</sup> February 2025 at 2:30 P.M., and on that date, the Applicant's Counsel was not admitted into the court session at the appointed time.

3. It is further averred that neither the Applicant nor his Counsel could access the judgment, as it was not uploaded to the Case Tracking System until 17<sup>th</sup> April 2025.
4. The Applicant avers that having now obtained a copy of the judgment, he is aggrieved and dissatisfied with the judgment delivered on 4<sup>th</sup> February 2025 and wishes to appeal against the whole of the judgment to this Honourable Court.
5. The Applicant adds that he was prevented from filing the appeal within the prescribed time because the judgment was unavailable on the CTS, and efforts to obtain a copy from the court file were unsuccessful as the file could not be located.
6. He avers that failure to file the appeal on time was not willful but arose due to the non-availability of the judgment.
7. That the time frame for filing the appeal lapsed as the Applicant awaited to access a copy of the judgment.

8. The Respondent opposed the Application by filing a Replying Affidavit sworn on 5<sup>th</sup> June 2025 by **Agnes Kagwiria**, its Human Resources Officer.
  
9. Ms. Kagwiria avers that she is informed by the Respondent's advocate on record, which information she verily believes to be true, that the judgment in this matter was duly delivered on 4<sup>th</sup> February 2025 in the presence of the Applicant's counsel, contrary to the assertions contained in the Notice of Motion.
  
10. She further states that, following the delivery of the judgment, the Respondent's advocate on record personally communicated with the Applicant's counsel by a letter dated 11<sup>th</sup> April 2025, requesting cooperation in the settlement of the decree arising therefrom. The Applicant neither responded to nor acted upon the said letter, thereby demonstrating awareness of the judgment and an unwillingness to resolve the matter in good faith.
  
11. According to Ms. Kagwiria, it is manifestly incorrect and misleading for the Applicant to claim ignorance of the judgment. She emphasizes that the fact that the judgment was uploaded to the Case Tracking System after the statutory period does not absolve the Applicant or their counsel of the duty to monitor and follow up on proceedings in a matter actively before the Court.

12. She asserts that any prudent counsel and litigant would have taken steps to obtain a copy of the judgment immediately upon, or shortly after, its delivery.

13. Ms. Kagwiria contends that the delay in filing the intended appeal is therefore not the result of any genuine or excusable oversight, but rather a deliberate tactic by the Applicant to frustrate the execution of a valid judgment.

14. In a rejoinder, the Applicant's Advocate on record, **Karen Kang'ethe**, filed a Further Affidavit sworn on 31<sup>st</sup> July 2025. Ms. Kang'ethe avers that on 4<sup>th</sup> February 2025, she logged into the court session in the morning, but the Hon. Magistrate indicated that the day's judgments would be delivered at 2:30 PM. However, at the appointed time, she was unable to access the court despite waiting in the lobby for over one hour, and therefore she contends that the judgment was not delivered in her presence.

15. She further avers that on 5<sup>th</sup> February 2025, she logged into Hon. Olengo's court and inquired about the said judgment, whereupon the Hon. Magistrate indicated that the judgment would be uploaded to the Case Tracking System and would then be accessible. Despite repeated follow-ups and logging into

the court on multiple occasions throughout February and March 2025 to obtain the judgment, it was not uploaded to the system until 17<sup>th</sup> April 2025.

16. She further states that, by way of an email dated 11<sup>th</sup> April 2025 from the Respondent's advocates on record, which forwarded the letter of even date, the Respondent effectively acknowledged that the judgment had not yet been uploaded to the trial court's system and that they too had been unable to obtain a copy.

17. Accordingly, despite receiving instructions to file an appeal against the trial court's judgment, the Applicant was prevented from doing so within the prescribed time, as access to the judgment through either the online system or the physical court file was not available.

### **Submissions**

18. Pursuant to the directions issued by the Court on 24<sup>th</sup> June 2025, the Application was canvassed by way of written submissions. The Court has considered the parties' respective submissions.

### **Analysis and Determination**

19. Evidently, the singular issue for determination is whether the Applicant ought to be granted leave to file an appeal out of time.

20. **Section 79G of the Civil Procedure Act** provides for the time for filing appeals from subordinate courts as follows:

**[79G] 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 and sufficient cause for not filing the appeal in time.**

21. Pursuant to **Section 95 of the Civil Procedure Act**, the Court may, in its discretion, from time to time, extend any period prescribed or allowed for the performance of any act under the Act, even if the original period has already expired.

22. Similarly, **Rule 18 of the Employment and Labour Relations Court (Procedure) Rules, 2024**, provides that this Court may, where circumstances justify, extend the period prescribed for filing an appeal or any document relating to an appeal.

23. Additionally, **Rule 80** of the same Rules stipulates that the Court may extend the time prescribed under the Rules or such time as may be stipulated in an order of the Court.

24. What can be drawn from the foregoing statutory provisions is that in considering an application for enlargement of time, the Court exercises discretionary power.

25. In the case of **Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, the Supreme Court outlined key principles to guide Courts in the exercise of discretion when considering applications for an extension of time, thus:

- a) **Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;**
- b) **A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;**
- c) **Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- d) **Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**

- e) Whether there will be any prejudice suffered by the Respondents if the extension is granted;**
- f) Whether the application has been brought without undue delay; and**
- g) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.**

26. The record bears that the Judgment the Applicant seeks to appeal was delivered on 4<sup>th</sup> February 2025, while the Applicant filed the instant Notice of Motion on 5<sup>th</sup> May 2025, resulting in an intervening period of approximately three months. The Applicant attributes the delay in filing the appeal within the prescribed time to difficulties in obtaining the lower court's judgment.

27. Annexed to the Applicant's Notice of Motion is a copy of the judgment delivered virtually on 4<sup>th</sup> February 2025, which notably reflects that the Applicant's advocate did not appear.

28. Further to the foregoing, the letter dated 11<sup>th</sup> April 2025 from the Respondent's advocate confirms that, as of that date, they had not yet obtained a copy of the judgment to furnish to their client for further action.

29. In view of the foregoing, the Court is inclined to grant the Applicant the benefit of the doubt that the judgment was obtained only after the prescribed period for filing an appeal had expired.

30. In the circumstances, the Court is satisfied that the Application seeking leave to file the appeal out of time is meritorious.

31. Accordingly, the Applicant is hereby granted leave to file an appeal out of time against the judgment delivered on 4<sup>th</sup> February 2025 in **MCELRC No. E856 of 2024** by Hon. Patrick Olengo.

32. The Applicant is directed to file and serve the Memorandum of Appeal within fourteen (14) days from the date of delivery of this Ruling.

33. The costs of this application shall abide the outcome of the Appeal.

**DATED, SIGNED and DELIVERED** at **NAIROBI** this **1<sup>st</sup>** day of **December** 2025.

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**STELLA RUTTO**

**JUDGE**

**In the presence of:**

Ms. Muthiani instructed by Mr. Kang'ethe for the Applicant

Ms. Wahome instructed by Mr. Eredi for the Respondent

Mohammed Court Assistant

### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**