

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NYERI

MISCELLANEOUS APPLICATION NO E038 OF 2025

MAURICE WASIKE.....APPLICANT

VS

AAA GROWERS LIMITED.....RESPONDENT

R U L I N G

1. This ruling determines the Notice of Motion dated 14th July 2025 by which the Applicant seeks leave to file his Memorandum and Record of Appeal out of time.
2. The application is supported by an affidavit sworn by the Applicant's Counsel, Nyakundi Susan Nyanchoka and is based on the following grounds:
 - a) That the Applicant wishes to appeal against the judgment/decree in Nanyuki ELRC Case No E009 of 2024 delivered by Hon Maureen Kimani, SRM on 6th March 2025;
 - b) That the permitted time of appeal is 30 days after delivery of judgment;
 - c) That the delay in filing the appeal was not intentional but was caused by an application for review which was filed in good faith and with a strong belief that there was an arithmetic error in the calculation of the Applicant's damages;
 - d) That the Applicant and/or his Advocate on record believed that the error would be cured by a simple application in the lower court;

- e) That the intended appeal is arguable and meritorious with high chances of success;
- f) That the Applicant stands to suffer prejudice and irreparable loss if the application is not allowed.

3. The Respondent filed Grounds of Opposition dated 4th September 2025 stating that:

- a) The application is misconceived, incompetent and bad in law;
- b) The Applicant, having elected to pursue a review of the judgment delivered on 6th March 2025, and the same having been dismissed on 6th June 2025, is estopped in law from lodging an appeal against the original judgment;
- c) The law, under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules bars a party from appealing after pursuing and exhausting a review application;
- d) The application offends the doctrine of election of remedies and amounts to giving the Applicant a second bite at the cherry, contrary to the principle of finality of litigation;
- e) The application is an abuse of the process of the court and is intended to circumvent the clear provisions of the Civil Procedure Act and Rules made thereunder, as well as established case law;

- f) The Applicant has failed to give a sufficient explanation for the delay in filing the appeal, within the prescribed period, after the ruling on the review application which was delivered on 6th June 2025. Litigation must come to an end, and parties must pursue their rights diligently;
- g) The application lacks merit, is frivolous, vexatious and ought to be dismissed with costs to the Respondent.

4. Rule 74(1) of the Employment and Labour Relations Court (Procedure) Rules provides as follows:

74. (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling-

(a) if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

(b) on account of some mistake or error apparent on the face of the record;

(c) if the judgment or ruling requires clarification; or

(d) for any other sufficient reason.

5. The law is well settled that a party who elects to pursue a review cannot lodge an appeal on the same matter. In its written submissions in opposition to the application, the Respondent cited the decision in **Otieno**

Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR where the Court of Appeal stated the following:

“Once a party has opted for review, he cannot after failing in review, fall back on the right of appeal. The two remedies are mutually exclusive.”

6. A similar verdict was pronounced in ***Multichoice (Kenya) Ltd Wananchi Group (Kenya) Ltd & 2 others [2020] eKLR***.
7. In the subsequent decision in ***John Gilbert Ouma v Kenya Ferry Services Ltd [2021] eKLR*** it was held that:

“A litigant who chooses to pursue review must be taken to have waived the right of appeal on the same grounds. The two processes cannot be invoked interchangeably, for that would occasion an abuse of the court process and perpetuate uncertainty.”

8. I do not need to say more; having pursued a review application before the trial court, the Applicant has no right of appeal over the same matter. The traditional considerations for extension of time are therefore not applicable as the application should not have been brought in the first place.
9. The only thing to do is to strike out the application, which I hereby do.
10. Each party will bear their own costs.
11. Orders accordingly.

DELIVERED VIRTUALLY THIS 17TH DAY DECEMBER 2025

LINNET NDOLO

JUDGE

Appearance:

Ms. Nyakundi for the Applicant

Mr. Onyambu for the Respondent

ORIGINAL