

**IN THE COURT OF APPEAL  
AT NAIROBI**

**CORAM: MUSINGA (P), MUMBI NGUGI, & ODUNGA, JJ.**

**A.) CIVIL APPEAL (APPLICATION) NO. E235 OF 2025**

**BETWEEN**

**KCB BANK KENYA LIMITED.....APPELLANT**

**AND**

**DAVID MUGASIA INYANGU ..... 1<sup>ST</sup>  
RESPONDENT COMMISSION ON ADMINISTRATIVE  
JUSTICE.....2<sup>ND</sup> RESPONDENT**

*(Being an application for striking out an appeal and stay of the ruling and orders of the Employment and Labour Relations Court at Nairobi (B.O.M. Manani, J.) dated and delivered on 19<sup>th</sup> September 2024*

*in*  
**Misc. Appl. No. E002 of  
2023)**

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**RULING OF THE COURT**

1. The application before us has its genesis in a dispute between **David Mugasia Inyangu**, the applicant (1<sup>st</sup> respondent in the appeal), and **KCB Bank Kenya Limited** relating to certain orders issued on 5<sup>th</sup> May 2022 by the **Commission on Administrative Justice (CAJ)**, the 2<sup>nd</sup> respondent in the appeal and application). The said orders were adopted as orders of the Court by the Employment and Labour Relations Court (ELRC) in a ruling dated 15<sup>th</sup>

June 2023.

2. Dissatisfied, the 1<sup>st</sup> respondent filed an application dated 29<sup>th</sup> February 202, seeking review of the said orders. The application was dismissed in the ruling dated 19<sup>th</sup> September 2024. Still dissatisfied, the 1<sup>st</sup> respondent filed this appeal, **Civil Appeal No. 235 of 2025**.
3. The record indicates that the 1<sup>st</sup> respondent filed two applications within the appeal, one dated 14<sup>th</sup> April 2025 and another dated 31<sup>st</sup> July 2025. When the matter came up for hearing before us on 21<sup>st</sup> October 2025, there was some confusion with regard to which application was slated for hearing. The 1<sup>st</sup> respondent, represented by learned counsel, Mr. Wilson, who was holding brief for learned counsel, Ms. Muthee, was of the opinion that the application dated 31<sup>st</sup> July 2025 was coming up for hearing. Learned counsel, Mr. Musembi, appearing for the 2<sup>nd</sup> respondent, indicated that the 2<sup>nd</sup> respondent was not taking any position on the applications, while the applicant, appearing in person, informed the Court that the application coming up for hearing was the one dated 14<sup>th</sup> April 2025. It is this application that we proceeded to hear, and this ruling is in respect thereto.

4. Before entering into an analysis of the application, we must observe that the confusion with regard to which application was coming up for hearing has manifested itself in the preparation of the parties for the hearing. The record indicates that both parties had filed submissions with respect to the application dated 31<sup>st</sup> July 2025, but none with respect to the application dated 14<sup>th</sup> April 2025. The applicant stated that he had filed submissions dated 1<sup>st</sup> May 2025 in respect of the application dated 14<sup>th</sup> April 2025, but no such submissions are on the Court record. We therefore determine the application on the basis of the affidavits in support and opposition thereto, and the oral submissions made by the parties at the hearing.
5. In the said application, the applicant seeks the following orders:

***i. THAT costs be awarded against Joshua Nyamweya Oigara, CBS; Paul Rudishie Russo, EBS; and, Japheth Ochieng Achola, herein after referred to as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants, for failing to institute appeals within the appointed time after lodging the notice of appeal dated 27<sup>th</sup> September, 2024.***

**ii. THAT the appeal filed by KCB Bank Kenya Limited or the 4<sup>th</sup> Appellant, herein after referred to as the appellant, be struck out with costs.**

**iii. THAT costs in (ii) above to include costs in the ruling of 30th January, 2025.**

6. The application is brought under rules 85 and 86 of this Court's Rules, 2022. It is supported by an affidavit and a further affidavit, both sworn by the applicant, on 14<sup>th</sup> April 2025 and 9<sup>th</sup> May 2025 respectively.
7. The applicant states that the '*appellants*' ( in reference, as we understand it, to the 1<sup>st</sup> respondent and **Joshua Nyamweya Oigara, Paul Rudishie Ruso** and **Japheth Ochieng Achola**, whom the applicant terms the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants) filed a notice of motion dated 29<sup>th</sup> February 2024 under rules 17 and 33 of the **Employment and Labour Relations Court (Procedure) Rules, 2016**; that on 19<sup>th</sup> September 2024, the ELRC delivered a ruling '*that declined the class suit*' and prompted the '*appellants*' to file the notice of appeal dated 27<sup>th</sup> September, 2024; that the '*1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants*' lost interest in pursuing the appeal and abandoned it to the '*4<sup>th</sup> appellant*' to file the current appeal.

8. The applicant asserts that extension of time is not a right of a party; and that the appeal filed is a nullity as it was filed out of time and without leave. He maintains that the 1<sup>st</sup> respondent's Memorandum of Appeal and Record of Appeal were not filed within the requisite time; that court fees and deposit of security for costs of the appeal were not done within the stipulated time; that the Certificate of Delay dated 5<sup>th</sup> February 2025 included in the Record of Appeal is not for this matter; and that the 1<sup>st</sup> respondent did not require proceedings in respect of a different matter to file its record of appeal.
9. Further, that the appeal is frivolous as it is against the views of the trial judge, and that the orders of the court declining the 1<sup>st</sup> respondent's application and making no order as to costs cannot amount to orders to be appealed against. He contends that the appeal is frivolous vexatious and an abuse of the court process.
10. In his affidavit in support of the application, the applicant avers that the prescribed fee and deposit of the security for costs of the appeal were made on 28<sup>th</sup> March 2025 after 190 days of the decision of 19<sup>th</sup> September 2024; and that the

court receipt for the prescribed fee is proof that the Memorandum of Appeal and Record of Appeal were filed out of the stipulated time and without leave of the court.

11. He avers that the notice of appeal dated 27<sup>th</sup> September 2024 was filed by four appellants; that the matter before the trial court in respect of the 1<sup>st</sup> respondent's application dated 29<sup>th</sup> February, 2024 was canvassed by way of written submissions and there were therefore no recorded proceedings that the appellant could require to use in appealing; and that the Certificate of Delay dated 5<sup>th</sup> February 2025 was issued for court proceedings from 25<sup>th</sup> January 2023 to 15<sup>th</sup> June 2023 for matters that are not under appeal. He alleges irregularities at the ELRC registry with the issuance of the Certificate of Delay but does not specify the nature of the irregularities.
12. The 1<sup>st</sup> respondent opposes the application by an affidavit sworn by Ms. Lilian Sogo, its Head Counsel-Litigation. It avers that it filed a Notice of Appeal against the ruling dated 19<sup>th</sup> September 2024 on 30<sup>th</sup> September 2024; and applied for typed copies of the proceedings and ruling by its letter of the same date. It avers that it has also filed its record of

appeal and was awaiting the directions of the Court for filing of submissions in respect thereto.

13. With regard to the applicant's prayer for costs against **Joshua Nyamweya Oigara, Paul Rudishie Ruso and Japheth Ochieng Achola**, the 1<sup>st</sup> respondent avers that the orders issued on 15<sup>th</sup> June 2023 indicated that the orders of the 2<sup>nd</sup> respondent issued on 5<sup>th</sup> May 2022 had been directed against it, and therefore the order in the current application directed against them was incompetent, and should be struck out.
14. Regarding the applicant's claim that its notice of appeal was filed out of time and without leave, the 1<sup>st</sup> respondent avers that the ruling that is the subject of the appeal was delivered on 19<sup>th</sup> September 2024; that it filed its Notice of Appeal on 30<sup>th</sup> September 2024; that rule 77 (2) of this Court's Rules requires that a notice of appeal should be lodged within fourteen days after the date of the decision from which an appeal is lodged; and that it had until 3<sup>rd</sup> October 2024 to lodge the notice of appeal. It is its averment, therefore, that its notice was lodged well within the timelines required by law.

15. Regarding the applicant's contention that the Record of Appeal was filed out of time without leave, the 1<sup>st</sup> respondent avers that a competent appeal could not be filed without the typed proceedings, which were not available until 31<sup>st</sup> January 2025; that it filed an application on 14<sup>th</sup> October 2024 seeking stay of execution of the order of 15<sup>th</sup> June 2023 pending the hearing and determination of its intended appeal; and that the parties were notified on 15<sup>th</sup> November 2024 that the typed proceedings were ready for collection.
16. It states that upon following up on the proceedings, it was informed that the file was not available as it was in chambers before Manani, J. for ruling on its application for stay of execution; that the ruling allowing its application was delivered on 30<sup>th</sup> January 2025 and the file thereafter released, a fact confirmed by the applicant's email to the 1<sup>st</sup> respondent's advocates dated 30<sup>th</sup> January 2025. The 1<sup>st</sup> respondent avers that it paid for and collected the proceedings on 31<sup>st</sup> January 2025, and it was issued with a certificate of delay on 5<sup>th</sup> February 2025.

17. The 1<sup>st</sup> respondent asserts that in accordance with rule 84 of this Court's Rules, it had 60 days from 31<sup>st</sup> January 2025, expiring on 31<sup>st</sup> March 2025, to file its record of appeal; that it filed its appeal on 28<sup>th</sup> March 2025; and accordingly, it was filed within the required timelines.
18. Regarding the contention by the appellant that security for costs was not paid within time, the 1<sup>st</sup> respondent avers that Kshs 6,000, being security for costs, was paid within the required timelines on 28<sup>th</sup> March 2025.
19. As for the contention that it had appealed on points of fact and law instead of points of law only, contrary to section 23 (3) and (5) of the **Access to Information Act**, the 1<sup>st</sup> respondent avers that it did not invoke the said section 23 to appeal the decision of the 2<sup>nd</sup> respondent to the High Court, and its appeal to this Court is, accordingly, a first appeal, not a second appeal, which should only be limited to points of law.
20. Regarding the contention by the applicant that the appeal was in contravention of rule 33 of the Employment and Labour Relations Court (Procedure) Rules which allows applications for review of decisions of the ELRC, the 1<sup>st</sup>

respondent avers that contrary to the contention by the applicant that it was, by this appeal, seeking to review the decision of the ELRC to this Court, which is prohibited under rule 33 (6), what is before this Court is not a further review of the ELRC decision but an appeal against the said decision, which is well within its rights. It prays that the application dated 14<sup>th</sup> April 2025 be dismissed with costs.

21. We have considered the application, the affidavits in support and opposition thereto, and the oral submissions of the parties. We deal at the outset with the first prayer sought by the applicant- that costs be awarded against three named individuals for having failed to institute an appeal within the prescribed time after lodging a notice of appeal. This prayer, we presume, is predicated on rule 85 of this Court' Rules, which provides that:

***(1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.***

**(2)The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.**

22. In the present matter, we note that it is indeed correct that the notice of appeal dated 27<sup>th</sup> September 2024 was lodged on behalf of the 1<sup>st</sup> respondent and Joshua Nyamweya Oigara, Paul Rudishie Russo, and, Japheth Ochieng Achola, and that it is only the 1<sup>st</sup> respondent who filed the present appeal. We make two observations with respect to this issue. First, we note that in the ruling dated 15<sup>th</sup> June 2023, the court struck out the applicant's application in so far as it was directed against Oigara, Russo and Achola. It would appear, then, that counsel for these parties erroneously included them in the notice of appeal.

23. The second observation we make is that costs under rule 85 against a party who lodges a notice of appeal but fails to file an appeal are payable, under the Rules, where, '**on the Court's own motion or on the application of a party**', the notice is deemed to have been withdrawn. The applicant has not made an application for the notice by the

three parties to be deemed as withdrawn. Further, the  
three parties are not

before us in this application, and we cannot therefore make any order against them in the circumstances.

24. The second and third substantive prayers are that the 1<sup>st</sup> respondent's appeal be struck out with costs, and that costs with respect to the prayer for striking out include costs in the ruling of 30<sup>th</sup> January, 2025, a reference, we believe, to the ruling of the ELRC that granted the 1<sup>st</sup> respondent stay of execution of the ruling dated 19<sup>th</sup> September 2024. This latter prayer is not one that can be addressed by this Court.

25. The prayer for striking out the 1<sup>st</sup> respondent's appeal falls under rule 86 of this Court's Rules, which provides that:

***A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—***

***(a) that no appeal lies; or***

***(b) that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:***

***Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.***

26. From the applicant's averments, it appears that he seeks striking out of the 1<sup>st</sup> respondent's appeal on both rule 86 (a) and (b). With respect to (a), his argument is that no second appeal lies from a decision of the 2<sup>nd</sup> respondent under section 23 (3) and (5) of the **Access to Information Act**. The 1<sup>st</sup> respondent counters that it had not filed an appeal to the High Court under the said section, and this appeal is therefore a first appeal.
27. We have considered the proceedings and ruling of the trial court in so far as is relevant for the determination of the issue raised by the applicant. We note that the applicant had applied to the trial court for adoption of the order of the 2<sup>nd</sup> respondent dated 5<sup>th</sup> May 2022 as an order of the court. The proceedings before the ELRC were not an appeal under section 23 of the Access to information Act. The 1<sup>st</sup> respondent applied for review of the ELRC adopting

the said order, and the application for review was declined in the ruling of 19<sup>th</sup>

September 2024 which is the subject of this appeal. We would, accordingly, agree with the 1<sup>st</sup> respondent that this is a first appeal, and the applicant's argument for striking out the appeal under rule 86(a) has no merit.

28. The applicant argues, secondly, that the 1<sup>st</sup> respondent's appeal was filed out of time and without leave. Whether to strike out the appeal as prayed by the applicant is dependent on whether the 1<sup>st</sup> respondent, in filing the record of appeal on 28<sup>th</sup> March 2025, complied with the provisions of rule 84 of this Court's Rules, which provides that:

***Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—***

- (a) a memorandum of appeal, in four copies;***
- (b) the record of appeal, in four copies;***
- (c) the prescribed fee; and***
- (d) security for the costs of the appeal:***

***Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is***

***desired to appeal, there shall, in computing  
the time within***

***which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.***

***(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.***

29. The ruling impugned in this appeal was delivered on 19<sup>th</sup> September 2024. We note that the 1<sup>st</sup> respondent lodged its notice of appeal on 30<sup>th</sup> September 2024. It applied for the typed proceedings by its letter of the same date. It avers, and this is not disputed by the applicant, that it was notified that the proceedings were ready on 15<sup>th</sup> November 2024, but that the file, which was in the judge's chambers for the writing of the ruling delivered on 30<sup>th</sup> January 2025, was not available till then.

30. We note that the Certificate of Delay indicates that the proceedings were supplied on 31<sup>st</sup> January 2025; the Record of Appeal was filed on 28<sup>th</sup> March 2025, which was within 60 days of receipt of the proceedings. We further note that

security for costs was deposited on the same date as the Record of Appeal was filed. In the circumstances, we are satisfied that the present appeal is properly on record. Accordingly, we find that the application dated 14<sup>th</sup> April 2025 is devoid of merit. It is hereby dismissed with costs to the 1<sup>st</sup> respondent.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of January, 2026.**

**D. K. MUSINGA, (PRESIDENT)**

.....  
**JUDGE OF**

**APPEAL MUMBI**

**NGUGI**

.....  
**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....  
**JUDGE OF APPEAL**

*I certify that this is  
a true copy of the  
original.*

*Signed*

**DEPUTY REGISTRAR.**