

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

APPEAL NO. E 159 OF 2025

EXCELLENT SECURITY SERVICES LTD .....APPLICANT

VERSUS

COLNEL ETYANG NYASIO..... RESPONDENT

**RULING**

**Background**

1 By a Notice of Motion Application dated 9<sup>th</sup> October 2025, the Appellant seeks;

a) THAT this matter be certified urgent and service be dispensed with at the first instance.

b) THAT this Honourable do hereby grant an order to arrest the judgment in CMCC [ELRC] NO. E 213 of 2024, Mombasa, between Colnel Etyang v Excellent Security Limited, scheduled for 30<sup>th</sup> October 2025 before Hon. E. Mwamuye [SRM]

c) THAT the Honourable Court do hereby grant an order for stay of proceedings in suit CMCC[ELRC] NO. E 213 of 2024, Mombasa, between Colnel Etyang v Excellent Security Limited pending the hearing and determination of this Application.

d) THAT the Honourable Court do hereby grant an order for stay of proceedings in suit CMCC[ELRC] NO. E 213 of 2024, Mombasa, between Colnel Etyang v Excellent Security Limited pending the hearing and determination of this Appeal.

e) THAT the costs of this Application be provided for.

2 The Application is premised on the grounds set out on the face of it and the supporting affidavit sworn by Wilson Maghanga Makati, its Operations Manager.

3 The Respondent opposes the Application on the grounds set out in the replying sworn on 21<sup>st</sup> October 2025.

### **The Applicant's Application**

4 In support of his Notice of Motion application, the Applicant states that they filed an Application dated 3<sup>rd</sup> February 2025 in the lower court

seeking the setting aside of *ex parte* proceedings of 3<sup>rd</sup> December 2024 and the Respondent's testimony as the matter had proceeded in the absence of the Applicant. Further, that the suit be heard *de novo*, and the Respondent's and the Applicant's respective cases be reopened for the purposes of an *inter partes* hearing. Lastly, leave be granted to the Applicant, unconditionally, to file a response to the Memorandum of Claim and to defend the suit.

5 The Application was heard, and by its ruling delivered on 8<sup>th</sup> May 2025, the trial Court dismissed the Application and scheduled the matter for mention to confirm filing of submissions on the *ex parte* proceedings. Aggrieved by the ruling, they sought leave of the lower court on 15<sup>th</sup> July 2025, to file an appeal against the ruling barring them from participating in the suit.

6 The lower Court matter is active and pending appeal. The substratum of the appeal is to enable the Applicant an opportunity to participate in the proceedings before the lower court. If the order of stay of proceedings isn't given, the substratum shall be defeated.

7 The learned trial Magistrate erred when she dismissed their application despite the fact that the Respondent failed to demonstrate that he had served them with summons to enter appearance and pleadings.

8 It is due to the non-service of the summons and pleadings that the matter before the lower court proceeded *ex parte* in their absence.

9 The Applicant asserts that to the suit before the lower Court, they have a defence with triable issues as they had valid and fair grounds to terminate the Respondent's employment, and that in effecting the termination, there was compliance with the dictates of procedural fairness.

10 The justice of this case demands that the order of stay of proceedings sought be granted,

### **The Respondent's Response**

11 The Respondent states that he pursued a claim for unfair termination against the Appellant/Applicant in the above-mentioned matter, seeking terminal and contractual remedies. The Applicant was physically served with a summons to enter an appearance and pleadings on 12<sup>th</sup> April 2024, and they duly acknowledged receipt thereof by stamping and signing the summons and pleadings served.

12 Despite the service, the Applicant failed to enter appearance and file defence within the statutory requisite period.

13 The Applicant was subsequently served with several mention notices on various dates through the email address indicated on their official stamp

that they affixed on the summons to enter appearance and pleadings served.

14 The Respondent further states that the suit was listed for hearing on 3<sup>rd</sup> December 2024, and despite service, the Applicant failed to attend court. The matter proceeded undefended. This, after the Court was satisfied that service for the hearing had been duly effected.

15 subsequently, the Applicant filed an application dated 3<sup>rd</sup> February 2025, seeking to set aside the ex parte proceedings; to have the suit reopened and heard de novo; and to be granted unconditional leave to respond to the Statement of Claim and defend the suit.

16 In her ruling of 8<sup>th</sup> May 2025, the learned trial Magistrate found that the Appellant was duly served with the summons to enter appearance and pleadings, and with subsequent notices, and that no sufficient reason had been placed forth to be a basis for setting aside the proceedings. She consequently dismissed the Application. The Appellant sought 14 days to lodge an appeal against the ruling.

17 Subsequently, the Appellant failed to file an appeal within the prescribed time. At the next mention date, 11<sup>th</sup> June 2025, he sought additional time to negotiate with his advocates regarding the setting aside of costs.

However, the Court slated the matter for judgment as the Appellant had failed to file an appeal.

18 The Appellant filed yet another application dated 9<sup>th</sup> July 2025, seeking to arrest the judgment that had been set down for 17<sup>th</sup> July 2025, and a stay of proceedings pending the hearing and determination of the application and an intended appeal. He opposed the application.

19 The Application was subsequently heard, and determined through the trial Court's ruling delivered on 15<sup>th</sup> July 2025. The Court found that no judgment had been delivered and that, therefore, there was no judgment to be arrested. However, the Court allowed the application on condition that the Appellant file its appeal within 30 days and deposit half of the claimed sum, being KShs. 770,465 .40 in a joint interest earning account held by both Advocates within 45 days, failing which the Respondent would be at liberty to set the matter down for judgment.

20 The Appellant blatantly failed to comply with both conditions. Further, the appeal herein was filed out of time and without leave of the Court on 18<sup>th</sup> August 2025, and no deposit of the ordered sum was made within the stipulated forty -five days.

21 Having failed to comply with the conditional orders of stay, the Appellant /Applicant was disentitled to the benefit of those orders, which lapsed

automatically upon non-compliance. In accordance with the trial Court's ruling, their Advocates moved the Court to fix the matter for judgment for 30<sup>th</sup> October 2025.

22 By filing its appeal without leave of the Court, together with a fresh application seeking similar orders to those in the earlier applications, namely, to arrest judgment and stay proceedings in this Court, and without having complied with the conditional orders previously issued, the Appellant is engaged in forum shopping, which amounts to an abuse of the court process, as it seeks to circumvent the trial court's orders and re-litigate the same issue before this Court.

23 The Respondent contends that the issues raised in the instant application are substantially the same as those raised and determined in the Appellant's application dated 9<sup>th</sup> July 2025 before the trial court. The application, therefore, offends the doctrine of *res judicata*.

24 Clearly, the Appellant/Applicant has concealed material facts from this Court. As the orders sought are discretionary, they shouldn't be granted in his favour, as he has come to this Court with unclean hands.

25 The proper remedy available to the Applicant, if aggrieved by the trial court's conditional order, was to file a competent appeal and seek

appropriate interim reliefs within the appeal, not to file a fresh application seeking identical orders before this court.

### **Analysis and Determination**

26 I have carefully considered the Appellant's application, the grounds upon which it is premised, the affidavit in support thereof, the replying affidavit by the Respondent, and the submissions filed by the parties' respective Counsel, and the following principal issues for determination emerge;

- a) Whether the Appeal herein was filed out of time, and if so, what should be its fate.
- b) Whether the Appellant deserves the orders of stay of proceedings as sought in the application.

27 Before I delve deeper into these issues for determination, I find it necessary to state in this ruling that orders staying proceedings pending appeal are discretionary. As such, any party seeking a favourable exercise of discretion in their application for a stay of proceedings must be prepared to be fully candid and forthright with the Court and to disclose

all material facts to the Court. Failure to do so will always be a recipe for dismissal of such an application.

28 I am not hesitant to express the view that the Appellant, in their sketchy supporting affidavit, was not candid and forthright with this Court. They deliberately failed to disclose material facts, including the vital events during the proceedings in the lower court.

29 Whether an appeal was filed in time or outside the statutory period, or a period set by order of the Court, is a jurisdictional issue. Where it is found that the appeal was filed out of time without leave, the Court will have no option but to strike out the appeal. It would not have jurisdiction to conduct proceedings under such an appeal.

30 The Respondent contends that the appeal herein was filed out of time, and that there is no competent appeal under which this Court should proceed to entertain the instant application. In response to the submission, Counsel for the Appellant submitted in the penultimate paragraph of their written submissions, thus;

***“.....the delay was occasioned by a genuine and inexcusable oversight in monitoring the end of the appeal timeline, which fell over the weekend and inadvertently carried into the following week. The delay, being just three days, is***

*minimal and has not occasioned any prejudice whatsoever to the Respondent. In the interests of substantive justice and fairness, we humbly urge this Honourable Court to exercise its discretion and admit the Appellant/Applicant's appeal out of time."*

31 Interestingly, the delay is not mentioned in the Appellant's application and supporting affidavit, nor has leave been sought to admit the appeal out of time. In my view, this statement does not assist the Appellant's application; it amounts to an admission that the appeal was filed out of time and is therefore incompetent.

32 By reason of the foregoing premises, the Appellant's appeal herein is struck out with costs. As the application dated 9<sup>th</sup> October 2025, therefore, stands on no foundation, it is hereby struck out.

**Read, signed, and delivered virtually in Mombasa on the 29<sup>th</sup> January 2026.**

**OCHARO KEBIRA**

**JUDGE**