



Suhara Transport [K] Limited v Ndung’ani (Miscellaneous Application E054 of 2025) [2026] KEELRC 163 (KLR) (29 January 2026) (Ruling)

Neutral citation: [2026] KEELRC 163 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E054 OF 2025**

**K OCHARO, J
JANUARY 29, 2026**

BETWEEN

SUHARA TRANSPORT [K] LIMITED APPLICANT

AND

PAUL MULUNGWA NDUNG’ANI RESPONDENT

RULING

Background

1. Before this Court is an application dated 28th May 2025 by the Applicant expressed to be under the provisions of Order 42 Rule 6 and Order 51 of the Civil Procedure Rules, 2010, Rules 18, 21, 45 and 80 of the Employment and Labour Relations Court [Procedure] Rules, 2024, and Sections 1A, 1B, 3, 3A, 79G and 95 of the *Civil Procedure Act*. The Application is supported with the grounds set out on the face thereof and the supporting affidavit sworn on 28th May 2024 by Gift Buso Katama. The application is for leave to file an appeal out of time against the judgment in the Mombasa Chief Magistrates Court, Employment and Labour Relations Cause No. E 253 of 2021, and a stay of execution of the decree flowing from the judgment pending the hearing and determination of the intended appeal.
2. The Application is opposed through a replying affidavit sworn by the Applicant on the 11th June 2025. In response to matters raised in the replying affidavit, the Applicant filed a supplementary affidavit dated 19th February 2025.
3. Per the directions of this Court, the parties have filed their respective written submissions.

The Application

4. The Applicant states that the trial Court [Hon. M.L. Nabibya, SRM] delivered judgment in the above-stated matter on 1ani7th October 2024, in favour of the Respondent. In the judgment, the



Court granted the Respondent service pay, KShs. 37,158, unpaid leave, KShs. 78,031.80, and overtime compensation, KShs. 1,092,466.96. Further, costs and interest.

5. The Applicant filed an appeal against the judgment on 15th November 2024, being Mombasa ELRC E 242 of 2024, Suhara Transport [K] Limited [formerly known as Prime fuels [Kenya] Limited v Paul Mulungwa Ndung'ani.
6. The Applicant's Advocate also requested certified copies of the impugned judgment, decree and typed proceedings for purposes of the appeal.
7. Subsequently, the Applicant filed an application for stay of the decree of the trial Court, pending the hearing and determination of the appeal.
8. Ultimately, this Court struck out the appeal on 13th March on account of the fact that the Applicant's change of name had not been sanctioned by the trial Court before lodging the appeal.
9. It was further stated that on advice of this Court, the Applicant moved the trial Court on 2nd April 2025 and sought an amendment of the impugned judgment and the resultant decree so that the Applicant's name could read Suhara Transport [K] Limited in the place of Prime Fuels [K] Limited. The application was allowed by consent on 15th May 2025, on the condition that the judgment and decree be amended to read Suhara Transport [K] Limited [formerly trading as Primefuels [K] Limited].
10. The Applicant now wants to exercise his right of appeal. The intended appeal isn't frivolous. It raises arguable grounds.
11. Considering the circumstances of this matter, the delay in lodging the intended appeal cannot be held to be inordinate.
12. Execution of the decree is imminent. Attachment and sale of the Applicant's movable property will render the intended appeal nugatory and an academic exercise; the execution and sale are not stayed.
13. It is further stated that the Respondent has no known source of income, and this makes the possibility of his refunding the decretal sum in the event the intended appeal is successful and he is called upon to refund the sum doubtful. The Applicant would, as a consequence, suffer substantial loss.
14. The instant application has been filed without unreasonable delay. Further, the delay in filing the intended appeal was neither deliberate nor inordinate.

The Response to the Application

15. In response to the Application, the Respondent stated that Prime Fuels [Kenya] Limited was at all material times represented by Counsel, in the proceedings before the lower court, and the Applicant was aware of the happenings thereof. The judgment that was delivered by the trial Court was against it.
16. The instant Notice of Motion has been presented by Suhara Transport [K] Limited, a party that is a stranger to him, and who was not a party to the proceedings before the lower Court.
17. The instant Notice of Motion Application seeks similar orders as those that were sought in the application that was struck out alongside the initial appeal on 13th March 2025.
18. The Application is bad in law and an abuse of the court process. It is full of falsehoods and vexatious.



The Applicant's Submissions

19. I have carefully considered the Applicant's Application, the grounds upon which it is premised, the affidavit in support thereof, the supplementary affidavit, the replying affidavit, and the submissions by Counsel for the parties, and the following issues emerge for determination;
- a. Whether the Applicant merits an order for extension of time to lodge an appeal, and
 - b. Whether the Applicant's Application meets the threshold for an order of stay pending appeal.
20. Inarguably, Section 79G of the *Civil Procedure Act* bestows upon this Court the power to extend in favour of a party to lodge an appeal outside the statutory period. However, as submitted by both Counsel for the Parties, the power is discretionary. It has to be exercised depending on the circumstances of each case, judiciously and not arbitrarily. In the case of *Cecilia Gathoni Herbers Odhiambo v Far East Chinese Medical Centre & another* [2002] eKLR, the Court stated;
-This application, having been brought under Rule 4 of the Court of Appeal Rules, must be considered in light of the observations by this Court's Rules must be considered in the light of the observations by this Court in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Application No. Nai. 255 of 1997 [unreported] in which it was said: -
- “It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that, in general, the matters which the Court takes into account in deciding whether to grant an extension of time are: the length of the delay; secondly, the reason for the delay, thirdly [possibly] the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”
21. It isn't disputed that the trial Court's Judgment was delivered on 17th October 2024, and the instant application was filed on 27th May 2025, a period of approximately seven months later. The question that then arises is: has the delay been sufficiently explained?
22. The Applicant stated that he filed an initial appeal against the judgment of the trial Court within time, and that this appeal was unfortunately struck out on 13th March 2025, on the ground that a stranger to the proceedings in the lower Court and to the judgment and decree that ensued, had been made an Appellant in the filed appeal. Thereafter, he was constrained to move the lower Court to amend its judgment and decree to reflect the changed circumstances. The Applicant had changed its name after judgment. The said application was eventually allowed by the parties' consent on 15th May 2025. The Respondent does not dispute these vital facts. In my view, the Applicant has sufficiently explained why it did not file an application for an extension of time until after the 15th May 2025. The reason is sound.
23. The instant application was filed within 15 days of the date on which the parties compromised the application before the trial Court, whose conclusion was first necessary for the initiation of any proceedings geared towards the filing of an appeal against the judgment of the trial Court. I find no difficulty in holding that the delay is not inordinate.
24. It is important to note that the conduct of the parties is a factor that would be vital to consider in an application for leave to lodge an appeal out of time. On this, I am not hesitant to point out that the Applicant impresses this Court as a party who, throughout, exhibited keenness to exercise his right of appeal against the judgment of the trial Court. I am not persuaded by the Respondent's submissions that the instant application is an afterthought, vexatious or bad in law as submitted by Counsel for the Respondent.



25. Rule 6 of Order 42 of the Civil Procedure sets out the conditions a party seeking a stay pending appeal must establish if the court from which he has sought the order is to grant it. In such an application, the Court exercises a fettered discretion. The Applicant must demonstrate that they would suffer substantial loss if the order for stay is not granted; that the application has been mounted without undue delay; and that they are offering security for the due performance of the decree.
26. On the limb for stay of execution, Counsel for the Applicant submits that the Applicant has expressed an apprehension that the Respondent will be unable to repay the decretal sum. It is trite law that once an Applicant expresses a reasonable fear that a Respondent will be unable to repay the decretal sum, the evidential burden shifts to the Respondent to show what resources he has, as that is a matter of pecuniary fact within his knowledge. To buttress this submission, Counsel places reliance on the Court of Appeal decision in *National Industrial Credit Bank v Aquinas Francis Wasike & Anor.* [2006] KECA 333[KLR]. The Respondent has not attempted to demonstrate that he has the means to refund the decretal sum. He has therefore not discharged the evidential burden.
27. I have carefully considered the Respondent's replying affidavit and submissions; neither addresses the Respondent's means and capability to refund the decretal sum in the event he is called upon to do so upon the success of the Appellant's appeal.
28. It is insufficient for the purposes of an application for a stay of execution to merely state, "I will suffer substantial loss if the orders are not granted". The applicant must explicitly delineate the nature of the loss to be incurred. In this particular application, it is evident that the applicant unambiguously argued that the respondent was unlikely to refund the decretal amount if the appeal was successful, and that, consequently, pursuing their right of appeal would amount to achieving nothing. To this Court, such circumstances would constitute substantial loss. The applicant has fulfilled the first condition stipulated under Order 42 Rule 6.
29. I have hereinabove determined that, under the circumstances of this matter, the instant application was filed without undue delay; therefore, the second condition outlined above has been fulfilled.
30. Lastly, the Applicant has offered to provide security for the performance of the decree, should they be called upon to do so. It is incumbent upon this Court, therefore, to determine what form of security shall be deemed sufficient. The decision regarding the appropriate security to be provided is a matter of judicial discretion, always dependent on the nature of the appeal and the necessity for the Court to perform a balancing act. This balancing act is essential to avoid stifling the Appellant's right to conveniently pursue his appeal, while also safeguarding the purpose of the law that mandates the provision of security pending appeal. Additionally, it is necessary to protect the Respondent's interest in realising the benefits of his judgment, should the appeal ultimately fail.
31. I have carefully considered the circumstances of the lower court suit, the various awards made by the trial Magistrate in her judgment, and the grounds set out in the draft memorandum of appeal by the Applicant, and hold that provision of half of the decretal sum as security shall be sufficient security.
32. By reason of the foregoing premises, the Applicant's application succeeds. The Applicant shall:
 - a. File their appeal within 14 days of the date of this ruling.
 - b. As security pending appeal, deposit half of the lower court's decretal sum in court within 30 days of the date of this ruling; in default, execution shall issue for the entire decretal sum forthwith.
33. Each party to bear its own costs of the application.



READ, SIGNED, AND DELIVERED VIRTUALLY IN MOMBASA ON 29TH JANUARY 2026.

OCHARO KEBIRA

JUDGE

