Chaudhri & Associates v Robert Bosch East Africa (Miscellaneous Application E363 of 2024) [2026] KEELRC 667 (KLR) (10 March 2026) (Ruling)

Neutral citation: [2026] KEELRC 667 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION E363 OF 2024

BOM MANANI, J

MARCH 10, 2026

BETWEEN

CHAUDHRI & ASSOCIATES .... ADVOCATE

AND

ROBERT BOSCH EAST AFRICA .... RESPONDENT

RULING

Background

1. The instant application seeks, inter alia: leave of the court to appeal from the order of this court which was issued on 15th September 2025; an order to deem the Notice and Memorandum of Appeal which are attached to the motion as properly lodged and served upon the Respondent; and an order for stay of execution of the impugned order pending appeal.

2. The application is premised on sections 3, 3A and 75 of the *Civil Procedure Act*, Rule 11 of the Advocates (Remuneration) Order and rule 77 of the Court of Appeal Rules.

3. The circumstances informing the filing of the application are that the Respondent filed a reference dated 3rd March 2025 seeking to challenge a taxation ruling which was delivered on 27th February 2025 in favour of the Advocate. In the ruling, the Taxing Master taxed the Advocate's Bill of Costs at Ksh. 3,971,195.04.

4. Upon hearing the reference, this court arrived at the conclusion that the Taxing Master committed an error of principle by relying on the figure of Ksh. 79,644,600.96 which was pleaded in the Statement of Claim as opposed to the amount which was awarded in the final judgment (Ksh. 829,631.26) to determine the value subject matter. It is this ruling which the Advocate is dissatisfied with and hence the quest to challenge it on appeal.

5. The application is supported by the grounds that are set out on the face thereof and the affidavit of Mohamed Ferhan Chaudhri. The affiant contends that the court erred in law in finding that the value of the subject matter in the parent suit was determinable by reference to the amount which was awarded in the final judgment as opposed to what had been pleaded. It is the affiant's position that the court misunderstood the import of the Court of Appeal decision in the case of Peter Muthoka & another v Ochieng and 3 others (2019) eKLR on the subject.

6. The affiant asserts that pleadings ought to the basis for ascertaining the value of the subject matter in a suit. In the premises, he contends that the court's finding that the Taxing Master committed an error of principle by relying on the figure in the pleadings to determine the value of the subject matter is flawed.

7. The affiant asserts that the Advocate filed a Notice and Memorandum of Appeal against the decision on 24th September 2025. However, he contends that the same cannot be considered as properly filed and served because of the requirement for grant of leave of the court before the appeal can be filed. As such, he prays that the court deems the Notice and Memorandum of Appeal as validly filed and served.

8. The affiant further avers that the court should also issue an order to stay execution of its decision pending appeal. He contends that if the stay order is not granted, the Advocate will suffer substantial loss.

9. The Respondent has opposed the application. It has filed a replying affidavit by one Ghislain Noumbessy to anchor its opposition to the motion.

10. The Respondent avers that the Advocate was represented in court when the impugned ruling was delivered. As such, it contends that the request for leave to appeal should have been lodged orally at that time.

11. The Respondent contends that the request for leave was lodged 23 days after the impugned ruling was delivered. As such, it avers that the motion is an afterthought.

12. The Respondent further contends that the prayer for stay of execution in the application is misguided since there is nothing to execute from the ruling. It contends that all that the court ordered was that the Bill of Costs be taxed afresh and that it is up to the Advocate to relist the said Bill for taxation.

13. The Respondent contends that it will suffer prejudice if the application is granted because this will subject it to unending litigation over the dispute. As such, it prays that the orders sought be declined.

Analysis

14. Rule 11 (3) of the Advocates (Remuneration) Order bars a litigant from appealing from a decision on a reference without leave of the court. As such, an appeal from a reference does not lie as of right. That being the case, the Advocate's contention that failure to grant the orders sought in the motion will infringe on its constitutional rights to be heard and to access justice is misguided.

15. In deciding whether or not to grant leave to appeal, the court ought to consider a number of matters. In Showcase Property Limited v Mugambi & Company Advocates [2020] eKLR, the court (quoting the case of Machira T/A Machira & Company Advocates vs. Mwangi & Another [2002] 2 KLR 391) made the following observations on the subject:-

> ''The court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word "realistic" makes it clear that fanciful prospects or an unrealistic argument is not sufficient. When leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. The

court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has no prospects of success. For example, the issue maybe one which the Court considers should be in the public interest, be examined by this court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law [is requires] clarifying. There must however almost always be a ground of appeal which merits serious judicial consideration.''

16. Further, it is trite that whether to grant leave to appeal under the aforesaid provision is a matter of discretion. However, the discretion must be exercised judiciously (Shah & Parek Advocates v Apollo Insurance Company Ltd (2005) eKLR).

17. In the court's view, all that an applicant who is seeking leave to appeal from a decision ought to demonstrate before the court can exercise its discretion to grant the request is that he has a realistic appeal. Put differently, he must demonstrate that the proposed appeal is not, prima facie, irredeemably hopeless.

18. In the instant case, the Advocate contends that the court erred by failing to appreciate that the pleadings in the parent file and not the judgment of the court was what was relevant in determining the value of the subject matter. The Advocate expresses the view that the court misconstrued the Court of Appeal decision in the case of Peter Muthoka & another v Ochieng and 3 others (supra) in arriving at its conclusion on the subject.

19. Whilst the court may not be in agreement with the Advocate's position on the matter, this does not imply that the Advocate's proposed appeal is irredeemably hopeless. In the court's view, to the extent that the proposed appeal seeks to determine whether the Taxing Master should have relied on the pleadings in the parent file as opposed to the judgment in the cause to ascertain the value of the subject matter, it raises a realistic question for determination by the Court of Appeal.

20. The record shows that the impugned ruling was delivered on 15th September 2025. On the other hand, the instant application was lodged on 24th September 2025 which was ten days down the line. As such, it is apparent that the request for leave was made without unreasonable delay.

21. The Respondent contends that since the Advocate's lawyer was present in court when the impugned ruling was delivered, he should have sought leave of the court to appeal orally before the court adjourned. However, the court notes that rule 11 (3) of the Advocates (Remuneration) Order does not preclude one from making a written application. As such, there was nothing wrong with the Advocate's lawyer opting to lodge a written as opposed to oral application for leave.

22. Besides the request for leave to appeal against the impugned ruling, the Advocate also asks the court to deem the Notice and Memorandum of Appeal as properly filed and served. However, the Advocate did not quote the provisions of law which grant the court the power to entertain this request.

23. Section 7 of the *Appellate Jurisdiction Act* provides, in part, as follows:-

> ''The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.''

24. It appears to the court that this is the provision which entitles it to enlarge time to present a Notice of Appeal. However, the instant application was not presented under the provision. As such, the court is not entitled to speculate whether the Advocate intended to move under the provision.

25. Even then, it appears to the court that it is only entitled to issue an order to enlarge time to present a Notice of Appeal out of time under the aforesaid provision where no Notice of Appeal has been lodged in the first instance. Once a Notice of Appeal is lodged (irrespective of whether it is valid or not), the jurisdiction donated to the court under the provision is extinguished. As such, a party seeking to validate an already filed Notice of Appeal must move to the Court of Appeal for the orders.

26. Speaking to this reality in the case of Sammy Kuria Ndungu v Samuel Mbugua Ikumbu 2021KEHC7665(KLR), the High Court stated as follows:-

> ''While the High Court is clothed with jurisdiction by section 7 of the *Appellate Jurisdiction Act* to extend time for a litigant who is desirous of filing a Notice of Appeal to the Court of Appeal for the first time and before he has taken any action at the Court of Appeal, such authority dissipates once the intended Appellant has taken any step at the Court of Appeal. This is so however incompetent the Notice of Appeal filed at the Court of Appeal is. Once a party has filed a Notice of Appeal, the authority to strike it out, extend time, deem it regular or any other action related to it lies with the Court of Appeal not the High Court.''

27. In the instant case, it is apparent that despite not having sought and obtained leave to appeal against the impugned decision, the Advocate lodged a Notice and Memorandum of Appeal before the Court of Appeal. Post facto, the Advocate now prays that the two instruments before the Court of Appeal be deemed as having been properly filed and served. This is despite the fact that the application is not expressed to have been brought under section 7 of the *Appellate Jurisdiction Act* which addresses such request.

28. InPeter Nyaga Muvake v Joseph Mutunga [2015] KECA 475 (KLR), the Court of Appeal held that if a Notice of Appeal is filed before leave to appeal is sought and granted, that Notice of Appeal is bad in law. The court expressed itself on the subject as follows:-

> ''Without leave of the High Court, the applicant was not entitled to give notice of appeal. Where, as in this case, leave to appeal is necessary by dint of Section 75 of the *Civil Procedure Act* and Order 42 of the Civil Procedure Rules, the procurement of leave to appeal is a sine qua non to the lodging of the notice of appeal. Without leave, there can be no valid notice of appeal.''

29. Having regard to the foregoing, it is apparent that the Advocate was not entitled to lodge a Notice and Memorandum of Appeal before obtaining leave to appeal under rule 11 (3) of the Advocates (Remuneration) Order. That being the case, the Notice and Memorandum of Appeal on record were improperly lodged and this court is bereft of the requisite jurisdiction to issue an order to deem them as validly filed and served.

30. Since the Advocate opted to file the Notice and Memorandum of Appeal before leave to appeal had been granted, the court which is seized with jurisdiction to deem the two documents as properly filed and served, if the pronouncement in the case of Sammy Kuria Ndungu v Samuel Mbugua Ikumbu (supra) is anything to go by, is the Court of Appeal and not this court. As such, the Advocate should move to that court, perhaps under section 3 of the *Appellate Jurisdiction Act*, for orders to deem the Notice and Memorandum of Appeal as properly filed and served.

31. The Advocate has also sought for an order for stay of execution pending the proposed appeal. However, the court is only entitled to grant stay where there is a valid appeal which has been lodged before the Court of Appeal.

32. Order 42 (6) (4) of the Civil Procedure Rules which speaks to the matter provides as follows:-

> ''For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.''

33. In effect, an appeal to the Court of Appeal for purposes of an application for stay of execution under the aforesaid Order is deemed as filed only after a Notice of Appeal has been validly lodged. As such, since the Notice of Appeal in the instant cause is yet to be validated by the Court of Appeal, this court (the Employment and Labour Relations court) cannot assume jurisdiction over the request for stay of execution under the aforesaid order.

Determination

34. The upshot is that the court allows the application dated 24th September 2025 only to the extent that it grants the Advocate leave to appeal from its decision which was delivered on 15th September 2025.

35. The court however declines the request to issue an order to deem the Notice and Memorandum of Appeal attached to the application as properly filed and served on the Respondent since that request now falls within the jurisdictional purview of the Court of Appeal.

36. The court declines to grant the request for stay of execution at the moment since the Advocate is yet to present a valid appeal to the Court of Appeal.

37. Each party to bear own costs of the application.

DATED, SIGNED AND DELIVERED ON THE 10TH DAY OF MARCH, 2026

B. O. M. MANANI

JUDGE

In the presence of:

................for the Advocate

................for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI