



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

APPEAL NO. E105 OF 2025

FREDRICK ODIWUOR OTIENO.....

APPELLANT

VERSUS

MEDICINS SANS FRONTIERS.....

.....**RESPONDENT**

(Being an appeal from the ruling and order of Hon. J. Orwa in Homa Bay C MELRC No. E012 of 2024 delivered on 6th November 2024)

RULING

1. The Appellant lodged this appeal on 10th December 2025 via a memorandum of appeal dated 9th December 2025 seeking to set aside the ruling of the Magistrate’s Court delivered on 6th November 2024. Subsequently, on 15th January 2026, the Respondent raised a Preliminary Objection challenging the

competence of the appeal. The Respondent contended that the appeal had been filed out of time and without leave of court, contrary to the 30-day timeline prescribed under Rule 12 of the Employment and Labour Relations Court (Procedure) Rules, 2024. It further argued that since the last day for filing the appeal fell on a Saturday i.e. 6th December 2025, section 57 of the Interpretation and General Provisions Act operated to extend the deadline to the next working day, namely 8th December 2025. Consequently, the Respondent asserted that the appeal filed on 10th December 2025 was still out of time. On that basis, the Respondent asserted that the Court lacked jurisdiction to entertain the appeal and urged that the Preliminary Objection be upheld, appeal dismissed, and costs be awarded to it.

2. The Appellant thereafter filed an application dated 23rd January 2026 under certificate of urgency seeking extension of time within which to file the appeal and an order that the memorandum of appeal dated 9th December 2025 be deemed as properly filed. The Appellant also sought costs of the application. When the application was first placed before

the court on 26th January 2026, the court directed that it be served for *inter partes* hearing on 19th February 2026. On that date, Counsel for the Respondent sought directions regarding the disposal of the Preliminary Objection. The court thereafter directed the parties to file written submissions and indicated that both the Preliminary Objection and the application would be considered together.

3. The application is supported by an affidavit sworn by Ms. Anyango Ivy, counsel for the Appellant. She deposes that, through inadvertence, the deadline for lodging the appeal was mistakenly computed as 12th December 2025. She avers that the error was honest and excusable, and was neither deliberate nor intended to obstruct the course of justice. She further states that upon discovering the mistake, the Appellant promptly moved the Court. According to her, the appeal raises arguable issues that deserve determination on the merits, and no prejudice would be occasioned to the Respondent if the application is allowed, whereas the Appellant would suffer grave injustice if the appeal was shut out on account of the error.

4. The Respondent opposed the application through a replying affidavit sworn by Ms. Emmarine Ogowapit, its Human Resource and Finance Coordinator. She deposes that the application is frivolous, vexatious, fatally defective, and an abuse of the court process. She states that on 6th November 2025 the trial court dismissed an objection raised by the Applicant's counsel to the production of a document by the Respondent's witness. Although the Applicant was granted leave to appeal and to seek stay of proceedings, she avers that no such steps had been taken by the time the matter was next mentioned before the Trial Court on 12th November 2025. Moreover, on that date, she states that counsel for the Applicant informed the Trial Court that they were not desirous of pursuing the avenue of appeal, but later proceeded to lodge the present appeal on 10th December 2025, prompting the Respondent to raise the Preliminary Objection.

5. The deponent further states that despite the existence of the appeal, the hearing before the Trial Court continued and was eventually closed, with the matter fixed for mention on 1st April 2026 to confirm the filing of submissions. She avers

that throughout this intervening period the Applicant did not file any application for stay of proceedings either before this Court or before the Trial Court. She further contends that the present application was served on 2nd February 2026 despite having been filed on 26th January 2026, and that it was lodged after the Preliminary Objection dated 15th January 2026, which demonstrated bad faith and an attempt to defeat the Preliminary Objection. Additionally, she asserts that no explanation has been provided for the delay of approximately forty-seven days between the filing of the appeal and the filing of the present application. She also contends that the appeal itself is irregular for having been filed without leave, and faults the Applicant for failing to personally swear an affidavit explaining the delay in filing both the appeal and the present application, despite having been granted leave by the Trial Court on 6th November 2025.

6. Finally, the deponent avers that the Respondent would suffer prejudice if the application is allowed. She explains that the trial has already proceeded to completion, the impugned document which the Applicant seeks to expunge has already

been produced as an exhibit and subjected to cross-examination, and the evidentiary record upon which the Respondent closed its case would be disrupted. She further states that the Respondent would be compelled to engage in parallel proceedings involving overlapping issues while the trial court is already poised to render judgment, thereby creating a risk of inconsistent outcomes and undermining judicial orderliness. In addition, she contends that the Respondent would incur further legal costs despite having already expended considerable time and resources in the proceedings since 2024. She therefore urges the court to dismiss the application with costs.

7. Both parties thereafter filed written submissions.

Appellant's Submissions

8. The Appellant urges the Court to exercise its discretion to admit the appeal out of time pursuant to section 79G of the Civil Procedure Act, which empowers the court to admit an appeal filed out of time upon demonstration of sufficient cause. In support of this position, reliance is placed on

Gerald M'Limbine v Joseph Kangangi

[2009] KEHC 2776 (KLR), where the court held that an appeal may be admitted out of time and that leave may either be sought formally or the court may regularize the position where sufficient cause is shown. The Appellant further cites the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999] 2 EA 231**, in which the Court of Appeal outlined the guiding principles in considering an application for extension of time, namely the length of the delay, the reason for the delay, the chances of success of the intended appeal, and the degree of prejudice to the respondent.

9. The Appellant further submits that the delay of two days in filing the appeal is minimal and excusable and does not warrant the striking out of the proceedings. He contends that the delay was inadvertent and that litigants ought not to be punished for mistakes where no prejudice is occasioned to the opposing party. In support of this argument, reliance is placed on **Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)**, where the Supreme Court emphasized that extension of time is a discretionary remedy

to be exercised judiciously, taking into account considerations of justice and proportionality. The Appellant also cites the case of **County Executive of Kisumu v County Government of Kisumu & 8 others (Civil Application 3 of 2016) [2017] KESC 16 (KLR)**, in which the Court held that procedural technicalities should not override substantive justice where no prejudice is occasioned.

10. On that basis, the Appellant submits that the Respondent has not demonstrated any prejudice that would arise from the admission of the appeal. Conversely, striking out the appeal would disproportionately punish the Appellant for a minor procedural lapse. The Appellant therefore urges the court to find that the Preliminary Objection is misconceived and intended to elevate procedural technicalities over substantive justice, and accordingly prays that the Court dismisses the Preliminary Objection with costs and either deems the memorandum of appeal as properly filed or, in the alternative, grants leave for the appeal to be admitted out of time.

Respondent's Submissions

11. The Respondent identifies the sole issue for determination as whether the Preliminary Objection is merited. It submits that the objection raises a pure point of law capable of disposing of the matter at the outset, as contemplated in **Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696**. It submits that by filing the appeal two days late the Appellant fell afoul of Rule 12 of the Employment and Labour Relations Court (Procedure) Rules 2024 which stipulates that appeals be filed within 30 days from the date of the decision. The Respondent therefore maintains that the Appellant's failure to seek leave to appeal out of time renders the appeal incurably defective. In light of the failure to comply with the prescribed statutory timelines, the Respondent submits that the court lacks jurisdiction to entertain the appeal and must consequently down its tools, relying on **Owners of the Motor Vessel Lillian "S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**. The Respondent emphasizes that compliance with statutory timelines is not a mere procedural technicality but a jurisdictional prerequisite. In support of this position,

reliance is placed on **Brothers Global Ltd t/a Snack Attack Restaurant v Musungu [2024] KEELRC 2709 (KLR)** and **Juma v Pinkertons Kenya Ltd [2025] KEELRC 2161 (KLR)** citing **Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)**, both of which held that an appeal filed out of time without leave could not be cured by any law or procedure and was a nullity. Consequently, The Respondent urges the court to uphold the Preliminary Objection with costs.

Disposition

12. The objection taken is founded on the law and is therefore proper to take as it may dispose of the appeal *in limine*. The Appellant moved this Court by way of an appeal against a Ruling by the Learned Trial Magistrate in **Homa Bay CMELRC No. E012 of 2024** between the parties now pending before the **Hon. J. Orwa Principal Magistrate**. The Appellant concedes the appeal was filed late and without leave as evidenced by the application dated 23rd January 2026 which was filed under a certificate of urgency seeking

extension of time within which to file the appeal and an order that the memorandum of appeal dated 9th December 2025 be deemed as properly filed.

13. As regards the merits of an appeal filed by the Appellant herein without leave of Court being sought first, the Supreme Court of Kenya dealt with a similar situation in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others** (*supra*). The Supreme Court held as follows:

“What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out

of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court."

[Emphasis supplied]

14. In my considered view, the leave now sought by the Appellant after the preliminary objection leads to the inevitable conclusion that the Respondent's Preliminary objection is merited. The Respondent has submitted that this Honourable Court is NOT properly clothed with jurisdiction to handle the instant matter and it should down its tools per the test for consideration of preliminary objections as set in the case of **Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd** (*supra*) and the question of

jurisdiction per the **Owners of the Motor Vessel Lillian “S” v Caltex Oil (Kenya) Ltd** (*supra*). Without being clothed with jurisdiction, any action of a court, amounts to nothing.

15. The Appellant here disregarded the matter of computation of time and instead filed an ‘appeal’ out of time. There is no appeal before me *strictu sensu* and as held in the case of **Salat v Independent Electoral and Boundaries Commission & 7 others** (*supra*) one needs to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the I cannot do. To file an appeal out of time and seek the Court to extend time is both presumptive and inappropriate. There is no appeal that can be filed out of time without leave of the Court. Such a filling renders the document so filed a nullity and of no legal consequence. The foregoing is ample to indicate the motion before me is one devoid of merit and

the preliminary objection succeeds to the extent the appeal is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Kisumu this 9th day of March

2026

**Nzioki wa Makau, MCI Arb.
JUDGE**