

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

Before Hon. Lady Justice Monica Mbarũ)

APPEAL NO. E108 OF 2025

EVANS AMBEGE KIVAZEO..... APPELLANT

VERSUS

ALUMBA CONSTRUCTION MATERIALS LIMITED.....RESPONDENT

RULING

The Appellant filed the application dated 24 February 2026, under the provisions of Articles 50 and 159 of the constitution, Order 12 Rule 7 and 51 of the Civil Procedure Rules and sections 1, 3 and 4 of the Civil Procedure Act, and Rule 18 of the Employment and Labour Relations Court (Procedure) Rules and seeking orders that the orders issued on 30 September 2025 be set aside and the appeal be reinstated to hearing on merit.

The application is supported by the Affidavit of the Appellant, who avers that he filed the appeal upon judgment of the trial court delivered on 8 May 2025 in Mombasa CMELRC No. E449 of 2024 on 9 June 2025. Upon the trial court judgment, he applied for typed proceedings, and the registry only replied on 16 September 2025. He only got the certified proceedings on 25 January 2026 after the appeal had been dismissed.

The Appellant avers that it was not his fault that the court registry failed to supply him with the records in time. Under Rule 18 of the Court Rules, a party is allowed to seek a time extension within which to file an appeal.

While the Appellant was awaiting written and certified proceedings, the matter was mentioned on 30 September 2025, and the court dismissed the appeal on the ground that the appeal had abated. Immediately the proceedings were issued, the Appellant filed this appeal without delay. It is in the interests of justice that the application be allowed.

In reply, the Respondent filed the Replying Affidavit of Shabbir K. Kassamali, who avers that Rule 15(2) of the Court Rules is mandatory, requiring that an appeal be filed within 30 days and the Record of Appeal within 60 days from the date the impugned judgment was issued. The trial court delivered judgment on 8 May 2025. As at 30 September 2025, when the appeal was dismissed, 5 months had elapsed, and there was no record of an appeal having been filed.

Kassamali avers that an abated appeal cannot be revived by filing a record of appeal after the fact. The application herein was filed on 24 February 2026, almost 10 months after the trial court judgment was delivered. No steps had been taken to have the tied proceedings before the appeal based. There are no justifiable grounds to warrant the orders.

Both parties filed written submissions. These are analysed. The sole issue for determination is whether the dismissed appeal should be reinstated for a hearing

on the merits.

Determination

The Appellant has invoked Rule 18 of the Court Rules to seek an order dismissing the appeal, having abated and set it aside, and that the appeal be reinstated for hearing on the merits. Before invoking Rule 18 of the Court Rules, an Appellant is guided by Rules 12 and 15 of the Court Rules.

Under Rule 12, an appeal should be filed within 30 days from the date the trial court delivered judgment.

Where, for one reason or another, the Record of Appeal is not filed together with the Memorandum of Appeal, under rule 15 of the Court Rules, a party is allowed up to 60 days to file the same. The 60-day period runs from the date the trial court delivers its judgment.

Rule 12(2) of the Court Rules is couched in mandatory terms:

(2) Where the record of appeal is not filed together with the memorandum of appeal, the Appellant shall file the record within sixty days from the date of delivery of the judgment, ruling, decision, or order, decree or award appealed against.

However, a party that is caught up under Rule 12 and 15(2) of the Court Rules and has not filed the Record of Appeal in time may invoke Rule 18 of the Court Rules.

18. The Court may, if circumstances justify, extend the time prescribed for the filing of an appeal or any document relating to an appeal .

These rules are meant to assist parties in seeking justice before the court.

In this case, the appeal subject to this appeal was delivered on 8 May 2025.

There was no Record of Appeal filed. None has been attached to the applicant's Supporting Affidavit save for certified copies of proceedings.

The 60 days within which to file the Record of Appeal lapsed on 29 July 2025, upon a generous tabulation of time.

When the matter came up in court on 30 September 2025, the appeal had abated.

In **Vyatu Limited & another v Public Trustee, Nyanza Province [2003] eKLR**, the court, when dealing with an application seeking an order to revive an abated appeal, held that the Rules have no provision for the revival of an abated appeal. The court held:

“...there is no provision in the Court of Appeal Rules which authorizes any party to an appeal to make an application for revival of an abated appeal. Similarly, there is no provision in the Court of Appeal Rules which gives this court jurisdiction to order the revival of an abated appeal. In the case of suits, order XXIII rule (2) of the Civil Procedure Rules gives a plaintiff or his legal representative a right to apply for a

revival of an abated suit and also the power to the court to revive an abated suit on terms as to costs as the court may think fit. There is no corresponding right given to an Appellant in the Court of Appeal.”

Similar provisions would apply before this court. The rationale is that once the trial court delivers a judgment, the clock starts running. Upon the lapse of time to file an appeal or Record of Appeal, a vigilant party should address and apply under Rule 12, 15 or 18 of the Court Rules. Once these provisions are overtaken by time, upon a dismissal of an appeal through abatement, they cannot be revised through whatever craft.

The Appellant, save to urge the court that the typed proceedings were not issued until after the court had dismissed the appeal, there is nothing else to demonstrate what steps were taken to urge the appeal within the timelines given. In **Pauline Wambui Ngari v John Kairu & another [2009] eKLR**, in addressing an application seeking to reinstate an appeal that had abated, the court held that:

“No application could be made thereafter to revive it... That is the current state of our rules. Concerns have been raised, however, about the possible injustice inflicted by the rule, and I am aware that in response to those concerns, the Rules Committee has made proposals, hopefully due for gazetting shortly, for the provision of rules similar to the Civil Procedure Rules, for the revival of an abated appeal or

application. Until the rules are amended, the only order I can issue, and which I do, is to dismiss the motion dated 20th March, 2009.”

Similarly, the time to file the Record of Appeal has since lapsed. There was no effort to invoke Rule 18 of the Court Rules before the appeal was dismissed through abatement.

Accordingly, the application date 24 February 2026 is without merit and is hereby dismissed. Costs to the Respondent.

Delivered in open court at Nairobi, this 30th day of April 2026

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Catherine and Omar

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