

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: OMONDI, JA (IN

CHAMBERS)) CIVIL APPLICATION

NO. E166 OF 2025 BETWEEN

**KENNETH ODHIAMBO T/A
JENKS AUCTIONEERS.....APPLICANT**

AND

**PAUL ODHIAMBO RAMOGI.....1ST RESPONDENT
GREAT LAKES UNIVERSITY KISUMU.....2ND
RESPONDENT**

*(An application seeking leave to appeal out of time from the
Ruling of the Employment and Labour Relations Court at
Kisumu (Nzioki wa Makau, J) dated the 18th February, 2025*

in

Cause No. 2 of 2022)

RULING

1. A ruling was delivered on 18th February, 2025 allowing an application by the 1st respondent to have the applicant surrender all the fees recovered at the sale of the Isuzu Pick Up, to the 1st respondent, to cover the decretal sum including the auctioneer's fees. As a result of the ruling the applicant paid a sum of Kshs.360,000/= to the 1st respondent via a Garnishee order absolute issued on 26th

November, 2025. The

applicant is aggrieved by the ruling of 18th February, 2025, saying that he complied with all provisions of the Auctioneers Act in the attachment and Sale of the Isuzu Pick Up registration, No. KBJ 277 belonging to the 2nd respondent.

2. As a consequence of the ruling, the applicant has never been paid the auctioneer's costs as all the proceeds of the sale were remitted to the 1st respondent. The applicant laments that unless the court grants the orders sought, he will permanently be locked out from reversing the decision of the Superior Court despite having not been paid for the services he rendered as an auctioneer. This is what has prompted the applicant to seek an order of leave to appeal the ruling out of time through the Notice of Motion dated 3rd December 2025.
3. In opposing the application, the 1st respondent by a replying affidavit dated 22nd January 2026, denies that the said ruling related to his application, to have the applicant surrender to him all the proceeds of sale of the 2nd respondent's Pick Up registration No. KBJ 277W including the auctioneer's (applicant) fees; that the correct position is that the said ruling related to the 2nd respondent's

application dated 1st October 2024, which successfully set aside the second execution

proceedings against the 2nd respondent conducted by the applicant on the 1st respondent's behalf. That in the said ruling, the learned Judge, ***suo moto***, ordered the applicant to surrender to the 1st respondent all the proceeds recovered at the sale of the said Pick Up. Further, upon application for review of the said order of 18th February 2025, the learned Judge clarified on 19th June 2025, that the applicant should refund Kshs.340,000 to the 1st respondent and as a consequence, the 1st respondent recovered Kshs.360,000 from the applicant's National Bank account through garnishee proceedings.

4. In a further affidavit dated 22nd January 2026, the applicant points out that the ruling delivered on 18th day of February, 2025 was dependent on the garnishee proceedings whereupon orders issued on the 26th November, 2025. It is the applicant's submissions that the two being inseparable in law and fact, it was impossible to file a competent appeal before the related application was heard and determined, as doing so would have been premature and procedurally unsound.
5. Drawing from the principles governing extension of time as set out in **Leo Sila Mutiso vs. Rose Hellen Wangari**

Mwangi

[1999] 2 EA 231, the applicant reiterates that the two rulings were delivered in this matter on the 18th day of February, 2025 and the other on 26th November, 2025; and this application was filed on 3rd December, 2025; and that in the circumstances, the present application has been filed without undue and/or unreasonable delay. He urges the court to find that the delay in filing the appeal was occasioned by enforcement through garnishee proceedings, as the two being inseparable in law and fact, rendered it impossible to file a competent appeal before the related application was heard and determined.

6. Is the delay herein, reasonable and is it sufficiently explained?
7. The applicant submits that he has a good appeal with high chances of success and that the said appeal touches on denial of crucial points of law, violation constitutional rights and unless the same is certified for hearing, the intended appeal would be rendered nugatory. That since in any appeal, the appellant only needs to show he has an arguable appeal, then draft Memorandum of Appeal demonstrates that the appeal is strong and arguable and this right should not ordinarily be taken away.

8. There is no dispute that the appeal was not filed within time as required; under Rule 77 of the Court of Appeal Rules requires an intended appellant to lodge the Notice of Appeal, before or within fourteen (14) days of the decision, then within 7 days of lodging the notice of appeal, serve copies thereof on all persons directly affected by the appeal- this did not happen; and the applicant seeks to salvage the situation courtesy of rule 4 of the Court of Appeal Rules provides as follows:

The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

9. Evidently, under Rule 4, this Court has unfettered discretion to extend time for any step intended to be done within the period stipulated by the rules. This was aptly set out in

Paul Wanjohi Mathane vs. Duncan Gichare Mathenge

[2013] eKLR this Court held thus:

“The discretion under Rule 4 is unfettered, but it has to be exercised judiciously, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in

previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of

prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”

10. There is no maximum or minimum period of delay set out under the law. However, the reason or reasons for the delay must be reasonable and plausible. For instance, in **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR**, this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

11. The applicant has also pointed out that he has an arguable appeal, although part of his submissions almost relates to applications under Rule 5(2)(b) of this Court’s rules, rather than an application under Rule.
12. The respondent on the other hand has dwelt on the merits of the intended appeal; and argues in contemplation of an application being made under Rule 5(2)(b), which arguments obviously falls outside the purview of Rule 4 applications.

13. On the issue as to whether or not the intended appeal has no chance of success, this Court is conscious of the fact that it is not the role of a single judge to determine the merits or otherwise of the appeal. This Court has held in the case of **Athuman Nasura Juma vs. Afwa Mohammed Ramadhan [2016] eKLR:**

“...this court has to be careful to ensure that the intended Appeal has merit or not is not an issue to be determined with finality by a single Judge”.

14. I bear in mind the afore-going principles whilst determining this application. In this case, the contested decision was made on was delivered on 18th February 2025; due to issues of procedural decorum, on 19th June 2025, the learned Judge clarified the sum of money that the applicant was to avail to the 1st respondent, then followed the garnishee orders which were made on 26th November 2025; and the instant application was filed on 3rd December 2023. Undoubtedly the notice of appeal should be lodged within 14 days of the delivery of the decision which it seeks to appeal against and served within 7(seven) days after lodging the same.

15. In the present application, the applicant has given the

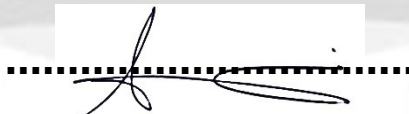
reason for the delay in lodging the appeal in time, having
been caught

up in a catch 22 situation as one ruling needed the outcome of the other, to make legal sense in the pursuit of the appeal. I hold the view that the period of delay is not inordinate, the reason given is plausible; and no prejudice is occasioned to the respondent as he will have his day in court on appeal.

16. The application is merited and is allowed. The applicant is granted extension of time to lodge and serve the notice of appeal. The same shall be filed and served within fourteen (14) days of today's date. There shall be no orders as to costs.

Dated and delivered at Kisumu this 28th day of April, 2026.

H. A. OMONDI



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JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed

DEPUTY REGISTRAR