



**Grain Industries Limited v Ali (Civil Appeal (Application)
E050 of 2024) [2025] KECA 932 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 932 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E050 OF 2024
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
MAY 23, 2025**

BETWEEN

GRAIN INDUSTRIES LIMITED APPLICANT

AND

ISMAIL AHMED ALI RESPONDENT

(Being a reference from this Court's decision in an application for extension of time to file a fresh Notice and Record of Appeal against the Judgment of the Employment and Labour Relations Court at Mombasa (Ongaya, J.) dated 13th May 2020)

RULING

1. This is a reference to the full Court by the Respondent, Ismail Ahmed Ali from a ruling of a single judge (Lessit, JA.) dated 22nd November 2024, brought under rule 55(1) (b) of the Court of Appeal Rules pursuant to a letter dated 29th November 2024 where the Respondent seeks to set aside the single judge's ruling in respect of the Motion dated 7th May 2024.
2. The grounds of the Reference as indicated in the letter are that, on 7th May 2024, the Applicant filed a Certificate of Urgency without a Notice of Motion and a partial affidavit that was allocated Civil Application No. E050 of 2024; that, on 28th May 2024, the Applicant filed another Certificate of Urgency dated 7th May 2024, together with a Notice of Motion and a supporting affidavit, which the Applicant did not disclose to the Respondent nor to the Court, when the parties appeared for the hearing; and that, the impugned second application filed on 28th May 2024 was filed without leave or directions of the Court. It was the Respondent's contention that the second application ought not to have been considered by the learned single Judge since new matters can only be introduced through a supplementary affidavit pursuant to leave of the Court.
3. Secondly, on the merits of the application, it was asserted that the single Judge misdirected herself when she overlooked the fact that the Applicant had never filed a Notice of Appeal against the judgment



- delivered on 13th May 2020; that the Applicant's annexed Notice of Appeal specifies that it is against a ruling of 13th May 2020, and not the Judgment; that, had the learned judge taken note of this anomaly, she would have required the Applicant to explain the failure to file and serve a Notice of Appeal against the Judgment of the Employment and Labour Relations Court.
4. Third, the Respondent complained that the single Judge accepted the applicant's explanation that its advocate did not know that he was required to serve the letter requesting for proceedings within 7 days, and to file a record within 60 days and serve it within 7 days of filing; and that, in addition, the Judge disregarded the fact that the advocate failed to depone an affidavit admitting to the mistake, and failed to appreciate that a mistake by an advocate is not a *carte blanche* for excusing a party.
 5. Lastly, regarding whether the appeal was arguable, the Respondent contended that the motion and its supporting affidavit did not specify the grounds of appeal; that, it was a misdirection on the part of the learned Judge to rely on the Applicant's submissions to conclude that the appeal was arguable; and that, it is trite law that submissions are not evidence, and the Applicant should have set out the grounds of appeal in the motion to enable the Court discern whether or not they were arguable.
 6. As a brief background to the reference, the Respondent filed a claim against the Applicant on 29th January, 2020. It is not in dispute that, by way of a letter of employment dated 20th November, 2016 the Applicant employed the Respondent as its Regional Sales Manager. The employment commenced on 1st January, 2017 for a term of 5 years where the Respondent earned a salary of Kshs. 150,000.00 per month.
 7. The Respondent's case was that the Applicant unlawfully and unfairly terminated the contract of employment on 20th August, 2019 without offering any genuine reasons. It was further stated that the Applicant did not follow any procedure in terminating the contract, with the result that the termination was unlawful, unfair and malicious. The Respondent prayed for judgment against the Applicant for: special damages of Kshs. 3,225,000; interest at court rates from the date of filing the suit; Certificate of Service; and costs.
 8. The Applicant filed the statement of response to the claim on 11th June, 2020 through Balala & Abed Advocates. It admitted employing the Respondent, and claimed to have dismissed him on account of loss of trust and confidence; that the Respondent was accorded a fair hearing; that the process of termination of the employment contract was in accordance with the provisions of the *Employment Act* 2007; but that the Respondent opted not to participate in the termination procedures. They prayed that the statement of claim be dismissed with costs.
 9. Upon considering the claim, the trial Judge delivered its Judgment dated 13th May 2022 and allowed the Respondent's claim and ordered t the Applicant to pay to the Respondent Kshs. 2,808,871.00 (less PAYE) by 1st July, 2022 together with interest and costs, and to deliver a Certificate of Service to the Respondent.
 10. Aggrieved, the Applicant filed a Notice of Appeal against the Judgment, which was lodged on 27th May, 2022 and an appeal to this Court in Mombasa Civil Appeal No. E 043 of 2023.
 11. Thereafter, by way of a Notice of Motion dated 29th July 2023, the Respondent sought orders to strike out the Memorandum and Record of Appeal in Mombasa Civil Appeal No. E 043 of 2023 for the reason that the judgment in the Employment and Labour Relations Court (ELRC) case was delivered on 13th May, 2022, and that the Notice of Appeal against the Judgment was lodged on 27th May, 2022, but was served on the Respondent out of time on 9th June 2022.



12. It was further submitted that, even though the Applicant purported to apply for copies of the judgment and certified proceedings in a letter dated 26th May, 2022, the letter was neither copied nor served on the Respondent or his advocate; that, in the circumstances, the Certificate of Delay dated 8th March, 2023 obtained by the Applicant indicating that the proceedings were prepared from 26th May, 2022 to 2nd March, 2023 which period could to be excluded from computation of time within which to file the Memorandum and Record of appeal, was of no use to the Applicant; that, on 30th June, 2023, the Applicant served the Respondent with the Record of Appeal stamped as lodged in Court on 21st March 2023; that the Memorandum and Record of appeal ought to have been served by 28th March 2023, but were served 92 days out of time.
13. The Respondent claimed that the Memorandum and Record of Appeal on 21st March, 2023 should have been filed within 60 days from the date of the Notice of appeal but that, since there was an 8 months' delay in filing them, and the Applicant had not taken any steps to regularize their filing, the Memorandum and Record of Appeal, should be struck out.
14. The Applicant's reply and submissions to the Motion were not available on the record before us for consideration.
15. This Court (P Nyamweya, K I Laibuta & GV Odunga, JJ.A.) upon considering the application in a Ruling dated 26th April 2024, held:

“In conclusion, we find that the memorandum of appeal and record of appeal in Mombasa Civil Appeal No. E043 of 2023 is fatally defective. Accordingly, the notice of motion dated July 29, 2023 is hereby allowed and Mombasa Civil Appeal No. E043 of 2023 - Grain Industries Limited v Ismail Ahmed Ali is hereby struck out with costs to the applicant.”
16. After the Memorandum and Record of Appeal were struck out, the Applicant filed a Notice of Motion dated 7th May 2024 seeking extension of time for the Applicant to file and serve a fresh Memorandum and Record of Appeal.
17. The application was heard and determined by a single Judge w,ho, in a ruling dated 22nd November 2024, allowed the application thereby extending time for filing of the Memorandum and Record of Appeal. It is this ruling on which the reference now before us is premised.
18. Both the Applicant and the Respondent filed written submissions. In highlighting the Applicant's written submissions, learned counsel for the Applicant Mr. Kioko submitted that, in arriving at the ruling, the learned single Judge took into account irrelevant factors; that, firstly, on 8th May 2024, the Respondent did not file a Notice of Motion as the Certificate of Urgency dated 7th May 2024, and that the supporting affidavit that was filed was incompetent.
19. It was submitted that on 13th May 2024, the Applicant was directed to file and serve the application on the Respondent, whereupon an incompetent affidavit was filed on 20th May 2024; that, on 28th May 2024, and without leave of the court, the Respondent filed a similar Notice of Motion together with an affidavit in support dated 7th May 2024.
20. It was counsel's submission that, by the time of the hearing before the learned single Judge, the Notice of Motion filed on 28th May 2024 had not been filed and, therefore, no substantive application for extension of time to file the Memorandum and Record of Appeal was before the single Judge; that, therefore, the ruling of the learned single Judge ought not to have taken into account the belatedly filed application to extend time for the Applicant to file and serve the Memorandum and Record of Appeal.



21. Submitting on behalf of the Applicant, learned counsel Mr. Masila stated that the issue of the alleged incompetent motion was not raised in the submissions; that the Notice of Motion filed by the Applicant was brought to the attention of the Court and that, therefore, it was not a matter that could be raised at this juncture; that what was before the single Judge was an application for extension of time to file a Memorandum and Record of Appeal where the single Judge accepted the mistake of counsel, and concluded that it should not be visited on the litigant; that further, no prejudice would be occasioned to the Respondent were the appeal to proceed to determination.
22. We have considered the record and the submissions. What is before us is a reference from the decision of a single Judge where the Respondent is aggrieved by the decision to extend time to file the Memorandum and Record of Appeal out of time. The Respondent's grievance is that the learned Judge failed to appreciate that the motion was incompetent and that, as a result, there was nothing upon which the Court could rely to extend time for filing and, further, that the Judge was wrong to accept that the mistake of counsel ought not to be visited on the client.
23. In the case of Kenya Cannery Limited vs Titus Muiruri Doge, Civil Application No. Nai. 119 of 1996 held that:

“A reference to the full court is not an appeal although it is in the nature of one and in exercising the discretion under rule 4, the single Judge was exercising the power on behalf of the full court and his discretion would not therefore be easily upset except on sound principles and these are that the single Judge took into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account; that he misapprehended or not properly appreciated some point of law or fact applicable to that issue; or that the decision, looked at in relation to the available evidence and the relevant law is plainly wrong...A breach of any or all of such principles would entitle the full court to interfere and the applicant must satisfy the Court that it ought to do so.”
24. So as to contextualise the motion before us, we take to mind that the Judgment in respect of this application was rendered on 7th May 2022. A Notice of Appeal was filed but not served upon the Respondent, and neither was a copy of the letter bespeaking the request for proceedings. On account of the missteps, the Respondent filed the Notice of Motion dated 29th July 2023 seeking to strike out the Memorandum and Record of Appeal which were struck out by this Court on 26th April 2024.
25. Subsequent thereto, the Applicant filed a Notice of Motion dated 7th May 2024 seeking time to be extended to file and serve a fresh Memorandum and Record of Appeal. This being the position, the length of delay would require to be computed afresh, and the Applicant would have to explain the delay in filing the Memorandum and Record of Appeal.
26. According to the Applicant, its counsel explained that, after filing the Notice of Appeal and the letter requesting for proceedings, he was unaware that he was required to serve the letters bespeaking copies of the request for proceedings on the Respondent or his counsel; that, furthermore, at the time, he was focused on filing a motion for stay of execution. The Applicant's complaint was that the mistake of its advocate should not be visited on the client. In finding the Applicant's explanation to be satisfactory, the learned single Judge had this to say:

“...The issue is

whether the mistake should be visited on his client the supplicant (sic).



It is my view that the mistake of counsel should not be visited on the applicant as this would be unfair and unjust”.

27. When dealing with an alleged mistake of advocate, this Court in the case of *Itute Ingu vs Isumael Wakavi Mwendwa* [1994] eKLR held:

“Since the amendment to this Court’s rule 4, the discretion of the Court under that rule is wholly unfettered and I agree with the applicants that a mistake by counsel, particularly where such a mistake is bona fide, can entitle an applicant to the exercise of the court’s discretion in his favour. But before doing so, the Court must, of necessity, examine the nature or quality of the mistake or mistakes.”

28. A consideration of the motion and affidavit in support that was before the single Judge clearly shows that an explanation for the delay attributed to the Applicant’s counsel was provided. In the exercise of her discretion, the learned Judge was satisfied with the explanation and accepted it for the reasons canvassed before her. However, in impugning the learned Judge’s exercise of discretion in the reference before us, the Respondent asserted that the learned Judge failed to appreciate that the Applicant’s counsel did not swear an affidavit owning up to the error. Needless to say, our consideration of the record does not disclose that this issue was canvassed before the single Judge. As such, we find that it cannot be advanced as a ground on which to impugn the Judge’s exercise of discretion at this point in time.
29. In addition, it is also not lost on us that, soon after the Memorandum and Record of Appeal were struck out, the Applicant embarked with haste and without delay to file the motion seeking orders to extend time, which in our view is denotive of its enthusiasm to pursue the appeal. Accordingly, having found no basis on which to interfere with the learned Judge’s exercise of discretion, we find that the Judge properly extended the time for filing of the Applicant’s Memorandum and Record of Appeal.
30. Turning to the complaint that the learned Judge misdirected herself when she overlooked the fact that the Applicant filed a Notice of Appeal against a ruling instead of the judgment delivered on 13th May 2020. Again, a review of the record does not reveal that this issue was raised at any time in earlier proceedings. Parties are bound by their pleadings and, therefore, the issue cannot now be raised before us.
31. As concerns the Respondent’s grievances that the Applicant filed an incompetent and defective motion, and amended the motion without leave of the Court, we find these allegations set out in the letter dated 29th November 2024 that prompted this reference, and in the Respondent’s submissions to be unsubstantiated. We say this because nothing in the record before the learned single Judge disclosed deficiencies in the Applicant’s application, and neither does the record before us disclose the deficiencies complained of. We therefore find the claim that the motion was incompetent to be unfounded. Similarly, we consider the complaint that there were no grounds of appeal set out in the Applicant’s motion to be equally unsubstantiated and unwarranted.
32. Accordingly, we find that the Respondent’s reference as set out in the letter dated 29th November 2024 against the ruling of the single Judge (Lesiit, JA.) of 22nd November 2024, to be lacking in merit. It is hereby dismissed with the result that the Applicant’s Memorandum and Record of Appeal are deemed as properly filed. Costs in the appeal.

It is so Ordered.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY, 2025.



A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

