



**Marianne Centre Foundation v Mutoro (Appeal E171 of 2024)  
[2025] KEELRC 91 (KLR) (22 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 91 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E171 OF 2024  
JW KELI, J  
JANUARY 22, 2025**

**BETWEEN**

**MARIANNE CENTRE FOUNDATION ..... APPLICANT**

**AND**

**ROSE ASHIONO MUTORO ..... RESPONDENT**

**RULING**

1. The applicant filed two applications before the court.
2. The Application dated 24<sup>th</sup> June 2024 sought the following Orders-
  1. That this Application be certified urgent and heard exparte on priority basis.
  2. That the appellants be allowed to file their notice of appeal out of time.
  3. That the already filed notice of appeal and annexed hereto be deemed as having been properly filed Notice of appeal be treated as the Appellants' Notice of appeal and that the same be deemed as having been duly filed and served.
  4. That the costs of this application be costs in the cause.
3. Grounds of the application
  - a. That the Appellants learned from their advocates on record M. N. Ndiritu & Co. Advocates of the outcome of the ruling on the 24<sup>th</sup> May 2024.
  - b. That on 26<sup>th</sup> May 2024 they convened a meeting whereby they decided to appeal against the ruling of the Lower court.



- c. That on 28<sup>th</sup> May 2024 they informed their advocates on record M. N. Ndiritu of the intention to file an appeal but the advocate was indisposed and also had a sick child who needed urgent medical care.
4. The application was supported by the annexed Affidavit of Mary Ndiritu Advocate and such other or further grounds as may be adduced at the hearing hereof.

## **2<sup>nd</sup> Application**

5. The other Application was dated 21<sup>st</sup> June 2024 seeking the following substantive orders:-
  - a. That the Honorable Court be pleased to stay execution pending the hearing and determination of the intended appeal.
  - b. That the Honorable Court be pleased to grant the defendant/applicant leave to appeal out of time against the ruling of the Honorable Principal Magistrate Becky Cheloti Mulema delivered on 24<sup>th</sup> May 2024 in Milimani Chief Magistrate Commercial Court Case No. MCELRC No. E355 OF 2020 that resulted from exparte judgment delivered on the 5<sup>th</sup> May 2023.
  - c. That costs of the application be provided for.
6. The application was based on the grounds on the face of the application and the supporting affidavit of Bernard Thairu sworn on the 21<sup>st</sup> June 2024. He stated that they had instructed their advocate to file an appeal, but the advocate was late in filing by two days due to sickness. That the trial court dismissed their application to set aside the exparte judgment the subject of the intended appeal. That the exparte judgment deprived them of the right to hearing. They had reasons for non-attendance to court.

## **Response**

7. The 2 applications were opposed by the respondent vide her replying affidavit dated 9<sup>th</sup> July 2024. The respondent contended that the applicant had not demonstrated an arguable appeal, the appeal from the trial court did not require filing of notice of appeal, the application was meant to delay enjoyment of fruits of her judgment and the application was tainted with inordinate delay.
8. The applicant filed a further supporting affidavit of Bernard Thairu dated 16<sup>th</sup> October 2024 in reply to the response. He stated that the applicant had filed draft memorandum of appeal. That Order 43 rule 1 of the Civil Procedure Rules provides for notice of appeal from the magistrate court. The applicant is seeking an opportunity to be heard and justice ought to be done in disregard to technicalities. The respondent stated that the exparte judgment deprived them of the right to be heard. The applicant is a school for disabled children. An execution would instill trauma on the children which cannot be compensated by way of damages.

## **Decision**

9. The applications were canvassed by way of written submissions. Both parties filed.

## **Issues for determination**

10. The court did not get why the applicant filed two applications. The application of 21<sup>st</sup> June 2024 covered the issue of stay of execution and extension of time to file appeal. The court finds that the application was more comprehensive. Of course this was shoddy pleadings. The court is however is obliged to focus on substantive justice under Article 159 of *the Constitution* and labored to render justice despite the shoddy pleadings. The issues for determination were:-



Whether the court should extend time for filing of appeal

Whether to grant order of stay of execution

Whether the court should extend time for filing of appeal

11. The ruling of the Trial Magistrate Court on the application to set aside the ex parte judgment was delivered on 24<sup>th</sup> May 2024. The application seeking to extend time to appeal was dated 21<sup>st</sup> June 2024 and filed on an even date. Appeals to the court are within 30 days. The applicant states they were late by 2 days. The delay was explained on the basis of the advocate having been sick. The Court found the delay was not inordinate and was explained. Rule 18 of the Employment and Labour Relations Court (Procedure) Rules (2024) provides for an extension of time to file an appeal as follows:-“ 18. The Court may, if circumstances justify, extend the time prescribed for the filing of an appeal or any document relating to an appeal.”
12. The principles for extension of time for filing appeals were settled by the Supreme Court Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR where it upheld its earlier decision in Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR) as follows:-“29] As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:

... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied].” Applying the foregoing decision of the Supreme Court I find the applicant has laid the basis for an extension of time to file appeal and the court grants the prayer.



### **Whether the Order of stay of execution was merited.**

13. The applicant was aggrieved with the ruling of the Trial Magistrate Court refusing to set aside the *ex parte* judgment. The application was brought without inordinate delay. The ruling was delivered on the 24<sup>th</sup> of May 2024 and the application dated 21<sup>st</sup> of June 2024 filed on even date. The court finds no inordinate delay in making the application. No security has been offered. The issue of having not been granted an opportunity to be heard is a triable issue.
14. The Employment and Labour Relations Court (Procedure) Rules (2024) on stay of execution in the event of appeal states:- ‘21. (1) Where an application for stay of execution pending appeal has been lodged, the applicant shall, in the supporting affidavit, declare whether a similar application has been filed in any other court.  
  
(2) An application for stay of execution pending appeal shall be filed in the appeal file.’ Since the Rules are silent on the conditions for granting stay then the lacuna is addressed by Order 42 Rule 6 (2) of the Civil Procedure Rules to wit:- ‘(2) No order for stay of execution shall be made under subrule (1) unless—
  - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.’
15. The court noted the decisions relied on by the parties. The court finds that the law is settled on the conditions for grant of stay of execution as stated by the Court of Appeal in *Butt -vs Rent Restriction Tribunal* (1982) KLR 417 which gave guidance on how a Court should exercise discretion in an application for stay of execution. The Court stated: -
  - “ 1. the power of the Court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle is granting or reusing a stay is: If there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge’s discretion. (sic) (trial Court judgement).
  3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
  4. The Court in exercising its powers under order XLI rule 4 (2) (b) of the civil procedure Rules can order security upon application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse”.
16. The Respondent is a school for children living with disabilities. Neither of the parties annexed the *Ex parte* judgment or stated the decretal amount. As stated earlier the court was dealing with shoddy pleadings. The court exercised its judicial discretion and gave a stay on condition that the memorandum of appeal is filed within 21 days.



17. In the upshot the application dated 24<sup>th</sup> June 2024 is deemed compromised in this ruling on the application dated 21<sup>st</sup> June 2024 which is allowed as follows:-
- a. The Court issues an Order of stay execution of the judgment dated 5<sup>th</sup> May 2023 in Milimani Chief Magistrate Commercial Court Case No. MCELRC No. E355 OF 2020 pending the hearing and determination of the intended appeal.
  - b. The applicant is granted leave of court to file an appeal out of time against the ruling of the Honorable Principal Magistrate Becky Cheloti Mulema delivered on 24<sup>th</sup> May 2024 in Milimani Chief Magistrate Commercial Court Case No. MCELRC No. E355 OF 2020 that resulted from exparte judgment delivered on the 5<sup>th</sup> May 2023.
  - c. The two orders (a and b) above are conditional to the memorandum of appeal being filed in court within 21 days.
18. Mention on 18<sup>th</sup> February 2025 to confirm compliance and for further directions.
19. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22<sup>ND</sup> DAY OF JANUARY, 2025.**

**JEMIMAH KELL,  
JUDGE.**

**IN THE PRESENCE OF:**

Court Assistant: Otieno

Applicant : - Ms. Nderitu

Respondent: Jumba

