



Landmark Holdings Limited v Mutisya (Employment and Labour Relations Appeal E252 of 2024) [2025] KEELRC 19 (KLR) (14 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 19 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E252 OF 2024**

**JW KELI, J
JANUARY 14, 2025**

BETWEEN
LANDMARK HOLDINGS LIMITED APPELLANT
AND
ALEX KIIO MUTISYA RESPONDENT

RULING

1. The applicant being aggrieved with the judgment and decree of the Chief Magistrate's Court in Nairobi delivered by the Hon. A.N. Ogonda (PM) on the 26th day of July 2024 in MC. ELRC EI542 of 2019 filed application by way of Notice of Motion dated 30th August 2024 and brought Under Sections IA, IB, 3A and 79G of the Civil Procedure Act; Order 42 and Order 51 of Civil Procedure Rules seeking the following Orders:-
 1. That the present Application be certified urgent and be heard ex-parte in the first instance and thereafter set for inter-partes hearing on a priority basis.
 2. That this Honourable Court do enlarge time for the Applicant/Appellant to file the Appeal out of time.
 3. That the Memorandum of Appeal dated 28th August, 2024 be deemed to be properly on record once the same has been filed.
 4. That this Honourable Court be pleased to issue an order for the stay of the execution of the Judgment dated 26th July, 2024 and Decree dated 27th August, 2024 & all consequential orders in MC ELRC/1542/2019: Alex Kiiio Mutisya v Landmark Holdings Limited pending the hearing and determination of this Application inter partes.
 5. That this Honourable Court be pleased to issue an order for the stay of the execution of the Judgment dated 26th July, 2024 and Decree dated 27th August, 2024 & all consequential



orders in MC ELRC/1542/2019: Alex Kiio Mutisya v Landmark Holdings Limited pending the hearing and determination of the Appeal.

6. That this Honourable Court be pleased to make an order as to costs.
 7. That this Honourable Court be pleased to make any such or further order as it may deem necessary in the interest of justice.
2. Grounds of the application
- a. On 28th June, 2024, the suit was fixed for delivery of judgment before the Magistrate's Court (Hon. A.N. Ogonda). However, Hon. A.N. Ogonda was not sitting and we were informed that the judgement will be delivered on notice.
 - b. On 27th August 2024, we made a follow up on the Judiciary e-filing portal when it came to our knowledge that judgment was published on the Judiciary e-filing portal.
 - c. The Applicant is aggrieved with the decision of the whole judgement of the trial Magistrate and is desirous of proffering an appeal against the said decision.
 - d. The Honourable trial Magistrate on his own motion granted a 30 day stay of execution and the same lapsed on 26th August, 2024.
 - e. That there was an inadvertent error by the Court not to issue a notice on delivery of the judgment as scheduled on the 26th July, 2024.
 - f. The time in which the Appellant/Applicant was to institute its appeal by filing its Memorandum of Appeal lapsed on 9th August, 2024.
 - g. Consequently, vide a letter dated 28th August, 2024 the Applicant, through his advocates on record, wrote to the Court requesting the certified copies of the judgment and the typed proceedings in this matter to enable him proffer an appeal against the said judgment.
 - h. The Applicant has an arguable Appeal and the same is annexed in the affidavit in support of this Application.
 - i. If this Application is not allowed as prayed, the Applicant stands to suffer substantial loss if the execution of the Judgment is not stayed as there is no certainty that the Respondent is in a position to reimburse the Appellant of any loss it may incur if the orders sought are not granted and its appeal is successful.
 - j. Additionally, there is a real danger of execution against the Applicant by the Respondent if the execution is not stayed, rendering the entire intended appeal nugatory and an academic exercise.
 - k. It is in the interest of justice that execution of the Judgment is stayed pending the hearing and determination of the appeal.
 - l. This Honourable Court has the power to certify this application urgent and grant the orders sought herein.
 - m. This Application is made timeously without inordinate delay.
3. The application was supported by the annexed affidavit sworn by Stephen Mwangi Kamau on the 5th September 2024 on the same grounds.
4. There was no response to the application.



Decision

5. The application was canvassed by way of written submissions. Both parties complied. The court having perused the application and the written submissions by the parties was of the considered opinion that the issues for determination in the ruling were as follows:-
- a. Whether to grant leave by extension of time for the applicant to file appeal
 - b. Whether to grant stay of execution of the judgment and decree of the Chief Magistrate's Court in Nairobi delivered by the Hon. A.N. Ogonda (P.M) on the 26th day of July 2024 in MC ELRC EI542 of 2019 pending the hearing and determination of the appeal.

Whether to grant leave by extension of time for the applicant to file appeal

6. Rule 12 *ELRC (Procedure) Rules* 2024 provides time for filing appeal to the court as follows:-

- “12. Where a written law provides for an appeal to the Court, an appellant shall file
- (1) a memorandum of appeal with the Court within the time specified under that written law.
 - (2) Where an appeal is from a magistrate's court or where no period of appeal is specified in the written law referred to in sub-rule (1), the appeal shall be filed within thirty days from the date the decision is delivered.”

7. The judgment of the Trial Magistrate Court was delivered on 26th July 2024 . According to Rule 12(2) the appeal ought to have been filed within 30 days. No appeal was filed. The instant application was dated 30th August 2024. The court found there was no inordinate delay in making the application. The applicant filed the memorandum of appeal dated 28th August 2024 which it seeks the court to validate by extension of time and deem it as duly filed. Rule 18 of the *Court(Procedure) Rules* (2024) provides for extension of time to file 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.”
8. The principles for extension of time for filing appeals were settled by the Supreme Court *Fahim Yasin Twaba 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].”

9. This court was satisfied with the basis laid by the Applicant for the prayer for the extension of time to file appeal. The court further found there was no inordinate delay in filing the application. That there is a memorandum of appeal raising arguable issues for determination. The prayer for extension of time is allowed and further the filed memorandum of appeal is deemed as duly filed.

Whether to grant stay of execution of the judgment and decree of the Chief Magistrate’s Court in Nairobi delivered by the Hon. A.N. Ogonda (P.M) on the 26th day of July 2024 in MC ELRC EI542 of 2019 pending the hearing and determination of the appeal.

10. The [ELRC \(Procedure\) 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.”

11. The court noted the decisions relied 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”.
12. The court was focused on ensuring that the intended appeal is not rendered nugatory and on compliance with the conditions under Order 42 Rule 6 (2) of the Civil Procedure Rules and as enunciated in the Butt decision (supra). The court finds that there was no inordinate delay in filing the application. The decretal amount was Kshs.835,380 plus interest and costs (SMK-1 was judgment and the decree) The applicant was silent on the security of performance of the decree in the event the appeal is unsuccessful. The Court finds that the condition of security is a key condition for grant of stay of execution as held in the Butt case.
13. Consequently, the application is allowed as follows:-
- a. The Court grants leave to the Applicant to file appeal out of time by issuance of an Order enlarging the time for filing of the appeal and further deems the Memorandum of Appeal dated 28th August 2024 as duly filed.
 - b. The Court hereby issues an Order of stay of execution of the said Judgment and decree of the Chief Magistrate’s Court in Nairobi delivered by the Hon. A.N. Ogonda (PM) on the 26th day of July 2024 in MC ELRC EI542 of 2019 pending the hearing and determination of the Appeal on condition the decretal amount of Kshs.835,380 is deposited in interest-earning joint account within 30 days to be opened in the names of the advocates for the parties and in default execution may proceed.
 - c. That the costs of this Application to the Respondent.
14. Mention on the 17th February 2025 to confirm compliance and issue further directions in the appeal.
15. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF JANUARY , 2025.

JEMIMAH KELI,

JUDGE.

In the presence of:

Court Assistant: Caleb

Appellant/ Applicant : -Dachi

Respondent: Kemumo h/b Namada

