



**Singh v Awa (Employment and Labour Relations Appeal
E041 of 2024) [2025] KEELRC 26 (KLR) (14 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 26 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E041 OF 2024**

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

BETWEEN

GURDEV KENTH SINGH APPLICANT

AND

BARAKO WARIO AWA RESPONDENT

RULING

Representation

Coram:

C/A Otieno

Legal Representation

For Applicant - Kimamo Kuria advocates

For Respondent - Khalwale & Co. Advocates

1. The Applicant vide Notice of Motion application dated 27th February 2024 brought under Section 12 of The *Employment And Labour Relations Court Act*, Rule 8 of The Employment And Labour Relations Court (Procedure) Rules, Sections 1A,1B,3A, *Civil Procedure Act*,2010, Section 79 G of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules 2010, The Inherent Powers of the Court And all other enabling provisions of the law sought for the following Orders: -
 - a. Spent
 - b. That this Honourable Court be pleased to grant the Appellant/Applicant leave to lodge an Appeal out of time against the Judgement of Honourable H.M Nyaga, Chief Magistrate, delivered at the Milimani Commercial Courts on 2nd December 2022.



- c. That upon grant of leave to appeal out of time, the Memorandum of Appeal lodged herein be deemed as duly and regularly filed.
- d. That Pending the hearing and determination of this Application inter-partes, there be a stay of execution of the Judgement of Honourable H.M Nyaga delivered on 2nd December 2022.
- e. That in the event Prayer No 2 is granted, pending the hearing and determination of the Applicant's Appeal, there be a stay of execution of the Judgement of Honourable H.M Nyaga delivered on 2nd December 2022.
- f. That this Honourable Court be pleased to issue any further or other Orders it deems mete and just in the circumstances.
- g. That the costs of and incidental to this Application be costs in the intended Appeal.

Grounds of the application

2. That on 2nd December 2022, Honourable Nyaga delivered Judgement in this matter dismissing the Claimant's entire claim.
3. That notwithstanding that his entire claim was dismissed, the Claimant was awarded an un-prayed for amount of Kshs. 40,128/- on the grounds that in the year 2006, the standard monthly minimum wages for watchmen were said to be gazetted at Kshs 8,136/= per month while the Claimant was being paid Kshs 7,300/= per month. Honourable Nyaga therefore awarded the Claimant underpayment for 4 years in the sum of Kshs 40,128/= along with costs to the Claimant.
4. That the Appellant having perused the Regulation of Wages Order (Legal Notice No. 38) which was in force in 2006 (when the Claimant's employment was terminated), it emerged that the applicable monthly minimum wage for watchmen as provided by the said Order was Kshs.5,796/- and not Kshs 8,136/=. The Claimant was therefore not being underpaid, and Honourable Nyaga had made a clear and demonstrable error with respect to what the minimum wage was.
5. That pursuant thereto, the Appellant filed an Application dated 9th February 2023 seeking to review the judgement of Honourable Nyaga on the grounds that there was a clear error on the face of the record with respect to what the applicable minimum wage was.
6. That in a Ruling delivered by Honourable Micheni, the learned Magistrate declined to review Honourable Nyaga's judgment on the grounds that inter-alia, the matter was more suited for appeal than for review.
7. That in the circumstances, the Applicant filed Civil Appeal No HCCOMMA 622 of 2023.
8. That upon the said appeal being filed, the same proceeded before Honourable Asenath Ongeri who granted a stay of execution pending appeal.
9. That in compliance with the said Order, the Appellant paid into Court the entire decretal sum.
10. That Honourable Ongeri also referred the parties to mediation.
11. That the parties having been unable to reach any agreement in the said Mediation session, the same failed and the parties returned to Court for hearing of the appeal.
12. That before the Appeal could be heard, it emerged that the Civil division of the High Court did not have jurisdiction to hear the matter since the same involved disputes on employment.



13. That in the circumstances, the Applicant filed Miscellaneous Application No E015 of 2024 seeking Orders to transfer the said Appeal from the Civil division to the Employment and Labour Relations Court.
14. That the said Miscellaneous Civil Application No E015 of 2024 was scheduled to proceed for hearing on 4th April 2024. That before the said the said Miscellaneous Civil Application No E015 of 2024 could be heard, Civil Appeal No HCCOMMA 622 of 2023 was struck out on 30th January 2024 leading the Applicant to file an Application to set aside the Order striking out the said Appeal to enable the Transfer Application to be heard and determined without the subject matter of the Application being extinguished.
15. That in the circumstances, the Applicant filed an Application dated 1st February 2024 praying for Orders that Justice Asenath Ongeri set aside the Order striking out the Appeal to enable the transfer application to be heard and determined.
16. That when the matter came up before Justice Ongeri on 14th February she declined to set aside the order striking out the appeal as her view was that an appeal filed without jurisdiction could not be transferred.
17. That in the circumstances and given that HCCOMMA 622 of 2023 was struck out without ever proceeding for hearing or determination, the same is not res judicata and can be filed in the ELRC.
18. That the foregoing notwithstanding, it is still necessary for this Honourable Court to give the Applicant leave to appeal out of time before the Appellant can have his appeal admitted out of time.
19. That in the circumstances, the Appellant had filed HCCOMM Appeal 622 of 2023 in good time and the same having been filed in the civil division instead of the ELRC was an inadvertent error on the part of Counsel for which the client should not be unduly punished for.
20. That the Appellant has an arguable appeal and humbly prays for this Honourable Court to extend time to allow him to file his Memorandum of Appeal out of time.
21. That the Applicant has fled this Application without any undue delay.
22. That the Claimant/Respondent is in the process of taxing his costs in the lower Court indicating that they are primed to commence execution, the timeous hearing of this Application is therefore extremely urgent.
23. That the Applicant had already provided security by depositing the entire decretal amount in Court when HCCOMM Appeal 622 of 2023 was filed the same conditions of stay should be accorded him to enable him to prosecute this appeal.
24. That the Claimant's financial situation is extremely uncertain and the Applicant is apprehensive that if this Application is not certified urgent and the sought stay granted, the Respondent will execute on the lower Court Judgement and will not be able to refund the said sum in the event the Appeal is successful.
25. The application was supported by the affidavit of the Applicant sworn on the 27th February 2024 where he produced as exhibit GSK1 a bundle of the documents in support of the grounds of the application.

Response

26. The application was opposed by the Respondent vide his affidavit in reply sworn on the 8th April 2024. The Court noted that Respondent referred to an application dated 8th January 2024 while the instant



application before the court was dated 27th February 2024. Nevertheless, the court found the response relevant to the application. The respondent stated that the decision sought to be appealed against was delivered on the 02.12.2022 where he was awarded Kshs. 40,128/-. That the application was an abuse of court process as the applicant had previously filed the dispute before the High Court in HCCOMMA E622 of 2023 and HCCOMMA E015 of 2023. That the matter in HCCOMMA E015 of 2023 filed in February 2024 was still pending before the court and had a date of 14.05.2024. That the High Court had referred the matter to mediation where the parties discussed and agreed on a settlement of Kshs. 100,000 but the applicant's advocate called his advocate soon thereafter and stated the payment could not be paid due to objection by the family members of the applicant. The matter was filed in 2008 and had been in court for 16 years and there was a delay of justice. That the instant application was meant to delay justice and the enjoyment of fruits of his judgment. That the applicant had not demonstrated he had an arguable appeal.

Decision

27. The application was canvassed by way of written submissions. Both parties filed. The court having perused the pleadings 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 extend the time for filing the appeal and whether to deem the filed memorandum of appeal as duly filed.
 - b. Whether to grant order of stay of execution.

Whether to extend the time for filing the appeal and whether to deem the filed memorandum of appeal as duly filed.

28. The parties were relatively in agreement with the history of the case and the applicant annexed the relevant documents as GSK -1. The application arose from the judgment of the Trial Magistrate Court, Hon H.M. Nyaga, dated 2nd December 2022(pages 1-3 of annexure GSK -1). In the Judgement, the trial court found no proof of the special damages sought but stated there was a case of underpayment and awarded Kshs. 40,128/- for the underpayment. The appellant being aggrieved by the decision sought for review where in the trial court held it was a case of appeal. He however appealed to the High Court instead of this court. The High Court Judge referred parties to mediation. There was no agreement. The High Court then struck out the appeal for lack of jurisdiction. The Applicant, out of time following the detour to the High Court, filed the instant application seeking extension of time to file a fresh appeal.
29. Rule 12 Employment and Labour Relations Court (Procedure) Rules 2024 provides for time to file 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.”
30. Rule 18 of the Court 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.”



31. The principles for extension of time for filing appeal were settled by the Supreme Court in 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].”

32. The court was satisfied with the basis laid by the Applicant to justify the extension of time to file the appeal out of time. The court among others found the delay was explained and that the appeal raised triable issues related to the reliefs granted by the trial court. Applying the principles set out by the Supreme Court in Nick Salat case on extension of time the Court holds that it is in the interest of justice to extend the time to file the appeal. Any prejudice occasioned to the Respondent can be compensated by costs. The court exercises its discretion in favour of an extension of time for the applicant to file an appeal and deems the memorandum of appeal dated 27th February 2024 as duly filed.

Whether to grant an order of stay of execution.

33. The ELRC (Procedure) Rules 2024 on stay of execution in case of appeal provides:- “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 Court rules are silent on the conditions for granting stay of execution in the case of appeal,



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.”

34. The Respondent in opposition to the application for stay of execution stated that no prejudice would be suffered by the Applicant in the event the stay is not granted. The Respondent submitted that the applicant had not demonstrated the likelihood of suffering substantial loss if the stay of execution was denied. The Respondent relied on the decision In Kenya Shell Ltd V Kibiru & another (1986)e KLR Where the court stated: “in consideration an application for a stay, the court doing so must address its collective mind to the question of whether to refuse it would, as Mr Kwach, urges, render the appeal nugatory. This is shown by the following passage from the judgment of Cotton LJ in Wilson v Church (No 2) (1879) 12 Ch D 454 at p 458, where he said;-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.” The respondent submitted that in the said decision, the court observed that there is a parallel right of a successful litigant not to be deprived of his fruits of a judgment in his favour without just cause.

35. The Respondent contended in written submissions that the appeal would not be rendered nugatory if the stay was refused as the case involved a money decree of Kshs. 40 128 /- capable of being repaid. The court on perusal of the affidavit in reply did not find such assertion. It is trite that Submissions ate not pleadings and cannot bind a litigant.

36. In Butt -vs Rent Restriction Tribunal (1982) KLR 417 the Court of Appeal gave guidance on how a Court should exercise discretion in an application for stay of execution and held that:-

- “ 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”. The Court upholds the decision to apply in the application. Having found there was an arguable appeal and the delay was justified, in order not to render the appeal nugatory in the event it is successful,



the Court finds it is in interest of justice to grant the order of stay of execution pending appeal.

37. In the upshot the court finds the application merited and grants the following Orders:-
- a. The applicant is granted extension of time to file the appeal out of time and the memorandum of appeal dated 27th February 2024 is deemed as duly filed.
 - b. The court grants Order of stay of execution of the judgment of the Trial Magistrate Court, Hon H.M Nyaga (CM), delivered on the 2nd December 2022 on condition that the entire decretal sum is deposited in a joint interest earning account within 30 days to be opened in the names of the advocates for the parties and in default execution may proceed.
 - c. Costs of the application to the respondent in the cause.
38. The applicant to file the record of appeal within 30 days. Mention on the 17th February 2025 to confirm compliance and for further directions.
39. 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: Otieno

Appellant : -Mmbongori

Respondent: Khalwale

