



**Muchemi v Roy Transmotors Limited (Employment and Labour Relations
Appeal E147 of 2024) [2025] KEELRC 650 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 650 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E147 OF 2024**

JW KELI, J

FEBRUARY 28, 2025

BETWEEN

SAMUEL GITONGA MUCHEMI APPELLANT

AND

ROY TRANSMOTORS LIMITED RESPONDENT

RULING

1. The Appellant/Applicant brought an Application by way of Notice of Motion dated 18th June, 2024 under Article 48 & 159 of the Constitution of Kenya, Section 1A and 3A, 79G of the Civil Procedure Act, Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law seeking for the following Orders:-
 - A. Time be extended for the Appellant to file an Appeal;
 - B. The Memorandum of Appeal dated 16th May, 2024 filed on 20th May, 2024 be deemed as duly and properly filed; and
 - C. The cost of this Application abide the outcome of the Appeal.
2. The application was based on the grounds on the face of the application and was further supported by the affidavit of Samuel Gitonga Muchemi sworn on 18th June, 2024 who averred that the trial court judgment was delivered without the knowledge and presence of the Applicant for reason that his Counsel had failed to diarize the Judgment date. He further averred that the applicant's counsel on 18th December, 2023 wrote a letter to Court requesting for a copy of the Judgment which process of obtaining the same took inordinately long and as a result, the Applicant was locked out of filing the Appeal within the required time. The Applicant further avers that he obtained the copy of Judgment on 6th March, 2024 after much waiting. He stated that he is aggrieved by the said decision and is desirous of Appealing against the whole decision however, the time of filing the Appeal has since lapsed hence



this instant Application. Further, the Applicant stated that the delay of the Court in giving them a copy of the Judgement should not be visited upon him and should be allowed to Appeal. Further, he averred that the Appeal is strong and has high chances of success.

Notice of Preliminary Objection

3. The Respondent subsequently filed a Notice of Preliminary Objection dated 14th August, 2024 against the Appellant's Appeal premised on the following grounds:
 - a. This Honourable Court has no jurisdiction to entertain this Appeal and related motions for want of leave to appeal out of time.
 - b. This Appeal is time barred contrary to Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016 as read together with Section 79G of the Civil Procedure Rules, 2010 and is filed without leave of Court to extend time being granted.

Response

4. The application was opposed by the Respondent vide its Replying Affidavit sworn by Tehseen Omar on the 19th August, 2024. The Respondent stated that both parties were fully aware that the trial court matter was coming up for Judgment on the 18th December, 2023 before Hon. L.B Koech. The Respondent further averred that the Applicant's annexure "SGM-1" being a letter requesting for a copy of judgment was sent and received by court on 8th January, 2024 and a follow up letter of the same was made on 27th February, 2024 more than fifty one days later. The Respondent further averred that the applicant took no action even in filing a Notice of Appeal within the required timelines. Further, it is averred that the Applicant filed a memorandum of Appeal dated 16th May, 2024 before filing the instant application irregularly despite clear provisions of section 79G of the *Civil Procedure Act*. The Respondent averred that the communication by the court directing the matter be filed in the Appeal docket was made on 2nd April, 2024 and the instant application was lodged on 18th June, 2024 seventy eight (78) days late without any explanation as no plausible reasons have been given by the Applicant for the delay. The Respondent contends that the delay in filing the Appeal and this instant Application is inordinate and was occasioned by the Applicant and not by the Court. It is further contended that the Application is defective and the Appeal has been filed without leave; therefore the Application should be dismissed with costs.

Decision

5. The application was canvassed by way of written submissions with each party complying. The court having perused the pleadings and the written submissions of the parties was of the considered opinion that the issue for determination in the ruling was whether the notice of preliminary objection was merited and if not whether application was merited.
6. The preliminary objection grounds were:-
 - i. This Honourable Court has no jurisdiction to entertain this Appeal and related motions for want of leave to appeal out of time.
 - ii. This Appeal is time barred contrary to Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016 as read together with Section 79G of the Civil Procedure Rules, 2010 and is filed without leave of Court to extend time being granted.
7. The court is obliged to dispense with the question of jurisdiction once raised in on priority basis (Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd(1989)e KLR)



Respondent's submissions on the preliminary objection

8. The parameters of consideration of a preliminary objection are now well settled. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated: "A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration." 4. At page 701 Sir Charles Newbold, P added as follows; "A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion..."
9. The preliminary objection challenging the jurisdiction of this Honourable Court having been raised in response to the application and "appeal", the same has to be addressed in limine. The crux of the preliminary objection is two pronged. First, that the Court has no jurisdiction to entertain this appeal and related motions for want of leave to appeal out of time. Secondly, the Appeal is time barred contrary to Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016 as read together with Section 79G of the Civil Procedure Rules, 2010 and is filed without leave of Court to extend time being granted.
10. Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides inter alia that; (1) Where any written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified for that appeal under the written law. (2) Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.
11. Section 79G of the *Civil Procedure Act* provides for time for filing appeals from subordinate courts as 30 days excluding such period which the lower court may certify as having been necessary for the preparation and delivery to the appellant a copy of the decree or order; provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal out of time.
12. The judgment appealed herein from was delivered on 18th December, 2023. The memorandum of appeal was filed on 20th May, 2024. Therefore, the appellant lodged his appeal four (4) months late excluding 30 days from 18th December, 2023. 15. It is evident that 30 days prescribed by the law expired around 17th February, 2024. The Appellant did not obtain an order for extension of time before filing the appeal and the record thereof. It is therefore, correct that this appeal was filed out of time and as such, it is incompetent. It cannot be gainsaid that leave, whether through an application that is determined first or extension of the time by the consent of the parties without application to court as provided for under Order 51 Rule 7 of the Rules, must be granted first before a document is filed. Thus, of the status of documents filed by the Appellant herein without leave of Court being sought first, the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR held as follows: "What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that



time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.” From the foregoing discussion, it is our considered view that the Respondent’s Preliminary objection is merited and thus it ought to be entertained. The Respondent emphatically submitted that this Honourable Court is NOT properly clothed with jurisdiction to handle the instant matter and it should down its tools for the test for consideration of preliminary objections as set in law has been adequately met.

The applicant’s submissions on the preliminary objection

13. On whether the Preliminary Objection is merited, the Respondent argued that the Court does not have jurisdiction to entertain the present application as it is based on an Appeal which is time barred. Rule 18 of the Employment and Labour Relations (Procedure) Rules provides that the Court may, if circumstances justify extend the time prescribed for filing an appeal or any document relating to an appeal. Based on the above provision, it is clear that the court has power and hence jurisdiction to entertain an application for extending time.
14. The limb of the Preliminary Objection to the effect that the Application and Appeal are irregular for being filed before leave was granted is a misconceived. This is moreso because first it requires the furnishing of evidence to answer it and second because the procedure used in filing the Appeal was what was expressly prescribed by the court itself. As indicated in the Application, the Applicant first filed ELRC Miscellaneous Cause E110 of 2024 which the court itself rejected and asked that the Applicant files a substantive Appeal and an application for leave in it. The record is there and the Applicant cannot be faulted for following the court’s own direction. In any event, courts have adopted a 2-way approach in dealing with matters seeking leave to Appeal. Some courts allow the filing of the subject Appeal with a simultaneous application seeking leave while others prefer seeking leave first. Both routes are okay as long as justice is achieved. The preliminary objection is thus misconceived in this regard. In this regard, we rely on *Gerald M’limbine vs. Joseph Kangangi* [2009] e KLR where the court stated that- “My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out the stipulated period. To do so would actually be an abuse of the court’s process under Section 79B”. Similarly, *Aburili, J. in Martha Wambui vs. Irene Wanjiru Mwangi & another* [2015] eKLR held, “In my view, the use of the term “admitted” connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time ...”
15. Rule 8 of the Employment and Labour Relations Court (Procedure) Rules 2016 states:- “8. (1) Where any written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified for that appeal under the written law.

(2) Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.” The rules have since the filing of the preliminary objection been amended to provide for an extension of time 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.” (2024 Rules)



16. The court finds that its discretion to decide whether or not to extend time to file appeal is unfettered under Procedure Rule 18 of the ELRC 2024. The only issue the court has to satisfy itself is met by the applicant is whether the circumstance justify the application. The court held that it had jurisdiction to extend the time under rule 18 of the ELRC (Procedure) Rules 2024. The preliminary objection is dismissed with costs in the cause.

Whether the application was merited.

17. On whether the application merited the exercise of the judicial discretion of the Court of enlargement of time to file appeal under Rule 18 of the Court Rules 2024 to wit: “18. The Court may, if circumstances justify, extend the time prescribed for the filing of an appeal or any document relating to an appeal.”
18. The applicant stated the reasons for the delay in his supporting affidavit dated 18th June 2024 and as summarised in the submissions thus :- “It is not in dispute that the Judgment was delivered on 18th December 2023 in the absence of the Applicant. It is not that the Applicant’s Advocate was unaware of the date. They logged in virtually but for unknown reasons they were not admitted in the session. It was barely a week before Christmas and the offices closed and the outcome of the judgment could not be established. Time does not run from 21st December – 13th January hence that period should be excluded from the computation of time. The Advocates for the Applicant requested for a copy of the judgment on 8th January 2024 and later followed it up with a letter on 27th February 2024 expressing their frustration in obtaining the judgment. The copy of the judgment was received on 6th March 2024 nearly 2 months after the delivery of the judgment. It was upon perusing the judgment that the Appellant made the decision to appeal the trial court decision. The Appellant filed a Miscellaneous Application on 18th March 2024 seeking for extension of time to file an appeal. However, the Court registry communicated that the Application should be filed in the appeal docket thereby leading to a further delay in filing the present application and the appeal. As per the registry’s instructions, the Applicant withdrew the miscellaneous application and filed the present application in the appeals docket. It is therefore apparent that the Applicant did not go into slumber. The delay in filing the present application was not deliberate and was occasioned by the Court despite the Appellant taking necessary steps to obtain the Judgment and file the application within the stipulated timelines. There is sufficient justification for the delay and as such the prayer for extension of time to file an appeal should be granted. As a matter of fact, the Applicant to demonstrate his eagerness to have the Appeal filed proceeded to file the entire Record of Appeal dated 8th August 2024. There is therefore nothing else impending the hearing and the Respondent will not be prejudiced in a way that may not be compensated by an award of thrown away costs if need be.”
19. The Respondent on other hand submitted as follows:- “A keen perusal of the Appellant’s Application reveals that evidently, there was no action to secure the right of appeal by even at least, filing a Notice of Appeal of the judgment of the Honourable Court within the required timelines so that their intention to appeal would be clear. The Appellant avers in their application that a letter was written to the Court requesting for a copy of the judgement sent and received on 8 th January,2024. After writing the letter received by the Honourable Court on 8th January,2024, the Applicant does not seem to have done anything else for more than fifty-one (51) days thereafter, until 28th February,2024 when they made further follow up on the matter through writing another letter dated 27th February,2024. In an interesting twist of events, the Appellant filed the Memorandum of Appeal dated 16th May,2024 on 20th May,2024 irregularly before filing the instant application despite the clear provisions of Section 79G of the *Civil Procedure Act*. Be that as it may, it is evident that the alleged communication from the Court directing that the matter be filed in the Appeal docket was made on 2 nd April,2024 and the



Instant Application was lodged and filed more than Seventy-Eight (78 days) later, on 18th June, 2024. The Applicant failed to explain to the Honourable Court why they took again, over Seventy Eight (78) days to file the instant application after the direction from the Honourable Court as claimed. Undoubtedly, from the material presented before the Honourable Court, it is crystal clear that the delay in filing the appeal and the Instant application was occasioned by the Applicant himself and not the Honourable Court's registry as he claims. Nonetheless, the delay of Seventy-Eight (78) days is inordinate and inexcusable as no plausible reasons have been given by the Applicant for the delay. In the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following: - ".....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted." A keen perusal of the impugned Memorandum of Appeal filed out of time without leave and the judgment of the trial court and noted that the appeal does not raise pertinent issues of law. The chances of the "appeal" succeeding in the event this application is granted, are quite limited. The Appellant has not established to the satisfaction of the court the reasons for enlargement of time. The Respondent stands to suffer great prejudice should the application be allowed as prayed."

20. The Supreme Court decision cited by the respondent of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission & 7 Others* [2014] eKLR set out principles to guide the court in the extension of time as :- "The underlying principles a court should consider in exercise of such discretion should include:- a) Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-by-case basis;
 - d) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e) Whether there will be any prejudice suffered by the respondent if the extension is granted;
 - f) Whether the application has been brought without undue delay."
21. The court held that the delay in filing the application was explained by the applicant on the reasons set out above to the court's satisfaction. The exercise of jurisdiction of the court in appeal is guided to be to sustain appeals. (*Butt -vs Rent Restriction Tribunal* (1982) KLR 417). Any prejudice caused by the delay can be cured by throw-away costs as submitted by the applicant. The court exercised its judicial discretion under Rule 18 of Court (Procedure) Rules in favour of the applicant by allowing an enlargement of time to file the appeal.
22. The court then considered prayers for the Memorandum of Appeal dated 16th May, 2024 filed on 20th May, 2024 be deemed as duly and properly filed; The Respondent was opposed to this prayer relying on the decision of the Supreme Court in *Salat Case* (supra) that :- "What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only



be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

53. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.' The decision is binding on this Court and the filed memorandum of appeal and the purported record of appeal thus struck out and expunged from the court record.
23. The court is guided to temper justice with mercy. As in the Salat case the final orders of the Supreme Court were as follows:- "The purported Appeal, to wit, Petition No. 10 of 2014 is hereby struck out and expunged from the Court's record. The time limited for filing of a Petition of appeal by the applicant is hereby extended. The applicant is granted leave to file an appeal within 14 days from today's date. The applicant shall bear the respondents' costs in this application." Similarly, in conclusion the memorandum of appeal and the record of appeal are hereby struck out and expunged from the court record. The time limited under Rule 18 of ELRC Procedure Rules 2024 for the applicant to file appeal is hereby extended by 30 days from today's date within which the applicant is file a memorandum of appeal and the record.
24. The applicant shall bear the respondents' costs in this application.
25. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

appellant :- Gikonyo h/b Thuita

Respondent: absent

