



Masai Rolling Mills Limited v Kunukha & another; Masai Rolling Mills Limited (Appellant); Ongaki & another (Respondent) (Appeal E141 of 2024) [2025] KEELRC 530 (KLR) (24 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 530 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E141 OF 2024
NJ ABUODHA, J
FEBRUARY 24, 2025**

BETWEEN

MASAI ROLLING MILLS LIMITED APPELLANT

AND

JOSEPH WAFULA KUNUKHA 1ST RESPONDENT

BARFORD COMPANY LIMITED 2ND RESPONDENT

AND

MASAI ROLLING MILLS LIMITED APPELLANT

AND

SAMUEL NYAOSI ONGAKI RESPONDENT

BARFORD COMPANY LIMITED RESPONDENT

RULING

1. The Appellant filed application dated 15th May, 2024 brought under article 48,50(1), 159 of *the Constitution* of Kenya, section 12 of the *Employment and Labour Relations Court Act*, section 1A, 3A, 79G and 95 of the *Civil Procedure Act* and Order 42 (6) of the *Civil Procedure Act* seeking for Orders to extend time for filing the appeal against Kajiado CMEL case number E055 and E076 of 2021; the court be pleased to consolidate the above appeals with ELRCA/E0155/2022 Nairobi and provide timelines for filing the appeal and the court grants stay of execution pending hearing of this application and the appeal.



2. The application was supported by the Affidavit of Moses Partisau who averred that the matters in the lower court, that is CMEL E076, E055 and E009 of 2021 were consolidated and judgment in the lower court was issued on 22nd and 23rd June 2022.
3. That being dissatisfied with the Judgment they instructed their advocate to file an appeal challenging the whole of that decision and the Memorandums of Appeal filed on 13th July 2022 in Kajiado High Court instead of the Employment and Labour Relations Court.
4. That the advocate discovered the mistake and made an application seeking to transfer the matters to Employment Court and CMEL E055 of 2021 was filed in Employment Court in Nairobi now ELRCA/E155 of 2022.
5. That the Appellant filed an application for stay of execution and the parties agreed to deposit the security for cost in an interest earning account and that the delay in filing the Memorandum of Appeal was because of inadvertent mistake by the advocate.
6. That it is in the interest of Justice that the Appeals be filed and consolidated with ELRCA E155 of 2022 and that Respondents will not suffer any substantial loss as decretal sum is already deposited in an interest earning account held by the two advocates.
7. The Respondents filed their replying affidavits by Joseph Wafula Kunukha and Charles Mbaka Ongaki sworn on 26th October 2024. Joseph Wafula Kunukha averred that he fully relied on the Replying Affidavit filed and sworn by the 1st Respondent in NRB ELRCA E155 of 2022, Masai Rolling Mill Limited V Charles Mbaka Ongaki & Anor.
8. Charles Mbaka Ongaki averred that the High Court at Kajiado upheld the Notice of Preliminary Objection and found that it did not have jurisdiction to hear the Appeals as filed nor did it even have jurisdiction to transfer the Appeals as filed.
9. That after the Preliminary Objection was upheld the Appellant/Applicant has now filed the instant Application to file the dismissed Appeals out of time, the Appeals having been dismissed, they are therefore res judicata and this Honourable Court lacks jurisdiction to hear the same.
10. That even if the Court were to have jurisdiction, which it doesn't; the delay of over 13 months is so inordinate and there is not even a single valid reason why the Applicant could not have filed the Appeals in time. That there is no precedence either that a party was given leave to file an Appeal out of time, 330 days after the judgment was delivered, on the sole excuse that an Advocate did a mistake.
11. That the only ground raised for the inordinate delay is that the Applicant's Counsel made a mistake which is an unsupported excuse as a litigant has equal responsibility in showing due diligence in prosecuting the matter.
12. That it is improper for leave to file an Appeal out of time being sought in another matter as the same confuses issues and wastes the Court's time and the Court cannot consolidate an on-going Appeal with an Appeal that is yet to be filed or a non-existent Appeal.
13. That the issues in the instant Appeal are distinct and different from the issues in the non-existent Appeal; even though the three matters were consolidated in the lower Court, the judgment in the instant Appeal was delivered by a different judge.
14. The Respondents prayed that in the interest of justice that the Application is dismissed with costs and the Court do issue directions on the main Appeal.



15. The Application was dispensed of by written submissions which this court will rely fully in determining the application at hand.

Determination

16. Before the court can determine the issue of leave to file appeals out of time the Respondents have raised the issue of res judicata. Without delving much on this issue the High Court found that it did not have jurisdiction to determine the appeals and dismissed the same. This does not mean the same were fully determined to be termed as res judicata as the high court did not have jurisdiction to entertain the same. The same Appeals are properly with the court with jurisdiction and cannot be deemed as res judicata.
17. On the issue of leave to appeal out of time, this court will not delve into this issue because it is noted that three causes were consolidated at the lower court and there is a substantive appeal in this court among one of the causes which is ELRCA E155 of 2022 which is coming up for Judgment on 7th February,2025 the same date this application is coming up for ruling.
18. In effect and in serving justice, any determination in the substantive appeal will affect the alleged appeals to be filed hence the Application is superfluous and ought to be dismissed. The issues in the appeals to be filed out of time will be conclusively determined by the judgment in the Appeal ELRCA E155 of 2022.
19. The Court finds that the Application is unmerited and is hereby dismissed with no orders as to costs while ordering that the judgment of ELRCA No. E155 of 2022 to apply across the intended appeals.
20. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2025

DELIVERED VIRTUALLY THIS 24TH DAY OF FEBRUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

