



**Kibos Sugar & Allied Industries v Amuna (Miscellaneous Case
E014 of 2025) [2025] KEELRC 921 (KLR) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 921 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS CASE E014 OF 2025**

**JK GAKERI, J
MARCH 24, 2025**

BETWEEN

KIBOS SUGAR & ALLIED INDUSTRIES APPLICANT

AND

CATHERINE AKINYI AMUNA RESPONDENT

RULING

1. Before the Court for determination is the Applicant's Notice of Motion dated 6th February, 2025 seeking Orders that: -
 1. Spent.
 2. Spent.
 3. The applicant be granted leave to appeal out of time against the whole judgment dated and delivered on 22nd November, 2019 and reinstate pursuant to an Order made on 4th April, 2024.
 4. Pending the hearing and determination of the intended appeal to be filed, there be a stay of execution of the decree in Kisumu Chief Magistrate's Court ELRC Case No. 5 of 2019, Catherine Akinyi Amuna V Kibos Sugar & Allied Industries Ltd.
 5. The costs of this application abide the outcome of the intended appeal.
2. The Notice Motion is expressed under Sections 1A, 1B, 3A 79G and 95 of the *Civil Procedure Act* and Order 50 Rule 5 of the Civil Procedure Rules and is based on the grounds set out on its face and the Supporting Affidavit of Richard B. O. Onsongo Advocate sworn on 6th February, 2025.
3. The applicant avers that in Kisumu CMC ELRC No. 5 of 2019 Catherine Akinyi Amuna V Kibos Sugar & Allied Industries Ltd, the claimant claimed Kshs.404,514.58 as salary in lieu of notice, compensation for unfair termination, service pay/gratuity, rest days, underpayment, unpaid leave days



- and house allowance and pro rata leave and judgment was entered in her favour on 22nd November, 2019 as the respondent neither entered appearance nor defend the suit.
4. However, by an application dated 19th December, 2019, the respondent sought to set aside the judgment and by consent, the judgment was set aside conditional upon that-
 - a. Respondent to pay the claimant throw away costs of Kshs.10,000.00 within 30 days.
 - b. Respondent to file a defence and comply with the rules within 3 days.
 - c. Failure to comply with (a) and (b) (written as (b) and (c)) within the time frames set the ex parte judgment on record shall revert and execution to issue.
 - d. The matter be mentioned on 28th August, 2020 to confirm compliance and further directions.
 5. The applicant admits that it did not comply with the terms of the consent but paid Kshs.10,000.00 and filed the defence out of time though the defence had been prepared and was dated 1st August, 2019.
 6. That on 4th April, 2024 when the suit came up for hearing, counsel for the claimant raised the issue of non-compliance by the respondent and the court held that since the respondent had breached the terms of the consent, the judgment entered on 22nd November, 2019 was reinstated or reverted to.
 7. That the claimants appeal against the Orders of the trial court was struck out for being incompetent for having been filed out of time without leave as the judgment sought to be appealed against was delivered on 22nd November, 2019.
 8. The applicant avers that it has an arguable appeal with chances of success and seeks leave to ventilate its dissatisfaction with the findings of the lower court on reversing of the judgment delivered on 22nd November, 2019 despite late compliance.
 9. The applicant further avers that the respondent has commenced the process of execution of the decree in Kisumu CMCELRC No. 5 of 2019 and its completion will render the appeal nugatory and stands to suffer serious and substantial pecuniary loss and was ready to provide security in the form of a bank guarantee or deposit of the decretal sum.
 10. The applicant further avers that the applicant was made without undue delay.

Response

11. In her Replying Affidavit sworn on 17th February, 2025, in opposition to the Notice of Motion, the respondent deposes that the application is fatally defective, bad in law and an abuse of the court process as it was a conglomeration of lies half-truths and concealment of true facts and aimed at perpetuating endless streams of legal manoeuvres in that a similar application was made on 23rd April, 2024 vide Kisumu ELRC Appeal No. E011 of 2024 seeking similar Orders and was dismissed with costs.
12. That a Preliminary Objection filed in 22nd October, 2024 against the ELRC appeal No. E011 of 2024 was successful and the appeal was dismissed with costs and the sum of Kshs.404,515 deposited in court be released to the respondents advocate as directed by the court and the decretal sum has been satisfied save for costs and interest.
13. That the applicant had filed a notice of appeal against the Ruling of Makau J dated 22nd January, 2025, together with an application for stay.
14. The affiant further deposes that the applicant has since filed a series of similar application before the lower court and the respondent's Preliminary Objection is scheduled for hearing on 10th March, 2025



and the issues are pending before the Court of Appeal, Hon. Justice Makau and Hon. Dennis Matutu, which is an abuse of the court process.

15. That Rule 21(1) and (2) of the Employment and Labour Relations Court (Procedure) Rules 2024 bars the court from entertaining the instant application and it is both sub judice and res judicata having been determined by Hon. Justice Radido in his ruling of 28th June, 2024 and Hon. Justice Makau in the ruling dated 22nd January, 2025 and should be struck out as the only available option is to appeal the Ruling of Hon. Justice Makau as opposed to a new application.
16. The affiant deposes that the instant application was instituted in bad faith after unreasonable and inordinate delay, is an abuse of the court process and ought to be struck out together with the appeal with costs.
17. The applicant neither responded to the respondent's depositions, nor file submissions, having opted to rely on the application and Supporting Affidavit.
18. The respondent was accorded 14 days to file and serve submissions and stay orders were extended though the respondent's counsel wondered what was being stayed, perhaps in light of the respondent's deposition.

Respondent's submissions

19. The respondent's counsel provided a history of the case before the court before the subordinate court, Kisumu CMELRC No. 5 of 2019, then Kisumu ELRC Appeal No. 011 of 2024, dismissal of Application for stay of execution on 28th June, 2024, and striking out of the appeal on 22nd January, 2025 for being statute barred.
20. This was followed by release of the funds deposited as security Kshs.404,515.00
21. A Notice of Appeal was filed on 23rd January, 2025. As to whether the orders sought should issue, counsel submitted that the judgment sought to be appealed against was delivered 5 years and 4 months ago.
22. Reliance was placed on the sentiments of the court in Edward Acholla V Sogea Saton Kenya Branch & 2 Others [2014] eKLR and Samuel Mbugua Ikumbu V Barclays Bank of Kenya Ltd [2015] eKLR, on consent judgments to urge that the consent remains in force to date and any appeal ought to have been filed by 22nd August, 2020 as opposed to 3rd April, 2024 as the court did not re-write the judgment dated 22nd July, 2020.
23. Reliance was also made on the provisions of Section 12(5) of the *Employment and Labour Relations Court Act* and Rule 8(1) (2) of the Employment and Labour Relations Court (Procedure) Rules 2016 and Rule 12(1) and (2) and Rule 18 of the 2024 Rules on the filing of appeals within 30 days.
24. Sentiments of the Court in Kavuu V Badar Hardware Ltd V Mombasa ELRC Appeal No. E025 of 2023; Mohamed Shally Sese (Shah Sese) V Fulson Company Ltd [2016] KECA 253 (KLR) on the times within which appeals ought to be filed and urge that the instant application is unsustainable.
25. Reliance was also made on Utalii Transport Co. Ltd and Others V NIC Bank Ltd & Another [2014] KEHC 7255 (KLR), Benson N Zambu & Others V Jedida Onduso Akanda [2021] KECA 630 (KLR) and Mary Jonathan Katumo V Nzomo Muli [2008] KEHC 1288 (KLR) on delay to urge that the applicant had not explained the inordinate delay.
26. Counsel submitted that the filing of multiple applications and appeals on the same issue was intended to harass and delay justice or to gain an unfair advantage and amounted to abuse of court process and



there was nothing to stay and any order made in that respect would be ineffectual as held in Kenya Wildlife Service V James Mulembi [2019] eKLR and David Oloo Onyango v Attorney General [1987] eKLR.

27. Counsel urged the court to dismiss the application with costs.

Analysis and determination

28. It is common ground that on 22nd November, 2019, the trial Magistrate delivered judgment against the applicant after formal proof hearing on 26th September, 2019 following the applicant's failure to enter appearance or file a defense.
29. The trial court entered Judgment in favour of the respondent as prayed for in the statement of claim.
30. Equally, it is not disputed that by consent dated 22nd July, 2020, counsels agreed that the judgment entered on 22nd November, 2019 be set aside on condition that the respondent paid thrown away costs of Kshs.10,000.00 and complied within 30 days effective 27th July, 2020 and failure to meet the two conditions within the time frame set, the ex parte judgment would revert and execution to issue and a mention slated on 28th August, 2020 but does not appear to have taken place.
31. Puzzlingly, and for unexplained reasons, the respondent did not comply but paid the thrown away costs after the 30 days.
32. According to the applicant, when the matter came up on 24th April, 2024, more than three years later, the issue of non-compliance with the terms of the consent dated 27th July, 2020 was raised and the court held that owing to the breach of the terms of the consent to ex parte judgment reverted and an appeal filed against the trial court's orders of reversion of the ex parte judgment failed on account of incompetence for being filed out of time.
33. Strangely, the applicant's Supporting Affidavit is reticent on when the appeal was struck out and what transpired thereafter.
34. The foregoing is important as it demonstrates whether the applicant has been a diligent litigator or defender of its rights in light of the chequered history of the suit.
35. Fortunately, the respondent's Replying Affidavit is more elaborate on the factual circumstances after the striking out of the appeal, which circumstances are uncontroverted.
36. A panoramic view of the Notice of Motion, Supporting Affidavit and the Replying Affidavit shows that the application turns on delay in seeking leave to appeal out of time as well as the principles of sub judice and res judicata raised by the respondent and which the applicant by default or design wished away in light of what transpired after 28th June, 2024.
37. The principles that govern applications for extension of time to file an appeal are well settled.
38. It is trite law that the court has discretion to extend time for a party to file an appeal out of time as held in Leo Sila Mutiso V Hellen Wangari Mwangi [1999] 2EA 231.
39. Needless to emphasize, such discretion must be exercised judiciously guided by the principles established in legions of decisions.
40. In Nicholas Kiptoo Korir Salat V I.E.B.C. and 7 Others [2015] eKLR, the Supreme Court addressed the principles in sufficient detail.



41. According to the court, the relief of extension of time to file an appeal is of an equitable nature and the applicant bears the burden of proof and the outcome is dependent on the circumstances of each case.
42. In addition, the reason for delay must be explained to the satisfaction of the court and the court must equally consider if granting the extension prejudices the other party and finally, the application must be brought without undue delay.
43. See also *Mining Co. Ltd V. Archdiocese of Nairobi Registered Trustees Civil Application No. 190 of 2019* and *Fakir Mohammed V Joseph Mugambi & 2 Others [2005] eKLR*.
44. Concerning the length of the delay, the court is guided by the rendition of the Court of Appeal in *Adrew Kiplagat Chemongo V Paul Kipkorir Kibet [2015] eKLR* that:

The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for the delay is the key that unlocks the courts flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercised”.
45. Instructively in *Omar Shurie V Marian Rashe Yatar Civil Application No. 107 of 2020*, the Court of Appeal expressed itself as follows:

...However, a prolonged and inordinate delay is more likely than not to disentitle the applicant leave. Likewise, the reason or reasons for the delay must be plausible”.
46. Similarly, in *Njoroge V Kiman [2022] KECA 1188 (KLR) Mativo JA* stated as follows:

An applicant for extension of time must show good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both the above that the court will use its discretion to grant the application.
47. This discretionary power, however, is judicial in nature and must be confined to the rules of reason and justice as held in *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 others [2014] eKLR*...
48. In granting leave, the court has to balance the competing interests of the applicant with those of the respondent, a position well stated in *M/S Portreizt Maternity V James Karanga Kabia Civil Appeal No 63 of 1997*...
49. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant’s prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court’s indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default”.
50. See also *Del Monte Kenya Ltd V Patrick Njuguna Kariuki [2015] eKLR*, *National Union of Mine Workers V Council for Mineral Technology [1998] ZALAC 22*, *Sokoro Savings and Credit Co-operative Society Ltd V Mwamburi Civil application E032 of 2022 [2023] KECA 38 (KLR)*,



Muchungi Kiragu V James Muchungi Kiragu [1998] eKLR and Ngei V Kibe & Another Civil Application E359 of 2021.

51. As adverted to elsewhere in this Ruling, the applicant's Supporting Affidavit captures the events and circumstances up to the striking out of the appeal and is silent on the date the striking out took place.
52. Assuming the appeal was struck out for incompetence on 28th June, 2024, according to the respondent's Replying Affidavit, it took the applicant over seven (7) months to file the instant application as it was filed on 7th February, 2025.
53. Intriguingly, paragraph 21 of the Supporting Affidavit states that the application was made without undue delay which is a misrepresentation of facts.
54. In the court's view, it would be overstretching imagination to consider or deem 7 months acceptable delay, bearing in mind that the Supporting Affidavit is devoid of any explanation, reason justification or excuse for the delay.
55. The absence of a reasonable or any account for the 7 months delay in instituting the instant application leaves the court with no alternative but to infer that there was none.
56. Clearly, the applicant has failed, neglected or refused to provide a satisfactory or any reason for the delay in the filing of the instant application and being one of the foundational pillars of the application for leave to file an appeal out of time, the application lacks a firm foundation for its sustainability.
57. As regards arguability of the appeal, the applicant faults the trial court on the grounds that some of the claims awarded were statute barred, right to be heard, the court did not consider the fact that the Kshs.10,000.00 thrown away costs was paid, albeit late and was not refunded and the evidence did not justify the decision and orders made.
58. Bearing in mind that arguability does not necessary imply that the same will be successful, and a single arguable issue suffices, the court is satisfied that the applicant had an arguable appeal on 22nd November, 2019.
59. Notably, the judgment against which leave to appeal is being sought was delivered in November 2019 and an appeal made in 2024 was dismissed for want of leave of the court.
60. Having found that no satisfactory or any explanation was provided by the applicant for the 7 months delay, the court is satisfied that the application is bereft of merit and the issues of sub judice and res judicata do not fall for determination in this instance.
61. Flowing from the foregoing analysis, it is discernible that the applicant's Notice of Motion dated 6th February, 2025 and filed on 7th February, 2025 is for dismissal and it is accordingly dismissed with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 24TH DAY OF MARCH, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They



have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

