



**Board of Management Ngere Kagoro Secondary School v Ochieng & another
(Appeal E019 of 2024) [2025] KEELRC 811 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 811 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E019 OF 2024
NZIOKI WA MAKAU, J
MARCH 13, 2025**

BETWEEN

**BOARD OF MANAGEMENT NGERE KAGORO SECONDARY
SCHOOL APPELLANT**

AND

BIUS CLEMENT OCHIENG 1ST RESPONDENT

MOURICE CLEMENT OCHIENG 2ND RESPONDENT

RULING

1. On 27th May 2024, the Appellants filed a memorandum of appeal dated 24th May 2024 against the judgment of Hon. K Cheruiyot delivered on 1st December 2023 in Kisumu MELRC No. E235 of 2023. Alongside the appeal, they also submitted an application seeking a stay of execution pending the appeal's determination and an extension of time to file the appeal out of time. On 10th December 2024 counsel for the Appellant initially expressed an intention to withdraw the application. However, this stance later shifted towards amending the application instead. Meanwhile, the Respondents filed a Preliminary Objection dated 29th November 2024, asserting that the appeal was incompetent since it had been filed without leave of the court, thereby rendering the court devoid of jurisdiction.
2. On the same day, 10th December 2024, the Court granted the Appellant leave to file and serve an amended application, after which the Court would give directions on both the Preliminary Objection and the application.
3. However, when the matter came up again on 21st January 2025, there was no appearance on behalf of the Appellant. Consequently, the Court proceeded to take directions for the disposal of the Preliminary Objection through written submissions. The absence of the Appellant continued on 17th February 2025, when the matter was mentioned to confirm filing of submissions. As a result, the Court scheduled the ruling for 13th March 2025. Since the Appellant did not follow through with



the proposed amendment, the only matter remaining for determination is the Preliminary Objection. In support of the preliminary objection the Respondent filed further submissions dated 27th January 2025. On its part the Appellant filed submissions dated 18th February 2025.

Respondents' Submissions

4. The Respondents submit that the appeal is incompetent, as it was filed beyond the 30-day limit prescribed by Rule 12 of the Employment and Labour Relations Court Rules. They submit that the lower court delivered its judgment on 1st December 2023, yet the Memorandum of Appeal was not filed until May 2024. Furthermore, they contend that no explanation has been provided for the delay, nor did the Appellant seek an extension of time before filing the appeal. In light of these factors, the Respondents assert that the appeal was lodged out of time without any justification and should therefore be struck out.

Appellant's Submissions

5. In response to the Preliminary Objection, the Appellant submits that the delay in filing the appeal was due to the court's failure to serve the notice of delivery of judgment. It contends that posting the notice in the Bar-Bench WhatsApp forum was insufficient, as its advocate had lost her phone at the time. Furthermore, the Appellant asserts that its advocate had not yet been added to the Bar-Bench WhatsApp forum, making it impossible to receive the notice through that platform. In light of these circumstances, the Appellant urges the court to dismiss the Preliminary Objection.
6. The Court has considered the law and submissions filed in coming to this decision. The issue for determination in my considered view is the question of the competence of the appeal before me. The filing of appeals to this Court is governed by Part III of the Employment and Labour Relations Court (Procedure) Rules 2024. The law provides under Rule 12(2) thereof as follows:-

12(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. [underlined for emphasis]
7. The law uses the peremptory "shall" not the words may, could or the like. It is mandatory. Rule 18 of the Employment and Labour Relations Court (Procedure) Rules 2024 makes provision for the extension of time, for good reason. No permission to extend time was sought nor was there any attempt to seek enlargement of time to file the appeal. The preliminary objection in the appeal before me is to the effect that the appeal before this Court is incompetent for having been filed without leave. The appeal was filed on 27th May 2024 after the delivery of judgment on 1st December 2023. That was a period of close to 6 months from the date of delivery of judgment. The Counsel for the Appellant was required to exercise diligence in the matter. It is apparent that Counsel was not diligent as the decision was rendered in December 2023 and there was no follow up in the entire month of December 2023, the whole of January, February, March or April 2024. The Appellant only filed this Appeal on 27th May 2024 a period of close to 6 months after delivery of judgment. The assertion by the Appellant that the posting of the notice of judgment in the Bar-Bench WhatsApp forum was insufficient, as its Advocate had lost her phone at the time. The Appellant also asserted that its Advocate had not yet been added to the Bar-Bench WhatsApp forum, making it impossible to receive the notice through that platform. These are possible grounds the Appellant could have advanced in its quest to enlarge time or seek the indulgence of the Court to admit the Appeal out of time prior to filing the appeal. Instead, the Appellant proceeded to file the appeal and waited for the objection to arise before offering an explanation for the apparent oversight in obtaining leave to file an appeal out of time.



8. The Respondents are therefore right in their assertion that the appeal was not filed within the 30 days prescribed and no leave was sought nor enlargement of time beseeched. Having regard to the law and the positions before me, the Respondents thus succeed in their quest to have the appeal struck off for being filed outside the time lines prescribed in the law for filing an appeal to this Court. The Appeal is hereby struck off albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF MARCH 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

