



REPUBLIC OF KENYA



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Patriotic Group of Companies Ltd v Mukuloh (Employment and Labour Relations Appeal E002 of 2025) [2025] KEELRC 1635 (KLR) (30 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1635 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E002 OF 2025**

MA ONYANGO, J

MAY 30, 2025

BETWEEN

PATRIOTIC GROUP OF COMPANIES LTD APPELLANT

AND

JIMMY KALAKATE MUKULOH RESPONDENT

RULING

1. There are two applications before me. The first one is dated 27th January, 2025 and is brought under Order 42 of the [Civil Procedure Act](#), Sections 3 and 3A of the [Civil Procedure Act](#) and all enabling provisions of the law. It seeks for orders that:
 - i. Spent
 - ii. That the Applicant be granted leave to file appeal out of time and the annexed draft Memorandum of Appeal be deemed as duly filed and served upon payment of the requisite court fees.
 - iii. That this Honorable Court do issue a temporary injunction against the 2nd Respondent from taking and auctioning the Applicant's proclaimed goods as per the proclamation dated 17.01.2025 pending the hearing and determination of this application.
 - iv. That the Honourable Court stays the execution of the judgment issued on 18th October, 2023 pending the hearing and determination of this application.
 - v. That the Honourable Court stays the execution of the judgment issued on 18th October, 2023 pending the hearing and determination of this Appeal.
 - vi. That costs be provided for.



2. The application is premised on the grounds set out on the face thereof to wit; that the court has discretion to grant an extension of time for the ends of justice to be met; that the attached memorandum of Appeal rises valid issues and should therefore be accorded an opportunity to ventilate the same; that auctioneers had distressed the Appellant's goods, that the 7 days are due to lapse for removal of the Appellant's goods on 27.01.2025; that the Appellant would suffer great prejudice, harm and substantial loss if it is condemned without ever having an opportunity to be heard and that it is in the interest of justice that the application is allowed.
3. In the supporting affidavit of Jennifer Koech, the Managing Director of the Appellant sworn on 27th January, 2025, she deposes that unknown to the Appellant, service was purportedly effected upon an unknown employee at Daima Towers building who then purportedly notified the Appellants Managing Director, Mr. Chepwoy who is unknown to her as she is the Managing Director of the Respondent. That ex parte judgment was obtained on the basis of that service. That the Respondent then sent auctioneers to the Appellant's head office in Nairobi.
4. Ms. Koech deposes that the Appellant's application for stay orders was dismissed by the trial court and so was an application to review the ruling.
5. Ms. Koech deposes that the Appellant has a good defence to the claim by the Respondent, that if it is not granted the orders sought in the application the Appellant will be condemned to pay a colossal sum of Kshs. 2,000,000. That the appeal has a high chance of success.
6. The application is opposed by the Respondent who filed a replying affidavit of BETHUEL KAPERER, counsel for the Respondent in which he deposes that he was instructed by the Respondent to file Eldoret CMELRC CAUSE NO. E184 OF 2022 wherein the Respondent obtained judgment against the Appellant on 18th October, 2023 and the Appellant has failed to settle the decretal sum prompting execution; that the Appellant moved the trial court for setting aside of judgment which application was dismissed; that the application for review of the orders was also dismissed by the trial court; that the Appellant made an undertaking to pay the decretal sum by installments and issued postdated cheques for the same; that orders for stay herein were therefor obtained without disclosure of material facts; that the appeal was filed out of time without leave and the appeal is therefore incompetent.
7. Counsel Bethuel Kapere further deposes that the orders of stay of execution of this court issued on 28th January, 2025 are prejudicial to the Respondent as it was condemned unheard, that the application is an abuse of court process and ought to be struck out.
8. The second application is dated 3rd February, 2025 and is filed by the Respondent under Order 45 Rule 1 of the Civil Procedure Rules and sections 1A, 1B and 3A of the *Civil procedure Act* and Rule 45(3) of the Employment and Labour Relations Court (Procedure) Rules, 2024. The Respondent seeks orders that:
 - a. Spent
 - b. The Honourable Court be pleased to review and set aside its Orders made on 28th January, 2025 staying the judgment and decree in Eldoret CMELRC CAUSE NO. E184 OF 2022 together with all the other consequent orders thereto
 - c. Costs be in the cause.
9. In the grounds on the face of the application and the affidavit in support thereto sworn by BETHUEL KAPERER, counsel for the Respondent, it is deposed that the orders as granted by the court, though framed as temporary, were conclusive in nature and resulted in the Respondent being condemned



unheard both on the appeal and in the application owing to their final nature. That the orders were obtained through misrepresentation and non-disclosure of material fact, that the orders are premised on a null and incompetent appeal, that judgement in Eldoret CMELRC CAUSE NO. E184 OF 2022 is not entirely impugned, that the decretal sum is principally admitted and undertaking made to pay the same and the Respondent will suffer prejudice due to refusal by the Appellant to pay the decretal sum.

10. It is further the averment of the Respondent that the appeal was filed out of time, by a stranger, without leave of the court, in contravention of mandatory provisions of the Employment and Labour Relations Court (Procedure) Rules, 2024.
11. There is a 3rd application dated 17th March, 2025 by the Appellant in which it seeks extension of time within which to deposit the decretal sum with the court as ordered. The application was granted summarily based on the nature thereof, after considering the grounds and affidavit of Jennifer Koech in support thereof.
12. The applications dated 27th January and 3rd February 2025 are both opposed. There are replying affidavits in response of both applications which I have considered. The applications were disposed of together after directions to that effect and that the same be by way of written submissions. Both parties filed submissions.

Determination.

13. I have carefully considered the Applications, Supporting Affidavits, Replying Affidavits as well as the submissions of the parties. The only issue which arises for determination is whether or not this court should grant stay of execution of the Judgment delivered on 26th November 2024 in Eldoret CMEL No E038 OF 2021.
14. Stay of Execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows:

“(1). No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.”
15. In summary, under that rule the Applicant must meet the following conditions:-
 - a. Demonstrate that substantial loss may result to the applicant unless the order for stay is granted;
 - b. The application has been made without unreasonable delay



- c. Security as to the due performance of the court orders is given by the applicant.
16. In this case, there is a judgment in favour of the Respondent. There is already a proclamation against the Appellant's property. Should the orders of stay not issue, the Respondent will proceed with attachment against the Appellant. I am therefore persuaded that substantial loss has been established.
17. As to whether the Application has been filed without undue delay, judgment was entered on 18th October, 2023. The hearing was *ex parte* as the Appellant did not file defence. The Appellant filed an application for setting aside the *ex parte* judgement which was dismissed. Its application for review was also dismissed *vide* a ruling delivered on 12th July, 2024. The appeal is against the said ruling delivered on 12th July, 2024. The Memorandum of Appeal is dated 23rd January, 2025.
18. I have considered both the grounds in support of the application and the supporting affidavit and have not seen any explanation for the inordinate delay in both filing of the appeal and the application for stay of execution which is from 12th July, 2024 to 23rd January, 2025, a delay of more than 6 months. There is also delay in filing of the appeal as the Memorandum of Appeal is dated 23rd January, 2025, hence the prayer to admit it out of time.
19. Rule 12 of the Employment and Labour Relations Court (Procedure) Rules, 2024 provides for time of appeal as follows:
- 12.
- (1) Where a written law provides for an appeal to the Court, an appellant shall file 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.
20. Further, section 79G of the *Civil Procedure Act* provide as follows:
- Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of 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 in time.
21. It is clear from the wording of both rule 12 of the Employment and Labour Relations Court (Procedure) Rules, 2024 and section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018] eKLR where the court stated that an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.



22. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that: -

“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.

23. Similarly 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.”

24. As stated in the above cited decisions, extension of time and stay of execution are in the discretion of the court. Such discretion must however be exercised on valid grounds which include 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, to mention but a few. Each application must be decided on its own merits.

25. In the instant application, the Appellants chances are greatly compromised by the failure to explain the reason for delay which is a mandatory requirement under both Rule 12 of the Employment and Labour Relations Court (Procedure) Rules, 2024 and section 79G of the *Civil Procedure Act*.

26. The Appellant is further compromised by the fact that it had already undertaken to pay the decretal sum and the non-disclosure of that fact in its application.

27. With regard to the issue of security for due performance, the Applicant was directed to deposit 50% of the decretal sum in court or in a joint interest earning account in the names of counsel for the parties as a condition for the stay.



28. The requirement for explanation of delay is necessary for both an application for stay and leave to file appeal out of time. Without such explanation an applicant would not be entitled to either of the two orders. As I have stated above, the Appellant has been silent on the explanation for the delay.
29. According to the Respondent's replying affidavit, the Appellant requested and was permitted by the Respondent to liquidate the decretal sum in installments. That the Appellant proceeded to issue postdated cheques in furtherance thereof. Copies of the said cheques are attached to the replying affidavit as EXH 7(a) to 7(d) for Kshs. 300,000; Kshs. 250,000, Kshs. 250,000 and Kshs. 219,188 respectively. This was not disclosed in the application or the supporting affidavit.
30. Flowing from the above analysis and the finding that the Applicant has not satisfied the two conditions for grant of orders of stay of execution pending appeal, I find that the Applicant has not satisfied this court on the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.
31. The Appellant has further admitted that the application and Memorandum of Appeal were filed by counsel who was not properly on record. This however is not the correct position as the suit in the lower court and the appeal are separate suits and parties do not have to be represented by the same counsel or apply for change of counsel where different counsel appear for the same party in the appeal. That is why both the appellant and the Respondent in an appeal is required to file an address for service even though parties have addresses for service in the lower court proceedings.
32. As stated by the Supreme Court in the case of Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others (supra), 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.
33. Regretfully, I must decline the application for expanding time for filing appeal. And because the prayer for stay of execution is dependent on the success of the prayer for expansion of time for filing appeal, that prayer too must fail.
34. Consequently, the application dated 23rd January, 2025 is dismissed with costs to the Respondent.
35. The orders herein inevitably mean that the appeal which was filed out of time, cannot stand. It is struck out. The applicant will pay the Respondent's costs.
36. Having reached the conclusion herein above, the application filed by the Respondent is superfluous and this court need not consider the same.

DATED, SIGNED AND DELIVERED VIRTUALLY ON

THIS 30TH DAY OF MAY 2025

MAUREEN ONYANGO

JUDGE

