



St Elizabeth Academy Karen Limited t/a St Elizabeth Academy v Lumunyenyi (Employment and Labour Relations Appeal E022 of 2025) [2025] KEELRC 1500 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1500 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E022 OF 2025**

**JW KELI, J
MAY 23, 2025**

BETWEEN
**ST ELIZABETH ACADEMY KAREN LIMITED T/A ST ELIZABETH
ACADEMY INTENDED APPLICANT**
AND
PETER SHAMALA LUMUNYENYI INTENDED RESPONDENT

RULING

1. The Applicant vide Notice of Motion application dated 16th January 2025 brought under the provisions of Order 50 Rule 6 and Order 42 Rule 6 of the Civil Procedure Rules 2010 sought the following orders:-
 - a. Spent
 - b. Spent
 - c. The Honourable Court be pleased to grant leave to the Intended Appellant to file its appeal out of time against the ruling delivered on 13th December 2024.
 - d. Upon grant of prayer 3 above, the Intended Appellant be granted 14 days within which to file and serve the Record of Appeal.
 - e. The costs of this application be provided for.

Grounds of the application

2.
 - a.. On 13th October 2024, the Learned Trial Magistrate delivered a ruling dismissing the Intended Appellant's application seeking enlargement of time to comply with court orders.



- b. The Intended Appellant is dissatisfied with the said Ruling and desires to appeal against it.
 - c. The Intended Appellant was unable to file the Appeal within the prescribed 14 days due to delay in obtaining a copy of the ruling from the Court registry.
 - d. The delay in filing the appeal is not ordinate as only 30 days have lapsed since the expiry of the appeal period.
 - e. The Intended Appellant has good grounds of appeal with reasonable chances of success as shall be demonstrated during the hearing of the appeal.
 - f. If the stay is not granted, the appeal if successful would be rendered nugatory as the Applicant's school operations would be severely and irreparably disrupted through the sale of essential assets including the school bus, which is vital for daily student transportation and school operations.
 - g. The Intended Respondent will not suffer any prejudice if the orders sought are granted as the Intended Appellant is willing to deposit the entire decretal sum in court.
 - h. This application has been brought in good faith, in the interest of justice and without any undue delay.
3. The application was opposed by the Respondent through his Replying Affidavit sworn on 10th February 2024. He argued that this Court lacks jurisdiction to hear and determine the present appeal as the Intended Appellant had failed to obtain leave from the Trial Court to file the same against its order of 13th December 2024. The Respondent also stated that the Motion and Supporting Affidavit are improper and should be struck out as the annexures do not conform to the Oaths and Statutory Declaration Rules. Specifically, he stated that the Authority to Plead attached to the Supporting Affidavit bears no seal, and the other attachments are not sealed under the stamp of a Commissioner for Oaths. The Respondent stated that the Intended Appellant has come to court with unclean hands in that they are guilty of wilful non-disclosure of facts.
4. The Respondent set out the facts of the Trial Court case as follows:
- a. The Intended Appellant was the Respondent in the Trial Court case namely MCELRC No. E1237 OF 2023 – *Peter Shamala Lumunyenyi v St. Elizabeth Academy Limited*.
 - b. Following their failure to enter appearance or file a defence in the matter, the Honourable Trial Magistrate entered judgment in favour of the Respondent herein on 12th February 2024 to the tune of Kshs. 329,959 plus costs of the suit and interest.
 - c. The Intended Appellant was served with a Decree issued by the court and a Notice of Entry of Judgment.
 - d. The Intended Appellant filed a Notice of Motion dated 20th February 2024 seeking stay of execution of the judgment entered on 12th February 2024, that the same be set aside, and that the court does enlarge time for it to file its defence and witness statements.
 - e. Vide a Ruling delivered on 1st July 2024, the Trial Court allowed the Intended Appellant's application conditionally. The conditions given were that the Intended Appellant pays to the Respondent thrown away costs of Kshs. 20,000/- within 21 days of the Ruling; the Intended Appellant deposits the entire decretal sum in court as security within 21 days of the Ruling; and the Intended Appellant files their defence and documents in accordance with Order 11 within



21 days of the Ruling. In default of the above, the application would be deemed dismissed with costs.

- f. The Intended Appellant failed to meet the conditions given by the Trial Court, hence their Notice of Motion dated 20th February 2024 stood dismissed with costs.
 - g. Subsequently, the Respondent herein proceeded with execution of the judgment of the Trial Court through a garnishee application dated 11th September 2024; and issuance of warrants of attachments of 19th September 2024, which culminated in proclamation of one bus belonging to the Intended Appellant. An Objector application dated 24th August 2024 was filed. The Respondent insists that the Intended Appellant was fully aware of the aforesaid execution proceedings.
 - h. In response to the execution proceedings, the Intended Appellant filed a Notice of Motion dated 16th October 2024 seeking extension of time (60 days) to comply with the Trial Court orders issued on 1st July 2024.
 - i. The Trial Court dismissed the application vide its Ruling delivered on 13th December 2024, which was uploaded to the Case Tracking System on 13th December 2024.
5. The Respondent contradicted the Intended Appellant's averment that the delay in filing the present appeal was occasioned by their inability to obtain a copy of the Ruling of the Trial Court. He emphasized that the Ruling of the Trial Court was uploaded to the Case Tracking System on the same day that it was delivered, namely, 13th December 2024. Both parties could access the same. The Respondent complained of the perpetual misrepresentation of facts by the Intended Appellant. He urged this court to take notice of the Intended Appellant's conduct before the Trial Court and stated that they are not deserving of the orders sought. The Respondent took issue with the Notice of Appeal dated 16th January 2025 filed by the Intended Appellant for its procedural unsoundness vis a vis an appeal from the Magistrates' Court to the High Court. Finally, the Respondent stated that no reason has been advanced by the Intended Appellant as to why they did not comply with the orders of the Trial Court, and no reason for the delay has been proved.

Decision.

6. The application was canvassed by way of written submissions. Both parties complied. The court noted that whereas the applicant submitted on stay there was no such prayer sought. Submissions are not pleadings and the court cannot grant orders not sought. The issues for determination are as follows:
- a. Whether the Supporting Affidavit dated 16th January 2025 should be struck out for failure to comply with Rule 9 of the Oaths and Statutory Declarations Rules.
 - b. Whether the Court should grant leave to the Intended Appellant to file its appeal out of time against the ruling delivered on 13th December 2024.

Whether the Supporting Affidavit dated 16th January 2025 should be struck out for failure to comply with Rule 9 of the Oaths and Statutory Declarations Rules.

7. Rule 9 of the *Commissioners for Oaths (Fees on Affidavits) Rules* Legal Notice Number 374 of 1956 under the *Oaths and Statutory Declarations Act* Cap 15 of the Laws of Kenya provides that:

“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.”



8. The Respondent states that the Supporting Affidavit dated 16th January 2025 should be struck out owing to the fact that the annexures/exhibits thereto were not sealed under the seal of a Commissioner for Oaths, and relies on various authorities for this position, which I take note of.
9. It is not in dispute that the Intended Appellant filed a Supplementary Supporting Affidavit whose annexures were duly sealed under the seal of a Commissioner for Oaths, to remedy its oversight. I find and hold that the filing of a second supporting affidavit is sufficient, and decline to strike out the Intended Appellant's notice of Motion. In doing so, I gather support from the case of *Trust Bank Ltd v Amalo* (2003) 1 EA 350 where the Honourable Court emphasized the Courts' mandate to promote the ends of justice. It held:-

“As we have endeavoured to explain in a certain amount of detail, this was a matter in which the learned judge had before him the appellant's documents upon which his whole case was based, on the date he had set down the matter for hearing; save for the mere irregularity that the same had not been served on the respondent in time.

The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by Georges, C.J. (Tanzania) in the case of *Essanji and Another v. Solanki* [1968] EA at page 224.

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.”

That accords with the policy of the law as can be gleaned from Order 9(1) of the *Civil Procedure Rules* whereby a litigant has the right to appear, file its defence and be heard before any interlocutory or final judgment is entered in default against him regardless of any time limit. The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.” (Emphasis Mine) The court is further guided by the provision of section 20 of the *Employment and Labour Relations Court Act*, section 20 to wit:-

“20(1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities.”

Whether the Court should grant leave to the Intended Appellant to file its appeal out of time against the ruling delivered on 13th December 2024.

10. The Intended Appellant filed a Notice of Appeal and a draft Memorandum of Appeal both dated 16th January 2025, on 27th January 2025.
11. Under Section 79G of the *Civil Procedure Act* 2010, an appeal of the said decision should have been filed before the Court within 30 days of the decision. Section 79G aforesaid provides:-

“79G. Time for filing appeals from subordinate courts

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 to the appellant 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.”

The same timeframe is restated in the Court Rules of 2024 in rule 12(2) as follows:-

“ 12 Where an appeal is from a magistrate’s court or where no period of appeal is
(2) 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.”

12. To comply with the above set out provisions, therefore, the Intended Appellant should have filed their Memorandum of Appeal before this Court within 30 days of the subordinate court’s decision, hence by 11th January 2025. The Intended Appellant failed to comply in two ways: firstly, they filed both a Notice of Appeal and draft Memorandum of Appeal instead of a Memorandum of Appeal only; and secondly, they filed their Notice and Memorandum of Appeal dated 16th January 2025 on 27th January 2025, instead of by 11th January 2025.
13. The Intended Appellant justifies their failure to file their appeal in good time by stating that there was a delay in obtaining a copy of the Ruling dated 13th December 2024. On the other hand, the Respondent counteracts this averment by stating that a copy of the Ruling was uploaded to the Case Tracking System on 13th December 2024.
14. Upon consideration of the facts set out hereinabove, the first question that I must answer is whether the filing of a Notice of Appeal by the Intended Appellant is fatal to their appeal. Although it was unprocedural for the Intended Appellant to file a Notice of Appeal in this matter, I answer this question in the negative, as there is indeed on record a valid draft Memorandum of Appeal dated 16th January 2025. The Notice of Appeal is therefore redundant and is hereby struck out. I hold that there is no need to dwell on this issue any further.
15. The Intended Appellant approached this Court on 16th January 2025, 1 month and 5 days after delivery of the impugned decision, seeking leave to file its appeal out of time.
16. The jurisdiction of this Court to enlarge time derives from Rule 18 of the Employment and Labour Relations Court (Procedure) Rules 2024 which provides:

“ The Court may, if circumstances justify, extend the time prescribed for the filing of an appeal or any document relating to an appeal.”
17. Section 79G of the Civil Procedure Act as set out above, which is also applicable, states that:

“ 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.”
18. The above means that the threshold which the Intended Appellant ought to meet is that they must satisfy the Court that they had a good and sufficient cause for failing to file the appeal in time; and they must show that the justice of the case favours the extension of time.



19. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v the Independent Electoral and Boundaries Commission & Others* [2014] eKLR, considered at length and re – stated the principles which should guide a Court considering an application for leave to extend time. It stated: -

“From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

- a. Extension of time is not a right of a 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 to 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 respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
20. In *Kenya Ports Authority v Silas Obengele* Civil Application No Nai 297 of 2004 [2006] 2 KLR 112 the Court held that:

“Whereas it is now settled that whenever there is a delay, even for one day, there must be some explanation for it otherwise an extension may not be granted where there was material before the single judge from which he could and did conclude that the delay or the periods of delay...the full bench will not interfere”

21. I shall consider the factors set out by the Supreme Court in the *Nicholas Salat case* (*supra*) in relation to this case. The delay in the present case is short, spanning 16 days (from 11th January 2025 the date by which the appeal should have been filed, to 27th January 2025 when it was actually filed). The reason advanced for the delay is that the Intended Appellant failed to obtain a copy of the Ruling delivered on 13th December in good time. Is the reason for the delay given by the Intended Appellant satisfactory? While a copy of the Ruling appears to have been uploaded by the Trial Court to the Case Tracking System on 13th December 2024, it is not inconceivable that the Intended Appellant’s counsel overlooked the same. In light of the length of the delay, being only 16 days, and the overall ends of justice, I come to the conclusion that the Intended Appellant has explained the reason for the delay in bringing the appeal before this Court to the satisfaction of this Court.



22. The next question that I must consider is whether the Respondent will suffer prejudice if the Intended Appellant is granted leave to file their appeal out of time. I find that they will not, as they will be granted ample opportunity to defend the appeal.
23. On the issue of whether there has been undue delay in bringing this application, I am persuaded that there hasn't. This is because the Ruling of the Trial Court (Hon. R.L Musiega) was delivered on 13th December 2024, and this application was filed on 27th January 2025, one month and 16 days later, as already stated herein.
24. Pursuant to the foregoing, I allow prayers 3 and 4 of the Notice of Motion application dated 16th January 2025. For the avoidance of doubt, the Intended Appellant s hereby granted leave to file their appeal out of time. The Intended Appellant shall file and serve their Memorandum of Appeal and Record of Appeal within 14 days of this decision.
25. In the upshot the application is allowed as follows:-
 - a. The Appellant is hereby granted leave to file and serve their Memorandum of Appeal within 14 days of this Ruling. In default, the appeal stands dismissed. Mention on 9th June 2025 to confirm compliance and issue further directions
 - b. Costs of the application to the respondent in the cause.
26. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF MAY, 2025.

J.W. KELI,

JUDGE.

In the presence of:-

Court Assistant - Otieno

Applicant: Absent

Respondent: Ms. Gathoni h/b Mbaabu

