



**Severin Sea Logde v Mwanyanje (Miscellaneous Case E118 of 2024)
[2025] KEELRC 1966 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1966 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS CASE E118 OF 2024**

**K OCHARO, J
JUNE 26, 2025**

BETWEEN

SEVERIN SEA LOGDE APPLICANT

AND

OMAR NYOKA MWANYANJE RESPONDENT

RULING

1. By the Notice of Motion application dated 14th November 2024, the Applicant sought;
 - a. That this application be certified urgent and service thereof be dispensed with in the first instance.
 - b. That this Honourable Court be pleased to stay all proceedings before the Chief Magistrate's Court at Mombasa in the Mombasa Chief Magistrate's Court Employment and Labour Relations Cause No. E 078 OF 2021 pending the hearing and determination of this application.
 - c. That this Honourable Court be pleased to grant the Applicant leave to file the appeal out of time from the ruling of Honourable Noelyne Reuben Akee delivered on 15th August 2024 as per the annexed draft memorandum of appeal.
 - d. That upon grant of prayer number 3, this Honourable Court be pleased to stay all of the proceedings before the Chief Magistrate's Court at Mombasa in Mombasa Chief Magistrate's Court Employment and Labour Relations Cause No. E 078 OF 2021 pending the hearing and determination of the intended appeal.
 - e. That this Honourable court be pleased to grant an order that the Applicant be furnished with certified copies of the proceedings in the Mombasa Chief Magistrates Court Cause



Employment And Labour Relations Cause No. 078 OF 2021 and the ruling delivered on 15th August 2024.

- f. That the costs of this Application be provided for.
2. The application is anchored on the grounds set out on the face of the application, and the supporting affidavit sworn by Ann Wamithi, sworn on 11th November 2024.
3. The Respondent vehemently opposes the application through a replying affidavit, sworn on 9th December 2025.

The Application

4. The Applicant states that the Respondent instituted the suit in the lower court by a Statement of Claim dated 3rd March 2022. Upon service of summons to enter appearance, the Applicant filed a memorandum of appearance on 23rd March 2022, and subsequently, a Response to the Statement of Claim on 14th April 2022.
5. On 23rd August 2022, the Mediation Registry served the parties with a Notice of appointment of a mediator, Notice of Referral to mediation, and a Case summary.
6. On 22nd September 2022, the matter came up for mention to confirm the outcome of the mediation. The mediator informed the Mediation Registrar through a mediation report dated 19th September 2022, that the mediation process was not fruitful. The matter was thus redirected to the trial court on 28th September 2022.
7. On 28th September 2022, the Applicant's Counsel attended Court for mention for directions. However, there was no appearance by the Respondent even though he was aware of the mentioned date.
8. When the matter was scheduled for mention on 3rd November 2022, the Respondent's counsel again failed to appear in court. The matter was then listed for hearing on 8th May 2023. The Respondent's counsel prepared a hearing notice and served it on the Applicant.
9. On 8th May 2023, the Respondent's Counsel did not turn up for the hearing. Consequently, the Applicant's Counsel sought dismissal of the Respondent's case for want of prosecution. The case was dismissed with costs.
10. On 19th May 2023, the Respondent filed an application seeking reinstatement of his case. The application was approved on August 15, 2024. After the ruling, Counsel for the Respondent sought and obtained leave to appeal against the ruling and requested to be furnished with copies thereof. The Court indicated that it could be uploaded on the portal by the close of the day. The ruling was never uploaded as promised.
11. On 7th August 2024, the Applicant's Counsel wrote to the court to be furnished with the proceedings and the ruling delivered on 15th August 2024 to advise the Applicant on the chances of success of the appeal against the ruling.
12. On 29th October 2024, the Applicant's advocates wrote to the court as a reminder to be furnished with the said ruling and proceedings. He did this again on November 5, 2024.
13. Despite several Court visits, the Applicant's advocates have been unable to be furnished with the ruling delivered on 15th August 2024 and the proceedings in the matter to date.



14. The Applicant cannot be faulted as a result of an administrative error or oversight, which has the effect of pushing him off the seat of justice.
15. The Respondent's application before the Lower Court was without merit in the circumstances of the suit before the Court.
16. The hearing of the matter was slated for 13th November 2024.

The Response.

17. The Respondent asserts that the Applicant has not set forth any sufficient grounds to justify a grant of the orders sought. It hasn't demonstrated that it has an arguable appeal, and that if the sought orders aren't issued, the intended appeal will be rendered nugatory if it is successful.
18. The learned trial magistrate exercised her discretion correctly on the premise that the respondent's failure to attend her court on the material day was a result of the confusion that emanated from the mislisting of cases in the cause lists of the day.
19. On the material day, the case was wrongly cause-listed before another Court [Hon. D.W. Mburu] and by the time the Respondent's counsel was logging into the trial Court, [Honourable Akee], the matter had already been dismissed.
20. The Respondent's failure to attend court on the material day was not deliberate, therefore.

The Applicant's Submissions

21. The applicant argues that under section 79G of the *Civil Procedure Act*, this Court has the authority to extend the time for filing an appeal. This power can only be exercised in favour of an applicant who demonstrates that they had a good and sufficient reason for not filing the appeal on time. To support this point, reliance was placed on the case of Paul Musili Wambua v Attorney General & 2 Others, where the Court of Appeal held;

“.....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.”
22. The delay in filing the appeal was occasioned by the fact that the ruling that the Respondent intended to impugn wasn't given to the Applicant within time or at all. A sufficient reason for the failure.
23. The Applicant has an arguable appeal. An arguable appeal is not one which must necessarily succeed, but which ought to be argued fully before the court, one which is not frivolous. To support this point, the decision in NCBA Bank Limited v WWss Logistics [Civil Appeal E 277 of 2023] [2024]KEHC 1613[KLR] was cited.
24. The Learned Trial Magistrate erred by treating a fundamental and substantive failure on the part of the Respondent to prosecute its matter as a mere procedural mishap. In doing so, the court occasioned a grave prejudice to the Applicant.



25. The power to dismiss a suit for want of prosecution is aimed at ensuring expeditious and fair administration of justice. A Claimant who fails to take the necessary steps in prosecuting their case frustrates the overriding objective of courts. To buttress this point, the Applicant cites the case of Thatiani Development Company Limited v Mombasa Water & Sewerage Company & Anor [2022] eKLR.
26. The reason advanced as to why the Counsel for the Respondent didn't attend court on the material date- mislisting of matters on the material date is not sufficient and convincing. Counsel for the Respondent knew that the matter was slated for hearing and not a mention.
27. If the orders of stay proceedings aren't granted, the Applicant risks suffering substantial loss. Substantial loss is the cornerstone of jurisdictions for granting a stay. To fortify this submission, reliance is placed on the case of Kenya Shell Ltd vs- Benjamin Karuga Kibiru & Another [1986] EKLK.
28. The Respondent has failed to provide credible reasons to justify his habitual absence from the proceedings in the lower court since 2022. The persistent failure to prosecute his own case leaves the Applicant at the mercy of an indifferent litigant, forcing the Applicant to bear the burden of unnecessary legal costs and prolonged litigation. Litigation should be fair and not oppressive to any party.

The Respondent's Submissions.

29. The Respondent submits that the Applicant hasn't met the prerequisites under Order 42, Rule 6 of the Civil Procedure Rules. The Applicant hasn't clearly shown the kind of loss it will suffer if the orders sought aren't granted. It isn't enough for the applicant to simply state that they will suffer a substantial loss without providing specifics. To support this submission, the Respondent relies on the decision in Machira t/a Machira & Company Advocates v East Africa Standard [2002] eKLR.
30. The Applicant has not offered any security as contemplated under Order 42 Rule 6 of the Civil Procedure Rules. On this ground, the Applicant's application should be declined. However, should the Court allow the application, it should be conditional upon the Applicant depositing security for costs.
31. The Applicant has not clearly articulated the reasons for their belief that the intended appeal is arguable. All they have done is express dissatisfaction with the ruling in a general manner.
32. The reasons for the delay in filing the appeal have not been sufficiently explained.

Analysis and Determination.

33. I have carefully considered the submissions by both Counsel for the parties herein and note that none of them addresses this Court on a very vital point of the Applicant's application, the prayer that the trial Court be compelled to furnish the Applicant with the copy of the ruling that it delivered on 15th August 2022.
34. The immediate question that comes to my mind, and which the Court reasonably expected Counsel to address, is whether the Applicant has properly approached the Court for the order. The Applicant describes the learned trial magistrate's failure to supply the ruling as an administrative error. Given the tone of the Applicant's application, it is reasonable to conclude that it alleges a failure on the part of the learned Magistrate to perform a duty that the law required her to undertake. In my view, the learned Magistrate can only be compelled to supply the ruling by an order of mandamus, which would be sought in an application for judicial review, rather than in an application like the instant one.



35. As Counsel for the Applicant correctly pointed out in his submissions, one of the prime conditions that an applicant must establish in an application for leave to appeal out of time is that the appeal is arguable. It is not possible for the Court to which the appeal is intended to be lodged to conclude that the condition has been established or not, where the decision intended to be challenged is not presented.
36. I hold that the Applicant could have sought an order for mandamus under a judicial review application and, thereby, sought a stay of proceedings before the trial court pending the judicial review proceedings. Ordinarily, where a party moves the Court under Order 53 of the Civil Procedure Rules, at the point of seeking leave to commence the proceedings, such a party is at liberty to ask the Court to allow the leave to act as a stay.
37. In sum, this Court is saying that in the circumstances of this matter, the Applicant ought to have first approached the Court through the process stated above, to enable him to get a compelling order and stay of proceedings.
38. Surprisingly, the Applicant didn't at all consider it necessary to present the application that the Respondent filed and its replying affidavit by itself, to enable this court even to appreciate the factual basis for the application, and opposition thereto.
39. The Applicant's Counsel elaborately submitted on factual matters that can only be discerned from the documents filed before the learned Magistrate, her ruling, and the respective submissions by Counsel for the parties. Perhaps a reminder is needed here; submissions are not evidence.
40. In conclusion, I find that the Applicant has not demonstrated that it has an arguable appeal.
41. Assuming I am wrong on the foregoing, on this sole point hereafter, I would still hold that the Applicant has no arguable appeal. The two cause lists for 8th May 2022, exhibited through the Respondent's affidavit, show that the matter was cause-listed before Hon. D.W. Mburu and not Hon. Akee. Reasonably, counsel will be expected to attend the court where his or her client's matter is listed. The Respondent's version that this is what his Counsel did has not been discounted. Given the administrative confusion, which the Respondent did not cause, any court of justice could have granted the application for reinstatement.
42. Having found as I have hereinabove, I see no point in proceeding to expend time in considering the other factors, for instance, the length of delay and the prejudice likely to be suffered by the Respondent if I were to grant the application.
43. By reason of the foregoing premises, I find the Applicant's application lacking in merit. It is hereby dismissed with costs.
44. Orders accordingly.

READ, SIGNED, AND DELIVERED VIRTUALLY IN MOMBASA ON JUNE 26, 2025.

OCHARO KEBIRA

JUDGE

