Waecom Self Selection Limited v Simiyu (Appeal E037 of 2025)
[2025] KEELRC 1822 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KEELRC 1822 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E037 OF 2025

JW KELI, J

JUNE 20, 2025

BETWEEN

WAECOM SELF SELECTION LIMITED ..... INTENDED APPELLANT

AND

OMAR KUSIMBA SIMIYU ..... INTENDED RESPONDENT

RULING

1. The Intended Appellant/Applicant vide Notice of Motion application dated 7th February 2025 brought under the provisions of Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010; Rules 18,21, 45 and 80 of the Employment and Labour Relations Court (Procedure) Rules 2014; and Sections 1A,1B,3,3A, 79G and 95 of the *Civil Procedure Act*, sought the following orders:-

    a. Spent

    b. Spent

    c. Pending the hearing and determination of the intended appeal, this Honourable Court be pleased to stay the execution of the Judgment and resultant Decree delivered in Milimani Commercial Magistrates' Court case MCELRC No. E2165 of 2022- Omar Kusimba Simiyu vs Waecon Self Selection Service Limited on 26th November 2024.

    d. This Honourable Court be pleased to extend time within which the Applicant is to file an appeal against the Judgment and Decree of the Chief Magistrates' Court, Employment and Labour Division at Milimani (Hon. Becky Cheloti Mulemia) dated and delivered on 26th November 2024 in MCELRC No. E2165 of 2022- Omar Kusimba Simiyu vs Waecon Self Selection Service Limited.

    e. This Honourable Court be pleased to grant such further or other orders as it may deem just and expedient in the circumstances of this case.

f. The costs of this application do abide the outcome of the intended appeal against the Judgment and Decree of the Chief Magistrates' Court, Employment and Labour Division at Milimani (Hon. Becky Cheloti Mulemia) dated and delivered on 26th November 2024 in MCELRC No. E2165 of 2022- Omar Kusimba Simiyu vs Waecon Self Selection Service Limited.

2. Grounds of the application

a. The Judgment was delivered on 26 October 2024 by the Honourable Becky Cheloti Mulemia in Milimani MCELRC No. 2165 of 2022 in the absence of the counsel with the personal conduct of this matter on behalf of the Applicant.

b. Despite the counsel for the Applicant diligently following up on the judgment, the judgment was not availed for perusal until 19th December 2024. At that time, their offices were closed from 18th December 2024 to 13th January 2025, and they therefore did not have the opportunity to peruse the judgment within that period.

c. Upon resumption, the counsel having personal conduct of the matter did not report to the office as he resigned in the intervening period. He had not conducted a handover of his matters, including the instant one, therefore occasioning a further delay in perusing the judgment and obtaining instructions on whether to appeal or not.

d. Once this lapse was discovered, a new counsel took over the personal conduct of the matter and contacted the Applicant who immediately made it clear that it intends to prefer an appeal against the Judgment of Hon. Becky Cheloti Mulemia delivered on 26 November 2024 in Milimani MCELRC No.2165 of 2022.

e. The 30-days statutory period of filing the Memorandum of Appeal lapsed on 26th December 2024.

f. The delay in filing the appeal is not inordinate as it has been 42 days since 26 December 2024.

g. The delay is not deliberate or unreasonable either for the reasons set out above.

h. Counsel who has since taken the personal conduct of this matter on behalf of the Applicant takes full responsibility for this delay and regrets the same. The consequences of this delay should not be visited upon the Applicant client.

i. The intended appeal is competent and has appreciable chances of success.

j. The Respondent has already commenced execution and has served the Applicant with warrants of attachment dated 5th February 2024 and a proclamation notice dated 6th February 2024 to branches in Tasia and Kamulu.

k. Unless execution of the Judgment is stayed, the intended Appeal will be rendered nugatory and substantial loss will be occasioned to the Applicant herein.

l. This Application has been brought timeously, and the delay in filing the intended Appeal was not deliberate, unreasonable or unnecessary.

m. The Respondent will not suffer any prejudice if leave to file the appeal out of time is granted.

3. The application was opposed by the Respondent through his Replying Affidavit sworn on 19th February 2025. He argued that the application is an afterthought, and abuse of court process, is devoid of merit, and should therefore be dismissed with costs. He explained that the judgment date of 26th November 2024 was taken by the consent of the parties in the presence of counsel for the Applicant, but on the date of the actual delivery of judgment, he failed to attend court. The judgment was

uploaded to the CTS on the same date of delivery, namely, 26th November 2024. On 30th November 2024, counsel for the Respondent nonetheless wrote to counsel for the Applicant informing them that the judgment was delivered and seeking payment of the decretal sum and costs. According to the Respondent, therefore, the Applicant was all along aware of the delivery of the judgment. The Respondent was adamant that closure of offices was not a good or satisfactory reason for failing to comply with the statutory timelines. Extension of time is not a right of a party, but is hinged upon a satisfactory explanation being provided, which the Applicant has not done.

4. It was the Respondent's position that the Applicant has also not met the threshold for grant of stay pending appeal. This is because they have not demonstrated the substantial loss that they will suffer if stay is not granted, since mere execution of a judgment does not amount to substantial loss, and the decretal sum can be refunded if the appeal is successful; there is no willingness to furnish security; and the draft Memorandum of Appeal does not raise even a single arguable issue hence the appeal has no chance of success. The Respondent stated that he will be greatly prejudiced if stay is granted having successfully prosecuted the suit. If the court is inclined to grant stay, however, the Respondent requested that the Applicant be ordered to deposit the entire decretal sum and costs of the lower court suit as security. They also prayed that the Applicant be ordered to settle the auctioneers' costs of Kshs. 72,485.60

Decision.

5. The application was canvassed by way of written submissions. Both parties complied. The issues for determination are as follows:

    a. Whether the Court should grant leave to the Intended Appellant to file its appeal out of time against the Judgment delivered on 26th November 2024.

    b. Whether the Court should grant the Intended Appellant stay of execution of the Judgment and Decree delivered on 26th November 2024 pending the hearing and determination of the Appeal.

Whether the Court should grant leave to the Intended Appellant to file its appeal out of time against the Judgment delivered on 26th November 2024.

6. The Intended Appellant annexed a draft Memorandum of Appeal dated 7th February 2025 as an attachment to the Affidavit in Support of Motion, which was filed on 10th February 2025.

7. Under Rule 12 (2) of the Employment and Labour Relations Court (Procedure)Rules 2024, and Section 79G of the *Civil Procedure Act*, an appeal of the said decision should have been filed before the Court within 30 days of the decision. Rule 12(2) aforesaid provides that:

> " Where an appeal is from a magistrate's court or where no period of appeal is specified in the written law referred to in subrule (1), the appeal shall be filed within thirty days from the date the decision is delivered."

8. 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."

9. On the form of appeals, Order 42 Rule 1 of the Civil Procedure Rules provides that:-

> " 1. Form of appeal [Order 42, rule 1.]
>
> (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
>
> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

10. 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 26th December 2024. The Intended Appellant failed to comply.

11. 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 Judgment in that it was only availed on 19th December 2024, they had closed their offices for the holidays, and the Advocate having conduct of the matter resigned without carrying out a proper hand-over of the matters he was handling. On the other hand, the Respondent counteracts this averment by stating that a copy of the Judgment was uploaded to the Case Tracking System on 26th November 2024, and further the Respondent notified the Applicant of the delivery of judgment vide their letter of 30th November 2024. They also dismiss as unsatisfactory the other explanations by the Applicant on why they failed to file their appeal within the statutory timelines.

12. Upon consideration of the facts set out hereinabove, I note that the Intended Appellant approached this Court on 7th February 2025, 2 months and 12 days after delivery of the impugned decision, seeking leave to file its appeal out of time.

13. 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."

14. 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."

15. It also derives from Order 50 Rule 6 of the Civil Procedure Rules 2010 which provides that:-

> "
>
> " 6. Power to enlarge time [Order 50, rule 6.]
> Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

16. The foregoing 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.

17. The Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat vs 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."

18. 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"

19. I shall consider the facts of the present suit against the factors set out by the Supreme Court in the Nicholas Salat case (supra). The delay in the present case is not inordinate, spanning 1 month 12 days (from 26th December 2024 the date by which the appeal should have been filed, to 7th February 2025 when it was actually filed). The reasons advanced for the delay is that the Intended Appellant failed to obtain a copy of the decision delivered on 26th November 2024 in good time, they closed their

offices until 13th January 2025, and the Advocate having conduct of the matter at the time resigned in the intervening period and failed to inform the other Advocates in the law firm of the need to file a Memorandum of Appeal.

20. Are the reasons for the delay satisfactory? I find and hold that the delay has been explained to the satisfaction of the Court, taking into consideration the length of the delay, being only 1 month 12 days, and the overall ends of justice. I also find that the Respondent will not suffer prejudice if the Intended Appellant is granted leave to file their appeal out of time, since they will have ample opportunity to defend the appeal. I am also persuaded that there hasn't been undue delay in bringing this application, having been brought 2 months and 12 days after the delivery of the impugned Judgment.

21. Pursuant to the foregoing, I allow prayer (d) of the Notice of Motion application dated 7th February 2025. For the avoidance of doubt, the Intended Appellant is 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. In default, the Appeal herein stands dismissed.

b.Whether the Court should grant the Intended Appellant stay of execution of the Judgment delivered on 26th November 2024 pending the hearing and determination of the Appeal.

22. It is instructive to note that the impugned Judgment is dated 26th November 2024. The Employment and Labour Relations Court (Procedure) Rules 2024 on stay of execution in case of appeal states:-

> ''21. (1) Where an application for stay of execution pending appeal has been lodged, the applicant shall, in the supporting affidavit, declare whether a similar application has been filed in any other court
>
> (2) An application for stay of execution pending appeal shall be filed in the appeal file.''

23. Since the Rules are silent on the conditions for granting stay then the lacuna is addressed by Order 42 Rule 6 (2) of the Civil Procedure Rules to wit:-

> ''(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.''

24. It is not in dispute that the Honourable Court (Hon. B.C. Mulemia) in Milimani MCELRC No. 2165 of 2022, delivered a Judgment in favour of the Respondent herein on 26th February 2024

25. I have granted the Intended Appellant leave to lodge their appeal out of time. No application for stay pending appeal was filed in the Trial Court.

26. This Court's mandate, therefore is to analyze whether the Intended Appellant has met the conditions for grant of an order of stay of execution, pursuant to Order 42 Rule 6 (2). Firstly, has the Intended Appellant proved that they will suffer substantial loss if the orders are not granted? The Intended Appellant insists that they will suffer substantial loss since the Respondent has already commenced execution by obtaining warrants of attachment dated 5th February 2024 and a proclamation notice

dated 6th February 2024 proclaiming goods in their Tasia and Kamulu branches. This is not denied by the Respondent.

27. In Timsales Limited Vs. Hiram Gichohi Mwangi, Civil Appeal Number 94 of 2008 (2013) eKLR the Honourable Court held that:-

> " the mere fact that the process of execution has commenced or is likely to commence does not amount to substantial loss for the reason that execution is a legal process and that the Appellant must establish other factors.

28. In the instant case, the Intended Appellant has merely demonstrated that execution has commenced against them. The Respondent cannot be faulted for wanting to enjoy the fruits of their judgment. In fact, the Honourable Court in the case of Thomas M. Nguti & 196 Others vs Kenya Railways Corporation [2022] e KLR emphasized that, in considering whether stay orders ought to be granted, the Court must consider that a successful party should be allowed to enjoy the fruits of their judgment. This position had earlier been affirmed in the case of Machira T/A Machira & Co Advocates vs East African Standard No. 2 [2002] KLR 63.

29. The Respondent is correct in stating that the subject decree, being a money decree, can be refunded if the Intended Appellant is successful. However, he has not demonstrated his ability to re-pay the decretal sum. The test for whether an Applicant will suffer substantial loss where a money decree is in issue was set out in the case of Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 where the court held:

> " Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment."

30. On the party on whom the burden of proving the Respondent's financial ability falls, in National Industrial Credit Bank Ltd vs Aquinas Francis Wasike and Another [2006] eKLR the Court of Appeal stated that:

> " This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya." (Emphasis Mine)

31. As the Respondent has not shown his ability to repay the decretal sum if he proceeds with execution and the appeal succeeds, I find and hold that the Applicant is likely to suffer substantial loss if a stay of execution is not granted.

32. Further, the law contemplates that a litigant who intends to appeal the decision of a court may be granted stay of execution of the said decision, on condition that they deposit a security for the performance of the decree. In the case of Michael Ntouthi Mitheu vs Kivondo Musau [2021] e KLR, the Honourable Court pronounced itself as follows on the reason why security should be given:-

> " 22. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100. (Emphasis Mine)

33. The third condition to consider is whether the application been made without unreasonable delay. The present application was brought 2 months and 12 days after delivery of the Judgment. The delay is therefore excusable.

34. I am guided by the decision of the Court of appeal in Butt -vs Rent Restriction Tribunal (1982) KLR 417 on how a Court should exercise discretion in an application for stay of execution where it held that: -

> " 1. the power of the Court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. The general principle is granting or reusing a stay is: If there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge's discretion. (sic) (trial Court judgement).
>
> 3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
>
> 4. The Court in exercising its powers under order XLI rule 4 (2) (b) of the civil procedure Rules can order security upon application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse".

35. The court finds that there is a high likelihood of the appeal being rendered nugatory in the event the Intended Appellant is successful in the appeal, as their assets are likely to have been sold, and there is no certainty that the Respondent will be able to repay the decretal sum.

36. I therefore grant stay of execution of the Judgment and Order of the Hon. B.C. Mulemia delivered on 26th November 2024 pending the hearing and determination of this appeal, on condition that the Intended Appellant deposits the entire decretal sum in Court within 30 days of this Ruling.

37. In the upshot the application is allowed as follows:-

a. The Court grants an Order of stay of execution in the Judgment of the Court dated 26th November 2024 pending the hearing and determination of the intended appeal on condition that the Intended Appellant deposits the entire decretal sum in Court within 30 days of this Ruling. In default execution may proceed.

b. 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.

c. Costs of the application to the respondent.

38. Mention on 7th July 2025 to confirm compliance with the Orders above for further directions.

39. It is so Ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF JUNE, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Applicant : -absent

Respondent: Ms. Small