



REPUBLIC OF KENYA



**Mwinyihaji v Livingstone t/a Mara River Lodge Limited & another (Cause E006 of 2022) [2025] KEELRC 1728 (KLR) (13 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1728 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E006 OF 2022  
AN MWAURE, J  
JUNE 13, 2025**

**BETWEEN**

**MWINYI AHMAD MWINYIHAJI ..... CLAIMANT**

**AND**

**DAVID LIVINGSTONE T/A MARA RIVER LODGE LIMITED .... 1<sup>ST</sup>  
RESPONDENT**

**MR. GOPAL PATEL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. The 1<sup>st</sup> Respondent/Applicant filed a Notice of Motion dated 4<sup>th</sup> December, 2024 under Certificate of Urgency seeking the following orders that:
  1. Spent
  2. The Honourable Court be pleased to grant leave to the Applicant to file the Notice of Appeal out of time against the judgment delivered on 18<sup>th</sup> September 2024 by Hon. Justice David Nderitu.
  3. The Notice of Appeal attached herein be deemed as duly filed and served.
  4. The costs of this application be provided for.
2. The application is brought under Order 50 Rule 6 of the Civil Procedure Rules, Section 3, 3A and 95 of the *Civil Procedure Act* and all other enabling provisions of the law.



### **1<sup>st</sup> Respondent/Applicant's supporting affidavit**

3. The application is supported by the affidavit of W. Kevin Michuki, the 1<sup>st</sup> Respondent/Applicant's advocate.
4. The advocate avers that judgment was delivered by Hon. Justice David Nderitu in Nakuru ELRC Cause No. E006 of 2022 against the 1<sup>st</sup> Respondent in favour of the Claimant/Respondent on 18<sup>th</sup> September 2024.
5. The advocate avers that the 1<sup>st</sup> Respondent, being aggrieved by the said judgment, the 1<sup>st</sup> Respondent instructed him to lodge an appeal by the time the said instructions were relayed the fourteen (14) day statutory period to lodge a Notice of Appeal had lapsed.
6. The advocate avers that the statutory timelines for filing the Notice of Appeal herein had lapsed and thus the same can only be admitted out of time.
7. The advocate avers that the time of lodging the Notice of Appeal lapsed on 1<sup>st</sup> October, 2024.
8. The advocate avers that he acted on his client's instructions, as the absence of the instructions delayed the lodging of Notice of Appeal before this Honourable court, and the delay is regrettable.
9. The advocate avers that the 1<sup>st</sup> Respondent/Applicant is willing to comply with the orders as this Honourable court may direct.
10. The advocate avers that the right of appeal is an essential of the justice system and should not be curtailed without justifiable reasons founded on consideration of public interest.
11. The advocate avers that the Claimant/Respondent shall not suffer any prejudice if leave is granted to the 1<sup>st</sup> Respondent/Applicant to file the Notice of Appeal out of time.

### **Claimant/Respondent's Replying affidavit**

12. In opposition to the application, the Claimant/Respondent filed a replying affidavit dated 20<sup>th</sup> December, 2024.
13. The Claimant/Respondent avers that judgment was entered in his favour and the same was competent, sound and just.
14. The Claimant/Respondent avers that the 1<sup>st</sup> Respondent/Applicant being aggrieved by the judgment should have immediately sought for leave to file the Appeal within the prescribed period in the law but seems to have decided to appeal as an afterthought which is an abuse of the judicial process.
15. The Claimant/Respondent avers that the intended appeal has not demonstrated overwhelming chances of success, and he will suffer irreparable loss and damage if orders being sought herein are granted.
16. The Claimant/Respondent avers that the Court of Appeal is very clear on the timelines and requirements to file an appeal and the 1<sup>st</sup> Respondent/Applicant has not demonstrated sufficient grounds for this Honourable Court to grant the leave sought.
17. The Claimant/Respondent avers that this Honourable Court in order to exercise its unfettered discretion must hear and take into consideration his interest as balanced against those of the 1<sup>st</sup> Respondent/Applicant.



18. The Claimant/Respondent avers that he will suffer irreparable loss and injustice if the prayers are granted as sought.
19. Parties canvassed the application by way of written submissions.

### **1<sup>st</sup> Respondent/Applicant's submissions**

20. The 1<sup>st</sup> Respondent/Applicant submitted that this Honourable Court has discretion to extend time to lodge a Notice of Appeal. The 1<sup>st</sup> Respondent/Applicant urged this Honourable Court to extend the time to lodge the Notice of Appeal out of time and annexed a copy of the said Notice of Appeal, and prayed the same be deemed as filed. In *Margaret Njoki Kamau v Reuben Ndivo Mwangi* [2021] KEELC 4616 (KLR) the court stated as follows:

“Order 50 Rule 6 provides that where a specific time is fixed for doing an act or taking any proceedings the Court has powers to enlarge such time on terms notwithstanding that the application is brought after the time prescribed has lapsed. The Courts power to enlarge time is unfettered. The discretion must however be exercised judiciously and not capriciously.”

21. In *Harun Osoro Nyamboki V Peter Mujunga Gathuru*(2019) eKLR the court expressed itself as follows:

“In determining such an application for time extension, the court has to consider whether the explanation given for any delay is reasonable and credible, whether there also exist extenuating circumstances to enable the court exercise its unfettered jurisdiction; and that the delay, in any event, should not be so inordinate as to leave no doubt, that an applicant has been slothful and filed such an application as an afterthought.”

22. In *Equity Bank Limited V West Link Mbo Limited* [2013] KECA 320 (KLR), the Court of Appeal held that courts serve the fundamental role of administering justice by carefully balancing the rights and interests of different parties while remaining within confines of the law to achieve fair outcomes. Inherent power refers to the court's implicit authority, which exists naturally and is not explicitly granted by *the Constitution* or statutory law.

23. The 1<sup>st</sup> Respondent/Applicant filed an application dated 25<sup>th</sup> February 2025, proposing to deposit the decretal sum in a joint interest savings account, demonstrating commitment and good faith. The security ensures that the Claimant/Respondent will not suffer prejudice if it is granted leave to file the Notice of Appeal out of time. The 1<sup>st</sup> Respondent/Applicant also submitted that this request is not a delay tactic but a necessary step to safeguard their right to appeal, as failure to lodge the notice would prevent them from seeking redress in the Appellate Court.

24. The 1<sup>st</sup> Respondent/Applicant relied on the case of *Andrew Kiplagat Chemaringo V Paul Kipkorir Kibet* [2018] KECA 701 where the Court of Appeal stated as follows:

“An arguable appeal does not necessarily mean one which will succeed.”

25. The 1<sup>st</sup> Respondent/Applicant submitted that granting an extension to file the appeal will not unfairly impact the Claimant, as no specific prejudice has been demonstrated. The 1<sup>st</sup> Respondent/Applicant argued that the delay in filing the Notice of Appeal, initially filed on 16<sup>th</sup> October 2024, was after the 14-day lapse thus promptly addressed through a formal application. The delay resulted from the advocates not receiving instructions to proceed, as legal representation requires clear directives from



the client. In light of these circumstances, the 1<sup>st</sup> Respondent/Applicant urged the Honourable Court to allow the application as prayed by extending time to lodge the Notice of Appeal out of time.

#### Claimant/Respondent's submissions

26. The Claimant/Respondent submitted that this Honourable Court has discretion under Order 50 Rule 6 of the Civil Procedure Rule, together with sections 3, 3A, and 95 of the [Civil Procedure Act](#), in determining whether or not to extend time. The Claimant/Respondent submitted that the exercise of discretion must be exercised judiciously, avoiding arbitrariness or bias. The Claimant/Respondent relied on the cases of *Mwangi V Kenya Airways Ltd* (2003) KLR 486 and *Sila Mutiso V Rose Hellen Wangari Mwangi* (1999) EA 21 where the courts held that when determining whether to grant an extension of time, courts consider four key factors: the length of the delay, the reason for the delay, the likelihood of the appeal succeeding if the extension is granted, and the potential prejudice to the respondent.
27. The Claimant/Respondent submitted that the length of the delay in the matter is inordinate and the reason given is inadequate for the exercise of the discretion, in favour of the 1<sup>st</sup> Respondent/Applicant. The judgment in this matter was delivered on 10<sup>th</sup> September 2024 as the delay was of more than 60 days is inordinate and not excusable in the circumstances of this case. Upon receiving the judgment, the 1<sup>st</sup> Respondent/Applicant, without any exhaustion, did not appeal within the prescribed time.
28. The Claimant/Respondent submitted that he is likely to suffer prejudice if the orders herein are granted in the circumstances and fact of the case.
29. The Claimant/Respondent urged this Honourable Court to dismiss the application with costs.

#### Analysis and determination

30. This Honourable Court considered the application, the grounds in support thereof, the rival submissions filed by counsels, authorities cited and the law. The issue for determination is whether the application before this Honourable Court is merited.

31. Order 50 Rule 6 of the Civil Procedure Rules provides as follows:

“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.”

32. In *Salat V Independent Electoral and Boundaries Commission & 7 Others* [2014] KESC 12 (KLR) the Supreme Court set out the principles for extension of time as follows:

- “ 1. 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;
2. A party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court;



3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petition, public interest should be a consideration for extending time.”

33. In this instant case, judgment was delivered on 18<sup>th</sup> September 2024 and the explanation given the 1<sup>st</sup> Respondent/Applicant’s advocate was that he did not have instructions to appeal. The court is satisfied the principles enunciated on granting of enlargement of time to appeal in *Salat -VS- Independent Electoral Boundaries Commission & 7 Others (Supra)* are met.

The Applicant filed the application on 4<sup>th</sup> December 2024 after judgment was delivered on 18<sup>th</sup> September 2024. The delay was not excessive in any case.

34. The reason given for the delay may not be very convincing but after instructions to file the appeal were granted the application was filed and dated 4<sup>th</sup> December 2024. Notice of Appeal was filed on 4<sup>th</sup> December 2024 as well.
35. The prejudice that is likely to be suffered by the Respondent was mitigated by the fact that the parties signed a consent dated 18<sup>th</sup> March 2025. As per the said consent the judgment debtor was to deposit with the court a bank guarantee for the sum of Kshs.1,335,000/= . By 31<sup>st</sup> March 2025. The stay of execution of judgment was issued upon providing the bank guarantee.
36. The court therefore is obliged to grant the prayers as per the Applicant’s Notice of Motion dated 4<sup>th</sup> December 2024.
37. The Record of Appeal to be filed within 60 days from today’s date.
38. Costs of the application will be on the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 13<sup>TH</sup> DAY OF JUNE, 2025.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of



Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

