



**Mandalia v Coolxtreme Limited (Cause 1481 of 2016)  
[2025] KEELRC 2306 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2306 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1481 OF 2016  
SC RUTTO, J  
JULY 31, 2025**

**BETWEEN**

**PEUSH MANDALIA ..... CLAIMANT**

**AND**

**COOLXTREME LIMITED ..... RESPONDENT**

**RULING**

1. What is before this Court for determination is a Notice of Motion dated 18<sup>th</sup> March 2025, through which the Respondent/Applicant seeks the following orders:
  1. Spent.
  2. Spent.
  3. This Court be pleased to extend the time for filing and serving a Notice of Appeal against the Judgement delivered on 25<sup>th</sup> January 2024.
  4. This Court be pleased to grant the Respondent/Applicant leave to file and serve the Notice of Appeal, Memorandum of Appeal and Record of Appeal within such a timeline as the court may deem fit.
  5. This Court be pleased to stay execution of the Judgement and decree of 25<sup>th</sup> January 2024 and any consequential orders emanating from the same, pending hearing and determination of the Respondent/ Applicant's intended appeal.
  6. Cost of this Application be provided for.
  
2. The Application is premised on the grounds on the face thereof and the Supporting Affidavit of Anwar Hajee, the Director of the Applicant herein. Grounds in support of the Motion are that the matter was



heard on its merits on 3<sup>rd</sup> February 2022 and 5<sup>th</sup> May 2022, and directions were issued on the filing of submissions. Subsequently, the parties complied and filed their submissions.

3. That on 22<sup>nd</sup> June 2022, when the case was scheduled for mention to confirm compliance, the Honourable Judge was not sitting and hence the mention was rescheduled to 27<sup>th</sup> September 2022. On 27<sup>th</sup> September 2022, the parties appeared before the Honourable Judge and confirmed that indeed they had filed submissions on account of which the Court directed that it would deliver a Judgment on notice.
4. Mr. Anwar deposes that since then, the Applicant herein has never received any notice from the Court on the delivery of the Judgment, and that the Applicant only came to learn of the existence of the Judgment when it was notified by the court by email that the matter was scheduled for a mention on 11<sup>th</sup> February 2025.
5. Mr. Anwar avers that upon follow-up, his advocates on record discovered that judgment had been delivered one (1) year ago on 25<sup>th</sup> January 2025 by Justice Byram Ongaya on behalf of Lady Justice Maureen Onyango in the absence of the parties and that the mention notice was for taxation of the Claimant's Party and Party Bill of Costs.
6. Mr. Anwar states that the Applicant then obtained a copy of the judgment from the registry and discovered that it was delivered in favour of the Claimant herein.
7. According to Mr. Anwar, the Applicant is aggrieved by the said judgment and wishes to appeal, albeit out of time.
8. Mr. Anwar contends that the right of appeal is an essential element of the justice system and should not be curtailed without justifiable reasons founded on considerations of access to justice.
9. That further, the Applicant's intended appeal is arguable.
10. According to Mr. Anwar, the delay in filing the appeal was not as a result of the Applicant's actions, as the events were beyond its control and by the time that the Applicant became aware of the judgment, the time for filing an appeal had run out. That the Application has been brought without delay from the time the Applicant learned about the judgment and is not so inordinate or so great as to be inexcusable in the circumstances of this case.
11. In Mr. Anwar's view, the Claimant will not suffer any prejudice since he had not taken any steps to enjoy the fruits of his judgment since it was delivered.
12. He further states that the Claimant herein has taxed his Party and Party Bill of Costs and is currently in the process of extracting the decree in order to commence the execution process and if the leave sought and stay of execution is not granted as a matter of urgency, the intended appeal will be rendered nugatory and an academic exercise.
13. The Claimant/Respondent herein, Peush Mandalia, opposed the Application through Grounds of Opposition dated 13<sup>th</sup> May 2025 and a Replying Affidavit sworn on 20<sup>th</sup> May 2025. Mr. Mandalia deposes that the Court delivered the judgment on 25<sup>th</sup> January 2024 in his favour and which he accessed from the judiciary Case Tracking System.
14. Mr. Mandalia avers that he tabulated his costs and the same was taxed by this Honourable Court and a taxation ruling delivered on 28<sup>th</sup> February 2025 allowing his bill at Kshs. 278,574.33/=.
15. According to Mr. Mandalia, the Applicant has not displayed the requisite preconditions to the granting of the orders sought. That in particular, the Applicant has not shown any loss that may result to



it unless the order for stay of execution is granted. He is advised by his advocates on the record, which advice he verily believes to be true, that the Applicant is required to show how execution shall irreparably affect him or will alter the status quo to his detriment, therefore rendering the appeal nugatory. That the Applicant ought to have established factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.

16. In Mr. Mandalia's view, the Supporting Affidavit by Mr. Anwar shows no prejudice that would befall the Applicant if stay of execution is not granted. He is advised by his advocates on the record, which advice he verily believes to be true, that execution is a lawful process and it is not in itself a ground for granting a stay of execution.
17. Mr. Mandalia further contends that the Application has been brought after an unconscionable amount of delay by the Applicant. That from the date of delivery of the judgment, as at the date of the Applicant's application, it had been one (1) year and eight (8) weeks. That there is no way to justify such an amount of delay.
18. In Mr. Mandalia's view, while the Applicant has made an attempt to justify their delay, it has not provided any reasonable grounds for such delay.
19. Mr. Mandalia further deposes that the failure of issue of notice of entry of judgment was not limited to the Applicant only, as he was also not issued with one. According to him, the failure to issue notice affected both parties and no party gained an advantage over the other.
20. He further avers that he did not get any preferential treatment from the court after it delivered its judgment but like any other reasonable and responsible litigant, he kept checking the judiciary e-filing system to confirm delivery of the judgment.
21. In Mr. Mandalia's view, it was incumbent upon the Applicant to equally follow up on its suit to find out its progress. According to him, accessing the judgment was fully and solely in the control of the Applicant and it was its business to follow up and find out if and when judgment was delivered. That both parties made several appearances in court during the pendency of the suit and were all abreast with all the developments in the matter.
22. He is advised by his advocates on record, which advice he verily believes to be true, that the right of appeal must be balanced against an equally weighty, rigid right of the Claimant to enjoy the fruits of the judgment delivered in his favour. That before the stay of execution pending appeal is issued, the Applicant ought to deposit security for the decretal sum, and the Applicant herein has not done this or committed to doing it.
23. Mr. Mandalia contends that even after receiving the mention notice for the matter coming up on 11<sup>th</sup> February 2025, the Applicant never filed their Notice of Appeal.
24. It is Mr. Mandalia's view that the instant Application is an afterthought and an attempt to hoodwink the court and deprive him of the fruits of his judgment.
25. In response to the Claimant's Replying Affidavit, the Applicant, through its Director, Mr. Anwar, filed a Further Affidavit in which he deposes that the Claimant has attached his pay slips, which copies are not certified by his employer and placing reliance on the same as proof of his ability to reimburse the decretal amount could turn out to be catastrophic.
26. Mr. Anwar further avers that the Claimant has failed to demonstrate the prejudice that is going to be occasioned on him should the stay of execution be granted and how the prejudice is greater compared to that likely to be occasioned to the Applicant.



27. That further, the Applicant has expressed willingness to issue an appropriate bank guarantee should the same become ultimately binding on them.

### Submissions

28. The Application was canvassed by way of written submissions. The Court has given due consideration to the submission by both parties. On the Applicant's part, it was submitted that the reasons for the delay in filing the Notice of Appeal are valid and clear.
29. It was further submitted that the delay, though for period of a year, should not be blamed on the Applicant who faithfully took part in all the stages of the proceedings before the trial Court, and cannot be said to be delaying the course of justice. In support of the Applicant's position, the Court was invited to consider the cases of *Mbugua Kamau Mugwe & 2 others v Joseph Kimani Kangethe & 2 others* [2015] eKLR and *Samuel Juma Keya & another v Chemelil Sugar Company & another* [2019] eKLR.
30. It was further urged by the Applicant that in the circumstances of this case, the delay in filing the Notice of Appeal is justified as the Court's record can bear witness that indeed no notice was issued by the Court before delivery of the Judgment.
31. The Claimant on the other hand, submitted that the Applicant has not shown any loss that may be occasioned to it if the court does not issue the orders sought. According to the Claimant, the Applicant does not even allude to any loss that may befall it if the sought orders are not granted. In support of this argument, reliance was placed on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR.
32. The Claimant further posited that the present Application is an afterthought as the Applicant participated in the taxation of the party and party bill of costs by filing their submissions dated 17<sup>th</sup> February 2025. The Claimant contends that if the Applicant really intended to appeal against the judgment, it should have brought the present Application prior to participation in the taxation process.
33. Referencing the case of *Jaber Mohsen Ali & Another v Priscillah Boit & another* E&L No.200 of 2012 (2014) eKLR, the Claimant submitted that one (1) year and eight (8) weeks is more than unreasonable, especially given the fact that Notice of Appeal ought to have been done within 14 days. In the Claimant's view, the delay cannot be said to have been satisfactorily explained.
34. The Claimant further submitted that the Applicant has not satisfied the prerequisite conditions for the grant of stay of execution pending appeal.

### Analysis and Determination

35. Flowing from the record, it is evident that at this juncture, the singular issue arising for determination is whether the Applicant should be granted leave to file a Notice of Appeal out of time.
36. In terms of Rule 77(2) of the *Court of Appeal Rules*, the timeline prescribed for filing a Notice of Appeal from this Court to the Court of Appeal is 14 days.
37. Section 7 of the *Appellate Jurisdiction Act* grants this Court the power to extend the time for giving notice of intention to appeal, making an application for leave to appeal, or obtaining a certificate that the case is fit for appeal, even after the original time limit has expired.
38. As can be discerned from Section 7 of the *Appellate Jurisdiction Act*, it is apparent that in considering an application for extension of time, the Court exercises discretionary power.



39. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, the Supreme Court while expressing itself on the matter opined that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.
40. In the present case, the record bears that judgment was delivered on 25<sup>th</sup> January 2024 while the instant Motion was filed on 18<sup>th</sup> March 2025. Accordingly, the intervening period is approximately one (1) year, two (2) months. Explaining the delay in its failure to file the Notice of Appeal within the prescribed timelines, the Applicant has averred through its Director, Mr. Anwar, that it was not aware of the date the judgment was delivered.
41. According to Mr. Anwar, the parties were notified by the Court on 27<sup>th</sup> September 2022 that judgment would be delivered on notice. That the Applicant never received any Notice from the Court on the delivery of the judgment and only became aware of the judgment when the matter was scheduled for mention on 11<sup>th</sup> February 2025.
42. The Claimant in his Replying Affidavit sworn on 20<sup>th</sup> May 2025, has confirmed the Applicant's assertions as he has averred that he was also not issued with a notice of delivery of judgment and it was as a result of his diligence in checking the judiciary e-filing system that he became aware that the judgment had been delivered by the Court.
43. Indeed, the record bears that the judgment was delivered in the absence of both parties. However, it is not clear whether the parties were notified of the date when judgment was scheduled to be delivered.
44. In *Ngoso General Contractors Ltd v Jacob Gichunge* [2005] eKLR, the Court of Appeal held that a judgment which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates.
45. And further, in *Leonola Nerima Karani v William Wanyama Ndege* [2012] KECA 41 (KLR), it was held that:
- “Since there is no indication that the judgement of the Superior Court was delivered with notice to the parties or their advocates which would be a serious breach of the rules, it would follow that the breach threw the litigation timetable off balance and the advocates on record for the applicant at the time cannot be blamed for filing the notice of appeal and the letter bespeaking copies of the proceedings and judgement when they did.”
46. Applying the above binding precedents to the case herein, I am persuaded that the Applicant has advanced a valid reason for its failure to file the Notice of Appeal within the prescribed timelines.
47. As to the issue of prejudice, the Court will follow the determination in the case of *Kenya Airports Authority v Kabia & another* [2023] KECA 1549 (KLR) (Odunga JA) that where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure.
48. In this case, the Claimant has not indicated or suggested that in the event the instant Application is allowed, he will suffer prejudice that cannot be compensated through payment of costs.



- 49. Further, the Court concurs with the sentiments expressed by the Court of Appeal (Korir JA) in the case of *Sokoro Savings and Credit Co-operative Society Ltd v Mwamburi* (Civil Application E032 of 2022) [2023] KECA 381 (KLR) (31 March 2023) (Ruling) that the interest of justice demands that a party is accorded every reasonable and available opportunity to ventilate their grievances within the available ranks of our judicial system.
- 50. To this end, I am persuaded that the Application seeking to file the Notice of Appeal out of time is merited.
- 51. Before I pen off, I must point out that the Applicant has further sought an order to stay execution pending hearing and determination of the Appeal. This order cannot be granted at this juncture, seeing that the Applicant is yet to file a Notice of Appeal. As such, there is no foundation upon which an order staying execution pending appeal can be granted.
- 52. In the circumstances, the Notice of Motion dated 18<sup>th</sup> March 2025 is allowed in terms of prayer 3 and the Applicant is hereby granted leave to file and serve a Notice of Appeal within 7 days from the date of the delivery of this Ruling.
- 53. There will be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY 2025.**

.....  
**STELLA RUTTO**

**JUDGE**

In the presence of:

- Mr. Kahara for the Claimant/Respondent
- Mr. Oundo instructed by Mr. Wandabwa for the Respondent/Applicant
- Millicent Court Assistant
- 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 had 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 Civil 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.

**STELLA RUTTO**  
**JUDGE**

