



Bidco Africa Limited v Muthembwa (Employment and Labour Relations Appeal E078 of 2025) [2025] KEELRC 2335 (KLR) (30 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 2335 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E078 OF 2025**

**JW KELI, J
JULY 30, 2025**

BETWEEN

BIDCO AFRICA LIMITED APPELLANT

AND

STEPHEN MUTUA MUTHEMBWA RESPONDENT

RULING

1. The applicant is dissatisfied with the ruling and orders of the Chief Magistrates Court at Thika, by Honourable Yusuf Barasa Mukhula, Principal Magistrate delivered on 13th November 2024 in Thika Misc. Civil Case NO. E006 of 2024 between the parties. It filed Notice of Motion application dated 17th March 2025 under Section 3 of the *Employment and Labour Relations Court Act*, Rules 18, 21, 45 and 47 the Employment and Labour Relations Court [Procedure] Rules, 2024, Sections 1A, 1B, 3A and 63 [e] of the *Civil Procedure Act* and all other enabling provisions of the Law] seeking for the Orders that-
 - a. This application be certified urgent and service thereof be dispensed with in the first instance
 - b. The Appellant be granted leave to file the appeal out of time and the memorandum of Appeal filed herewith be deemed as properly filed.
 - c. Pending the hearing and determination of this application inter partes, there be a stay of execution and/or a stay of the enforcement of the ruling and orders of the Chief Magistrates Court at Thika, by the Honourable Yusuf Barasa Mukhula, Principal Magistrate [the Trial Court] delivered on 13th November 2024 in Thika Misc. Civil Case No. E006 of 2024.
 - d. Pending the hearing and determination of this application, there be a stay of any further proceedings in Thika CMELRC E001 of 2025: Stephen Mutua Muthembwa v Bidco Africa Limited.



- e. Pending the hearing and determination of the appeal, there be a stay of execution and/or a stay of the enforcement of the ruling and orders of the Chief Magistrates Court at Thika, by the Honourable Yusuf Barasa Mukhula, Principal Magistrate delivered on 13th November 2024 in Thika Misc. Civil Case NO. E006 of 2024.
 - f. Pending the hearing and determination of the appeal, there be a stay of any further proceedings in Thika CMELRC E001 of 2025: Stephen Mutua Muthembwa v Bidco Africa Limited.
 - g. The court do grant any other order it may deem fit in the circumstances.
 - h. The cost of this application be provided for.
2. Grounds of the application
- a. The Respondent was an employee of the Appellant and his contract of employment was terminated on 10th September 2019.
 - b. Section 90 of the Act provides that;- "Notwithstanding the provisions of section 4[1] of the Limitation of Actions Act [cap. 22], no civil action or proceedings based or arising out of this act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof."
 - c. The cause of action, if any, relating to the contract of service between the Appellant and the Respondent arose on 10th September 2019 upon termination of employment. Any claim arising therefrom ought to have been filed within three years which lapsed on 10th September 2022.
 - d. On 27th April 2023 the Respondent filed a suit against the Appellant for alleged unfair termination of Employment; Thika CMELRC E012 of 2023: Stephen Muthembwa Mutua v Bidco Africa Limited. This was 8 months outside the 3-year limitation period set out in Section 90 of the Employment Act. The Respondent was served with summons to enter appearance on the same date. Upon being served with the summons and pleadings, the Appellant filed a notice of preliminary objection on the basis that the suit was time barred under section 90 of the Employment Act and the court lacked jurisdiction to hear and determine the matter. The Respondent then filed a notice of withdrawal of the suit on 7th September 2023.
 - f. The Respondent did not serve the said notice of withdrawal upon the Appellant. The Appellant only learnt of the notice on 5th October 2023 when Counsel for the Appellant appeared before court for directions and the Magistrate informed Counsel that there was a notice of withdrawal in the file.
 - g. The matter was subsequently mentioned on 18th January 2024 and 1st February 2024 when the court marked the file as closed. The Respondent or his Advocate did not appear before court on any of those days despite being served with the requisite notices.
 - h. The Respondent thereafter filed a fresh suit against the Appellant; Miscellaneous Civil Case No. E006 of 2024: Stephen Mutua Muthembwa v Bidco Africa Limited at Thika Magistrates Court. In the said suit the Respondent filed an application dated 10th January 2024 seeking leave to file a suit against the Appellant out of time. The grounds for the application were contained in the Affidavit of Mitau Kimanzi, Counsel for the Applicant who deponed that the intended suit was for alleged unfair termination of employment and the statutory limitation period under section 90 of the Employment Act had lapsed.



- i. The Appellant was never served with the said application hence it was denied the right to participate in the proceedings and defend the Application. The said Application was determined ex parte vide the ruling and orders of the Trial Court made on 13th November 2024. The Applicant was never served with a hearing notice.
- j. In the Ruling of 13th November 2024 the Trial Court granted the Respondent leave to file the suit for unfair termination of employment against the Appellant out of time.
- k. Consequently, the Respondent filed a fresh suit against the Appellant; Thika CMELRC E001 of 2025: Stephen Muthembwa Mutua v Bidco Africa Limited. The Appellant was served with summons to enter appearance on 19th February 2025. A copy of the orders made on 13th November 2024 was attached to the summons and pleadings.
- l. The Appellant has filed the instant appeal challenging the ruling and orders made on 13th November 2024. The Appellant only became aware of the orders when it was served on 19th February 2025 which was more than 30 days from the date the order was made. As such the Appellant was unable to file the appeal within the stipulated timelines under Rule 12 of the Employment and Labour Relations Court Procedure Rules 2024. The Appellant therefore seeks leave of this honourable court to file the appeal out of time.
- m. The Appellant has an arguable appeal with a good chance of success. The memorandum of appeal sets out 4 grounds of appeal as follows:
 - i. The learned trial magistrate erred in law and fact by granting the Respondent leave to file an employment and labour relations suit against the Appellant after the limitation period.
 - ii. The learned trial magistrate erred in Law and fact in failing to hold and should have held that the court has no jurisdiction to extend time for filing a suit under section 90 of the [Employment Act](#), 2007.
 - iii. The learned trial magistrate erred in law and in fact by granting the said orders ex parte without considering that the Appellant was never served with the application and/ or the hearing notice.
 - iv. The learned trial Magistrate erred in law and fact in failing to dismiss and/or strike out the Respondent's application with costs.
- n. The gist of the appeal is that the Trial Court lacked jurisdiction to grant the Respondent leave to file a suit out of time since section 90 of the [Employment Act](#) is couched in mandatory terms leaving no discretion for the court to expand time. There is a plethora of decided cases from this Honourable Court and the court of Appeal which have affirmed this position.
- o. The Respondent filed the Application dated 10th January 2024 and obtained the orders of 13th November 2024 in bad faith since the said application was never served upon the Appellant. The conduct of the Respondent reeks of abuse of court process since the orders sought in the Application dated 10th January 2024 could have been sought in the same suit and the said application determined alongside the preliminary objection raised by the Appellant. Instead, the Respondent blindsided the Appellant by secretly filing a fresh application/civil suit and obtaining ex parte orders.
- p. The Respondent has already filed the suit and served the Appellant with summons which means that the timeline provided under the law for responding to pleadings have started



running. Unless the orders of stay of proceedings sought herein are granted, it is likely that the incompetent suit; Thika MCELRC E001 of 2025 will be heard and determined thus rendering the appeal nugatory. This would occasion great injustice to the Appellant and would lead to further waste of precious judicial resources by entertaining incompetent suit. There shall be no prejudice occasioned to the Respondent if the orders sought herein are granted. The interest of justice would be better served by granting a stay of execution as well as a stay of further proceedings in the lower court. The application has been filed timeously.

3. The applicant filed affidavit of Hellen Olwanda in support of the application and annexed copies of court summons, statement of claim and served documents in Thika CMELRC NO. E012 OF 2023 between the parties, copy of its Notice of Preliminary Objection, notice of withdrawal of the suit by the respondent/claimant, copies of Miscellaneous Application in Thika CMELRC No. E006 OF 2024 seeking for leave to file fresh suit out of time which it states was heard *ex parte* without service for response. The Ruling/court order in favour of the Respondent/Claimant to file suit out of time dated 13th November 2024 and a copy of pleadings in the fresh suit Thika CMELRC N E001 OF 2025 between the parties.
4. The application was opposed by the respondent through his replying affidavit sworn on the 26th March 2025 as follows:-
5. That sometimes on April, 2023, he instructed his advocates on record to file an employment suit to enable me seek compensation for unfair termination of my contract of employment by the Appellant/Applicant herein.
6. That during the pendency of the said suit in court, his advocates realized that the same had been filed out of time and withdrew the same so as to seek leave to file the suit out of time. [Annexed hereto & marked "SMM-1" is Notice of Withdrawal].
7. That he had been advised by my advocates on the law that Rule 64 [1] [2] of the Employment and Labour Relations Court [Procedure] Rules, 2024 allowed him to withdraw the said suit and all the court was allowed to do was to costs.
8. That upon withdrawal of the said suit his Advocates went ahead and filed application dated 17th November 2023 seeking to file the suit filed an [Annexed hereto & marked "SMM-2" was a copy of the said Application].
9. That upon perusal of the said applications the Hon. Y. M Barasa exercised his and Labour Relations discretion as provided under Rule 80 of the Employment and Labour Court [Procedure] Rules, 2024 as well as Order 50 Rule 6 of the Civil Procedure Rules, 2010 and allowed him to file the said suit out of time. [Annexed hereto and marked "SMM-3" is a copy the order of the court].
10. That he was privy to the fact the power to extend timelines is not a right granted to a party but rather discretionary in nature upon a party furnishing the court with good and substantial reasons for the delay. He demonstrated to the court why he delayed filing the suit and the court exercised its discretion and allowed me to file the suit out of time.
11. That he had been advised by his advocates, that pursuant to Rule 73 [2] of the Employment and Labour Relations Court [Procedure] Rules, 2024, Order 42 Rule 6 [2] of the *Civil Procedure Act* the law requires that before order of stay is granted the Applicant must demonstrate it will suffer substantial loss.
12. That the Applicant/Appellant has not demonstrated the loss it will likely suffer and how such a loss would occur if at all a stay to the ruling of the trial court as well as the proceedings in the trial court is



not granted. That allowing his suit before the trial court to proceed for hearing will not occasion any substantial loss as the Respondent will equally have other legal mechanisms to correct the same in the event it is not satisfied with the court's determination.

13. That he had read the Appellant's/Applicant's application and prayer 2 of the said application is extremely ironical, as it is seeking to be allowed to file an appeal out of time while at the same time challenging the discretion of the lower court to grant me leave to file a suit against it out of time. The Appellant/Applicant herein is challenging the discretion of the trial court to extend time and which discretion was exercised properly and hence this Honourable Court cannot be invited to interfere with the same when there are no grounds on the misuse of the said discretion.
14. That the Appellant/Applicant is fully aware the power to extend timelines is a discretion of the court and not a right to a party and as such it cannot argue that it was not served with the Respondent's application seeking leave to file suit out of time. That he was convinced there is no injustice incurred by the Appellant/Applicant as my application to file a suit out of time was heard ex-parte and it disclosed before the Honourable such plausible grounds to warrant intervention of the trial court.[Annexed hereto and marked "SMM-4" is a Medical Report dated 29th December, 2023].
15. The Respondent urged the court to find the Appellant's Application dated 17th March, 2025 as well as the Memorandum of Appeal filed as fatally defective and the same be struck out with costs.

Determination.

16. The application was canvassed by way of written submissions. Both parties filed.
17. The issues for determination in the application were;
 - a. Whether the application for leave to file appeal out of time was merited
 - b. Whether to grant stay of proceedings in Thika CMELRC E001 OF 2025

Whether the application for leave to file appeal out of time was merited

18. 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.”
19. 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.”
20. The foregoing law 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.
21. 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.”

22. 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”

23. I have taken into consideration the submissions by the parties and will 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 approximately 3 months taking into account the period when time not run from 13th December. The reason advanced for the delay is that the Miscellaneous Application by the respondent before the lower court leading to the ruling was heard *ex parte* and the applicant only became aware of the ruling on being served with the orders on 19th February 2025. The ruling/order had serious consequence of leave to file a claim out of the time stated in section 89[formerly 90] of the *Employment Act*. The court finds that this case makes a good reason for extension of time to file appeal and in the overall ends of justice. Arguable point of law has been raised in the application of which this court is obliged to give an opportunity to the applicant to argue for determination. Time limitation touches root of the jurisdiction of the court.
24. 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.



Whether to grant stay of proceedings in Thika CMELRC E001 OF 2025

25. The applicant submitted that its intended appeal will be rendered nugatory if the proceedings before the lower court are not stayed pending the hearing and determination of the application. That it would be an abuse of court process to allow a matter extinguished by law to be heard. That, to preserve the integrity of the court's appellate and supervisory jurisdiction the court ought to stay the lower court proceedings.
26. Conversely, the Respondent submits that allowing the Appellant's application would occasion undue prejudice, particularly in light of his current health and financial constraints. The prolonged litigation has already strained the Respondent's limited resources, and any further delay will only aggravate his vulnerability and deny him the opportunity to enjoy the fruits of the orders lawfully granted in his favour. Additionally, the Respondent is a person of limited means, currently battling serious health complications, and it is only just and equitable that he be allowed to litigate his claim to finality without the burden of unnecessary and avoidable delays. Justice delayed in this case will amount to justice denied.
27. The court having held that the statute time limitation is at the root of the jurisdiction of the court, notwithstanding the personal hardships of the respondent, it is in the interest of justice to stay the lower court proceedings pending the hearing of intended appeal being mindful that without jurisdiction any action by the lower court is null and void. It would be a waste of limited judicial time if the lower court was to proceed and this court holds it lacks jurisdiction to extend the time.

Conclusion

28. The application dated 17th March 2025 is allowed. The Court is hereby pleased to issue Orders that-
 - a. Pending the hearing and determination of the intended appeal, there will be a stay of execution and/or a stay of the enforcement of the ruling and orders of the Chief Magistrates Court at Thika, by the Honourable Yusuf Barasa Mukhula, Principal Magistrate delivered on 13th November 2024 in Thika Misc. Civil Case NO. E006 of 2024.
 - b. Pending the hearing and determination of the appeal, there will be a stay of any further proceedings in Thika CMELRC E001 of 2025: Stephen Mutua Muthembwa v Bidco Africa Limited.
 - c. Costs of the application to the respondent.
29. Mention 12th August 2025 before the court Deputy Registrar for directions on filing of record of appeal.
30. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF JULY, 2025.

J.W. KELI

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant/Applicant : - Wangóngu



Respondent: Mbulu

