



**Juma v Pinkertons' Kenya Limited (Appeal E164 of 2023)
[2025] KEELRC 2161 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2161 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E164 OF 2023**

**JW KELI, J
JULY 18, 2025**

BETWEEN

GEORGE WAFULA JUMA APPELLANT

AND

PINKERTONS' KENYA LIMITED RESPONDENT

RULING

Coram: Before Lady Justice J.W. Keli

C/A Otieno

1. The applicant/Respondent to the appeal, filed Notice of Motion dated 17th February 2025 seeking for the following orders-
 - a. That this Honorable court be pleased to strike out the Memorandum of Appeal dated 29th August 2023 and Record of Appeal dated 29th August 2023 for being filed out of time without leave of this Honorable Court.
 - b. That this Honorable court be pleased to strike out the Record of Appeal dated 29th August 2023 for being incomplete.
 - c. That the Honourable Court be pleased to issue any other order as may seem just.
 - d. That the costs of this application be in the cause.
2. Grounds of the application
 - i) This Honourable Court does not have jurisdiction to hear and determine the appeal herein due to the appeal being filed out of time and without leave of court. The court's jurisdiction is further divested by the incompleteness of the record of appeal herein.



- ii) The judgment subject of this appeal was delivered by the trial Court (Hon. Kagoni E.M (PM) on 5th August 2022.
 - iii) Both the Memorandum of appeal and Record of appeal dated 29th August 2023 were filed on 5th September 2023.
 - iv) The period between when the trial court's judgment was delivered and the memorandum of appeal was lodged is more than one year which means the memorandum of appeal was filed way out of time-it ought to have been filed within 30 days- without leave of courtv) Moreover, the Appellant failed to request for the certified copy of proceedings and decree/judgment of the Court within 30 days of the delivery of judgment. They only requested for the same on 15th November 2022,70 days later.
 - vi) As per the Certificate of delay, the Appellant received the certified copies of proceedings and judgement on 23rd April, 2023. However, the Appellant filed the record of appeal on 5 September 2023, a delay period of more than 5 months.
 - vii) It is trite law that no appeal can be filed out of time without leave of the Court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. As a result, the appeal herein is defective and invalid in the eyes of the law and should be struck out with costs.
 - viii) Further, the purported record of appeal filed does not include the certified copy of proceedings which is contrary to Order 42 rule 13(4)(c) and (d) of the Civil procedure Rules rendering the said record of appeal incompetent and defective divesting this Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.
 - ix) On 3rd February 2025, the Court directed the Respondent to file submissions and appear before it on 17th February 2025 to take a judgment date, however, in light of the foregoing anomalies that go to the jurisdiction of the Court, it is in the interest of justice and fairness that the Application is urgently heard and interim Orders granted to avoid the Court from proceeding on a nullity and in order to protect the integrity of court proceedings herein.
 - x) It is just and fair that the application be allowed.
3. The application was supported by the affidavit of Cecilia Ndanu Mutinda 13th October 2024 who further annexed a copy of judgment dated 5th August 2022, copies of the memorandum of appeal and the record dated 29th August 2023 all marked as 'CNM'.
4. The application was opposed by the respondent/appellant *vide* his replying affidavit dated 5th March 2025 as follows:-
- a. That the court took long until July, 2023 before issuing a certified copy of the typed proceeding.
 - b. That at the time, the advocate on record was on leave and I thought that the appeal had been filed.
 - c. That it took me time to get another lawyer who took some time to get the record of appeal ready as the file had not been handed over to him by my previous advocate.
 - d. That on 22nd August, 2024, the memorandum of appeal was filed.
 - e. That on 5th September, 2024, the appeal was filed.



- f. That the advocate who was on record, Linda Muthanje from Muthanje & Co. Advocates had gone on maternity leave when the certificate of delay, typed proceedings and certified copy of the judgment were availed.
 - g. That the mistake of an advocate cannot and must not be visited on a client.
 - h. That for fair trial, we pray that the appeal be admitted as filed and be considered to be admitted out of time.
 - i. That it is in the interest of justice that the prayers sought be allowed as prayed.
 - j. That what is deponed herein is true to the best of my knowledge.
5. The application was canvassed by way of written submissions. Both parties complied.
 6. The court found the issue for determination to be whether the application was merited.

Applicant's submissions

7. The applicant submitted on whether the Appellant's Memorandum and Record of Appeal should be struck out? That it is undisputed that the Memorandum and Record of Appeal in this matter both dated 23.08.23 were filed over a year after the trial court's judgement and without leave of court.
8. It is trite law that an appeal cannot be filed out of time without leave of court. Section 79G of the *Civil Procedure Act* provides that an appeal from the subordinate court must be filed within 30 days from the date of the decree or order appealed against, excluding any period that may be certified by the court as requisite for preparing the decree or order. In this instance, the Appellant's certificate of delay dated 11 July 2023 reveals that the certified copies of proceedings and judgment were available from the 28.04.23. Leave was therefore needed before the Appellant filed his appeal on the 5 of September 2023.
9. Besides, there is no reason why the Appellant could not lodge his Memorandum of Appeal within 30 days of the trial court's judgment. A Memorandum of appeal does not require certification from the court and could have been prepared and filed timeously by the Appellant. In *West Kenya Sugar Co Ltd v Angulu* (Appeal E004 of 2024) [2024] KEELRC 1698 (KLR), this court sitting at Bungoma cited with approval the Supreme Court's decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* in support of the principle that an appeal filed out of time and with no leave of court renders such a document a nullity and of no legal consequence. Accordingly, the court proceeded to hold the appeal in the case a nullity. The circumstances herein call for a similar inference and decision.
10. Critically, the Appellant had the option of filing an application for the extension of time prior to lodging his appeal. The Court in *Josephine Wambui Mwangi v Michael Mukundi Ngugi* [2021] eKLR was faced with a similar circumstances and it held thus at para 3 and 5 thereof made have the appeal admitted out of time. In the "3. No attempt circumstances, the court cannot condemn the respondent to respond to an appeal that has been filed in blatant disregard of the law and no attempt has been made to regularize the defect. The net result is that the court agrees with the respondent that this appeal stands to be struck out the ground that it was filed more than one year outside the stipulated time and without an order enlarging time for bringing the appeal. The net result is that the appeal herein is struck out for having been filed more than one year out of time and without an order enlarging the time for filing the appeal. The appellant shall bear costs of the appeal."
11. The assertion in the replying affidavit blaming the advocate for the highlighted mistakes cannot cure the mistakes herein. The case was the Appellant and it was upon him to follow up with the advocate.



- Further, the said assertions are mere bald without evidence since there is no evidence that the appellant made any effort to contact the advocate as such the Court should ignore the same. It relied on Court's holding at paragraphs 18-21 and 23 in *Mwangangi v Mugi* (Civil Appeal I of 2023) [2024] KEHC 6321 (KLR) (30 May 2024) (Ruling).
12. The Appellant has also failed to offer any extenuating circumstances why he failed to appeal in time. Article 159 of the *Constitution* cannot be of aid to the Appellant herein since the mistake is not a mere technicality but goes to the root of the appeal. As such, it must follow that there is no proper appeal before the court for consideration. The documents filed by the Appellant are a nullity of no legal consequence. Without a valid appeal the Court cannot exercise jurisdiction over the purported appeal. We rely on the holding of the Court at paragraphs 22 and 23 of *Mbaya v Kamau & another* (Civil Appeal E012 of 2023) [2023] KEHC 24945 (KLR) (7 November 2023) (Ruling).
 13. It is further undisputed that the Record of Appeal before the court is incomplete as the same does not include a certified copy of the proceedings, contrary to Order 42 rule 13(4) (c) and (d) of the *Civil Procedure Rules*.
 14. In the case of *Akile & another v Mugo* (Civil Appeal E013 of 2023) [2024] KEHC 6538 (KLR), the court cited with approval the Supreme Court's decision in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* where it was held that a court cannot exercise its adjudicatory powers under the law or the constitution without a record of appeal. The incompleteness of the record of appeal divests the court of jurisdiction to consider the legal and factual controversies in the issues before it.
 15. On the strength of the authorities above, it must therefore follow that this court is divested of jurisdiction by the incompleteness of the record before it. As a practical matter, this court has no means of determining the appeal without the benefit of the proceedings in the trial court. The Appellant is inviting the court into an impossibility where it seeks a decision without furnishing the court with a certified copy of the proceedings.
 16. Unfortunately, the defects in the appeal herein are unexplained, fateful and systematic. There is a discernible pattern of chronic indolence in each step of the appeal process. The certified copy of proceedings and judgment were availed on the 23.04.23 but for some unclear reason were filed 5 months later; The letter requesting for a certified copy of the proceedings and judgment was lodged 70 days after the trial court's judgment instead of the required 30 days. The proceedings were not filed at all despite being available. No explanation has been proffered as to why an application to extend time was not considered or filed. In the end, we surmise that the Appellant has done enough to convince this court's to strike out the appeal with costs to the Respondent.

Respondent/appellant submissions

17. The Respondent/Applicant seeks, among others, to strike out the Memorandum and Record of Appeal dated 29th August 2023, alleging that they were filed out of time and are incomplete. The respondent urged the Court to dismiss the said Application with costs for the reasons set out hereunder. The Judgment appealed from was delivered on 5th August 2022. The Appellant requested certified proceedings and judgment on 15th November 2022 and received them on 23rd April 2023, as evidenced by the Certificate of Delay. The appeal was filed on 5th September 2023. The reason for such delay is that the Court took long until July 2023 before issuing a Certified Copy of Proceedings. As at the time of getting the certified copy of proceedings, the advocate on record was on leave and the Appellant thought that the Appeal had been filed. To his utter surprise, the Appeal had not been filed. He then took to retain another counsel who had to prepare the record of Appeal. Again there



was delay to prepare the record of Appeal since the file was not yet handed over to new advocate by the previous Counsel.

18. The Respondent submitted the delay was occasioned by factors beyond the control of the client; namely the Court took too long to issue the certified copy of proceedings and the mistake of an advocate by failing to file the Appeal as instructed on reasons that she (the previous counsel) was on her maternity leave. The respondent relied on the Supreme Court Ruling In [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others](#) [2014] eKLR, on the reasons that warrant allowing an Appeal out of time;-
- a. Extension of time is not a right of a party; it is an equitable remedy available at the Court's discretion.
 - b. The applicant bears the burden of providing a satisfactory basis for the delay.
 - c. The Court's discretion to extend time is exercised on a case-by-case basis.
 - d. A reasonable explanation for the delay must be provided to the Court's satisfaction.
 - e. The Court considers whether the respondent would suffer prejudice if the extension is granted.
 - f. The application must be brought without undue delay.
 - g. In certain cases, such as election petitions, public interest may be a factor in extending time."

The Court took almost a year to issue certified copy of proceedings despite constant follow up. The Appellant had issued instructions to the previous advocate to file the Appeal and all along he had thought that the same was filed but the same was not filed as the instructed advocate was on maternity leave. As soon as the Appellant/Respondent realized that the Appeal had not been filed, he went on to swiftly instruct another Counsel to move with speed and file the Appeal. However, it also took some while before the Counsel for the Applicant could receive the file from the firm of the previous advocate of which issue was compounded by her absence for maternity leave. The Memorandum of Appeal was filed without any further delay.

19. The respondent submitted that the mistakes of an advocate should not be visited upon the client. This was highlighted in the case of [Paul M. Mwangi v Paul M. Mwangi](#) (2015) eKLR "Although there was a blunder on the part of the Appellant's advocate, the Appellant... had no contribution to the blunder at all... it would be unjust to lock out such a litigant from prosecuting his case. Further, the same position was reiterated by the Court of Appeal in the case of [Philip Chemwolo & Another v Augustine Kubende](#) [1982-88] KAR 103 "Blunders will continue to be made from time to time, and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case heard on merit.8. Further in the case of [JN v JNN](#) (Civil Appeal E011 of 2021) [2022] KEHC 584 "Section 79G of the [Civil Procedure Act](#) states: 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 of a copy of the decree or order." Based on the above the respondent submitted that the time taken to prepare the copies of decree by the lower court is excluded from the computation of time under Section 79G of the [Civil Procedure Act](#). The Certificate of delay issued by the lower Court ON 11TH July 2023 attest to this fact. The time then began running as of then and the delay was of less than 11 days which was among other reasons was occasioned by the need to change advocates and for file being transferred from the previous advocate and to record a Consent as required by law.
20. To sum it up on this issue, the maxim of equity states that equity aids the vigilant and not the indolent. The Application by the Applicant dated 17th February, 2025 is an afterthought. Despite being served



more than once with the Appeal way back in August 2024, the Applicants only did an Application requiring to strike the Appeal out for alleged delay in filing the same when they have sat with the Appeal for close to 7 months only to respond with an Application. One who seeks equity must do equity. The doctrine of approbation has it that one cannot blow hot and cold at the same time. The Applicants cannot seek this Court to strike an Appeal on want of timeliness while they have also filed the Application 7 months after being served on the Appeal. On that premise the respondent urged that it's in the interest of justice to allow the Application as the Respondent would not suffer any prejudice for allowing it. This is because they reserve the right to respond to the appeal and the Court will have the opportunity to determine the Appeal on its merits and render a Judgment.

21. On whether the Record of Appeal is Incomplete, The Applicant alleges that the Record of Appeal lacks certified proceedings. However, Order 42 Rule 13(4) of the Civil Procedure Rules allows the Court to issue directions even where the record is not fully complete. The omission, if any, is curable and does not render the appeal fatally defective. Technical lapses should not be used to deny substantive justice. This Honourable Court is empowered under Article 159(2) (d) of the Constitution to administer justice without undue regard to procedural technicalities.
22. On whether the Court Has Jurisdiction, it is conferred by statute. This Court has appellate jurisdiction under Section 12 of the Employment and Labour Relations Court Act and Section 79G of the Civil Procedure Act. The allegation that the Court lacks jurisdiction is without merit.
23. Interests of Justice - The appeal raises important legal issues that warrant a full hearing on the merits. Striking out the appeal at this stage would unjustly prejudice the Appellant and deny him access to justice. The Honourable Court is urged to exercise its discretion to preserve the appeal for substantive determination.

Decision

24. The appeal was filed way out of time (30 days after decision) and without leave of the court, that is not acceptable. The explanations given did not explain the delay as certification of proceedings does not affect filing of appeal. Before the court there was no leave sought to file the appeal out of time. The court upholds its own decision in West Kenya Sugar Co Ltd v Angulu (Appeal E004 of 2024) [2024] KEELRC 1698 (KLR), where it cited the Supreme Court's decision in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others in support of the principle that an appeal filed out of time and without leave of court, renders such a document a nullity and of no legal consequence. The memorandum of appeal and entire record of appeal (which was incomplete) is struck off the record. The appellant is granted leave of 60 days to file a fresh appeal in compliance with the rules of the court and provide hard copies to court. Costs of the application to the applicant / respondent.
25. Mention on 22nd September 2025 to confirm compliance and issue directions.
26. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF JULY, 2025.

J.W. KELI,

JUDGE.

In the Presence of:

Court Assistant: Otieno



For Appellant – Kimathi

For respondent/Applicant - Mwalago

