



**Mbwiya t/a Mtwapa North Secondary School v Ged (Miscellaneous Application 20 of 2025) [2025] KEELRC 2410 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2410 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
MISCELLANEOUS APPLICATION 20 OF 2025**

**K OCHARO, J  
JULY 17, 2025**

**BETWEEN**

**MAKAZI MBWIYA T/A MTWAPA NORTH SECONDARY SCHOOL ..... APPLICANT**

**AND**

**ISSACK ISMAIL GED ..... RESPONDENT**

**RULING**

**Background.**

1. By a Notice on Motion application dated 7<sup>th</sup> February 2025, the Applicant seeks the following orders:
  - I. That this application be certified as urgent and service be dispensed with first Instance.
  - II. That pending the hearing and determination of this application, the Honourable Court does grant a temporary order of stay of execution.
  - III. That pending the hearing and determination of this Appeal, this Honourable Court be pleased to stay the Judgement delivered herein on 23<sup>rd</sup> September 2024 in Mombasa and any other order that may be issued pursuant thereto, pending the hearing of the Appeal.
  - IV. That the Honourable Court be pleased to extend time for the Applicant to file and serve the Memorandum of Appeal and Records of Appeal, lodged herein and served on the Respondent.
  - V. That the Honourable Court be pleased to direct the Applicant to serve this application to the Respondent and then be mentioned within 14 days for further Court directions.
  - VI. That the cost of this application be provided for.
2. The application is supported by the grounds set out on the face thereof and the supporting affidavit sworn by Makazi Mbiya filed herein, sworn on 7<sup>th</sup> February 2025.



3. The Respondent resists the application on the grounds set out in the replying affidavit sworn by Issack Ismael Gedi on 19<sup>th</sup> February 2025.

### **The Applicant's application**

4. The Applicant asserted that judgment was entered for the Respondent against them on 23<sup>rd</sup> September 2024.
5. The applicant was represented by an advocate who failed to ask the relevant questions during the hearing of the matter before the trial.
6. It is further asserted that the Applicant was misdirected by their advocate, who misfiled the memorandum of appeal in the wrong forum.

### **The Respondent's case**

7. The Repondent contends that for a stay of execution pending Appeal and leave to file Appeal out of time Application to suffice the conditions set out in Order 2 Rule 6(1) and (2) of the Civil Procedure Rules amended in 2020 and Section 79G of the *Civil Procedure Act* ought to be met.
8. It is further contended that whereas a Court of Law has unfettered power to grant a stay of execution pending an Appeal, three conditions must be satisfied. The Applicant must demonstrate that they will suffer substantial loss if the order isn't granted, furnish security, and that the application has been filed without unreasonable delay.
9. The Applicant's instant does not meet the legal threshold for granting a stay of execution pending Appeal, as no substantial loss has been demonstrated by the Applicant that it stands to suffer if the sought orders are not given, and as such, he is undeserving of the sought orders.
10. Furthermore, execution has not yet commenced; hence, the orders sought herein are unwarranted. That notwithstanding, the mere fact that execution has been commenced does not necessarily amount to substantial loss, that process being a lawful one. The Applicant must tender empirical or cogent documentary evidence of the substantial loss, which the Applicant hasn't done.
11. The intended Appeal does not raise triable issues for consideration by this Honourable Court since the Judgment delivered on 23<sup>rd</sup> September, 2024, by Hon. R.N. Akee (SRM) in MCELRC No. 48 of 2019 was well-reasoned and supported by cogent evidence. The intended Appeal by the Applicant herein is a waste of the precious Court time, an afterthought and made to delay him from enjoying the fruits of my judgment as a successful litigant.
12. He states that, should this Honourable Court find it reasonable to allow the instant Application. It should be a condition that the Applicant pays or deposits the entire decretal sum in a joint interest-earning account in an escrow account or with the Court within thirty (30) days as security for costs.
13. The Applicant has further failed to demonstrate good and sufficient reasons for this Court to exercise its discretion and entertain the instant Application. The Applicant has put forth no plausible explanation as to why and on what basis the stay of execution orders are sought. The Applicant was granted a thirty (30) day stay of execution orders on 23<sup>rd</sup> September, 2024, which right he slept on and as such he cannot be allowed to circumvent the course of Justice to have a second bite of the cherry before the same Court.
14. The Applicant has further failed to demonstrate good and sufficient reasons for the Court to exercise its discretion and grant leave to file its Appeal out of time. No plausible explanation for the inordinate



delay in filing the intended Appeal out of time or any action at all has been given. The Applicant was jotted into seeking leave to appeal out of time and stay of execution orders upon being served with a letter for the settlement of the decretal award on 15.01.2025.

### **Analysis and Determination**

15. I have carefully considered the Applicant's application, the grounds upon which it is anchored, the affidavit in support thereof, and the Respondent's replying affidavit, and distilled a single issue for determination, namely, whether the Applicant is entitled to an order of extension of time to appeal out of time and for stay of execution of the lower court decree if the order of extension is granted.
16. The Court's power to extend time for filing an appeal outside the statutory period is a discretionary authority, exercised based on the particular circumstances of each case. It is exercised judiciously, not out of sympathy, whims, or caprice.
17. Through jurisprudence, the factors that courts must consider when faced with an application for an extension of time for determination are now well established. These factors include: whether the applicant has provided sufficient reason for the delay; the duration of the delay; whether the respondent would suffer prejudice if the extension is not granted; and the public interest.
18. I have carefully examined the grounds on the face of the Applicant's application and affidavit in support thereof, and without hesitation conclude that there is no sufficient explanation for the delay in applying. This is considering that he knew of the delivery of the judgment by the lower court, and that the stay of execution granted by that court expired on 22nd October 2024. In the circumstances of this case, the Applicant had the obligation to explain the failure to file an appeal in time and the delay of more than four months in filing this application. He did not offer any plausible explanation.
19. By reason of the foregoing premises, I find no reason to proceed to consider the other grounds. The Applicant's application must fail at this point for the reason that the Applicant hasn't demonstrated sufficient reason for the delay in filing their appeal within the statutory period.
20. The Applicant's application is hereby dismissed with costs.

**READ, SIGNED AND DELIVERED THIS 17<sup>TH</sup> DAY OF JULY 2025.**

**OCHARO KEBIRA**

**JUDGE**

