



REPUBLIC OF KENYA



**Kanyaa v NK Brothers Limited (Miscellaneous Application  
E028 of 2025) [2025] KEELRC 2062 (KLR) (11 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2062 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E028 OF 2025**

**AK NZEI, J  
JULY 11, 2025**

**BETWEEN**

**JOSEPH KIMANZI KANYAA ..... APPLICANT**

**AND**

**NK BROTHERS LIMITED ..... RESPONDENT**

**RULING**

1. The application before me for determination is the Applicant's Notice of Motion dated 30<sup>th</sup> January, 2025. The applicant seeks Orders:-
  - a. That this Court be pleased to grant the Applicant leave to appeal out of time against the Judgment of Hon. E. Riany dated 18<sup>th</sup> December, 2024 in Milimani MC ELR Case No. E831 of 2023 in terms of the annexed draft memorandum of appeal.
  - b. That this Court be pleased to issue temporary and/or interim orders of stay of execution of the Judgment and/or decree in Milimani MC ELR Case No. E831 of 2023.
  - c. That costs of the application be in the cause.
2. The application, expressed to be brought under Rules 18, 21, 45(1) & (3) and 73(2) of the Employment and Labour Relations Court (Procedure) Rules 2024, among other provisions of the law, sets out on its face the grounds on which it is based, and is anchored on the Applicant's supporting affidavit sworn on 30<sup>th</sup> January, 2025. It is deponed in the said supporting affidavit:-
  - a. that Judgment in Milimani MC ELR Case No. E831 of 2023 was delivered on 18<sup>th</sup> December, 2024, dismissing the suit with costs for lack of merits.
  - b. that the Applicant's Advocates had closed their offices for Christmas and New Year Holidays by the time the trial Court's Judgment was delivered, and that the Applicant was not advised on the outcome of his case until 13<sup>th</sup> January, 2025 when his Advocates opened their offices;



and that being dissatisfied with the whole Judgment, he instructed his Advocates to appeal against the same.

- c. that on 15<sup>th</sup> January, 2025, the Applicant's Advocates wrote to the trial Court requesting to be supplied with certified copies of the trial Court's proceedings and Judgment for purposes of compiling a record of appeal.
  - d. that 30 days within which the Applicant ought to have filed his appeal lapsed on 17<sup>th</sup> January, 2025, and that the delay in filing the appeal was occasioned by the administrative closure of the Applicant's Advocate's Offices for Christmas and New Year holidays, which is excusable.
  - e. that the intended appeal is arguable and has high chances of success; that the application herein was brought without inordinate delay; and that the Respondent will not be prejudiced if the application is granted.
3. Documents annexed to the supporting affidavit include copies of the trial Court's Judgment delivered on 18<sup>th</sup> December, 2024, a letter by the Applicant's Advocates to the trial Court (dated 15<sup>th</sup> January, 2025) requesting for certified copies of the Court's proceedings and Judgment, a Court receipt on payment of Court charges, and a draft memorandum of appeal.
4. The application is opposed by the Respondent vide a replying affidavit of Rajesh Rathod sworn on 25<sup>th</sup> February, 2025. It is deponed in the said replying affidavit, inter-alia:-
- a. that under Section 79G of the *Civil Procedure Act*, appeals from Subordinate Courts to the High Court should be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify for the preparation and delivery to the appellant of a copy of the decree or order, provided that an appeal may be admitted out of time if the appellant certifies the Court that he had good and sufficient cause for not filing the appeal in time.
  - b. that the impugned Judgment was delivered on 18<sup>th</sup> December, 2024 in the presence of Counsel for both parties herein, and that Counsel for the Applicant should have called the Applicant and informed him of the [case] outcome.
  - c. that the impugned Judgment was uploaded on the E-filing system on 20<sup>th</sup> December, 2024, while the current application was filed on 11<sup>th</sup> February, 2025; and that the Applicant's Advocate's letter dated 15<sup>th</sup> January, 2025 requesting for a copy of the Judgment is meant to mislead the Court.
  - d. that by 15<sup>th</sup> January, 2025 when instructions to appeal are said to have been given, time for filing an appeal had not lapsed, and that the Applicant has not explained why an appeal was not filed upon giving of those instructions.
  - e. that the application herein is an afterthought, and an abuse of Judicial process.
  - f. that the Respondent will be prejudiced if the application is granted, and litigation is re-started after having been finalised.
  - g. that the Applicant has not satisfied the conditions of granting a stay of execution as required under Order 42 Rule 6 of the Civil Procedure Rules.
5. The Applicant filed a further affidavit, sworn by himself on 3<sup>rd</sup> March, 2025. It is deponed in the said further affidavit:-



- a. that the Applicant was supposed to file an appeal within 30 days of delivery of the trial Court's Judgment pursuant to Rule 12(2) of the Employment and Labour Relations Court (Procedure) Rules 2024, which ought to be read together with Order 50 Rule 4 of the Civil Procedure Rules 2010, which provides that time does not run between 21<sup>st</sup> of December and 13<sup>th</sup> of January in the year next following, both days included.
  - b. that the Applicant instructed his Advocates to file an appeal on 15<sup>th</sup> January, 2025 but being unable to pay the Advocate's fees as requested by them (the Advocates), the appeal was not filed within 30 days, hence the delay.
  - c. that the delay was due to financial constraints on the part of the Applicant as he was paying his children's school fees for the 1<sup>st</sup> term 2025; and only managed to pay his Advocates legal fees on 10<sup>th</sup> February, 2025.
  - d. that the period between the date of delivery of the impugned Judgment (18<sup>th</sup> December, 2024) and the date of filing the present application was 31 days, and that the delay involved was of a 1 day.
  - e. that the Respondent was awarded costs in the impugned Judgment, and may tax the same anytime, causing the Applicant to suffer substantial loss.
6. Documents annexed to the further affidavit are a school fees structure and a school fees receipt dated 9<sup>th</sup> March, 2025.
  7. Both parties filed written submissions on the application pursuant to the Court's directions in that regard.
  8. The trial Court's Judgment intended to be appealed against was delivered on 18<sup>th</sup> December, 2024. Rule 12(2) of the Employment and Labour Relations Court (Procedure) Rules 2024 provides as follows:-
 

“Where an appeal is from a Magistrate's Court or where no period of appeal is specified in the written law referred to in Sub-rule (1), the appeal shall be filed within thirty days from the date the decision is delivered.”
  9. Rule 18 of this Court's said Rules on the other hand provides as follows:-
 

“The Court may, if circumstances justify, extend the time prescribed for the filing of an appeal or any document relating to an appeal.”
  10. It is clear from the foregoing provisions of this Court's Rules of Procedure that for the Court to exercise discretion in favour of an applicant seeking extension of time to file an appeal out of time, circumstances of the case must justify such exercise.
  11. Further, as held in the case of First American Bank of Kenya Limited – vs – Gulab P. Shah & 2 Others [2002] 1EA 65, a Court must also consider the following factors:-
    - (a) The explanation, if any, for the delay.
    - (b) Merits of the contemplated action, whether the matter is arguable or deserving of a day in Court, or whether it is a frivolous one which would only result in delay of the course of Justice.



- (c) Whether or not the Respondent can be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant.”

12. The circumstances of this case are rather interesting. The trial Court’s Judgment was delivered on 18<sup>th</sup> December, 2024 and two days later (on 21<sup>st</sup> December, 2024), time stopped running, and did not start running again until 14<sup>th</sup> January, 2025. Although this Court’s aforesaid rules of procedure are loudly silent on when time does not run, Order 50 Rule 4 of the Civil Procedure Rules 2010 provides as follows:-

“Except where otherwise directed by a Judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the Court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.”

13. The foregoing provision of the law cannot be overlooked or wished away, despite the fact that the same is not saved into this Court’s Rules of Procedure. The Civil Procedure Rules are a older written law, and can provide perfect guidance where this Court’s Rules, which came to scene much later, are silent on any procedural issue.
14. Thirty days within which the Applicant ought to have filed an appeal against the trial Court’s said Judgment lapsed on 10<sup>th</sup> February, 2025. The present application, dated 30<sup>th</sup> January, 2025, was filed on 11<sup>th</sup> February, 2025, a day after the said lapse. The Applicant admits to having been briefed on the Judgment on 15<sup>th</sup> January, 2025, and depones that he on the said date instructed his Advocates to appeal against the Judgment, upon which his Advocates applied for certified copies of the trial Court’s proceedings and the said Judgment. Copies of the letter of request and Court receipt on payment of Court charges for the copies were filed with the application. Copies of the trial Court’s proceedings have, however, NOT been filed in this Court. I will come back to this issue later in this Ruling.
15. The Applicant tried to explain the one day delay in filing the intended appeal by deponing that he was not able to pay the part-legal fees requested for by his Advocates on record before they could file the appeal, and that he had difficulties raising the legal fees as he had to pay his Children’s school fees for the 1<sup>st</sup> term 2025. The Applicant has not however, exhibited any letter/request for legal fees deposit from his Advocates, and has not stated and/or demonstrated when he eventually paid the alleged legal fees (deposit). All that the Applicant has exhibited are copies of a school fees structure and a school fees payment receipt for Kshs.15,000/=, shown to be dated 9<sup>th</sup> March, 2025. It is to be noted that the present application was filed on 11<sup>th</sup> February, 2025, whereas the school fees said to have occasioned the delay is shown to have been paid almost a month later, on 9<sup>th</sup> March, 2025. The School fees allegation, does not, in my view, explain the one day delay; though the delay is one that the Court may excuse if the Applicant demonstrates that he has an arguable appeal.
16. As already stated elsewhere in this Ruling, the Applicant has not filed copies of the trial Court’s proceedings in this Court. Copies of pleadings filed in the trial Court have also not been exhibited in this Court. Having not perused and considered the said documents, this Court cannot tell whether or not the Applicant has an arguable appeal; or whether or not the intended appeal is frivolous. An applicant seeking leave to file an appeal out of time must, as a matter of necessity, file certified copies of



the trial Court's proceedings and copies of pleadings on which the proceedings were based. It is only upon perusing and considering the said documents alongside the impugned decision that this Court can make a decision on whether or not the intended appeal is arguable, or is frivolous.

17. That said, and having considered written submissions filed for and against the application, I find no merit in the Notice of Motion dated 30<sup>th</sup> January, 2025, and the same is hereby dismissed with no order as to costs.

18. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF JULY 2025**

**AGNES KITIKU NZEI**

**JUDGE**

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Miss Omollo for the Applicant

No appearance for the Respondent

