



**Zaam Industries Limited v Fibanda (Appeal E056 of 2025)
[2025] KEELRC 2025 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2025 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E056 OF 2025**

**JW KELI, J
JULY 4, 2025**

BETWEEN

ZAAM INDUSTRIES LIMITED APPELLANT

AND

FRANCIS MAKUNDA FIBANDA RESPONDENT

RULING

1. The applicant pursuant to judgment delivered on the 18th December 2024 by Hon. Ogonda in MCELRC/E1712 of 20221 between the parties in favour of the respondent filed the instant application by way of Notice of Motion dated 26th February 2025 brought under Articles 48, 50 and 159 of the , Sections 1A and 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of law seeking for the following orders:-
 - a. That this Application be certified urgent and be heard on a priority basis.
 - b. That this Honourable Court be pleased to issue an order for stay of execution of the judgment and/or decree delivered on the 18th day of December, 2024 pending the hearing and determination of this application and intended appeal.
 - c. That this Honourable Court be pleased to grant leave to file an appeal out of time.
 - d. That the Notice and Memorandum of Appeal annexed hereto be deemed as dully filled.
 - e. That costs of this Application be provided for.
2. The application was premised on the following grounds-
 - a. The Appellant/Applicant is the judgement debtor in MCELRC/E1712/2021 (Francis Makunda Fibanda v Zaam Industries Limited) wherein judgement was entered against it in the sum of Kshs. 120, 615 together with interests at court rates from the date of filing the suit.



- b. The Appellant/Applicant was never aware that judgement had been entered against it as no Notice of Entry of Judgement was served upon it.
 - c. That instead, the Appellant/Applicant only learnt of the judgement from the public information desk and has since proffered to appeal against the entire judgement.
 - d. That while the Appellant/Applicant had Advocates representing it in the matter, the delivery of the judgement against it was not brought to the Appellant's attention in time.
 - e. That an innocent mistake of Counsel should not be visited upon the Appellant/Applicant in manner likely to occasion injustice.
 - f. While the Honourable Trial Court granted stay for thirty (30) days, the same has lapsed and the Respondent may embark on the execution of decree.
 - g. The Appellant/Applicant is apprehensive that unless this application is certified urgent and a temporary stay of execution granted pending the hearing and determination of this Application and the intended appeal, the Respondent may resort to executing the judgement and/or decree thus rendering the appeal preferred herein nugatory.
 - h. The Appellant intends to lodge an appeal before this Honourable Court and has annexed hereto the Memorandum of Appeal.
 - i. The appeal is highly arguable and thus meritorious with higher chances of success as the Learned Trial Magistrate erred in law and fact by making an inference as to the existence of an employment when no evidence was adduced to that effect.
 - j. That should execution proceed pending the hearing of the appeal, the Respondent's ability to refund the decretal amount remains unknown and is presumably insufficient.
 - k. Unless stay of execution is granted as prayed, the appeal will be rendered nugatory, and the Appellant will suffer substantial loss.
 - l. The Respondent will neither suffer loss nor injustice if an order staying execution is granted.
 - m. The Appellant undertakes to comply with the directions as will be issued by the Honourable Court in respect to the grant of stay of execution
 - n. The appeal, akin to the present Application has been brought without unreasonable delay.
 - o. That it is in the interest of justice that the orders sought herein are granted as otherwise would amount to denying the Appellant the crucial opportunity to exhaust its legal remedies.
3. The application was further supported by the affidavit of Mohammed Amin Ali dated 26th February 2025 annexing the judgment of the lower court appealed against as "MA-1".
4. The application was opposed by the respondent through his replying affidavit dated 12th March 2025 to the effect that :- The Application is fatally defective and a non-starter because although the Appellant has an Appeal case number, their Application for stay of execution is not anchored on any appeal and is ripe for striking out. That the Firm of Abdihakim Haji & Co. Advocates have not sought leave to come on record for the Appellant herein in place of the Firm of Muirungi & Co. Advocates and they are therefore not properly on record. That the Appellant has not satisfied the conditions necessary for the granting of stay of execution. The Appellant has neither demonstrated the loss it will suffer if stay is not granted nor furnished security for the due performance of the decree. That although the Appellant claims not to have been aware of the entry of Judgment, it has not given evidence of any communication



with its previous Advocates to demonstrate that they followed up on the Judgment given that the date for Judgment was taken by consent of parties. That in any event, after the lapse of the 30 days stay period granted by the trial Court, my advocates sent the Appellant a letter dated 28th January 2025 asking that the Appellant settles the decretal sum (Annexed hereto and marked "FMF-1" is a copy of the letter dated 28th January 2025). That the letter dated 28th January 2025 went unanswered, and my advocates sent a follow up letter dated 6th February 2025 notifying the Appellant that they were going to proceed with execution (Annexed hereto and marked "FMF-2" is a copy of the letter dated 6th February 2025). That the Appellant's former Advocates responded through an email dated 12th February 2025 stating that they had received the Judgment and they were going to advise their client on the next steps (Annexed hereto and marked "FMF-3" is a copy of the email dated 12th February 2025). The Appellant did not take any steps until 26th February 2025 when they filed the present Application. That in reply to Paragraph 10 of the Supporting Affidavit by Mohamed Amin Ali, the Appellant claims that the trial Court inferred to the existence of an employment when there was no evidence to prove it yet the Appellant filed documents in Court proving that the Respondent was their employee and that means that the Appellant's intended appeal is neither arguable nor meritorious and there is therefore no reason to grant the Appellant leave to appeal out of time.

5. The appeal was canvassed by way of a written submission. Both parties filed.

Decision

Whether the advocate were properly on record

6. The Respondent stated that the law firm of Abdihakim Haji & Co. Advocates have not sought leave to come on record for the appellant herein in place of the Firm of Muirungi & Co Advocates and hence not properly on record. The Respondent submitted that the [Employment and Labour Relations Court \(ELRC\) \(Procedure\) Rules, 2024](#) do not provide for the procedure of change of Advocate after Judgment. Order 9 Rule 9 of the [Civil Procedure Rules, 2010](#) provides that: "9. Change to be effected by order of court or consent of parties. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-
 - (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be." The Firm of Abdihakim Haji & Co. Advocates has not sought the leave of this Court to come on record for the Appellant thus they are not properly on record.
7. Conversely, the applicant submitted that the rationale of Order 9 Rule 9 of the [Civil Procedure Rules](#) as demonstrated by a plethora of judicial decision is to inter alia to protect Advocates who acted in the original suit and as observed above; their entitlement to costs in the original suit will not be affected by the new Advocate prosecuting the appeal. The foregoing rule espoused in Order 9 Rule 9 of the [Civil Procedure Rules](#) (above), only applies where an advocate comes on record after Judgment in the same proceedings, suit or action, which is not the case herein.
8. In the case of [Kiarie V Njibia](#) [2023] KEHC 23093 (KLR) the Learned Judge confronted with a similar issue held that;- "In my view, the requirement of Order 9 Rule 9 is meant to apply where a new Advocate comes on record after Judgment in the same proceedings, suit or action, not an ancillary action, no matter how much related they might be. In my understanding, a separate Miscellaneous Application such as the present one or even an Appeal is a different "action" distinct from the initial suit from which it arises. Since these different "actions" are filed and canvassed in different distinct



Courts, a party can well have one Advocate acting for him in the initial suit and after Judgment, instruct a separate Advocate to act for him in the Miscellaneous Application such as the present one or in an Appeal despite these ancillary actions arising from the initial suit. Order Order 9 Rule 9 does not apply in such scenario." In *Peter Chere Kiiru v Charles Mulanda Manyelo* [2019] eKLR, the Judge observed as follows: "The issue here is whether Advocates who were not on record in the original suit is required to seek leave to file appeal. Is an appeal to be treated as separate from original suit or it is a continuation."¹⁹. At paragraph 15, the Learned Judge went ahead to hold that: "My view is that the fact that instructions to file suit in original suit and appeal have to be given by the client, it makes them distinct suits; and a party is at liberty to either continue with Advocate who acted in lower suit or engage another for the appeal. No prejudice will be occasioned to an Advocate who acted in the lower suit as the appellate court will made orders in respect to costs of the appeal. "I uphold the foregoing decisions to hold that the appeal is a different instruction of the advocate. A party is not obliged to keep one advocate at all stages of litigation. The process at the lower court is complete and no prejudice can be occasioned by instruction of new advocates at the appeal. I hold law firm of Abdihakim Haji & Co. Advocates is properly on record at this stage.

Whether the application merits order of extension of time to file appeal out of time

9. Under Rule 12 (2) of the *Employment and Labour Relations Court (Procedure) Rules* 2024, and Section 79G of the *Civil Procedure Act*, an appeal of the said decision should have been filed before the Court within 30 days of the decision. Rule 12(2) aforesaid provides that: "Where an appeal is from a magistrate's court or where no period of appeal is specified in the written law referred to in subrule (1), the appeal shall be filed within thirty days from the date the decision is delivered."
10. Section 79G aforesaid provides:- "79G. Time for filing appeals from subordinate courts

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 to the appellant of a copy of the decree or order: 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."
11. The judgment of the lower court was delivered on the 18th December 2024. The applicant filed the instant application on the 26th February 2025 seeking for leave to file an appeal out of time on the ground that they were not notified of the judgment delivery and further that their advocate then did not update them. The respondent sent a letter dated 28th January 2025 after lapse of 30 days stay issued by the lower court, seeking payment to Murungi & Co advocates. The court noted an email of the said Advocates to the respondent's advocates stating they had the judgment and would advise their client(FMF-3) .
12. The court had no basis to doubt the position by the applicant that their advocate did not inform them of the judgment earlier. The court finds that the mistake of advocate was established and without unreasonable delay, the applicant made this application. The court found that the applicant had disclosed a good cause to allow extension of time to appeal out time as guided 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.”

13. The extension of time is allowed. The memorandum of appeal was filed without leave of court which was improper. The applicant having lodged it as same time as the application the same is deemed as duly filed(see section 20 of the [Employment and Labour Relations Court Act](#).

On whether the order stay was merited

14. It is instructive to note that the impugned Judgment is dated 26th November 2024. The [Employment and Labour Relations Court \(Procedure\) Rules 2024](#) on stay of execution in case of appeal states:-

“21. (1) Where an application for stay of execution pending appeal has been lodged, the applicant shall, in the supporting affidavit, declare whether a similar application has been filed in any other court

- (2) An application for stay of execution pending appeal shall be filed in the appeal file.”

15. Since the Rules are silent on the conditions for granting stay then the lacuna is addressed by Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) to wit:-

- “(2)) No order for stay of execution shall be made under subrule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”



16. The applicant did not address the court on the issue of security. I am guided by the decision of the Court of appeal in *Butt -v Rent Restriction Tribunal* (1982) KLR 417 on how a Court should exercise discretion in an application for stay of execution where it held that: -

- “1. The power of the Court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle is granting or reusing a stay is: If there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge’s discretion. (sic) (trial Court judgement).
3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
4. The Court in exercising its powers under order XLI rule 4 (2) (b) of the *Civil Procedure Rules* can order security upon application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse”.

17. The court finds that there is a high likelihood of the appeal being rendered nugatory in the event the Intended Appellant is successful in the appeal, as their assets are likely to have been sold (substantial loss), and there is no certainty that the Respondent will be able to repay the decretal sum. The court cannot issue stay without security under order 46(2)(b). The court then allows the application as follows:-

1. That this Honourable Court is pleased to issue an order for stay of execution of the judgment and/or decree delivered on the 18th day of December, 2024 pending the hearing and determination of the intended appeal on condition that the decretal sum is deposited in court within 30 days of this order in default execution may proceed.
2. That this Honourable Court is pleased to grant leave of the court to the applicant to file an appeal out of time. That the Notice and Memorandum of Appeal annexed hereto is deemed as duly filled.
3. Costs of the application to the respondent being the decree holder.

18. It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF JULY 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Applicant –absent

Respondent: Kibet h/b Ms Mideva

