



REPUBLIC OF KENYA



KENYA LAW
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**Rawago v South Nyanza Sugar Co. Limited (Miscellaneous Civil Application
E229 of 2023) [2024] KEHC 8148 (KLR) (2 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 8148 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION E229 OF 2023**

RPV WENDOH, J

APRIL 2, 2024

BETWEEN

MORRIS OWINO RAWAGO APPLICANT

AND

SOUTH NYANZA SUGAR CO. LIMITED RESPONDENT

RULING

1. The application for consideration is dated 14/9/2023. It has been filed by Morris Owino Rawago (the applicant) and he seeks the following orders:-
 1. The applicant be granted leave to appeal out of time against the whole of the judgement of Hon. R.K. Langat dated 19/7/2022 in PMCC No. 325 of 2018;
 2. That the memorandum of appeal annexed hereto and marked X be deemed as duly filed upon payment of the requisite filing fees;
 3. That costs be provided for.
2. The application is based on the grounds on its face and the supporting affidavit of Ezekiel Oduk Counsel who has conduct of this matter on behalf of the applicant. He deposed that judgement was delivered on 19/7/2021 without prior notice and in absence of Counsel; that he was made aware of the judgment on 6/9/2023 after the trial Magistrate's transfer; that he has since communicated to the applicant who is aggrieved by the decision; that he has prepared a memorandum of appeal but the time for lodging the appeal has now lapsed; that the judgement raises serious grave misdirection and it is important that the court looks into the propriety of the decision. Counsel urged that no prejudice will be suffered if the application is allowed as the delay was beyond the applicant's control.
3. The application was not opposed. The applicant filed written submissions dated 22/11/2023 and asked this court to allow his application as prayed.



4. The application is for leave to appeal out of time. Section 79G of the *Civil Procedure Act*, provides that the time for filing an appeal from the Subordinate court to the High Court is 30 days. The same provision gives the High court discretion to enlarge time for a party to file an appeal out time if there are good and sufficient reasons.
5. According to the applicants' Counsel, judgement was delivered on 19/7/2022 without notice to the parties. Counsel stated that he discovered the existence of the judgement on 6/9/2023.
6. In determining whether leave to appeal out of time should be granted, I am guided by the binding decision of the Court of Appeal in *Edith Gichungu Koine vs Stephen Njagi Thoithi* (2014) eKLR Odek JA rendered himself as thus:-

" Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others."

7. On the period of delay, the impugned judgment was delivered on 19/7/2021. The instant application was filed on 14/9/2023. This is a period of approximately 2 years and 4 months. The applicant's reason for the delay was that there was no notice issued on when the judgement would be delivered.
8. Looking at the judgement from the trial court, there is no coram which was recorded by the Magistrate. This court is also not fortunate to peruse through the trial court's proceedings to appreciate whether the court told Counsel for the applicant when judgement would be delivered.
9. However, that does not absolve the applicant from being vigilant and following up on a matter which they had an interest in. I am not convinced that the applicant has given a proper reason on why he wishes to commence this appeal two years later. Counsel knew that he had a pending judgement and it could not have taken two years to follow up on the same. In my view, the delay period of 2 years has not been explained succinctly and no proper reasons have been advanced on the delay.
10. Whether the applicant has an arguable appeal: I have considered the judgement being appealed against. The trial Magistrate observed that the alleged breach of contract was for the compensation of 2 cycles of ratoon crops. The Magistrate observed that there was no document produced to show the price applicable then and since the claim was for special damages, the price had to be proved. On that basis, the suit was dismissed.
11. In the applicant's draft memorandum of appeal, the applicant mainly contends that the learned Magistrate erred in failing to appreciate that the sugarcane price was admitted by the respondent to be Kshs. 3, 200/= and the award should have been made based on that.
12. In my view, this being a claim for special damages, it was prudent that the same be pleaded and proved. Thus, the learned Magistrate reached a proper finding. This is not an arguable appeal
13. The finding of this court is that the application is devoid of merit. it is hereby dismissed with no orders as to costs.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 2ND DAY OF APRIL, 2024

R. WENDOH

JUDGE

Ruling delivered in the presence of:-



Ms. Theuri for the Applicant.

Mr. Odhiambo for the Respondent.

Emma and Phelix Court Assistants.

