



**Butali Sugar Mills Ltd v Chikamai & another (Civil Application  
E011 of 2022) [2023] KECA 1304 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1304 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E011 OF 2022  
M NGUGI, JA  
OCTOBER 27, 2023**

**BETWEEN**

**BUTALI SUGAR MILLS LTD ..... APPLICANT**

**AND**

**ISAIAH CHIKAMAI ..... 1<sup>ST</sup> RESPONDENT**

**FRODAK KENYA LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for leave to file an appeal out of time against the ruling  
of the Employment and Labour Relations Court of Kenya at Bungoma  
(Keli J) dated 2nd December, 2022 in ELRC Misc. App No E009 of 2022)*

**RULING**

1. In the application dated January 16, 2023 expressed to be brought under sections 72 and 95 of the [Civil Procedure Act](#) and Rules 4 and 41 of the [Court of Appeal Rules, 2022](#), the applicant seeks three substantive orders:
  - i. That the Appellant be granted leave to appeal out of time against the whole ruling of the Hon. Judge Keli delivered on December 2, 2023 (sic) at Bungoma.
  - ii. That this Honourable court be pleased to issue an order for stay of execution of the ruling delivered on December 2, 2022 in ELRC Misc App No E009 of 2022 pending the hearing and determination of the intended appeal.
  - iii. That the Notice of Appeal and Memorandum of Appeal annexed hereto be deemed as duly filed and served.
2. The application is based on the grounds set out therein and, on an affidavit, sworn by the applicant's advocate, Ms. Sylvia Kedogo, on January 16, 2023.



3. It is contended in these grounds and in the affidavit by Ms. Kedogo that the ruling in the matter was delivered on December 2, 2022 in favour of the 1<sup>st</sup> respondent and against the applicant and the 2<sup>nd</sup> respondent.
4. That upon delivery of the impugned ruling, the applicant requested for certified copies of the typed proceedings and the ruling by way of a letter dated 16<sup>th</sup> December 2022 attached to Ms. Kedogo's affidavit as annexure SK-1. I pause here to observe that there is no annexure marked as Ms. Kedogo avers, or indeed any document, annexed to her affidavit.
5. It is further contended that being aggrieved with the decision of the trial court, the applicant desires to appeal against it but by the time sufficient instructions could be obtained from the appellant, the time within which to file the appeal had run out.
6. Ms. Kedogo avers that she truly believed that they would get a copy of the typed ruling within a week or two but they are yet to receive the ruling, but they decided to lodge an appeal anyway. She is fully aware that the time for lodging an appeal has lapsed but this Court has the power to enlarge time. The applicant contends that it has an arguable appeal with a high chance of success and if stay is not granted, the appeal stands to be rendered nugatory.
7. There is no response from the respondents. I note, however, from the Hearing Notice dated June 30, 2023 sent by email to counsel for the applicant on the email kedogo@mnlegal.co.ke, resolution@mnlegal.co.ke and Ken Okong'o on the email kenokongo69@gmail.com, the applicant's advocate is directed to serve the notice upon V. Shibanda & Co. Advocates. There is no evidence of service on this latter firm. This notwithstanding, and having considered the applicant's pleadings before this court, I believe it is possible to dispose of the application notwithstanding the absence of service on this latter firm, which may well be the firm of advocates on record for the 1<sup>st</sup> respondent.
8. I observe, first, that while, in its substantive prayers, the applicant seeks an order of stay of execution of the ruling dated December 2, 2022, it has not invoked the provisions of Rule 5(2)(b) of the *Rules* of this Court. The rule grants this Court discretion to grant stay of execution where an applicant has filed a notice of appeal in accordance with rule 77 of the *Rules* of this Court. The applicant not having filed a notice of appeal, an application under Rule 5(2)(b) is not available to it.
9. Regarding the prayer for leave to appeal out of time, Rule 4 grants this Court the discretion to extend time. However, the exercise of such discretion is conditional on certain factors which have been enunciated in a line of decisions by this Court- see, for instance, *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* [1999] 2 EA 231 and *Fakir Mohammed v Joseph Mugambi & 2 Other* [2005] eKLR. The Court is required to consider first, the length of the delay, secondly, the reasons for the delay, thirdly, (possibly) the chances of success of the intended appeal, and finally, the prejudice that the respondent would suffer if the orders sought are granted.
10. The ruling that the applicant seeks to appeal against was delivered on December 2, 2022. Under Rule 77(2), the applicant was required to file a notice of appeal within 14 days of that date, which would have been the 16<sup>th</sup> of December 2022. That is the date on which the applicant alleges that it wrote to the trial court seeking copies of the proceedings and ruling. As I observed above, there is no letter placed before this Court requesting for copies of the proceedings and ruling. This application is dated January 16, 2023.
11. The delay in lodging the notice of appeal is about two weeks, taking into account the time during the Christmas period when, under the Civil Procedure Rules, time does not run. The reason for the delay, however, is not excusable. The provisions of Rule 77 with respect to the lodging of a notice of appeal



are clear, and it cannot be an acceptable excuse for an officer of the Court, fully conversant with the Rules of this Court, to explain a delay in filing a notice of appeal within the prescribed time limit on the basis that “I truly believed that we would obtain the typed ruling within a week or two. To date we have not received the said ruling but have decided to lodge an appeal anyway.”

12. I observe, further, that, according to Ms. Kedogo, the applicant is yet to receive the ruling it seeks to appeal against, nor has it received the proceedings, so it is still not in a position to file an appeal against the said ruling. That being the case, not having the ruling sought to be appealed against before it, this court is also not able to discern and make a determination on the other principles to be considered under Rule 4- the possibility of the applicant’s appeal succeeding, and the prejudice to be suffered by the respondent if the orders are granted.
13. It seems to me that the applicant would have been better served by waiting until it has received the ruling and proceedings before the trial court to file an application for extension of time. Regrettably, it has not annexed any correspondence with the trial court requesting for the ruling and the proceedings. Judging from the material that the applicant has placed before the Court, I find that the present application is premature and incompetent, and I hereby strike it out with no order as to costs.

**DATED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

