



**Kenya Union of Commercial Food and Allied Workers v Kisii Bottlers Limited & another (Employment and Labour Relations Appeal E004 of 2023) [2024] KEELRC 519 (KLR) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 519 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO**  
**EMPLOYMENT AND LABOUR RELATIONS APPEAL E004 OF 2023**  
**HS WASILWA, J**  
**MARCH 5, 2024**

**BETWEEN**

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS ..... APPELLANT**

**AND**

**KISII BOTTLERS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ALMASI BEVERAGES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me for determination is the intended Appellant/ Applicant Notice of Motion dated 26<sup>th</sup> October, 2023, filed pursuant to Order 51 Rule 1 & 3 of the Civil Procedure Rules, Sections 3, 3A and 95 of the *Civil Procedure Act*, Rule 8 of the Employment and Labour Relations Court (Procedure) Rules 2016 and all the enabling provisions of the law, seeking for the following Orders; -
  - a. Spent.
  - b. That this Honourable be pleased to grant leave to the intended Appellant/ Applicant to Appeal out of time against the Judgement of the Magistrate Court at Kisii, in MC ELRC Cause No. 5 of 2022, delivered on 12<sup>th</sup> September, 2023.
  - c. That the application be heard interpartes on such date as the Honourable Court may direct.
  - d. That costs of the Application abide the outcome of the Appeal.
2. the Application is premised on the grounds on the face of the Application and the supporting affidavit of Dickens Atela, the assistant General secretary of the Union, sworn on 26<sup>th</sup> October, 2023.



3. He stated that the Judgement in the trial Court was delivered on 12<sup>th</sup> September, 2023, where the grievants were awarded only 21 days worked in January, 2016, without awarding the other claims such as overtime, leave days, public holidays and rest days.
4. Aggrieved by the decision of the trial court, the Grievants, instructed the claimant herein to lodge an Appeal, however the time within which an appeal can be filed had already lapsed on 11<sup>th</sup> October, 2023, necessitating the leave be sought herein.
5. The reason for the delay is that some time was lost when the Applicant was tracing and contacting the grievants, who are all living in various parts of this Country and out of employment, to inform them of the outcome of the case at the Magistrates Court and get instruction of the way forward.
6. He stated that the intended Appeal is arguable with high chances of success and in the event the application is not allowed they are likely to suffer substantial loss and the intended Appeal will be rendered nugatory.
7. The affiant stated that the Application is made in good faith, within reasonable time and that the Respondent will not be prejudiced in any way.
8. In response to the Application, the Respondent filed a replying affidavit sworn on 16<sup>th</sup> November, 2023 by Timothy M Muthini, the Chief Human Resource manager of the 2<sup>nd</sup> Respondent.
9. The Respondent stated that the Application is grossly misconceived. That this Honourable Court lacks territorial jurisdiction to hear and determine the Application for the reason that the primary suit, Kisii CM Employment Cause No. E005 of 2020 had originally been filed in the Employment and Labour Relations Court in Kisumu, serialized as Kisumu ELRC Cause No. 91 of 2017 but transferred to Kisii because the magistrates court had pecuniary jurisdiction.
10. He thus stated that there is no reason why the Appeal herein has been filed in this Court when Kisumu Court has territorial jurisdiction over the matter. On that note the Respondent stated that the Applicant is guilty of forum shopping.
11. He stated that the filling of the Appeal in this Court is an afterthought and an abuse of Court process. Further that the Applicant is guilty of laches.
12. He also took issue with the Appeal and stated that the Applicant has not advanced any plausible ground for favorable exercise of discretion by this Court.
13. The Application herein was canvassed by written submission with the Applicant filling on 2<sup>nd</sup> February, 2024 .and the Respondent filed theirs on 5<sup>th</sup> February, 2024.

#### **Applicant's Submissions.**

14. The Applicant's reiterated the grounds of its Application and argued that the trial Court awarded the grievants only 21 days worked in January, 2016 and ignored all the other prayers of the claim, therefore that the Intended Appeal is merited and warrants the issuance of the leave sought in the Application herein.
15. It was also submitted that the argument by the Respondent that the suit herein had been filed in Kisumu before transfer and hence Appeal should be lodge in ELRC Kisumu is not proper because, the Applicant had several filed that had been transferred to Kisii and Appeal lying before this Court such as MCELRC No. 29 of 2021. Therefore, that this Court has territorial jurisdiction over the matter.



16. The Applicant submitted further that the Application has been filed timeously, without any unreasonable delay. He thus urged this Court to allow the application as prayed.

### **Respondent's Submissions.**

17. The Respondent submitted from the onset that the Application herein is merely seeking for leave to Appeal but the heading is under Appeal, which heading was not amended despite them raising the issue.
18. It was also submitted that the matter herein had initially been filed in Kisumu Employment and Labour Relations Court as such the Appeal ought to lie before that court and not this Court. Hence the filling of this Application before this Court is an abuse of Court process.
19. On delay, it was submitted that the delay is inordinate and no evidence has been tabled before this Court to support the allegations that the delay was occasioned by the tracing of the grievants. Therefore, that this Court should exercise its discretionary powers sparingly and against the Applicant. In support of this, they relied on the case of *Kenya Revenue Authority V Habimana Sued Hemed & Another [2017]* eklr where the Court held that; -

“In Salat and Ochanda, we remarked that the discretionary power to extend time should be exercised with caution, care, and even-handedness. We observed that this discretion must be exercised judicially, regularly, and not capriciously; and due regard must be had to the principles enshrined in *the Constitution*. Just as in Ochanda, the issue that arises in this case is “whether a basis has been satisfactorily laid to warrant this Court extending time to file a notice of appeal”. The answer depends on whether the applicant has satisfied the principles outlined above. The applicant has delayed in filing the notice of appeal by more than a month, attributing this largely to the need to consult the 2<sup>nd</sup> respondent, on whether or not to appeal. The applicant further states that it had difficulty obtaining the Appellate Court’s Judgment, getting it only on 7<sup>th</sup> August, 2015. The applicant states also that, between 7<sup>th</sup> and 14<sup>th</sup> August 2015 it was engaged in interdepartmental and intergovernmental consultations to determine whether or not to file an appeal. The applicant, however, provided no chronology of the events that took place during that period. Without such information, this Court is left to merely speculate as to the cause of the alleged impediments. There is only the vague signal that the applicant “was consulting”. As was observed in Ochanda, the cause of delay is to be candidly stated. It has not been, in this instance. The applicant set much store by the need to consult the 2<sup>nd</sup> respondent on whether or not to appeal, as a cause of delay. With respect, we fail to appreciate the relevance of the 2<sup>nd</sup> respondent, in the present proceedings. In any event, the 2<sup>nd</sup> respondent has not confirmed that there were any consultations with it; and the applicant has not shown the mode of any such consultations.”

20. The Respondent submitted that litigations belongs to the grievants as was stated in the case of *Hawkind Corporation (The Owners of the Mv Kairos Vs African Marine and General Engineering company Limited [2019]* eklr and thus, they are obligated in law to pursue the same to its logical conclusion, which is not the case in this matter as no evidence has been tendered before this Court to ascertain that the grievants were vigilant and or followed up the matter herein.
21. In Conclusion, it was argued that litigation must come to an end as was held in the case of *Kenya Revenue Authority V Habimana Sued Hemed & Another [2017]* eklr and urged this Court to allow the matter to rest as all parties have had their day in Court.



22. I have considered the application. It is clear that the application arises from a judgment delivered in the CM's ELRC Kisii Case No 5/2022. It is not clear why the applicants chose to file this application in Nakuru when their area of jurisdiction is Kisumu.
23. In the circumstances, I transfer this application to ELRC Kisumu for consideration and further directions.
24. Costs in the appeal.

**RULING DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF MARCH, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

