



Kenya Union of Commercial, Food and Allied Workers v Kisii Bottlers Ltd & another (Appeal 1 of 2024) [2024] KEELRC 1042 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 1042 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL 1 OF 2024**

**S RADIDO, J
APRIL 24, 2024**

BETWEEN

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

AND

KISII BOTTLERS LTD 1ST RESPONDENT

ALMASI BOTTLERS LTD 2ND RESPONDENT

(Being an Appeal from the judgment by the Honourable Caroline A. Ocharo, Senior Principal Magistrate on 12th September 2023 in Chief Magistrates Court ELRC Cause No. 5 of 2020)

RULING

1. The Kenya Union of Commercial, Food and Allied Workers (the Union) moved the Court sitting in Kericho seeking orders:
 - i. ...
 - ii. That this Honourable Court be pleased to grant leave to the intended Appellant/Applicant to Appeal out of time against the judgment of the Magistrates Court at Kisii in MC ELRC Cause No. 5 of 2022 delivered on 12th September 2023.
 - iii. That the application be heard interpartes on such date as the Honourable Court may direct.
 - iv. That the costs of the application abide the outcome of the Appeal.
2. The Respondents filed a replying affidavit in opposition to the Motion and on 28 November 2023, the Court directed the parties to file and exchange submissions.



3. The parties filed and exchanged submissions and the Senior Principal Magistrate reserved Ruling to 5 March 2024.
4. In the Ruling, the Court declined territorial jurisdiction and transferred the file to this Court.
5. When the parties appeared before this Court on 12 March 2024, they confirmed that submissions had been filed and requested the Court to deliver a Ruling.
6. The Court has keenly perused the material placed before it.
7. The primary grounds advanced by the Union in seeking leave of Court to file an appeal out of time are that upon delivery of judgment by the Senior Principal Magistrate on 12 September 2023, the Union lost contact with the Grievants and could not get instructions; that the intended appeal is arguable and has high chances of success and that the Respondent would not be prejudiced if leave was granted.
8. In opposing the application, the Respondents asserted that there had been laches on the part of the Union and that the Union had not given any plausible reasons to allow the Court to exercise its discretion favourably by granting leave.
9. The Union had 30 days (up to 11 October 2023) after the delivery of the judgment sought to be appealed to file a Memorandum of Appeal.
10. The Union missed the timeline, and it moved the Court on 27 October 2023 seeking leave. It was late by around two weeks and the explanation given for the delay is that the Grievants could not be traced to give instructions.
11. The Union has not disclosed which means it attempted or used to reach out to the Grievants. None of the Grievants has filed an affidavit to explain why they did not reach out to the Union immediately after the judgment. The Court assumes that the Grievants had knowledge of the delivery of the judgment.
12. Nevertheless, the Court is called upon to exercise its discretion. The discretion should be exercised judicially and not arbitrarily or capriciously. Before a favourable exercise of discretion is made, the party seeking the exercise of such discretion should satisfy the Court that there are justifiable grounds.
13. The Union herein has not given any justifiable reasons why a Memorandum of Appeal was not lodged with the Court within the prescribed timeline.
14. The Court, therefore, declines to exercise its discretion in its favour.
15. The Court also notes that instead of approaching the Court through a Miscellaneous Application, the Union moved it through an Appeal. However, the anomaly could have been rectified by the Registry staff if they were keen.
16. Before concluding, the Court notes that the material placed before it shows that the Grievants separated from the Respondents on or around 21 January 2016 while the Cause before the Magistrates Court was filed in 2020.

Orders

17. The Motion dated 26 October 2023 is found without merit and is dismissed with no order on costs considering the social partnership between the parties.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 24TH DAY OF APRIL 2024.

RADIDO STEPHEN, MCIARB



.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Appearances

For Union Mr Munda, Industrial Relations Officer

For Respondent Ms Kebungo instructed by Nyamurongi & Co. Advocates

Court Assistant Chemwolo

