



REPUBLIC OF KENYA



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**Mambili v Butali Sugar Mills Limited & another (Miscellaneous Application  
E022 of 2022) [2023] KEELRC 489 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 489 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
MISCELLANEOUS APPLICATION E022 OF 2022**

**JW KELI, J**

**FEBRUARY 23, 2023**

**BETWEEN**

**SIMON BARASA MAMBILI ..... CLAIMANT**

**AND**

**BUTALI SUGAR MILLS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

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

**RULING**

1. The Applicant following Order of the trial court in Kakamega MCELR No 205 of 2019 issued on the 16<sup>th</sup> March 2022 filed Notice of Motion application dated 4<sup>th</sup> November 2022 under section 79 G of the *Civil Procedure Act*, Order 50 Rule 6 and Order 40 Rule 1 of the *Civil Procedure Rules* seeking for leave to file appeal out of time.
2. The Application was opposed by the 2<sup>nd</sup> Respondent who filed grounds of opposition dated 11<sup>th</sup> January 2023 and the 1<sup>st</sup> respondent who filed Replying affidavit sworn by George Onyango Ager on the 21<sup>st</sup> December 2022.
3. The court directed that the application be canvassed by way of written submissions. The applicant filed written submissions dated 18<sup>th</sup> January 2023 through the law firm of vA Shibanda.
4. The 1<sup>st</sup> respondent filed written submissions drawn by the law firm of Okongo Wandago & Company advocates dated 26<sup>th</sup> January 2023
5. The 2<sup>nd</sup> Respondent through the law firm of LG Menezes filed their written submissions dated 18<sup>th</sup> January 2023.



## Determination

### Issues for determination

6. The Applicant in their written submissions addressed merit of the application.
7. The 1<sup>st</sup> Respondent in their written submissions addressed the issue of whether the application was merited and whether the applicant met the threshold for grant of the order sought.
8. The 2<sup>nd</sup> Respondent in their written submissions addressed the issue of whether the application was merited.
9. The court having considered the application was of the considered view that the issue under the application was whether or not the applicant should be granted leave to file appeal out of time.
10. The Application is brought under Section 79G of the [Civil Procedure Act](#) Order 50 Rule 6 and Order 40(1) of the [Civil Procedure Rules](#).
11. Section 79G of the [Civil Procedure Act](#) reads:- .

“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.”
12. Order 50, rule 6 reads:-

‘ Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.
13. It would appear from the foregoing the main issue to consider in the instant application is whether the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time as required under section 79G of the [Civil Procedure Act](#).

### The applicant’s case and submissions

14. The applicant sought leave to file appeal out of time against the decision of the magistrate court issued on the 16<sup>th</sup> March 2022 where the court declined review.
15. The applicant submits that the instant application had been brought under Order 43 Rule 1(1)(x) of the [Civil Procedure Rules](#) whereby the litigant has automatic right of appeal on application made under order 45 of the Civil Procedure of the [Civil Procedure Rules](#) which states that; ‘ Appeals shall lie as of right for orders and rules made under Section 75 (1)(h)” where (paragraph x) provides for orders under application for review Order 45 rule 3. The applicant submits that the instant application is properly before the court. That no leave to appeal was required from the trial court.



16. The claimant submits that their counsel Shibanda was present in court when ruling of 7<sup>th</sup> March 2022 was delivered but that was not the impugned ruling. That they challenge ruling of 16<sup>th</sup> March 2022 which they submit was delivered when counsel had proceeded on maternity leave.
17. That contrary to the submissions by the respondents there is no requirement that instructions from claimant to advocate must be in writing as held in *Kenya Power & Lighting Company Limited v Rose Onyango & another* (2020) eKLR
18. That the intended appeals had high chances of success as the subordinate court dismissed the suit under which the application had not been canvassed the matter coming up for mention on basis of duplication of the suits. The claimant submits there was no duplication as they had withdrawn the alleged duplicate suit. The claimant submits relied on the decision in *Vishva Stone Suppliers Company Limited v RSR Stone 2006 Limited* (2020) eKLR to extent that the court may invoke the Article 159(2) (d) of the *Constitution* to cure default for ends of justice to be met in the matter and the applicant cited the decisions in *Jaldesa Tuke Dabelo v IEBC & another* (2015) eKLR, *Raila Odinga and 5 others v IEBC & 3 others* (2013) eKLR, *Lemanken Arata v Harum Meita Mei Lempaka & 2 others* and *Patricia Cherotich Sawe v IEBC & 4 others* eKLR and cited that

‘rules of procedure are handmaiden of justice, a court of law should not allow prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties ...’

19. The applicant did not provide the said authorities. The court then went online at Kenya Law to check out the said authorities. In *Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others* [2015] eKLR the Supreme Court held ‘[31] Although the appellant involves the principal of the prevalence of substance over form, this Court did signal in *Law Society of Kenya v The Centre for Human Rights & Democracy & 12 others*, Petition No 14 of 2013, that;

“Article 159(2) (d) of the *Constitution* is not a panacea for all procedural shortfalls.” Not all procedural deficiencies can be remedied by Article 159; and such is clearly the case, where the procedural step in question is a jurisdictional prerequisite.”

In *Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & another* [2015] eKLR the Court of Appeal held;

‘Finally, the appellant contends that he was condemned unheard; that the merits of his application have not been determined; that Article 159 of the *Constitution* requires that justice should be delivered without undue regard to technicalities. It has often times been stated that rules of procedure are handmaidens of justice; where there is a clear procedure for redress of any grievance prescribed by an Act of Parliament, that procedure should strictly be followed. (See National Assembly, *In the Matter of James Njenga Karume* Civil Application No Nai. 92 of 1962 . In the instant case, the *Elections Act* stipulates that the procedure to challenge membership to the County Assembly is by way of Petition. The appellant having chosen the wrong procedure cannot turn around and rely on Article 159 of the *Constitution*. Article 159 was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiating a cause of action before courts. The statutory procedure stipulated for determining the question of membership to the County Assembly is by way of petition.’

In *Lemanken Arata v Harum Meita Mei Lempaka & 2 others* which was an election petition the court found no holding under Article 159 .



In *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) The Supreme Court held:-

‘218 Notwithstanding such considerations of merit, which led the court to exclude belatedly-introduced papers, counsel argued on the basis of article 159(2)(d) of the *Constitution*, which thus provides: “In exercising judicial authority, the courts and tribunals shall be guided by the following principles –……(d)justice shall be administered without undue regard to procedural technicalities……”The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course. The time-lines for the lodgement of evidence, in a case such as this, the scheme of which is well laid-out in the *Constitution*, were in our view, most material to the opportunity to accord the parties a fair hearing, and to dispose of the grievances in a judicial manner. Moreover, the *Constitution*, for purposes of interpretation, must be read as one whole: and in this regard, the terms of article 159(2)(d) are not to be held to apply in a manner that ousts the provisions of article 140, as regards the fourteen-day limit within which a petition challenging the election of a President is to be heard and determined.”

20. The court finds that the applicant set out to mislead this court by citing a quote which did not exist. The said citation was a summary of holdings in the above decisions. The court finds this conduct to be abhorring. A quote of a decision should be specific to the particular decision and in this era where majority of judges use paragraphs, the particular paragraph in the decision should be cited for ease of refence of the court. The court does not have the luxury of time to waste on finding non-existent quotes.
21. The court finds that the issue of filing appeal out of time is not a procedural technicality as envisaged under Article 159 (2)(d) of the *Cconstitution* and as can be deduced from paragraph 218 of the Supreme Court decision in *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) cited above.

### **1<sup>st</sup> Respondent’s submissions**

22. The 1<sup>st</sup> respondent relied on the affidavit of George Onyango Ager who opposed the application and further submits that the impugned ruling/order of the trail court was not appealable as of right and that the applicant was bound by provisions of Order 43 rule 1 (3) of the *Civil Procedure Rules* to wit:

‘ (3) An applications for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”

The 1<sup>st</sup> respondent further relies on the decision of the Justice J Mutungi in *Serephen Nyasani Menge v Rispah Onsase*(2018) eKLR where the court held that the application for extension of time to bring appeal out of time could only be made before the court that made the order. That the instant application is premature and abuse of court process.

23. The 1<sup>st</sup> respondent further submits that the extension of time is an equitable remedy reserved only for a deserving applicant and relied on the decision of the Supreme Court in *Nicholas Kipto Arap Korir*



Salat v IEBC and 7 others as cited in Mombasa County Government v Kenya Ferry Services & another (2019) eKLR [25] where the court stated:-

‘Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:-

“... 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.

... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. 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;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to-case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”

24. The 1<sup>st</sup> respondent further submitted that the delay in the instant application was inordinate stating that there was no evidence before court to support the reason given of the counsel for the claimant having been on maternity leave when the ruling was issued. The 1<sup>st</sup> respondent submits she was in court when the ruling was issued and did not seek leave to appeal. They submit that there was inordinate delay which was also not justified. The 1<sup>st</sup> respondent cited several decisions to buttress their submissions on the delay which the court read.

25. The 1<sup>st</sup> respondent submits that they will suffer prejudice if the application is allowed having waited for 4 years for verdict in the primary suit and now enjoying the fruits of the decision, that the application is causing them annoyance and irritation. They relied on the decision of Odunga J (as he then was) in Wangui Kathryn Kimani v Disciplinary Tribunal Law Society of Kenya & another where the court cited with approval holding in Machira t/a Machira & Co Advocates v East African Standard [2002] eKLR that,

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial



discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

## 2<sup>nd</sup> Respondent’s submissions

26. In opposition to the application the 2<sup>nd</sup> respondent filed grounds of opposition dated 11<sup>th</sup> January 2023 stating no good or sufficient cause had been demonstrated for the delay in filing appeal on time as required under section 79 G of the *Civil Procedure Act*. That the application was an afterthought and misuse of court process and that the 2<sup>nd</sup> respondent would suffer great prejudice if the application was allowed noting the time lapse of over 7 months of the date of ruling.
27. The 2<sup>nd</sup> respondent urged the court to be guided by decision in *Charles Karanja Kiiru v Charles Gitbinji Muigwa* (2017) eKLR and decision in *Edith Gichungu Koine v Stephen Njangi Thoitbi* (2014) eKLR where the Court of Appeal held,

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

## Decision.

28. Section 79G of the *Civil Procedure Act* reads:-

“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.”

The Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR upheld the issues to be considered in considering application for extension of time to file appeal as stated in its decision in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (1999)2 EA which was relied on by the Respondents the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.

29. The court in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR stated that :-

“It must not be forgotten that even the recent case of Mutiso did not lay it down that the single judge is obliged to consider the issue of the chances of an appeal succeeding; the case only put that issue down as one for possible consideration.”



30. Guided by the foregoing authority the court then finds that the issue to be considered is if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time pursuant to section 79G of the [Civil Procedure Act](#).

### Key findings on facts

31. The applicant had filed different suits on same cause in. There is evidence that Bungoma ELRC Cause 049 of 2021 was withdrawn vide notice of withdraw dated 16<sup>th</sup> February 2022 and received in court on the 7<sup>th</sup> march 2022. The court finds that the Bungoma ELRC matter was withdrawn same day order of the court was issued following duplicity allegation (exhibit VS2 received in court on the 7<sup>th</sup> march 2022). The court finds that the applicant filed multiple suits and the trial court being inferior to ELRC was justified to dismiss the duplicate suit on the 7<sup>th</sup> march 2022. The applicant was not candid with the court and the court found it was probable the suit in Bungoma ELRC Cause 049 of 2021 was withdrawn after the order of the magistrate court of same date.
32. That the applicant filed application for review dated 8<sup>th</sup> March 2022 under certificate of urgency and the court issued decision on the 16<sup>th</sup> March 2022. The applicant's counsel stated she proceeded on maternity leave upon lodging the application. The court noted that the decision of the court was delivered the next day after the application was filed. The court did not believe the claimant was not aware of the said decision delivered the next day upon approaching the court under certificate of urgency. The exact date of counsel of the applicant preceding from maternity leave was not disclosed. The allegation was not supported by evidence and in any case statutory maternity leave is for 3 months. The counsel averred the claimant gave instructions to appeal on 31<sup>st</sup> October 2022. The court finds that the conduct of the claimant is tantamount to abuse of court process to the prejudice of the respondents who it is reasonable to believe they had legitimate expectation that over 7 months down the line after order of 16<sup>th</sup> March 2022 without any further action, litigation between the parties had come to an end. The court upholds with approval decision by Kuloba j (as he then was) in [Machira t/a Machira & Co Advocates v East African Standard](#) [2002] eKLR to effect that the beneficiary of a decision should not be deprived of its fruits of judgment without justified grounds and adopts the following citation of the decision to wit : To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. ...In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”
33. The court is satisfied that the delay was inordinate and was not explained. The court is not satisfied there was good and sufficient cause for not filing the appeal on time as expected under section 79 G of The [Civil Procedure Act](#) and as guided by court of appeal in [Thuita Mwangi Case \(supra\)](#). Applying the 4<sup>th</sup> criteria thereunder the court finds that the respondents would be prejudiced due to the inordinate delay in filing appeal and further the court also found that the applicant was not candid with the court as to the cause of the delay and also on the duplicity of the cases filed in court. To this extent the court upholds criteria for such applications set by Court of Appeal Odek JJA in [Edith Gichugu Koine v Stephen Njagi Thoithi](#) [2014] eKLR under paragraph 8 to wit :-

“There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of “sufficient reasons”. Nevertheless, it ought to be



guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others – See *Fakir Mohamed v Joseph Mugambi & 2 others*, Civil Application Nai. 332 of 2004 (unreported). There is also a duty now imposed on the Court under sections 3A and 3B of the [Appellate Jurisdiction Act](#) to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.”

34. On whether the application was proper, the court agrees with the applicant that they had right to approach court vide the instant application under Order 43 Rule 1(1)(x) of the [Civil Procedure Rules](#) whereby the litigant has automatic right of appeal on application made under order 45 rule 3 of the Civil Procedure of the [Civil Procedure Rules](#) which states that;

‘ appeals shall lie as of right for orders and rules made under Section 75 (1)(h) where (paragraph x) provides for orders under application for review Order 45 rule 3.’

35. In conclusion the court finds and determines that there was no good and sufficient cause for the delay in failing to file appeal in time. The court declines to exercise its discretion to allow the filing of the intended appeal out of time as it would be prejudicial to the respondents who are entitled to legitimate expectation that 7 months down the road after the decision of the trial court that litigation had come to an end. The conduct of the claimant of going to slumber for 7 months only to wake up and decide to instruct counsel to appeal is tantamount to abuse of the court process and annoyance of the respondents. On *prima facie* basis the court also note the ELRC Bungoma E019 of 2021 notice of withdraw was received on 7<sup>th</sup> March 2022 same date of order of the lower court dismissing the suit for duplication. The court found that the claimant was likely to have withdrawn the suit at the ELRC upon order of the magistrate of 7<sup>th</sup> March 2022. The court found the applicant was not candid with the court.

36. In the upshot based on the foregoing reasons the application dated 4<sup>th</sup> November 2022 is dismissed with costs to the respondents.

37. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA ON THE 23<sup>RD</sup> DAY OF FEBRUARY, 2023**

**J.W.KELI,**

**JUDGE.**

