



**Mbayi v Kibos & Allied Industries Limited & another (Environment and Land Civil Miscellaneous Application E023 of 2022) [2023] KEELRC 486 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 486 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION E023 OF 2022**

**JW KELI, J**

**FEBRUARY 23, 2023**

**BETWEEN**

**SIMON CHENJE MBAYI ..... CLAIMANT**

**AND**

**KIBOS & ALLIED INDUSTRIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**CHANNAN AGRICULTURAL CONTRACTORS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant following judgment of the trial court in Kakamega Civil Suit No 328 of 2016 delivered on the October 19, 2022 brought to court Notice of Motion application dated December 2, 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 respondents who filed grounds of opposition dated January 11, 2023.
3. The court directed that the application be canvassed by way of written submissions. The applicant, through his advocates VA Shibanda & Company Advocates vide email dated January 17, 2023 informed the court that they would rely on the supporting affidavit to the application sworn on the December 2, 2022 and would not file written submissions.
4. The Respondents through the law firm of LG Menezes filed their written submissions dated January 19, 2023 which were received in court on the January 26, 2023.



## Determination

### Issues for determination

5. The Applicant addressed merit of the application under the supporting affidavit sworn on the December 2, 2022 by Shibanda Advocate.
6. The Respondents in their written submissions addressed the issue of whether or not the applicant should be granted leave to file appeal out of time.
7. 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.
8. 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.
9. 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.’
10. 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’.
11. 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*.
12. The applicant states that the judgment of the lower court was delivered in the absence of the counsel handling the matter, that the counsel discovered the judgment had been delivered on the November 22, 2022 on enquiring from the court clerk whether the decision had been delivered, that the judgment was to be scheduled to be delivered on the July 5, 2022 which date was taken by consent of both parties. That on the said date the judgment was not ready and the court stated it would be delivered on notice. That no notice was issued and judgment was delivered on the October 19, 2022 in the absence of counsel for the claimant. That the plaintiff dissatisfied with the judgment instructed counsel to appeal but time for appeal had lapsed. That the delay to appeal was not intentional. That the applicant had an arguable appeal since the lower court dismissed the suit on the ground that the court lacked jurisdiction to hear the matter whereas the defendants never raised objection on the issue of jurisdiction under their defence and further the matter proceeded on full hearing without the issue of jurisdiction being raised. That the court is limited to issuing orders as pleaded in the plaint as observed in the decision in *Caltex Oil(Kenya ) limited v Rono Limited(2016)* and that preliminary objection should be raised in the defence as was observed in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors (1969) EA696*. The applicant produced evidence of having applied for the proceedings to appeal.



## Respondents' position

13. The respondents opposed the application on basis that the applicant had not provided sufficient cause for the delay to file appeal on time. That they would suffer great prejudice if an extension of time was granted . In their written submissions the respondents relied on the Court of Appeal decision in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997)(1999)2 EA* where the Court of Appeal set out the factors to be considered in application to appeal out of time being first length of delay , reason or secondly the explanation if any for the delay, thirdly (possibly) the chances of the appeal succeeding If the application is granted ie. The merits of the contemplated action , whether the matter is arguable deserving day in court, whether frivolous and fourthly the degree of prejudice to the respondent if application is granted and whether or not the respondent can be adequately compensated by costs.
14. The Respondent while agreeing that the scheduled date was vacated stated that the court issued notice to all parties via the judiciary e-filing public kiosk system notifying that the judgment would be delivered on October 18, 2022 before Hon. Hazel Wandere when the applicant did not appear and again the decision delivery was postponed to the next day.
15. The Respondents submit that the applicant did not justify why on being aware of the decision on November 22, 2022 they failed to make application forthwith only to apply 2 weeks thereafter.
16. On arguability of the appeal the respondents submit that the judgment is free from error to warrant the appeal as the court had no jurisdiction and the decision was as held by the Supreme Court in *Petition No 4 of 2019 Law Society of Kenya v Attorney General* where it was held that matters field post WIBA are to be determined by the Director of Occupational Safety and Health Services under WIBA. That the claim KAKAMEGA CMCC 328 OF 2016 was instituted on September 16, 2016 when WIBA was in force hence the intended appeal is a waste of time,

## Decision.

17. 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'.

18. 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.’

19. Guided by the foregoing authority the court then finds that the issue to be considered is whether 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.
20. It was not in dispute that the scheduled date of delivery of judgment by the magistrate court was July 5, 2022 which date was vacated and judgment delayed for months only for a notice allegedly to appear on the judiciary e-filing public kiosk system notifying parties of judgment on October 18, 2022 which date was also vacated to the next day. There was no evidence that the date of judgment date was communicated to the plaintiff.
21. The instant application was received in court on December 7, 2022. The applicant stated he was informed by the court clerk on the November 22, 2022 that the judgment had been issued.
22. The court is satisfied that the delay was explained by fact of non-communication of judgment delivery date by the magistrate court, secondly the court finds the delay of 2 weeks after awareness of the judgment was not inordinate. The court is satisfied there was good and sufficient cause for not filing the appeal on time.
23. On the issue of arguability of the appeal, whereas it was noted as a possible criteria in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997)(1999)2 EA , the Court of Appeal in a following decision 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.’
24. The court agrees that the jurisdiction over WIBA matters lies with the Director of Occupational Safety and Health Services as held by the Supreme Court in *Petition No 4 of 2019 Law Society of Kenya v Attorney General*.
25. The court is however cautious not to lock out the parties from appealing guided by the Court of Appeal decision in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR that I am not obliged to consider the issue of the chances of an appeal succeeding and further by decision in *Butt -vs Rent Restriction Tribunal (1982) KLR 417* where the Court of Appeal held that the discretion should be exercised in such a way as not to prevent an appeal.
26. In conclusion the court allows the application dated December 2, 2022 and grants the following orders:-
  - a. That the applicant is granted leave to appeal out of time against the Judgment of the magistrate court delivered on the October 19, 2022 In *Kakamega Civil Suit No 328 of 2016*.
  - b. The applicant to pay the respondents costs of the application.

It is so ordered.

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

**J. W. KELI,  
JUDGE.**

IN THE PRESENCE OF



Court Assistant: Brenda Wesonga

For Applicant: Shibanda

For Respondents: Fundi

