



**Paul v West Kenya Sugar Co. Limited (Miscellaneous Application  
E001 of 2023) [2023] KEELRC 487 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 487 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
MISCELLANEOUS APPLICATION E001 OF 2023**

**JW KELI, J**

**FEBRUARY 22, 2023**

**BETWEEN**

**CHRISTOPHER LWANDA PAUL ..... APPLICANT**

**AND**

**WEST KENYA SUGAR CO. LIMITED ..... RESPONDENT**

**RULING**

1. The applicant following judgment of the trial court in Kakamega Civil Suit No E42 of 2020 delivered on the October 13, 2022 brought to court notice of motion application dated January 26, 2023 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 not opposed. The application was on the February 8, 2023 fixed for inter partes hearing on February 22, 2022 in presence of representatives of both parties.

**Hearing on 22<sup>nd</sup> February 2022.**

3. The respondent was absent. The application proceeded on hearing as scheduled unopposed .
4. Ms Shibanda Advocate for the applicant orally submitted that their application seeking for leave to file appeal out of time was unopposed. That their application was premised on the grounds that judgment was delivered on the October 13, 2022 in Kakamega CMELR Cause No E42 of 2020 dismissing the claim with costs. That counsel for the applicant was unable to trace the claimant to inform him of the decision. That the claimant was informed of the decision when he visited the office to inquire about his case. That upon perusal of the decision the claimant issued instructions to file appeal by which time the statutory time to file appeal had lapsed. That the applicant has arguable appeal and that the respondent would not suffer prejudice as the suit was struck off.



## Determination

### Issue for determination

5. 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.
6. 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](#).
7. 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.”
8. 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’.
9. 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](#).
10. Ms Shibanda Advocate for the applicant submitted that their application seeking for leave to file appeal out of time was unopposed. That their application was premised on the grounds that judgment was delivered on the October 13, 2022 in Kakamega CMELR Cause No E42 OF 2020 dismissing the claim with costs. That counsel for the applicant was unable to trace the claimant to inform him of the decision. That the claimant was informed of the decision when he visited the office to inquire about his case. That upon perusal of the judgment the claimant issued instructions to file appeal by which time the statutory time to file appeal had lapsed. That the applicant has arguable appeal and that the respondent would not suffer prejudice as the suit was struck off.
11. The respondent was absent.

### Decision.

12. 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”.

13. 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.’
14. 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*.
15. The lower court delivered its judgment on the October 13, 2022. The application seeking leave to file appeal out of time was filed on the February 2, 2023. That court finds that there was no inordinate delay in bringing the instant application. On the reasons given for the delay the claimant being not traceable and issuing instructions late, in the affidavit the claimant is indicated to have lost his phone and contacts of the advocate. The court is inclined to find good cause for the delay which in any case was not inordinate.
16. 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.’ The court declines to deal with the arguability of the appeal in this application guided by the forgoing authority.
17. The court is guided 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.
18. In conclusion the court allows the application dated January 26, 2023 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 13, 2022 In Kakamega Civil Suit No E42 of 2020.
  - b. No order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA ON THE 22<sup>ND</sup> FEBRUARY 2023.**

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

In the presence of:-



C/A Brenda Wesonga

For Applicant: Ms. Shibanda

Respondent- absent

