



Wambasi v Frodak Kenya Limited & another (Employment and Labour Relations Appeal E051 of 2022) [2023] KEELRC 781 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 781 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E051 OF 2022**

**JW KELI, J
MARCH 23, 2023**

BETWEEN

ENOCK WAMBASI APPELLANT

AND

BUTALI SUGAR MILLS LIMITED 1ST RESPONDENT

FRODAK KENYA LIMITED 2ND RESPONDENT

RULING

1. The appellant being dissatisfied with ruling delivered by Hon Josephine Maragia delivered on June 27, 2022 in Kakamega Chief Magistrate Court ELR Cause no 90 of 2020 filed the instant appeal.
2. The ruling of the trial court dated June 27, 2022 arose from a Notice of Preliminary Objection by the respondent challenging territorial jurisdiction to effect that the respondents carry out business within Butali town near Butali Principal Magistrates Court and as such the claimant ought to have filed the suit at Butali Law Courts. The learned trial magistrate held that the suit offended provisions of section 11 to 18 of the *Civil Procedure Act*. That the proper court for the claimant to have filed the suit should have been Butali Principal Magistrate court and in upholding the preliminary objection proceeded to strike out the suit with costs to the respondents.
3. The 2nd respondent/applicant vide the Notice of Motion dated January 23, 2023 sought the following orders:-
 - a. That the memorandum filed herein be struck out for being fatally defective and incompetent
 - b. That the costs of this application be provided for.
4. The application is premised primarily on the ground that the ruling challenged in the memorandum of appeal was delivered on June 27, 2022 and the appeal lodged December 21, 2022 outside the 30 days statutory period as provided under section 79G of the *Civil Procedure Act* and without the leave of the



court. The application is supported by the affidavit of Alex Mbeka Advocate annexing the said ruling of June 27, 2022 and the memorandum of appeal filed in court on December 21, 2022.

5. The respondent/appellant filed replying affidavit to the application sworn by Vivian Andeka Shibanda advocate for the appellant sworn on February 3, 2023 and received in court on March 8, 2023 where in summary it was stated that the instant matter was among series consolidated in the subordinate court under the ruling delivered on June 27, 2022 appealed against. That the filing of the instant appeal without leave of court was an oversight on their part. That the delay was for 6 months only and they had an arguable appeal. That leave was granted by this court under Bungoma ELRC Misc Application No E014 of 2022 in related cases filed in the subordinate court affected by the said ruling.
6. The court directed that the application be canvassed by way of written submissions. Only the 2nd respondent/applicant filed written submissions drawn by Mbeka & Associates and dated February 28, 2023 and received in court on even date.

Determination

7. Issue for determination.
8. Only the applicant filed submissions under which it identified the following issues for determination:-
 - i. Whether the memorandum of appeal filed herein is competent
 - ii. Whether the memorandum of appeal filed herein is curable if the same is found to be fatally defective and incompetent
 - iii. Which party should bear the costs of the application.
9. The court having considered the application, the response and the submissions filed by the applicant was of the considered opinion that the issue placed before it for consideration in the application was whether the memorandum of appeal filed herein is competent.

Whether the memorandum of appeal filed herein is competent

10. The applicable law is section 79 (G) of the *Civil Procedure Act* which provides for time for filing appeal from subordinate courts. 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.’”

Applicant’s submissions

11. The applicant submits that the appellant had right to institute the appeal against the ruling of the trial court within 30 days. That the 30 days from June 27, 2022 lapsed on July 22, 2022 and no appeal had been filed by that date. That whereas section 79G of the *Civil Procedure Act* allows for application to appeal out of time the appellant failed to seek leave to appeal out of time and proceeded to file the instant memorandum of appeal on December 21, 2022 without leave of the court and served the same upon the parties on December 23, 2022.
12. That the appellant admits to lapse of time in their replying affidavit and argues it was unintentional. That it is trite law the appellant ought to have withdrawn this appeal and filed an application seeking leave to file appeal out of time. The applicant to buttress the foregoing submissions relied on the



decision in *Trade Bank Limited(in Liquidation)v L Z Engineering Construction Limited*(1997)eKLR Where the court held that:- “an appeal must be struck out if an essential step is not taken leaving the party concerned to take such corrective steps as it may wish to take”.

13. The applicant submits that the appellant upon service of the application opted to file separate application altogether being Bungoma ELRC Misc Appl No 2 of 2023 seeking leave to file appeal out of time in effort to rectify her mistakes without withdrawing the instant appeal and with the intention of defeating the instant application.
14. The applicant submits that there is no competent appeal before the court as the memorandum of appeal dated August 30, 2022 and filed in court on December 21, 2022 is fatally defective and incompetent.
15. The applicant submits that the defect is not curable and the memorandum of appeal ought to be struck out relying on the authority in *Patrick Kiruja Kitbinji v Victor Mugira Marete* (2015)eKLR where the court held that whether or not an appeal is filed on time goes to the jurisdiction of the court and that an appeal filed out of time was not curable under article 159 of the *Constitution*. The applicant cited other related authorities which the court looked at.
16. The appellant/ respondent did not file written submissions. The court finds that the appellant admitted under replying the affidavit of Vivian Shibanda advocate that the instant memorandum of appeal was filed out of time and without leave of the court.

Decision

17. There was no dispute that the instant memorandum of appeal filed in court on December 21, 2022 was against a ruling of the trial magistrate court delivered on June 27, 2022. That was a delay of approximately 6 months. Section 79 G of the *Civil Procedure Act* provides for time to appeal from the subordinate courts as follows:- ‘. 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.’”
18. The appellant filed the memorandum of appeal outside the 30 days allowed by section 79G without the leave of the court. The court finds that the said memorandum of appeal filed outside the statutory time limit of 30 days without leave of the court was thus incompetent and fatally defective. The court upholds the cited authorities in *Patrick Kiruja Kitbinji v Victor Mugira Marete* (2015)e KLR where the court held that whether or not an appeal is filed on time goes to the jurisdiction of the court and that an appeal filed out of time was not curable under article 159 of the *Constitution* and in *Trade Bank Limited(in Liquidation)v L Z Engineering Construction Limited*(1997) eKLR Where the court held that an appeal must be struck out if an essential step is not taken leaving the party concerned to take such corrective steps as it may wish to take.
19. The court finds the application dated January 23, 2023 to be merited and allows the same with costs to the applicant.
20. The memorandum of appeal dated August 30, 2022 and filed in court on December 21, 2022 is struck out for being incompetent and fatally defective.
21. It is so ordered.



DATED, SIGNED AND DELIVERED AT BUNGOMA IN OPEN COURT ON THE 23RD MARCH 2023.

JEMIMAH KELI,

JUDGE.

In the Presence of:-

Court assistant: Lucy Macheso

Applicant: Mbeka

1st respondents : Ms Twena

2nd respondents:- absent

