



**Wambasi v Frodak Kenya Limited & another (Miscellaneous Application
E002 of 2023) [2023] KEELRC 764 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 764 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E002 OF 2023**

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

BETWEEN

ENOCK WAMBASI APPLICANT

AND

FRODAK KENYA LIMITED 1ST RESPONDENT

BUTALI SUGAR MILLS LIMITED 2ND RESPONDENT

(An application for leave to appeal out of time against the ruling of Hon Josephine Maragia delivered on June 27, 2022 in Kakamega CM ELR Cause No 90 of 2020.)

RULING

1. The Applicant being dissatisfied with ruling delivered by Hon. Josephine Maragia delivered on June 27, 2022 in Kakamega Chief Magistrate Court ELR Causes No 90 of 2020 filed the instant application dated February 6, 2023 and received in court on the February 10, 2023 under section 79G of the [Civil Procedure Act](#) seeking the following reliefs: -
 - A. That the Applicant be granted leave to appeal against the ruling delivered on the June 27, 2022 in Kakamega ELR Cause No 90 of 2020
 - B. That the applicant be granted leave to file a memorandum of appeal and serve out of time.
 - C. Any other order that this Honourable Court deems fit to grant.
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 this suit at Butali Law Courts. The learned 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 this



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 Application is premised on the grounds that the ruling was delivered when counsel handling the matters had proceeded on maternity leave. That Counsel received instructions from the Claimant to appeal on the said ruling after she had resumed from maternity leave. That this matter was among series being Kakamega ELRC Cause No 48,78,53,55 and 52 of 2020 whereby a ruling was delivered on the June 27, 2022 striking out the matters on ground that the subordinate court lacked territorial jurisdiction to hear the matter, that counsel for appellant consolidated the said matters and sought for leave to file appeals in the same out of time and Kakamega ELR Cause No 90 of 2020 was inadvertently omitted by typing error as this matter was among the said Kakamega CM ELRC Cause Nos 48,78,53,55 and 52 of 2020 whereby leave to file appeal out of time was granted on the December 2, 2022 vide Bungoma HC ELRC Misc Application No E014 of 2022
4. That the Applicant has an arguable appeal . That the Respondent will not suffer any prejudice since the suit was struck off.
5. The Application is further supported by the Affidavit of Vivian Shibanda wherein she annexed ruling of the court and stated they filed instant memorandum of appeal being E051 of 2022 being on leave granted in E014 of 2022 since the matters were all under the trial court ruling.
6. The Application is opposed by the 2nd Respondent through their Counsel Alex Mbeka Affidavit dated February 21, 2023 to the effect that the delay of 8 months was not justified and that the application was filed upon service of the application by the 2nd respondent dated January 23, 2023 seeking to strike out the defective appeal filed in Bungoma ELRC No 51 of 2022. That the delay would prejudice the respondents.
7. The Application is further opposed by the 1st Respondent vide replying affidavit of Achieng Twena Advocate who in summary opposed the application on ground that the delay was not justified. That that the application was an abuse of process the appellant having filed initial appeal in Bungoma ELRCA E051 of 2021.
8. The court directed that the Application be canvassed by way of written submissions. Only the 1st and 2nd respondents complied.

Determination

9. The applicable law is Section 79 (G) of the *Civil Procedure Act* which provides that an appeal may be admitted out of time if the Appellant satisfies the court that he had a good and sufficient cause for not filing the appeal on time.

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. The court considers its ruling in Bungoma Misc Application No E14 of 2022 on application for leave to file appeal outside the 30 days statutory period was in similar ruling of Hon. Josephine Maragia delivered on June 27, 2022 in Kakamega MC ELRC Cause No 48,78,53,55 and 52 of 2020. The said ruling applied in Kakamega ELRC Cause No Cause 90 of 2020. The only issue was the counsel for the appellants left out Cause 90 of 2020 when filing Bungoma ELRC Misc Application No E014 of 2022 where the court considers the same issues were raised by the parties. The court granted leave in that application to file appeal out of time against the ruling of Hon. Josephine Maragia delivered on June 27, 2022 in Kakamega MC ELRC Cause No 48,78,53,55 and 52 of 2020. The ruling of the trial magistrate court also applied to Kakamega ELRC Cause No No 90 of 2020 sought to be appealed against. The court finds that the arguments of the parties are similar as under Bungoma ELRC Misc Application No E014 of 2022 where leave was granted. The court then finds no basis to shift from its decision in Bungoma ELRC Misc Appl No E014 of 2022 and that it would be duplication to consider the issues afresh.
11. In conclusion the court upholds its decision in Bungoma ELRC Misc Application No E014 of 2022 to apply as its decision in Notice of Motion Application dated February 6, 2023 and makes the follows orders:-
12. The Applicant is granted leave to appeal out of time against the ruling of Hon. Josephine Maragia delivered on June 27, 2022 in Kakamega CM ELR Cause No 90 of 2020.
13. The Applicant is granted leave to file Notice of appeal, memorandum of appeal and serve out of time.
14. Costs of this application to the respondents.
15. It is so ordered.

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

JEMIMAH KELI,

JUDGE.

In the Presence of:-

Court Assistant: Lucy Macheso

Applicant: Absent

1st Respondents : Shibanda

2nd Respondents:- Mbeka

Court Order:

Record of Appeal to include fresh memorandum of appeal be filed in 30 days together with submissions.

Mention on April 25, 2023 to confirm compliance and issue response.

Direction notice to issue.

It is so ordered.

JEMIMAH KELI,

JUDGE

