Mwanzo v Frodak Kenya Limited & another (Miscellaneous Application E019 of 2022) [2023] KEELRC 974 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 974 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

MISCELLANEOUS APPLICATION E019 OF 2022

JW KELI, J

APRIL 20, 2023

BETWEEN

TIMOTHY LUDEY MWANZO ..... APPLICANT

AND

FRODAK KENYA LIMITED ..... 1ST RESPONDENT

BUTALI SUGAR MILLS LIMITED ..... 2ND RESPONDENT

RULING

Issue: Extension of time to file appeal out of time

1. The Applicant being dissatisfied with the judgment of hon. Eric Malesi delivered on the 30th August 2022 in Kakamega MCELR No. 194 of 2019 and being out of the statutory period for lodging appeals, filed Notice of Motion application dated 4th 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. The application was supported by the affidavit of Vivian Shibanda Advocate of even date annexing supporting documents.

2. The Application was opposed by the 2nd Respondent who filed grounds of opposition dated 12th January 2023 and the 1st respondent who filed Replying affidavit sworn by George Onyango Ager on the 21st December 2022.

3. The court directed that the application be canvassed by way of written submissions. The applicant field written submissions dated 30th January 2023 through the law firm of V.A Shibanda. The 1st respondent filed written submissions drawn by the law firm of Okongo Wandago & Company advocates dated 26th January 2023. The 2nd Respondent through the law firm of LG Menezes filed their written submissions dated 17th January 2023.

Determination

Issues for determination

4. The Applicant in their written submissions addressed merit of the application.

5. The 1st 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.

6. The 2nd Respondent in their written submissions addressed the issue of whether the application was merited.

7. 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*. 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 issue to consider in the instant application is whether application was merited by the appellant satisfaction to 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

The Applicant's submissions

10. The applicant sought leave to file appeal out of time against the decision of the magistrate court issued on the 30th August 2022. 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.

11. That contrary to the submissions by the respondents there is no legal 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

12. The applicant submit that some of the factors that aid court in exercising discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd*(2003)e KLR to include:-

'i. The period of delay

i. The reason for the delay

ii. The arguability of the appeal

iii. The degree of prejudice which could be suffered by the respondent if the extension is granted

iv. The importance of compliance with time limits to the particular litigation or issue; and

v. The effect if any on the administration or justice of public interest if any is involved."

13. The applicant relied on the decision in *Vishva Stone Suppliers Company Limited v RSR Stone 2006 Limited*(2020)e KLR 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)e KLR , *Raila Odinga and 5 Others v IEBC &3 Others* (2013)e KLR, L*emanken Arata v Harum Meita Mei Lempaka & 2 Others and Patricia Cherotich Sawe v IEBC & 4 Others* e KLR 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 ..."

14. 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 Commision(IEBC) & 4 others* [2015] e KLR 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] e KLR 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."

15. 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.

16. 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.

1st Respondent's submissions

17. The 1st respondent relied on the affidavit of George Onyango Ager dated 21st December 2022 who opposed the application and further submits that the impugned judgment of the trial 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 1st respondent further relies on the decision of the Justice J Mutungi in *Serephen Nyasani Menge V Rispah Onsase*(2018)E KLR 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.

18. The 1st 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)e KLR [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" [emphasis supplied]

19. The 1st respondent further submitted that the delay in the instant application was in ordinate. That the applicant submitted that the delay was occasioned by his advocate's failure to act on his instructions as she was on maternity leave when the judgment was delivered. That the is evidence on record to show that the applicant and his advocates were aware of the entry of judgment less than a month after it had been delivered. That the unexplained delay of more than 4 months was therefore inordinate.

20. The 1st Respondent submits that the inordinate delay was not explained. That there was no evidence before court that the counsel for the applicant was indeed on maternity leave and no proof to show the applicant was not indolent and indeed followed up the judgment at the registry. That the letter of 10th September 2022VS2 following up on the file was an indication the applicant was aware of the judgment a week after delivery. To buttress their submission on the unexplained inordinate delay the 1st respondent relied on the decision of Musinga J.A *The Hon. Attorney General v Law Society of Kenya & Another* C.A Civil Appeal application no. 133 of 2011 to wit '...Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events." (A*ttorney General v Law Society of Kenya & another* [2013] e KLR)

21. The 1st 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."

2ND Respondent's submissions

22. In opposition to the application the 2nd respondent filed grounds of opposition dated 12th 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. That the 2nd respondent would suffer great prejudice if the application was allowed.

23. The 2nd respondent urged the court to be guided by decision in *Leo Sila Mutiso v Hellen Wangui Mwangi Civil Application* NO.Nai 255 of 1997 (1999) 2 EA 231 quoted by justice O'Kubasu in *Stanley Kaiyongi Mwenda v Cyrian Kubai* (2001)e KLR where the court of appeal set out the factors to be considered in deciding whether or not to grant such an application to file appeal out of time being the length of delay, reason or the explanation if any of the delay and chances of the appeal succeeding if the application is granted.

24. That the date of judgment delivery date of 31st May 2022 was taken by consent of parties but the applicant chose not to appear. That the judgment was not ready on that date, on 2nd august 2022 and was read on 30th august 2022 vide notice through the Judiciary Public Kiosk System. That the applicant's advocates failed to appear. That no explanation was given why the applicant took long to know about the decision yet the information was ready available at the Judiciary Public Kiosk System. That even after learning about the decision on the 27th September 2022(VS3)the applicant still sat until 11th November 2022 when he file the instant application.

Decision.

25. 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".

26. 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."

27. 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* as stated by Justice Musinga J.A. in *The Hon. Attorney General v Law Society of Kenya & Another* C.A Civil Appeal application no. 133 of 2011 to wit '...Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events." (A*ttorney General v Law Society of Kenya & another* [2013] e KLR)

28. The applicant relied on affidavit of counsel Vivian Shibanda dated 4th November 2022. The application was filed in court on the 11th November 2022. The judgment sought to be appealed against if leave is granted was delivered on the 31st August 2022. The application was brought 72 days post delivery of judgment making 42 days delay. The court finds that 42 days was inordinate delay that required sufficient cause. The applicant's evidence was that his counsel was not present when judgment was delivered. That counsel was on maternity leave. No evidence of the said leave was annexed. That counsel sought instruction to appeal against judgment on resumption of duty. That counsel sought for copy of the judgment where the court file could not be traced and stated VS2 was letter requesting for judgment. The court found VS2 was a letter dated 10th September 2022 which was 10 days post delivery of judgment. The counsel for the applicant stated she got the judgment on 27th September 2022 which was still within time. No explanation was given why the appeal was not filed then only for the instant application to be lodged on 11th November 2022. The court finds no sufficient cause was given as there was material unexplained time gap. The court upholds the holding of Musinga JA IN The Hon. A*ttorney General v Law Society of Kenya & Another C.A Civil Appea*l application no. 133 of 2011 to wit '...Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events." (*Attorney General v Law Society of Kenya & another* [2013] e KLR). The court further 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 ....., 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."

29. The court is satisfied that the delay of 42 days 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 4th criteria thereunder the court finds that the respondents would be prejudiced due to the inordinate delay in filing appeal. 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."

30. 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 4 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 4months only to wake up and decide to instruct counsel to appeal is tantamount to abuse of the court process and annoyance of the respondents. In the upshot the application dated 4th November 2022 is dismissed with costs to the respondents.

31. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA ON THIS 20TH APRIL 2023.

JEMIMAH KELI,

JUDGE.

In the presence of:-

C/A: Lucy Macheso

For Applicant: Shibanda

For 1st Respondents: Ms. Achieng

For 2nd respondent Otieno -Njoga