



**Sygenta Pollen Limited v Mbogo (Employment and Labour Relations Cause E110 of 2022) [2023] KEELRC 1679 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1679 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E110 OF 2022**

**JK GAKERI, J**

**JULY 13, 2023**

**BETWEEN**

**SYGENTA POLLEN LIMITED ..... APPLICANT**

**AND**

**MARY WANGECHI MBOGO ..... RESPONDENT**

**RULING**

1. Before the court for determination is a Notice of Motion by the Applicant dated October 18, 2022 seeking Orders That;
  1. The Honourable Court be pleased to grant the applicant leave to file an appeal out of time against the Ruling of the Hon Chief Magistrate AM Maina delivered on July 27, 2021 in the Chief Magistrate's Court case Thika CMCC No 105 of 2018.
  2. Upon grant of leave to appeal out of time, the Memorandum lodged herein be deemed as duly filed.
  3. The order made by Honourable Court dismissing the Applicant's Application dated May 28, 2018 be vacated and set aside.
  4. The costs of this application be provided for.
2. The application filed under Certificate of Urgency is expressed under Order 51 Rule 1 of the *Civil Procedure Rules*, Section 79G and Section 95 of the *Civil Procedure Act* and all other enabling provisions and is based on the grounds set out on its face and the Supporting Affidavit of Jackson Muema Kisinga sworn on October 18, 2022 who depones that on the date the ruling was delivered, the advocate in conduct of the matter failed to attend court and has since left employment of the firm without a proper handover and the file was inadvertently filed away until June 2022 by which time the time to file appeal had lapsed.



3. The affiant deposes that the failure on its part is highly regretted and the same should not be visited upon the client.
4. That the Applicant had an arguable appeal with a high probability of success in light of the grounds raised in the Memorandum of Appeal which will be rendered nugatory if the suit is not reinstated.
5. That no prejudice will be suffered by the Respondent if the application is allowed and that application was brought expeditiously and it is in the interest of justice that the appeal be heard on merits.
6. That it was only fair that the order dismissing the application dated May 29, 2018 be set aside and leave granted to file the appeal.

### **Response**

7. In opposition to the application through her Replying Affidavit sworn on March 16, 2023, the Respondent deposes that the hearing of the main suit is scheduled for June 20, 2023 at the Thika Law Courts and the applicant herein in seeking leave to file an appeal out of time after 5 years is intended to delay determination and sabotage the hearing of the case.
8. The affiant states that barring the suit from proceeding would deny her the right to fair hearing as the issues being raised by the applicant can be addressed in its defence as opposed to an appeal.
9. That the ruling intended to be appealed against was delivered on May 28, 2018 and the delay was inordinate.
10. The affiant deposes that the applicant had not provided a substantive reason or the prejudice it stands to suffer other than denying the Respondent the right to be heard.
11. That it is in the interest of justice that prayers sought be disallowed.

### **Applicant's submissions**

12. Counsel relied on Section 79G of the *Civil Procedure Act* to urge that the court had jurisdiction to enlarge time for an appeal if satisfied that the appellant had good and sufficient cause for not filing the appeal in time.
13. Reliance was also made on the sentiments of the court in *Murage Nyawira Gladys V Lydia Mutindi Mutunga (2022) eKLR* on the meaning of sufficient cause.
14. Counsel submitted that there was no difference between sufficient cause and good cause as held in *Feroz Begum Quereshi & another V Maganbhai Patel & others (1964) EA 633* cited with approval in *Peter Kioko & another V Elizabeth Wanza Musyoki (2021) eKLR*.
15. Counsel urged that since the leave sought was discretionary, the court may consider; period of the delay, reason for the delay, arguability of the appeal, degree of prejudice the Respondent stands to suffer, importance of compliance with time limits and effect, if any on public interest or administration of justice.
16. The Supreme Court decision in *Nicholas Kiptoo Arap Korir Salt V IEBC & 7 others (2014) eKLR* was also relied upon to urge the parameters to be considered in the exercise of discretion.
17. According to counsel, the issues for determination are whether;
  - i. The applicant had sufficiently explained the delay.
  - ii. There will be any prejudice suffered by the Respondent if extension is granted.



- iii. The applicant has an arguable appeal.
  - iv. The application has been brought without undue delay.
18. On delay, counsel submitted that the deponent had demonstrated the reason for the delay and the mistake ought to be excused as held in [Belinda Murai V Amos Wainaina \(No 4\) \(1982\) KLR 38.](#)
  19. Equally cited was the *decision in Kalemera V Salaama Estates Ltd (1971) EA 284.*
  20. As regards the prejudice the Respondent stood to loose, counsel submitted that the Respondent had not demonstrated any prejudice she stood to suffer. That the applicant stood to suffer more prejudice.
  21. On arguability of the appeal, counsel made reference to the Memorandum of Claim dated October 18, 2022 arguing that the learned trial Magistrate erred by failing to consider the directions in Section 27 of the [Work Injury Benefits Act, 2007 \(WIBA\)](#) affirmed in [Law Society of Kenya V Attorney General & another \(2019\) eKLR.](#)
  22. That the foregoing issue was triable and need not necessarily be successful as held in [Olympic Escort International Co Ltd & 2 others V Parminder Singh Sandhu & another \(2009\) eKLR.](#)
  23. As to whether the application was brought without undue delay, counsel submitted that the application was filed 'around 3 months' after the applicant's counsel discovered the mistake.
  24. That Section 75G of the [Civil Procedure Act](#) had no fixed timelines as to what undue delay was.
  25. Reliance was also made on the decision in [Juma Nyaleko V Fredrick Omondi Oketch \(2021\) eKLR](#) to urge that 3 months from the date of judgement was not inordinate to deny the applicant right of appeal.
  26. The Respondent did not file submissions.
  27. The singular issue for determination is whether the Notice of Motion dated October 18, 2022 is merited.
  28. From the documents filed by the applicant, the Respondent filed a suit against the applicant in 2018 seeking various reliefs.
  29. That on July 27, 2021, the trial Magistrate AM Maina (CM) delivered a ruling the subject matter of the intended appeal.
  30. Regrettably, the applicant did not avail a copy of the ruling for perusal by the court bearing in mind that there is no consensus between the parties on when the ruling was delivered.
  31. The law on enlargement of time for purposes of filing an appeal out of time is well settled.
  32. Section 79G of the [Civil Procedure Act](#) provides that;
 

' 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 of time any time which the lower court may certify as having been requisite for the preparation and delivery of 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 has good and sufficient cause for not filing the appeal in time.'
  33. Clearly, the appeal must be filed within 30 days from the date of judgement or ruling was delivered by the trial court barring the excluded duration.



34. Thus, leave to file an appeal out of time will only be granted pursuant to the proviso of Section 79G where the applicant establishes that he has a good and sufficient cause for the delay.
35. Courts have elaborated and embellished the meaning of 'good and sufficient cause' in the proviso to Section 79G of the *Civil Procedure Act*.
36. Judicial authority is clear that good cause means sufficient cause. Sufficient cause has been defined to mean that the party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently' or 'remaining inactive'. (See *FWNM V SMM (2019) eKLR* cited by the applicant).
37. Similarly, in *Daphne Parry V Murray Alexander Carson (1963) EA 546*, the court stated as follows;  

' Though the provision for extension of time requiring 'sufficient cause' should receive a Liberal Construction so as to advance substantial justice, when no negligence, nor inaction nor want of bona fides is imputed to the appellant, its interpretation must be in accordance with judicial principles.'
38. It is trite law that whether or not to enlarge time to enable a party file an appeal out of time involves the exercise of judicial discretion. (See *Thuita Mwangi V Kenya Airways Ltd (2003) eKLR*, Nicholas Salat V IEBC & 7 others (Supra).
39. In exercising its discretion, the court is enjoined to consider several parameters as authoritatively articulated by superior courts, such as facts of the case, whether the applicant has laid a basis for the extension, reasonable reason for the delay, prejudice likely to be suffered by the Respondent, length of the delay and arguability of the appeal.
40. It is against the foregoing analysis that I now proceed to juxtapose the facts of the instant application on the principles of law to determine whether the application before the court is merited. Simply stated and according to the Supporting Affidavit sworn by counsel, the advocate handling the matter did not attend court on the date the ruling was delivered.
41. Puzzlingly, the affidavit has no date of the ruling.
42. That the advocate left employment without a proper handover.
43. Puzzlingly, the affiant makes no reference to the date when the advocate left employment without handing over or when the law firm discovered he had quit employment. These are essential details.
44. According to the Notice of Motion, the ruling in Thika CMCC No 105 of 2018 was delivered on July 27, 2021.
45. That the file was inadvertently filed away until June 2022 when the 'mistake' was discovered and the instant application was filed on October 26, 2022, almost five (5) months later. Was this acting with reasonable dispatch?
46. Regrettably, the Notice of Motion dated October 18, 2022 is not supported by any documentary evidence to embellish the affiant's statements and essential details are missing such as the bring up system of files.
47. It is also evident that the Respondent had not requested for any update on the matter during the 11 months.



48. No doubt the delay is inordinate and the court is not persuaded that the applicant has laid a basis for grant of leave to file the appeal out of time.
49. This is a 2018 matter and granting the leave requested will further delay the hearing schedule of the main suit to the prejudice of the Claimant who acts in person.
50. In the court's view, the reason provided by the applicant does not meet the threshold or good and sufficient cause as a degree of inaction is discernible.
51. As regards arguability of the intended appeal, the court is intrigued by the fact that apart from the draft Memorandum of Appeal dated October 18, 2022, no other document was availed as neither the ruling to be appealed against nor the record of appeal were provided. In other words, there is no appeal before the court for admission out of time as envisioned by the proviso to Section 79G of the Civil Procedure Act, as held in Gerald M'Limbine V Joseph Kangangi (2009) eKLR.
52. For the above stated reasons, the court is not persuaded that the Notice of Motion dated October 18, 2022 is merited and it is accordingly dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF JULY 2023**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

