



**Unilever Tea Kenya Ltd v Baruku & 24 others (Appeal E001 of 2023)
[2023] KEELRC 2370 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2370 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
APPEAL E001 OF 2023
DN NDERITU, J
OCTOBER 5, 2023**

BETWEEN

UNILEVER TEA KENYA LTD APPLICANT

AND

JOSEPH BARUKU & 24 OTHERS RESPONDENT

RULING

I. Introduction

1. By way of a notice of motion dated February 14, 2023 (the application) the appellant (applicant), through Kaplan & Stratton Advocates, prays for the following –
 1. Spent
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 3. That this Honourable Court be pleased to grant the Applicant leave to file its Appeal against the Ruling of the Honourable Magistrate’s Court delivered on July 8, 2022 out of time.
 4. That the Memorandum of Appeal dated February 13, 2023 be deemed as duly filed.
 5. That pending the hearing and determination of the Appeal, this Honourable Court be pleased to grant an order of proceedings in the Chief Magistrates’ Court at Kericho in CMELRC No 1 of 2019 as consolidated with CMELRC NO 2-25 of 2019.
 6. That costs of and incidental to this Application be costs in the Appeal
2. The application is expressed to be brought under Sections 79G, 1A, 1B, and 3A of the *Civil Procedure Act*, Order 51 Rule 1, Order 50 Rule 6 of the *Civil Procedure Rules* and all enabling provisions of the law.



3. The application is based on the grounds on the face of it and supported with the affidavit of Tumaini Kimone, legal counsel for the applicant, sworn on even date with several annexures thereto.
4. On March 8, 2023 when this matter came up in court for inter partes hearing Mrs Opiyo appeared for the applicant and Miss Mwangi appeared for the respondents. The court issued some interim orders among them staying proceedings in Kericho CMCC Nos1 - 25 of 2019 as consolidated under Kericho CMCC No 1 of 2019 pending the hearing and determination of this application. It was also agreed that the application shall be heard by way of written submissions.
5. The application is opposed and the respondents filed a replying affidavit sworn by Joseph Baruku on March 3, 2023.
6. Counsel for the applicant filed her written submissions on March 16, 2023 while counsel for the respondents filed on March 17, 2023.
7. The applicant filed a notice of motion dated March 11, 2021 in the lower trial court seeking to strike out the causes mentioned above, as consolidated, alleging that the said causes are res judicata and as such the trial court lacked jurisdiction to entertain the same. However, the said application was dismissed with costs in a ruling delivered by the lower court on July 8, 2022. Aggrieved by the dismissal, the applicant filed an appeal in the High Court of Kenya at Kericho Appeal No 48 of 2022.
8. It is deposed that the counsel in conduct of the matter (Ms Patricia Muma) left the law-firm representing the applicant and upon review counsel for the applicant realized that the filing of the appeal in the High Court was erroneous as the matter concerns employment and labour relations and the appeal ought to have been filed in this court (ELRC). That appeal was subsequently withdrawn and an application that had been filed in the lower court for stay of proceedings was also withdrawn as per notices annexed to the supporting affidavit.
9. It is stated in the supporting affidavit that the applicant has an arguable appeal with high chances of succeeding and hence if the orders sought (stay of the proceedings in the lower and leave to appeal out of time) are not granted the appeal shall be rendered otiose. It is further stated that if the orders sought are not granted the applicant shall be highly prejudiced. It is alleged that the subject matter of the causes filed by the respondents was heard, determined, and settled vide a consent judgment in Nairobi ELRC No 1578 of 2017 which was a consolidation of various causes filed by the respondents herein.
10. It is the applicant's position that the appeal has merits in that if the respondents are allowed to prosecute the causes pending in the lower court any award therefrom shall amount to double compensation and unjust enrichment to the respondents. The submissions by counsel shall be considered in the succeeding parts of this ruling alongside those by counsel for the respondents.
11. On their part, the respondents are vehemently opposed to the application through the filed replying affidavit. The factual circumstances as stated in the foregoing paragraphs are not disputed. However, it is deposed that the appeal in the High Court was filed after a period of over one month since the ruling of the lower court and that no explanation has been proffered for the delay which the respondents consider inordinate.
12. It is the respondents' position that the application herein and the intended appeal are intended to delay the trial and conclusion of the causes pending in the lower court.

II. Submissions by Counsel

13. Counsel for the applicant submits that the respondents were regularly, fairly, and lawfully dismissed by the applicant after they participated in an illegal strike which had been prohibited through a court



order. After prolonged negotiations the summary dismissal of the respondents was deemed normal termination as a result of which the terminal dues for the respondents were negotiated, agreed, and paid following an agreement and a consent filed in Nairobi ELRC No 1578 of 2017 as consolidated with other causes in which the respondents were represented by their union, the Kenya Plantation and Agricultural Workers Union (KPAWU).

14. It is the applicant's submission that since the claims were settled as above the subject matter is res judicata and as such, the lower court lacks jurisdiction to entertain all the causes as consolidated under Kericho CMCC No 1 of 2019.
15. Counsel has identified two issues for determination of this court – whether the applicant may be granted leave to appeal out of time, and, whether the court should stay the proceedings in the lower court.
16. On the first issue counsel for the applicant argues that Section 79G of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules* grant this court unfettered discretion in enlarging time and allowing an appeal to be filed out of time.
17. It is submitted that there was a delay of 17 days in filing the appeal in the High Court following the ruling of July 8, 2022 by the lower court which was allegedly occasioned by the electoral process that was taking place across the country. It is submitted that the delay of 17 days was not inordinate and counsel has cited *Paul Wambua V AG & 2 Others* (2015) eKLR in support of that argument. Counsel has also cited *Charles Kiiru V Charles Muigwa* (2017) eKLR wherein a delay of eight months was considered not inordinate.
18. It is submitted that if there is any mistake or delay that occurred the same may only be attributed to counsel and the applicant should not be punished for the same. In that regard counsel has cited *CFC Stanbic V John Maina Gitthaiga & Another* (2013) eKLR.
19. It is submitted that the applicant has an arguable appeal with high chances of success as a similar cause as those filed by the respondents, Kericho ELRC No 52 of 2019 - *Geoffrey Wafula Okumu V Unilever Tea Kenya Limited*, was dismissed for being in abuse of the court process.
20. It is on the basis of the foregoing that counsel for applicant submits that the intended appeal is arguable and raises triable issues hence pleading that the applicant be allowed to file it out of time and that the filed memorandum of appeal be deemed as properly filed.
21. On the second issue counsel submits that the issue raised on jurisdiction is so fundamental that if the proceedings in the lower court are left to continue the appeal shall be rendered nugatory and the applicant shall be highly prejudiced. It is submitted that if the stay of proceedings is not granted and the intended appeal succeeds a lot of judicial time and resources shall have gone to waste.
22. It is submitted that if at all the respondents will suffer any inconvenience the same may be compensated by way of costs. It is submitted that the respondents shall suffer no prejudice as they were already fully compensated over the same subject matter as alluded to in an earlier part of this ruling.
23. On the basis of the foregoing, the applicant insists that the application be allowed as prayed.
24. On the other hand, counsel for the respondents identifies the same issues for determination but on the second issue it is submitted that this court cannot validate an appeal that has already been filed out of time without leave. It is submitted that the first appeal in the High Court was filed 17 days after expiry of the 30 days within which the applicant should have filed its appeal. Further, it is argued that the only reason given for delay in filing the appeal is that the counsel in conduct left the law-firm.



25. Citing *County Government of Mombasa V Kenya Ferry Services & Another* (2019) eKLR counsel argues that the applicant has not demonstrated a good cause why this court should exercise discretion in favour of the applicant and hence prays that the application be dismissed with costs.

III. Issues for Determination

26. This court agrees with counsel for the parties that there are two issues for determination – Should this court grant leave to the applicant to file the intended appeal out of time? And, should this court stay proceedings in the lower court?
27. I have deliberately emphasized the word intended above as a memorandum of appeal is not an appeal of itself. It is only one step towards filing an appeal. This is so because if no other documents are filed, and more so the record of appeal, the memorandum of appeal amounts to nothing and should be struck out. It is for this very reason that the applicant is seeking that the memorandum of appeal be deemed duly filed and accepted as the first step towards filing of the appeal. If this court denies the applicant the leave, it cannot be said that there is an appeal filed.
28. Since 2010 our courts have moved beyond mere technicalities and now substance and merit should be the major consideration in determining a matter before any court. The applicant may have approached the court by way of a miscellaneous application or, as it did, filed the application in the same file wherein it filed a memorandum of appeal, which signaled the intention to file an appeal. I see no prejudice to either party so long as the matter is considered on merit.
29. The unfettered discretion of this court under Section 79G of the *Civil Procedure Act* to enlarge time within which an action may be taken, as expounded in Order 50 & 51 of the *Civil Procedure Rules*, is only subject to judicious exercise of the same based on sound legal principles.
30. The subject matter of the intended appeal is the fundamental issue of jurisdiction based on the doctrine of *res judicata*. The applicant holds that the lower court has no jurisdiction over the subject matter and has cited a similar case, as those pending, which was struck out on the basis of abuse of court process in essence for being *res judicata*. Jurisdiction is everything to a court and a court that deals with a matter without jurisdiction labours in vain *The Owners of Motor Vessel Lilian “S” V Caltex(K) LTD*.
31. The court has gone through all the materials placed before it and I form the opinion that the memorandum of appeal as filed raises triable issues deserving serious consideration and interrogation by the court for a just and fair outcome.
32. Likewise, if an appeal is to be filed and heard it shall be absurd for this court to allow the proceedings in the lower court to continue and as such an order for stay of proceedings is appropriate in the circumstances.
33. It is not denied that causes relating to the same, similar, or related issues and between the same parties or parties litigating on their behalf were compromised and settled. This particular allegation has not been attacked by the respondents and forms the gist of the matter being *res judicata*.
34. No particular prejudice has been alleged by the respondents and the delay in the trial in the lower court, if any, may be compensated by way of costs. It is also not disputed that the delay in filing of the appeal and the filing of the same in the wrong forum is only attributable to counsel and not to the applicant. The alleged delay is neither inordinate nor unreasonable in the circumstances.
35. The court is inclined to allowing the application on the terms hereunder.



IV. Orders

36. The applicant's notice of motion dated February 14, 2023 is allowed on the following terms –
- a. The applicant is granted leave to file an appeal out of time.
 - b. The memorandum of appeal placed on record by the applicant is hereby deemed duly filed and served.
 - c. The applicant shall prepare and file a record of appeal within 30 days of this ruling failure to which, unless otherwise ordered and or directed by the court, the leave shall lapse.
 - d. The proceedings in the lower court in regard to Kericho CMCC Nos 1 – 25 all of 2019 as consolidated under case No 1 of 2019 are hereby stayed pending the hearing and determination of the appeal.
 - e. The respondents are awarded costs of the application which are hereby assessed at Kshs 25,000/= to be paid before the hearing of the appeal is directed.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 5TH DAY OF OCTOBER, 2023.

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DAVID NDERITU

JUDGE

