



**Nduhiu v Gathuthi Tea Factory (Appeal E012 of 2021)  
[2022] KEELRC 13165 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13165 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
APPEAL E012 OF 2021  
DKN MARETE, J  
OCTOBER 31, 2022**

**BETWEEN**

**RHODAH WANJIKU NDUHIU ..... APPELLANT**

**AND**

**GATHUTHI TEA FACTORY ..... RESPONDENT**

**RULING**

1. This is an application dated March 14, 2022 and comes out thus;
  - i. That this matter be and is hereby certified urgent.
  - ii. That this Honourable court be pleased to grant leave for the appellant to file this appeal out of time.
  - iii. The Honourable court do allow the present Appeal as filed albeit out of time to be properly filed and give directions on how to expeditiously dispose this matter.
  - iv. That costs for this Application be in the cause.It is grounded as follows;
  1. The Appeal arises from the Ruling in Nyeri CMCC No.42 of 2018 delivered on 15th July 2021 by Honourable Nelly Kariuki (Principal Magistrate) who dismissed the matter on account of want of jurisdiction.
  2. Prior to the ruling being delivered, the matter came up for a mention on June 8, 2021 and the appellant's counsel was not in attendance as he was down with Covid 19, the Respondent was required to serve a mention notice as per the court's directions issued on the same day.
  3. The respondent's counsel did not serve the appellant's counsel at all and there was no appearance for the appellant on 15th June 2021 when the ruling on record did not have notice



of the progress of the matter yet this numerous enquiries from the registry on the date of delivery of the Ruling went unanswered. The Appellants submissions though filed and paid for through MPESA transaction (Code transaction number PFJ2BIOMBQ) on 19th June 2021 was never placed on the court file hence never considered.

4. The ruling was delivered on July 15, 2021 appellant's counsel on record only came to learn of the existence of the same nearly 1 ½ months subsequent to the said ruling. The appellant's counsel received instructions to appeal against the said ruling on September 1, 2021 in respect of which he filed the notice of appeal.
  5. Thereafter, attempts by the applicant to get certified typed proceedings and Ruling of the lower court has been met with numerous challenges to this very date.
  6. A notice of appeal by the appellant/applicant was served and filed on September 1, 2021, barely 2 weeks after the lapse of the statutory 30 days and cannot thus be said to be inordinate in light of order 42 rule 6 (2) of the Civil Procedure Rules.
  7. Consequently thereof, a memorandum of appeal dated October 7, 2021 was filed and served.
  8. The grant of the orders sought herein will not be prejudicial upon the Respondent.
2. The respondent in a replying affidavit sworn on April 8, 2022 opposes the application on the following factual averments. That on April 10, 2021 the applicant was served with a mention notice for June 15, 2021 and the court on establishment that service was duly done proceeded to issue directions on the preliminary objection. That the matter was scheduled for mention on June 15, 2021 for confirmation of filing of submissions but the applicant failed to comply or attend court and the matter proceeded. That the allegations by the applicant that their submissions were never filed though duly paid for is lame duck. That on the date of the ruling, the court requested counsel for the respondent to call the applicant's office and inform them that the ruling was about to be delivered. They failed to heed. The failure to attend court for the ruling or make a follow up speaks volumes of the applicant's conduct on this matter. That the memorandum of appeal was filed 4 months after delivery of the ruling and this has not been explained. This appeal is an afterthought and the applicant has failed to offer substantial explanation of the delay in so filing. That this application therefore frivolous, vexatious, bad in law, unmerited and an abuse of the process of court.
3. The respondent in her written submission dated July 8, 2022 opposes the application and concludes as follows;

“It is out humble submission that the application dated March 14, 2022 is without merit and should be dismissed with costs to the respondents. The applicant is guilty of latches in the prosecution of their case and the court should not come to the aid of an indolent party at the expense of the respondent.

Section 79G of the Civil Procedure Act requires that before the court enlarges the time for appealing the applicant must satisfy the court that he had good and sufficient cause for not filing the appeal in time and none has been given. The delay of 86 days is inordinately long and even after the incompetence of the appellants appeal was pointed out; the appellant took inordinately long to rectify the error.

We pray that this appeal be struck for being incompetent as it was filed out of time and without leave of the court.”



4. This is an helpless case. The conduct of the applicant and her dalliance in the litigation of a case frustrates the application from day one. The respondent's case and submission all point out to massive default in the part of the applicant's counsel in the litigation of their case. The application therefore is based on quick sand and cannot be sustained.

5. I am therefore inclined to dismiss the application with orders that each party bears the costs of the same.

**DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER, 2022.**

**D.K.Njagi Marete**

**JUDGE**

**Appearances**

1. Mr.Kiroko Ndegwa instructed Triple N.W & Co.Advocates LLP for the Applicant.
2. Mr.Mungai Nyoro instructed by J.K.Kibicho & Co.Advocates for the Respondent.

