



Matayos Vocational Training Center & 3 others v Okunga & 5 others (Employment and Labour Relations Appeal E002 of 2022) [2022] KEELRC 12910 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12910 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E002 OF 2022**

**JW KELI, J
OCTOBER 13, 2022**

BETWEEN

**MATAYOS VOCATIONAL TRAINING CENTER 1ST APPELLANT
BOARD OF GOVERNORS MATAYOS VOCATIONAL TRAINING
CENTER 2ND APPELLANT
COUNTY GOVERNMENT OF BUSIA 3RD APPELLANT
CHAIRPERSON BOARD OF GOVERNORS MATAYOS VOCATIONAL
TRAINING CENTER 4TH APPELLANT**

AND

**FANUEL OKUNGA 1ST RESPONDENT
NEREAH SANYA 2ND RESPONDENT
JOHN NYONGESA 3RD RESPONDENT
CONSTANT MAKOKHA 4TH RESPONDENT
JOHNSTON AGUNDA 5TH RESPONDENT
JUSTUS OPONDO JUMA 6TH RESPONDENT**

JUDGMENT

1. Pursuant to court order of July 28, 2022 the court directed that it would issue one ruling on the preliminary objection dated March 21, 2022 by the respondents and March 31, 2022 respectively and the Notice of Motion dated December 21, 2021 by the applicant.
2. In terms of genesis of the application which informed the filing of the two notices of preliminary objections by the respondents is a ruling of the lower court Chief Magistrate Court Busia ELRC Cause



no 3 of 2021 dated November 24, 2021 where the Hon SPM P A Olengo issued a ruling granting interim order restraining the respondents (applicants) from terminating the applicants' employment pending the hearing and determination of the main suit and an order directing the respondents to pay the applicants their minimum statutory wages from January 2021 to April 2021 in compliance with the [Labour Institutions Act](#), 2007 and the [Regulations of Wages\(General\) \(Amendment\) Order](#), 2018 and to continue paying the minimum statutory wages as computed pending the hearing and determination of the suit.

3. The respondents' being aggrieved by the said ruling filed the instant application on January 12, 2022.
4. The respondents filed notice of appointment of advocates Ibrahim E Otiende Advocates and filed response to the application vide affidavit of John Ngongesa sworn on February 16, 2022. The respondents further filed a notice or preliminary objection dated February 21, 2022 on basis that the application not attached a memorandum of appeal.
5. The respondents further filed another notice of preliminary objection dated March 31, 2022 on the ground that the applicants had lodged appeal out of time without leave of the court and further that they never bother to serve the memorandum of appeal and accompanying documents while serving the application leading respondents to file the first notice of preliminary objection. The ruling will thus focus on the second preliminary objection and the first is overtaken by events.

Ruling on the preliminary objection

6. The preliminary objection dated March 31, 2022 seeks to strike out the "appeal" against the ruling/order of Hon SPM P A Olengo in Busia ELRC Cause no 3 of 2021 on grounds that the appellant/applicants lodged appeal out of time and without leave and the applicant did not serve the Memorandum of appeal and accompanying documents.
7. The appellant submits that the appellant served the application dated DEcember 21, 2021 while in court without the Memorandum of Appeal. That counsel for respondents perused the court file on February 14, 2022 and the Memorandum of Appeal was not on record.
8. That on March 31, 2022 it was the court that indicated to the parties that the Memorandum of Appeal was filed on January 12, 2022.
9. That it was not until April 21, 2022 the filed Memorandum of Appeal was served on the respondents which they term as act of impunity. That rule 8 (2) of [Employment and Labour Relation Court rules 2016](#) provide for appeal from lower court to be filed in 30 days.
10. That the impugned ruling was delivered on November 24, 2021 and appellants /applicants filed their Memorandum of Appeal on January 12, 2022 without leave of court contrary to rule 8 (2) of Employment and Labour Relation Court rules 2016 . To buttress their submission that the preliminary objection be allowed they rely on the decision of Supreme Court [Nicholas Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others](#) [2014]eKLR (Salat case): "..... counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed. What we hear the applicant telling the court is that he is acknowledging having file a 'document' he calls 'an appeal' out of time without leave of the court. Pursuant to rule 33(1) of the [court's rules](#), it is mandatory that an appeal can only be filed within 30 days of filing the Notice of Appeal. Under rule 53 of the [court's rules](#), this court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires. By filing



an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such ‘an appeal’, is tantamount to moving the court to remedy an illegality. This, court cannot do. To file an appeal out of time and seek the court to extend time is presumptive and inappropriate. no appeal can be filed out of time without leave of the court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court.” This is a binding decision on the court and the same is upheld to apply in the instant case.

11. The respondents submit that the appellants/applicant has not disclosed reasons for the delay. They submit that the Salat case to state that the said Memorandum of Appeal is as good as never filed.
12. The applicant submits the preliminary objections filed are responded to by way of grounds of oppositions dated April 20, 2022 of which the court summarized to be the objections were in bad faith the memorandum of appeal having been served and contravened provisions of article 159 of the Constitution and were meant to delay hearing of the application and appeal.

Determination of preliminary objection .

13. The court finds that the Memorandum of Appeal lodged on January 12, 2022 challenged the ruling dated November 24, 2021 of the lower court in Busia Chief Magistrate Court ELRC Cause no 3 of 2021. That period between the impugned ruling and filing of the memorandum of appeal was outside the 30 days window. Rule 8 (2) of Employment and Labour Relation Court rules 2016 provided for appeal to this court from the lower court be done within 30 days of the decision.
14. The applicants submits that the memorandum of appeal was filed with the application and that the preliminary objection offended the provisions of article 159 of the Constitution. The applicants submit that the delay of 2 months was not inordinate and relies on decision in Port Florence Company Health Care v Crown Health Care Limited (2022) where the court found two months delay not inordinate.
15. The court finds that the submission on the delay to be out of context as no leave is sought under the application.
16. The court finds and determines that the memorandum of appeal was filed out of time without leave of the court. The Applicant in their application has not sought for extension of the file of appeal out of time as envisaged under Section 79 (g) of Civil Procedure Act. The submission by the applicants that delay of 2 months was not inordinate was not pleaded in the application. The court upholds the decision of the Supreme Court in Salat case(*supra*).
17. The court adopts with approval the decision of the Court Of Appeal in Salat case(*supra*) to wit: “To file an appeal out of time and seek the court to extend time is presumptive and inappropriate. no appeal can be filed out of time without leave of the court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence” and finds that Memorandum of Appeal filed herein is a though it was never filed and expunges it from the court record.
18. Consequently the court finds and determines that the preliminary objection dated March 31, 2022 is merited and is allowed with costs. The 1st preliminary objection is found to have been overtaken by events.

Ruling on application dated December 21, 2021.

19. The application dated December 21, 2021 which seeks stay pending appeal has no leg to stand on without the Memorandum of Appeal as there is no evidence of any intended appeal and in any event



any appeal against the impugned ruling is out of time and can only be admitted on extension of time by this court. No such prayers have been sought in the application.

20. The court finds and determines that the application dated December 21, 2021 was fatally flawed. The lack of a valid memorandum of appeal and failure to seek leave to file appeal out of time are not flaws that can be cured by article 159 (2) (d) of Constitution. They are not mere procedural technicalities. They go to the root of the application.
21. Consequently the court strikes out the application dated December 21, 2021 with costs to the Respondents.
22. It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT IN BUNGOMA THIS 13TH DAY OF OCTOBER, 2022.

J W KELI

JUDGE

In the Presence of :-

Court assistant: Brenda Wesonga

Applicant : Absent

Respondent : Otiende

