



**Cheto v Frodak Kenya Limited & another (Miscellaneous Application
14 of 2022) [2022] KEELRC 13374 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13374 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
MISCELLANEOUS APPLICATION 14 OF 2022**

JW KELI, J

DECEMBER 2, 2022

RULING ON NOTICE OF MOTION APPLICATION DATED 26TH AUGUST 2022

BETWEEN

EZEKIEL WAKUKHA CHETO APPLICANT

AND

FRODAK KENYA LIMITED 1ST RESPONDENT

BUTALI SUGAR MILLS LIMITED 2ND RESPONDENT

RULING

1. The Applicant being dissatisfied with Ruling delivered by Hon. Josephine Maragia delivered on 27th June, 2022 in Kakamega Chief Magistrate Court ELR Causes No. 48,78,53,155 and 52 of 2020 filed the instant appeal.
2. The ruling of the trial court dated 27th June 2022 arose from a Notice of Preliminary Objection by the Respondent challenging territorial jurisdiction to effect that the Respondents carry out business within Butali town near Butali Principal Magistrates Court and as such the Claimant ought to have filed this suit at Butali Law Courts. The learned Magistrate held that the suit offended provisions of Section 11 to 18 of the *Civil Procedure Act*. That the proper court for the Claimant to have filed this suit should have been Butali Principal Magistrate court and in upholding the Preliminary Objection proceeded to strike out the suit with costs to the Respondents.
3. The Applicant vide the Notice of Motion dated 20th August 2022 seeks the following orders:-
 - a. That the Applicant be granted leave to appeal against the ruling delivered on the 27th June, 2022 in Kakamega ELR Cause Nos. 48,78,53,55 and 52.
 - b. That the applicant be granted leave to file a memorandum of appeal and serve out of time.



- c. Any other order that this Honourable Court deems fit to grant.
4. The Application is premised on the grounds that the ruling was delivered when counsel handling the matters had proceeded on maternity leave. That Counsel received instructions from Claimants to appeal on the said ruling after she had resumed from maternity leave.
 5. That the Applicant has an arguable appeal . That the Respondent will not suffer any prejudice since the suit was struck off.
 6. The Application is further supported by the Affidavit of Vivian Shibanda who avers that in the suit struck out the Claimant sought several reliefs against the Claimant for unlawful termination.
 7. The Respondent contested territorial jurisdiction of the lower court leading to the ruling striking out the suit with costs. That when ruling was delivered she was on maternity leave and counsel who held brief inadvertently failed to seek leave to appeal against the ruling. Ms. Shibanda avers that resumed duty from maternity leave on 19th August, 2022 and received instruction from client to appeal 34 days on lapse of the statutory 30 days .
 8. That the Applicant has arguable appeal under Section 11 of the Civil Procedure Act and under Article 174 of the Constitution the suits could be instituted in any court within Kakamega County. That they have already appealed for typed proceedings (VS 3 (a) and 3 (b) being the request and the payment for the typed proceedings).
 9. The Application is opposed by the 2nd Respondent through their Counsel Ales Mbeka Affidavit dated 26th September 2022 to the effect that the ruling the Applicant intends to appeal against was delivered on 27th June 2022 when the Applicant's counsel was present in court, that no appeal was lodged within the statutory limitation of 30 days and further 35 days on lapse of the statutory time. The Applicant has no good reasons for the leave to be granted and is guilty of laches. That it was in the interest of justice application be dismissed with costs to the Respondent for lack of merit.
 10. The Application is further opposed by the 1st Respondent vide replying affidavit of George Onyango Ager who averred he was the Operations Manager of the 1st Respondent. Mr. Ager avers that he was informed by his Advocate that the Advocate for the applicant was present when ruling was delivered and did not seek leave and that the Applicant Counsel is not truthful in her supporting affidavit when she alleges to having been on maternity leave when the ruling was delivered.
 11. Mr. Ager further avers that his advocate informed him that under order 43 rule 1 of the Civil Procedure Rules leave ought to be sought . that the delay is not explained and is meant to deny respondents realizing fruits of their decision. The courts must said the affidavit is based on hearsay as no evidence was placed before court that the Advocate for Applicant was personally present at the ruling.
 12. The court directed that the Application be canvassed by way of written submissions. The parties complied save for the 1st Respondent.

Determination

13. The applicable law is Section 79 (G) of the Civil Procedure Act which provides that an appeal may be admitted out of time if the Appellant satisfies the court that he had a good and sufficient cause for not filing the appeal on time.



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.”

Applicant’s submissions

14. The Applicant submits that some of the factors in exercising discretion whether to extend time to file appeal out of time were suggested by Court of Appeal in [Thuita Mwangi v Kenya Airways Ltd](#) (2003) eKLR to include period of delay, reason of the delay arguability of the appeal, degree of prejudice that would be suffered by the Respondent due to the extension granted, importance of compliance with time limits to the particular litigation or issue and effect if any on the administration of justice or Public interest if any is involved.
15. That the ruling herein was delivered on 27th July, 2022 and present application filed on 30th August, 2022 5 days after lapse of the 30 days statutory period to lodge appeal to the court from the subordinate court. The delay in filing an appeal on time was occasioned by counsel for the Applicant who alleged she was on maternity leave when the said ruling was delivered.
16. The Applicant’s counsel submits that Counsel Kombrayo held brief for and the court record will bear witness. That the counsel for Applicant was not indolent as immediately on resuming she filed instant appeal. On the arguability of intended appeal, the Applicant submits that the court erred in striking out the suit because the 2nd respondent carries on business situate within Kakamega County and hence was in compliance with Section 11 of the [Civil Procedure Act](#) which has a provision for return of suit to lowest grade competent court within the County.
17. The intended appeal has high chance of success considering the law inclines in favour of the Applicant. The Applicant further relies on decision in [Vishija Stone Supplies Company Limited v RSR stone 2006 Limited](#) (2020) eKLR where it was observed the court has mandate to invoke both the inherent power of the court ensured in Rule (1) (2) rules and Article 159 (2) (d) of the [Constitution](#) to cure the default for ends of Justice to be met in the matter.

The 2nd Respondent’s submissions.

18. The 2nd Respondent submits that the powers of the court in determining such application under section 79 (g) of the [Civil Procedure Act](#) are discretionary and the principles for exercise of such discretion are as laid out by Court of Appeal in [First American Bank of Kenya v Gulab P Shah & 2 Others](#) Nairobi HCCC No. 2255 of 2002 to wit

“Length of the delay, explanation if any for the delay, the merits, the merits of the contemplated action, whether the matter is arguable out deserving delay in court or whether frivolous one which will only result in delay of the court justice, whether the Respondent can be adequately be compensated with costs for any prejudice that he may suffer as a result of the favourable exercise of discretion in favour of the Applicant.”



19. That the Applicant has not given sufficient reasons for the delay and relies on the maximum of “equity that the equity favours the vigilant and not the indolent”.
20. The Respondents to further buttress their submissions relied on the authority in *Berber Abibhai Menji v Sultan hasham Lalji and 2 Others* (1990 – 1994) EA 377 where court held inaction on the part of Advocate as opposed to error of judgement or slip is not excusable and in *Akibhai Musafée v Sharif Mohammed Al -bet* Civil Appeal No. 283 of 1998 where court held that failure to act does not constitute a good and sufficient cause and in *Hunter Trading Oil Kenya Limited* Civil Appeal No. 6 of 2010 where Court of Appeal held that Applicant cannot be allowed to invoke oxygen Rules and at the same time abuse it save the abuse it at will.

Determination

21. The court from the pleadings of the parties and their submissions makes the following finding- That under Section 79 (G) of the *Civil Procedure Act* the court may admit appeal out of time if the Appellant satisfies the court it had good and sufficient cause for the delay.
22. The Applicant’s Advocate being on maternity leave at time of ruling was not controverted. The 1st Respondent did not state she was present. The 1st Respondent was informed making it hearsay evidence. The court confers benefit of doubt to counsel of the Applicant as an officer of the court. The court finds that the ruling intended be appealed against was delivered on 27th June, 2022 (Annexure VSI) and the instant application filed in court on 30th August 2022.
23. The statutory period limitation to appeal to this court being thirty days there was a delay of 5 days. The court found evidence the applicant had applied for typed proceedings of the lower court and made payment an indication of commitment to appeal.
24. The 1st Respondent is situated and doing business within Kakamega County.

Decision.

25. The court upholds decision cited by the Appellant on the factors to consider in exercising discretionary consideration of application for extension of time to file appeal in *Thuita Mwangi case (supra)* and further upholds decision cited by the Respondent on the factors to consider in Application under Section 79 (G) of the *Civil Procedure Act* in *First American Bank of Kenya case (supra)* of which the two decisions cited by the parties summarize the factors to consider in application for extension of time to file appeal to include length of delay.
26. The Court having found the applicant’s counsel was on maternity leave when the impugned ruling was delivered, the delay being of 5 days upon expiry of the statutory period, the court holds that the delay was not ordinate and was explained by fact of the counsel dealing being on maternity leave at time of delivery of the ruling. The court is satisfied sufficient cause has been shown by the Applicant explanation of the delay. The applicant submitted that that the intended appeal is arguable as it is based on the interpretation of the law (section 11 of the *Civil Procedure Act*). The applicant submits that the respondents will suffer no prejudice if the order is granted.

The Respondent submits failure to act does not constitute a good and sufficient case as held in *Alibhai Musajee Case (supra)*.
27. The court considers the arguability of the appeal. The impugned ruling struck out the suits on grounds of offending territorial jurisdiction. The Respondents operate their business within Kakamega County where Butali Law courts were also situated. The cases were filed in Kakamega Law Courts within



the same county. On a prima facie basis, the court holds that the intended appeal by the applicant is arguable and deserving day in court.

28. The court holds that the Respondents only prejudice would be costs which the court finds can be compensated.
29. In conclusion the Notice of Motion Application dated 26th August, 2022 is allowed with costs to the Respondents.
30. The Applicant is granted leave to appeal against the ruling delivered on 27th June, 2022 in Kakamega CM ELR Cause Nos. 48,78,53,55 and 52 of 2020.
31. The Applicant is granted leave to file Notice of appeal, memorandum of appeal and serve out of time.
32. Costs to the Respondents
33. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA IN OPEN COURT ON THE 2ND DAY OF DECEMBER, 2022.

**J. W KELI,
JUDGE.**

In the Presence of:-

Court Assistant: Brenda Wesonga

Applicant: Vivian Shibanda

1st Respondents : Ms Achieng

2nd Respondents:- Alex Mbeka and Ms Kedogo

