



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 9 OF 2010**

**COOK 'N' LITE LIMITED .....APPELLANT**

**-V E R S U S-**

**SILVESTER MUTIA JONATHAN ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Senior Resident Magistrate Court at Mombasa delivered by Hon. Mrs. Teresia Mwangi (SRM) on 8<sup>th</sup> December 2009)*

**JUDGMENT**

1. Respondent filed **Mombasa SRMCC Case No. 2078 of 2007** against the Appellant. On 8<sup>th</sup> December 2009 the Court delivered judgment in his favour. That judgment is the subject of this Appeal.
2. Appellant being aggrieved by the judgment of 8<sup>th</sup> December 2009 filed a Memorandum of Appeal on 20<sup>th</sup> January 2010. Unless there was leave granted to the Appellant to file this appeal out of time as provided under Section 79G of the Civil Procedure Act Cap 21, this appeal is incompetent. This appeal should have been filed on or before 7<sup>th</sup> January 2010. I have perused the Court file of this appeal and I am unable to find an order granting Appellant leave to file an Appeal out of time.
3. Section 79G provides as follows-

**“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.”**

4. Having filed this appeal on 20<sup>th</sup> January 2010 Appellant breached the above Section. The Court of Appeal considered the fate of an appeal filed out of time in the case **FELISTER WAKONYO WAMAHIU v JOSEPH WACHIRA MWANGI [2014]eKLR** where the Court stated-

**“The appeal was filed out of time on 19<sup>th</sup> April, 2013 and without leave of this Court. No explanation was given by the Respondent for the delay in filing the Record of Appeal. Can the overriding objective of this Court be invoked to save the appeal? We are of the view that the competency of the appeal goes to the jurisdiction of this court and cannot be cured by the overriding objective of this court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. In City Chemist (NRB) & Others – vs- Oriental Commercial Bank Ltd – Civil Application No. Nai. 302 of 2008 this Court**

**in discussing the overriding objective of the Court stated:-**

**“That however is not to say that the new thinking totally uproots well established principles or precedents in the exercise of discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and ambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”**

I wholly adopt that holding and apply it to this Appeal.

5. The lower Court case the subject of this Appeal related to an industrial accident. I did consider the transfer this appeal to the Industrial Court for determination but in view of the fact there is no valid Appeal capable of being transferred I declined to do so.
6. In view of what is stated above this appeal is hereby struck out with costs to the Respondent. The stay of execution granted to the Appellant is hereby lifted.

**DATED and DELIVERED at MOMBASA this 18<sup>TH</sup> day of SEPTEMBER, 2014.**

**MARY KASANGO**

**JUDGE**