



**Kitonga & 11 others v Shreeji Chemicals Limited & 2 others (Cause
370 of 2017) [2023] KEELRC 3457 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3457 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 370 OF 2017
M MBARÚ, J
DECEMBER 19, 2023**

BETWEEN

**FRANIS MWANZIA KITONGA 1ST CLAIMANT
KEFA MORARA ONTIRI 2ND CLAIMANT
AMOS KIBOMU ZOMBO 3RD CLAIMANT
REMJUS OTIENO ODUOR 4TH CLAIMANT
MOSES THETHE NDHUNDHI 5TH CLAIMANT
JOSPHAT KARANJA ONDITI 6TH CLAIMANT
KENNEDY KOLA KALAMU 7TH CLAIMANT
ALEX CHIVATSI MWASUGA 8TH CLAIMANT
SAMUEL WANGILA MASTEN 9TH CLAIMANT
PATRIC OTIENDE KALANI 10TH CLAIMANT
GEOFFREY MURONI LIKHAKO 11TH CLAIMANT
GEOFFREY KARISA CHARO 12TH CLAIMANT**

AND

**SHREEJI CHEMICALS LIMITED 1ST RESPONDENT
DICKMASH ENTERPRISES LIMITED 2ND RESPONDENT
KHAMSO LAND AGENT & GENERAL CONTRACTORS ... 3RD RESPONDENT**



RULING

1. The claimants filed application dated 23 August 2023 under the provisions of Section 1A, 1B, 3A and 63(E) and 79G of the Civil Procedure Act and order 9 rule 9, order 42 rule 6 and order 51 of rule 1 and is seeking the following orders;
 1. Spent.
 2. Leave be granted to the claimants to act in person in place of the firm of IRB Mbuya & Company Advocates previously on record;
 3. This court be pleased to grant the claimants leave to appeal out of time against the judgment delivered by Hon. B. Ongaya on 10th February 2023.
 4. Costs of this application be provided for.
2. The application is supported by the annexed affidavit of Kennedy Kola Kalamu, the 7th claimant and on the grounds that the claimants are aggrieved by the judgment of the court and are desirous of filing an appeal. The delay in not filing the appeal in time was due to the court system when the file was taken by the presiding judge upon transfer from Mombasa to Nairobi and the advocate representing the claimants did not inform them that judgment had been delivered. The claimants only learnt late of the judgment upon visiting the registry.
3. In his Sporting Affidavit, my Kola aver that the appeal against the judgment of the court has high chances of success and if allowed and be granted leave to appeal out of time, there are sufficient grounds to support the appeal.
4. In response, the 1st respondent filed Grounds of Opposition to the application on the grounds that the court is *functus officio* having rendered judgment herein on 10 February 2023. There is no jurisdiction to hear and determine the matter on leave to file appeal out of time since that is the preserve of the appellate court under rule 4 of the Court of Appeal Rules. There is no appeal filed or Notice of Appeal filed or served by dint of rule 77 of the Court of Appeal Rules. The application should be dismissed with costs.
5. Parties attended and made oral submissions which are put into account and the issues for determination is whether the claimants should be allowed to act in person and whether leave to appeal out of time should be granted.
6. The claimants are the right holders in this suit. They appointed their advocates, Mbuya and Co. Advocates to act for them herein and to secure their interests. They have the same power to change and act in person to secure their rights as the rights holders herein. There were no objections by the respondents in this regard.
7. With regard to granting leave to appeal out of time, indeed as submitted by the 1st respondent, upon the judgment of the court on 10 February 2023, there being no stay or application for review of the judgment, the claimants had a right of appeal to the Court of Appeal as a matter of right. However, that right had to be secured at the Court of Appeal and not this court which upon its judgment became *functus officio*. The business of this court ended with its judgment on 10 February 2023.
8. For any reason, that the claimants were unable to file an appeal in time, such are matters reserved and should be addressed by the appellate court. Section 79G of the Civil Procedure Act must be read in



context. The court which the appeal lie is the court to grant leave to appeal to it out of time. Upon the judgment herein, the claimants ought and should have applied the Court of Appeal Rules, 2022 to move the court.

9. Where there is an automatic right of appeal from any decision of this court pursuant to Section 17 of the Employment and Labour Relations Court Act, 2011 then as a matter of procedure and practice, a party should move to the Court of Appeal immediately. Where unable to do so, leave to appeal out of time should be lodged with the appellate court. See Obange & another v Oganyo & 4 others (Civil Appeal E033 of 2021) [2022] eKLR.
10. No Notice of Appeal is filed herein to assert any right of appeal. There is no draft memorandum of appeal to demonstrate any intention of filing an appeal. Even though the claimants are acting in person, the rules of procedure and practice invoked do not aid their case. Acting in person does not remove them from abiding the procedural requirements of filing an appeal and the motions thereof.
11. The right to grant leave to file appeal out of time against the judgment herein delivered on 10 February 2023 is hence a matter removed from the court, without power to allocate time to file appeal out of time, the court stands *functus officio*. It must stop.
12. Application dated 23 August 2023 is without merit and is hereby dismissed. Each claimant shall pay Ksh.500 to the 1st respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF DECEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:-

Court Assistant: Japhet Muthaine

..... and

