



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

MISC. APPLICATION NO.5 OF 2018

(Before D. K. N. Marete)

SOTIK TEA COMPANY LIMITED.....APPLICANT

VERSUS

HENRY NYABUTO MENTA (suing as the personal representative of

MARY KERUBO MANDERA (DECEASED).....RESPONDENT

RULING

This is an application dated 29th June, 2018 and seeks the following orders of court;

- i) *THAT this application be certified urgent and its service of be dispensed with in the first instance.*
- ii) *THAT this honourable court be pleased to grant the Applicant leave to file appeal out of time.*
- iii) *THAT there be stay of execution of the judgment and Decree of the subordinate court issued in Sotik CMCC No. 31 of 2003; pending the hearing and determination of this application.*
- iv) *THAT there be stay of execution of the Judgment and Decree of the subordinate court issued in Sotik CMCC No.31 of 2003; pending the hearing and determination of the Applicant's intended Appeal.*
- v) *THAT the necessary direction to issue.*

It is grounded as follows;

- i) *The Applicant being aggrieved with the judgment and decree of the lower court in Sotik CMCC NO.31 of 2003 preferred an appeal against it vide the Memorandum of Appeal dated 2nd December, 2016 to this honourable court.*
- ii) *That the said appeal had been filed appeal that is, Kericho Employment and Labour Relations Court Civil Appeal No.8 of 2016 was however struck out on 20th June, 2018 for having been instituted out of time, without leave of this honourable court.*
- iii) *That the said appeal had been filed pursuant to the leave of the High Court issued in Bomet Miscellaneous Application No.53 of 2015.*
- iv) *That the said appeal was filed under the mistaken impression that the leave of the High Court operated in this honourable court.*
- v) *The Applicant's intended appeal is arguable thus it would only be fair and just if this honourable court grants leave to the Applicant to lodge it out of time.*
- vi) *That unless leave of this honourable court is granted to the Applicant to file appeal out of time, and stay granted; the Applicant is apprehensive that the Respondent may imminently levy execution rendering its intended appeal a nugatory.*
- vii) *This application has been made in pursuit of the interests of justice and without reasonable delay.*

viii) *The Applicant herein stands to suffer untold prejudice unless this application is heard and determined on its merits.*

The respondent opposes the application in the following Grounds of opposition;

1. *The application for leave to file Appeal out of time is inordinately late. Judgment was delivered on 10/5/2015 in the presence of Applicant's counsel. This is a long period not excusable.*

It is now 2 years 10 months since the delivery of Judgment.

The period of delay is too long hence highly prejudicial to the Respondent's interest.

2. *The applicant has failed to provide good and sufficient reasons to enable the Court to consider the application for leave. The applicant is supposed to give at least the following determining factors to the Court in order for the Court to exercise discretion in granting leave. These are;*

- a) *The reason for the delay or lapse.*
- b) *The length of the delay.*
- c) *The circumstances in which the delay or lapse occurred.*
- d) *The degree of prejudice (if any) to the other party.*

The burden of proof lies on the Applicant

3. *The other consideration such as mistake, inadvertency, accident, or other factors beyond control caused the delay have not been shown.*

v The filing of Bomet Misc Application No. 53 of 2015 for leave to appeal out of time at Bomet High Court was not a mistake, inadvertent, accidental and should not be considered as part of wider discretion to grant leave to appeal out of time. The filing was intentional, freely, deliberate and was not by mistake.

v The filing of Appeal No.8/2016 was also not be a mistake, inadvertent or accidental to enable the Court to exercise discretion in favour of the applicant to file Appeal out of time. The filing was intentional, freely and deliberate.

4. *The filing of Appeal No.8/2016 and the Bomet Misc Application No.53/2015 are not relevant to this application for leave to appeal out of time or is not good and sufficient reason for not filing Appeal in time.*

5. *That the Applicant has not annexed against the application a Certificate of delay issued by the trial Court and which is mandatory.*

6. *That there is no Certified Copy of judgment annexed to the application in order for the Court to exercise discretion to grant leave to appeal out of time Hence the Court cannot know whether the appeal is arguable or not.*

7. *That it is also necessary to note that the applicant's intention to file appeal out of time is in bad faith and intended to frustrate the Respondent from enjoying the fruits of his Judgment. The element of bad faith on the Applicant has been demonstrate in the Appeal No.8/2016 which was filed on 2/12/2016 but was not prosecuted until the Respondent filed an application dated 6/3/2018 to strike it out.*

8. *Article 150 of the Constitution is not meant to shield one from indolence and sloppiness. Negligence and casual approach in dealing with appeals is not condoned by the article. Hence the applicant should not rely on the article*

v Article 159 is not a panacea to litigants mistake – it is not a tool for putting right all troubles, nor is it a medicine for failure. Failure or omission to file appeal in time is not procedural technicality and cannot be cured by Article 159. Hence the applicant's failure to file appeal cannot be cured by Article 159.

v Equally Provisions of S. 1A & B of Civil Procedure Act – The Overriding Objective Principle were not meant to camouflage the indolence and or negligence of parties to the Appeal.

v Hence S. 1A & 1B of the Civil Procedure Act and Article 159 are not savior to party's omission and lapses, negligence or failures not to file Appeal in time.

9. *The Application for Stay of execution is res judicata and an abuse of Court process.*

v By an application dated 22/10/2015 filed at Sotik Court the Applicant sought inter alia a stay of execution of decree pending the filing for leave to appeal out of time and the hearing and determination of appeal. The Application was allowed by a ruling dated 12/11/2015 whereby the Applicant was granted stay and to pay ½ decretal sum to the Respondent

and another ½ to be deposited in Court within 2 weeks.

v The Stay Orders are still in force but have not been complied with to date and there is not appeal against the Stay Order.

v The Application for Stay of execution of decree is therefore an abuse of Court Process.

10. The Applicants are in Contempt of Court Order of Stay dated 12/11/2015 and therefore they do not deserve audience of Court until they purge Contempt. The applicant blatantly refused to obey the conditional Stay Order.

11. In conclusion the plaint was filed on 10/11/2003. It is now 14 years 8 months old. There must be an end to litigation. In all fairness the interest of justice tilts in favour of the Respondent.

The respondent/applicant submits a case of inadvertence on the cause of delay in not filing an appeal on time or even seeking leave to appeal out of time. In this case, leave was sought and obtained from the High Court in the mistaken belief that this would suffice. This court disapproved this and therefore the disarray occasioning this application.

The applicant in her written submissions dated 18th September, 2018 seeks to rely on the authority of **Richard Muthusi vs Patrick Gituma Ngomo & Another [2017]eKLR** where the court citing the findings of **Nicholas Kiptoo Arp Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014]eKLR** where it was held;

“...It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion:- Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

The respondent/applicant rubbishes the reasons for delay on the grounds that this was inordinate and therefore inexcusable. I agree but add that this matter was referred to the High Court where such leave was granted. Delay therefore starts from the date of dethroning the leave awarded by the said High Court. On this, the applicant cannot be faulted. She has consistently pursued her ventures on leave application diligently to the present day.

I am therefore inclined to allow the application and award the respondent leave to file an appeal out of time. This would not prejudice the respondent in any way but entrench the tenets of justice. Each party shall bear their costs of the application.

Delivered, dated and signed this 1st day of February, 2019.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Koech instructed by Bett & Company Advocates for the applicant.
2. Mr. J. K. Rono for the respondent.