



REPUBLIC OF KENYA

**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CIVIL APPEAL NO. 8 OF 2017**

***(Before D. K. N. Marete)***

**SOTIK TEA COMPANY LTD.....APPELLANT**

**VERSUS**

**MARY KERUBO MANDERA .....RESPONDENT**

**RULING**

This is an application dated 6th March, 2018 seeking the following orders of court;

1. *THAT the appeal be struck out for being filed without leave of court.*
2. *That Hon Court be pleased to Order that the decretal sum be released to the Applicant/Respondent.*
3. *Costs be provided for.*
4. *Any other order may be made in the interest of justice.*

It is grounded as follows;

1. *The Appeal is against the judgement and decree of the Sotik PMCC NO.31/2003 delivered on 10/09/2015.*
2. *The Memorandum of Appeal dated 2/12/2016 was filed in Court on 5/12/2016.*
3. *That the appeal ought to have been filed within 30 days from the date of judgment.*
4. *That the leave issued by the Bomet High Court on 22/12/2015 in Civil Application No.53/2015 does not operate in the ELR Court.*
5. *That the leave at Bomet High Court was granted in the light of the draft Memorandum of Appeal intended to be filed at Bomet High Court and not at ELRC.*
6. *The appeal is therefore not properly on record having been filed out of time without leave.*
7. *The time of filing Appeal is of essence in civil process.*

The respondent in a Replying Affidavit sworn on 26th April, 2018 opposes the application on grounds that leave to institute this appeal was indeed sought and granted in Bomet Civil Application No. 53 of 2015.

The appellant/respondent further avers and submits that prior to the promulgation of the Constitution of Kenya, 2010 culminating in the creation of courts of equal status, the authority and jurisdiction to grant leave to appeal out of time was vested in the High Court. This transferred to courts of equal status as established under the Constitution. This application is therefore a pretender intended to unseat the appellant from the seat of justice through unprocedural technicalities and is therefore opposed.

The respondent/applicant submits that the filing of a Memorandum of Appeal dated 2nd December, 2016 was done on 5th December, 2016. This was done fifteen months after delivery of judgement. This is contrary to section 79 G of the Civil Procedure Act, Chapter 21, Laws of Kenya which provides that appeals from subordinate courts to the High Court must be had within 30 days and further that appeals may be admitted out of time if the appellant satisfies that he had a good and sufficient cause for not filing it on time.

Further, a party who wishes to launch an appeal out of time must seek leave of court. In the instant case, the appellant has not. This court has no jurisdiction to enlarge time when this has not been sought. Again, the applicant's submission that leave was sought and granted in the High Court of Bomet in Civil Application No. 53 of 2015 is not applicable in the circumstances of this court. The High Court has no jurisdiction in matters of employment and labour relations and therefore the leave issued by the High Court in Bomet could not have been issued to operate in this court.

In the penultimate, the respondent/applicant submits that there is no appeal before court and pray that it be struck out for offending the Civil Procedure Act and Rules.

The appellant/respondent in her written submissions reiterates her case as pleaded. It is her submission that the jurisdiction of the High Court to grant leave has never been ousted but is now shared between it and courts of equal status. On this, she relies on the authority of **Edward Njane Nganga & another v Damaris Wanjiku Kamau & another [2016] eKLR** as follows;

*...it will be seen from the above that section 7 is explicit, that the High Court (which now in light of the Constitution of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is a kin to completely disregarding, what in my view, is a clear provision in the law.*

This is not so. While it is agreeable that the High Court is vested with the authority to grant leave to appeal out of time, one must separate this and this court or any other court of equal status. These are courts distinct in jurisdiction and operational status. One cannot stand in for the other. There is no room for swapping jurisdiction. Leave in the instant case should have been sought before this court before commencement of the appeal. In any event, the judgement sought to be appealed against is a post Constitution of Kenya, 2010 one and also within the establishment of this court. This application must therefore succeed.

I am therefore inclined to allow the application with costs to the respondent/applicant. The appeal stands struck out for all intents and purposes.

Delivered, dated and signed this 20<sup>th</sup> day of June 2018.

**D.K.Njagi Marete**

**JUDGE**

Appearances

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