



REPUBLIC OF KENYA



BPS v PJS (Appeal 12 of 2023) [2024] KEHC 11206 (KLR) (Family) (26 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11206 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
APPEAL 12 OF 2023
BM MUSYOKI, J
SEPTEMBER 26, 2024

BETWEEN

BPS APPELLANT

AND

PJS RESPONDENT

(Being an appeal from ruling and orders of Honourable G.M. Gitonga (PM) in Chief Magistrate's Court at Milimani Commercial Courts Divorce Cause number 7 of 2022 dated 26-05-2023)

RULING

1. By a notice of motion dated 9th September 2023 the respondent in the appeal has asked this court to grant the following orders.
 - a. That this Honourable Court be pleased to strike out the appeal dated 17th August 2023 for having been filed out of time and without the leave of this Court.
 - b. The costs of this application be borne by the appellant.
2. The appellant has opposed the application vide her replying affidavit dated 21st March 2024. The undisputed facts relevant to this application are as follows;
3.
 - a. The subordinate court delivered the ruling being appealed on 26th May 2023.
 - b. On 9-08-2023, the appellant obtained leave to appeal from the subordinate court through application to that effect dated 7-08-2023.
 - c. No leave was obtained from this court to file this appeal out of time.



- d. This appeal was filed on 18-08-2023.
4. The respondent has deponed that he was not served with the application dated 7th August 2023 filed and prosecuted in the lower court while the appellant maintains that the said application was served. I am not able to ascertain the correct position in respect of these two rival stands from the court file because the proceedings in the record of appeal do not have record in respect of the application except the application itself. I have also gone through the physical original record of the lower court and I have not seen the proceedings. Even the hand written proceedings do not have any proceedings past the ruling of 26-05-2023. However, since there is a possibility that the proceedings could have been recorded in the CTS which I have no access to owing to the fact that I am not mapped to that court, I will assume that the application was prosecuted and granted because I have seen the order to that effect at page 113 of the record of appeal and I have no reason to doubt its authenticity.
5. It is not in dispute that the appeal was filed out of time. There is also no dispute that the lower court granted an order to appeal out of time. The respondent has argued that the lower court had no jurisdiction to grant the order. The application was said to be brought under Sections 1, 1A, 3A, 79G and 95 of the *Civil Procedure Act*. Section 79G of the said Act provides that;
- ‘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.’
6. The question begging for answer here is whether the court referred to in that proviso is the subordinate court or the High Court. I do not think it is difficult to answer this question. The wording of the section is very clear that the court being referred to is the High Court. It cannot possibly be that the subordinate court can admit an appeal to the High Court. The proviso to the section is very clear and instructive that the jurisdiction lies with the High Court. The subordinate court can only grant leave to appeal where such leave is required but it cannot handle an application for leave to appeal out of time.
7. The lower court order dated 9th August 2023 which purported to grant leave to the appellant went further and stated that the memorandum of appeal was deemed filed and served. If indeed such order was issued, the same is a nullity as the lower court cannot make directions in respect of proceedings pending or to be filed in the High Court. That will be going against the principle of hierarchy of the courts. I therefore find and hold that the subordinate court had no jurisdiction to entertain the application for leave to file this appeal out of time.
8. The appellant has argued that the respondent did not appeal the order of the subordinate court dated 9-08-2023 and as such he cannot challenge it in this appeal. I hold the position that an order or decree which is issued without jurisdiction has no force of the law. Whether appealed or not, the order cannot give rise to any right capable of being exercised. Where an act is a nullity, it is in law taken as if it never happened. The respondent is therefore right to raise the issue at this stage. An issue of jurisdiction is core to the administration of justice and can be raised at any stage of the proceedings.



9. In *Phoenix of E.A. Assurance Company Limited vs S.M. Thiga t/a Newspaper Service* (2019) eKLR, the Court of Appeal in addressing the issue of orders granted without jurisdiction cited with approval *Macfoy vs United Africa Co. Ltd* (1961) 3 All ER, 1169 as follows;

‘If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse (Emphasis ours).’

10. It has been argued in the appellant’s submissions and replying affidavit that the issue of statutory time limit is a procedural technicality and in spirit of Article 159(2)(d) of *the Constitution*, the same should not be an obstacle to substantive justice. The appellant has cited the case of *GKK vs JWG* (2020) eKLR where Honourable Justice L.W. Gitari held that failure to file appeal in time is a procedural technicality. It is noteworthy that in the cited case, the respondent had not raised the issue of time limitation as an objection and had proceeded to argue the appeal substantively. Be that as it may, I am not persuaded by that holding. In my view, the issue of statutory timelines is not a procedural but a jurisdictional issue. Where a matter has been filed out of the statutory timelines without the leave of the court, the court has no jurisdiction to entertain it. In *Monata Matiko Chonchorio vs John Chabaro* (2021) eKLR it was held that;

‘Jurisdiction of a court is conferred by a Statute or *the Constitution* and it is no doubt that the issue of limitation of time goes to the root of the jurisdiction of a court. The law speaks for itself, thus, an appeal, whether successful or not, cannot be used to confer jurisdiction to a court where there was none.’

11. The same was the same position taken by the Court of Appeal in *Anaclet Kalia Musau vs Attorney General & 2 Others* (2020) eKLR where it held that;

‘The solitary issue in this appeal is whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of *Nasra Ibrahim Ibren vs Independent Electoral and Boundaries Commission & 2 Others*, Supreme Court Petition *No. 19 of 2018*, where the court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo moto.’

12. Article 159(2)(d) of *the Constitution* was not intended to usurp the provisions of the law but to avoid undue procedural technicalities which do not go into the substance and merits of the case. If we were to go the way proposed by the appellant, that would be tantamount to allowing all manner of suits and proceedings despite timelines which would open a pandora’s box which will be impossible to close. It would also amount to violation of the provisions of *Limitation of Actions Act* and all other laws which make provisions for timelines. In my view, in doing so, the court would have usurped the powers of the Legislature.

13. The proviso to Section 79G excludes the period required in providing the lower court’s order or decree being appealed to the appellant in computation of time. It is my opinion that where it is sufficiently shown that the appellant had not obtained proceedings from the trial court in time and was prevented from filing the appeal by the lack of the proceedings, the appellate court should admit the appeal as



a matter of right. Actually, the wording of the proviso appears to me to suggest that the intended appellant does not need the leave of the court. All that he needs to do is to obtain a certificate of delay.

14. I note that at page 122 of the record of appeal, there is a certificate of delay. I have also seen the original certificate of delay in the original lower court file. The certificate of delay states;

‘An application for certified copies of proceedings was filed by the Advocate for the Petitioner on 3rd July 2023.

On 17th October 2023 the Petitioner’s counsel was notified by the court that the proceedings were ready and sent representative to the court registry for collection.

The Advocates for the Petitioner collected the duly certified copies of the proceedings on 17th October 2023.

The period from 3rd July 2023 and 17th October, 2023 was necessary for the purposes of preparing and delivery of the certified copies of the proceedings, Order and Ruling.’

15. Can this certificate be of help to the appellant in this appeal? The certificate shows that the appellant applied for proceedings on 3-07-2023. The statutory time to file appeal in the matter lapsed on 25-06-2023. That means the appellant even thought of preferring the appeal after the statutory period for filing the appeal had lapsed. The certificate of delay was issued long after the appeal was filed. I do find that the application for the certificate of delay and the entire appeal were an afterthought. The appellant has not explained to this court what circumstances prevented her from filing the appeal in time. Even after the respondent showed intention of striking the appeal for lack of leave, the appellant has not made any application in this court to have the appeal admitted out of time or even offer an explanation why she could not file it in time. In my view this shows lack of seriousness on the part of the appellant.
16. In view of the above, I do agree with the respondent that the appeal is incompetent for having been filed out of time without the leave of the court. The same is struck out with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered virtually in the presence of;

Mr. Mbatha holding brief for Mr. Burugu for the respondent/applicant.

Miss Gedion doe the appellant/respondent.

