



**Maalim v Mwangi (Commercial Appeal E070 of 2024)
[2024] KEHC 14882 (KLR) (Commercial and Tax) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14882 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E070 OF 2024**

H NAMISI, J

NOVEMBER 28, 2024

BETWEEN

AHMED HABIB MAALIM APPLICANT

AND

PATRICK MUIRURU MWANGI RESPONDENT

RULING

1. On 22 March 2024, the Appellant filed a Notice of Appeal and Memorandum of Appeal in respect of a judgment delivered on 25 October 2023 by Hon. Gillian Simatwo in SCCCOMM No. E6507 of 2023. On 12 September 2024, the Appellant filed his Record of Appeal. On the same day, the Appellant filed Notice of Motion seeking stay of execution of the Ruling in the lower court matter delivered on 6 October 2023, pending the hearing and determination of the intended appeal. On 12 September 2024, the Appellant filed submissions in respect of the said Application, which was presumably served upon the Respondent because the Respondent then entered appearance and immediately filed Grounds of Opposition and Notice of Preliminary Objection on 9th October 2024.
2. The Preliminary Objection, which is the basis of this Ruling, is on the following grounds:
 - i. The Appeal is incompetent as it violates the provisions Section 79G of *Civil Procedure Act* 2010 which requires an Appeal to be lodged within 30 days of lodging the Notice of Appeal.
 - ii. The Appeal in its entirety ought to be struck out with costs as it is an aberration of justice prosecuted in gross abuse of the due process.
 - iii. The Appeal is ill conceived, bad in law, abuse of the Court process and should be dismissed with costs to the Respondent.
3. The Appellant did not file any response to the Preliminary Objection.



4. The Preliminary Objection was canvassed orally.
5. Section 79G of the *Civil Procedure Act*, Cap 21 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.

6. Whereas the impugned judgement was delivered on 25 October 2023, it was not until March 2024 that the Appellant lodged this appeal. Even then, the Appellant did not consider filing an application for leave to appeal out of time, and was only jolted into action when the Respondent raised this Preliminary Objection 7 months after lodging the appeal. In submissions, the Appellant admitted that a grave error had been occasioned by not seeking leave to appeal out of time. The Appellant urged the Court to allow the appeal to proceed.
7. On their part, the Respondent relied on the case of *Nicholas Kiptoo arap Korir vs IEBC (2014)* in arguing that leave is a necessary step and one cannot try to ratify it.
8. In this case, the Appellant filed the Memorandum of Appeal 4 months late. The Record of Appeal was then filed in September 2024. Admittedly, the Appellant was aware that the appeal was out of time, but did nothing to resolve this until the Preliminary Objection was raised. There is no good cause demonstrated by the Appellant why the appeal was not filed in time. Under the Rules, where the Appellant realised that time had lapsed, he ought to have moved the Court and sought leave to file the appeal out of time, giving reasons.
9. In the case of *Stanley Kahoro Mwangi, Timothy Njoroge & Joseph Mwangi (suing on behalf of Twendane Company Ltd) -vs- Kanyamwi Trading Company Ltd [2015] KECA 967 (KLR)* the Court held that that an applicant seeking to file an appeal out of time must have a plausible and satisfactory explanation for the delay for the court to address. The right of appeal must be exercised within the rules of procedure applicable to ensure justice to all parties.
10. An appeal filed out of time cannot be cured under any other law or procedure. It cannot stand or be argued. I, therefore, uphold the Preliminary Objection and dismiss this cause with costs to the Respondent, assessed at Kshs 20,000/-.

DATED AND DELIVERED AT NAIROBI THIS 28 DAY OF NOVEMBER 2024

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

N/A.....for the Applicant

Ms. Wanjalafor the Respondent

