



Ouma v Agwingi (Civil Appeal E054 of 2022) [2023] KEHC 19699 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19699 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E054 OF 2022
DO OGEMBO, J
JUNE 29, 2023**

BETWEEN

MOURICE OUMA APPELLANT

AND

JULIUS HAJERA AGWINGI RESPONDENT

RULING

RULING ON APPLICATION

1. The Appellant, Mourice Ouma, has moved this court by way of Notice of motion application dated April 11, 2023. The application, brought under Order 50 Rule 8 and order 51 Rules 1 and 4 of the [Civil Procedure Rules](#) seeks 2 prayers;
 - (i) That the Memorandum of appeal be struck out for being filed out of time.
 - (ii) That the costs of this application and the appeal be borne by the appellant.
2. The application of the Applicant is supported by the Affidavit of William Onyuro Ochuka, Advocate, sworn on April 11, 2023. In the said Affidavit, it has been deponed that the appellant had filed an application for leave to file an appeal out of time ie. Miscellaneous Application No 9 of 2022 which application was allowed by consent recorded on October 17, 2022. That the memorandum of appeal was then filed on November 22, 2022 after the 14 days as recorded in the consent. That the appeal having been filed outside time, is incompetent and ought to be struck out.
3. The parties herein agreed to canvass this appeal by way of written submissions. Both sides have complied and duly filed their set of submissions.
4. In support of the application, the Respondent (applicant in the present application) has submitted that the 144 days captured in the consent granting leave to file appeal out of time, lapsed on November 7, 2022. That there is no further leave sort to file this appeal outside the 14 days in accordance with



the consent order. In the opinion of the applicant, this is an abuse of the court process and the court lacks any jurisdiction to determine this appeal.

5. Counsel referred the court to the case of *Patrick Kirunja Kitinji v Victor Mugira Marete [2015] eKLR* in which the Court of Appeal held;

' In our view whether or not an appeal is filed out of time goes to the jurisdiction of this court. It is trite that this court has jurisdiction to entertain appeals filed within requisite time or appeals filed out of time with the leave of the court. To hold otherwise would upset the established clear principles of institution of appeal in this court'.

6. The court was further referred to *Boss Freight Terminal Ltd v The Commissioner of Domestic Taxes, NAI Appeal No 224 of 2015* in which the court held that an appeal out of time and without leave of the court is not a mere technicality that can be saved by Article 159 of the *Constitution*.
7. The court was urged to strike out with costs the instant appeal filed outside the court order of October 25, 2022.
8. The Appellant/Respondent has opposed this application. In the submissions files on May 9, 2023, the Appellant/Respondent has submitted that this application is devoid of any merit. That the consent orders as conched did not condition the leave obtained to having the same filed within 14 days. That the consent granted the applicant leave to file the appeal as prayed with no orders as to costs and that the time within which the memorandum of appeal would be filed was simply directed by the Judge to be within 14 days.
9. That the order of the Judge was specific that the memorandum of appeal is what ought to have been filed within 14 days from the date of the order. That what was filed on November 22, 2022 was record of appeal, while the memorandum of appeal had long been filed within time. That the court even went on to admit the appeal.
10. The appellant has maintained that the appeal was filed within time and the record of appeal filed on November 22, 2022 timeously. Finally, that the instant application lacks merit and an abuse of the process of the court, inconsistent with the overriding objective of the cost and should be dismissed with costs.
11. I have considered the submissions of both sides with regard to this application. The genesis of this application is the consent order given by the court on October 22, 2022 in Miscellaneous Application No E006 of 2022, Mourice Ouma and Christopher Goiya Onginjo -vs- Julius Hajera Aguringi. The terms of the said order are generally agreed by the parties to be:

- (i) That parties have agreed to settle the application dated March 1, 2022 by consent.
- (ii) That by consent of both counsel for the parties to this application, the application dated March 1, 2022 be and is hereby allowed as prayed with no orders as to costs.
- (iii) That the appellant shall file and serve the intended memorandum of appeal within 14 days from the date hereof.
- (iv) That this order shall be annexed to the memorandum of appeal.



12. The court clearly ordered that the memorandum of appeal be filed within 14 days from the date of issuance of the order i.e October 25, 2022. The 14 days granted for filing of the memorandum of appeal would therefore lapse on November 7, 2022. The memorandum of appeal filed by the appellant herein shows it was filed in court on November 22, 2022 well after the lapse of the 14 days that the Honourable court had ordered in the consent order of October 22, 2022. There is no evidence on record to show if the appellant ever sought for and obtained any extension of the period for filing of the memorandum of appeal or even that the appellant ever sought any further leave to file the said memorandum of appeal out of time.
13. The appellant has submitted that it is the record of appeal that was filed on November 22, 2022. I have perused the same. Whereas the record of appeal on the face of it confirms that it was lodged and filed on January 31, 2023, the memorandum of appeal at page 1 of the said record shows it was filed on November 22, 2022, a date beyond the 14 days ordered in the consent order issued by the court on October 22, 2022.
14. The issue is therefore the legal effect of the filing of the memorandum of appeal out of time and without leave of the court. On this the applicant has referred this court to binding decisions of the court of appeal as follows;
 - i. Patrick Kiruja Kithinji v Victor Mugira Murete [2015] ekLR, that whether or not an appeal is filed out of time goes to the jurisdiction of the court. That it is trite that this court has jurisdiction to entertain appeals filed within requisite time and or appeals filed out of time with the leave of the court. And that to hold otherwise would upset the established clear principles of institution of appeal to the court.
 - ii. Boss Freight Terminal Ltd v The Commissioner of Domestic Taxes (NAI) Appeal no 24 of 2015, that an appeal filed out of time and without leave of the court is not a mere technicality that can be saved by Article 159 of the Constitution or the overriding objective.
15. Guided by the above 2 authorities, this court is persuaded by the submissions of counsel for the applicant, that the appeal of the appellant as filed herein is incompetent and no orders can issue on the same.
16. The record shows that this court had indeed admitted this appeal and given directions on hearing of the same. However, with this present application and the finding of the court on the same, such directions already given by the court would fall flat.
17. The resultant is that the application dated April 28, 2023 is allowed and the memorandum of appeal filed herein by the appellant on November 22, 2022 and dated November 7, 2022 is struck out. Costs of this application to the Respondent (applicant in this application).

Orders accordingly.

D. O. OGEMBO

JUDGE

29TH JUNE, 2023

Court:

Ruling read out in open court in the presence of Ms. Ojuang for Respondent and Mr. Ouma for Applicant.



D. O. OGEMBO
JUDGE

