



**Ismail & another v Otwala (Civil Appeal 67 of 2022)
[2023] KEHC 27531 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 27531 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 67 OF 2022
F WANGARI, J
OCTOBER 27, 2023**

BETWEEN

JUMA ISMAIL 1ST APPELLANT

MEJUMA MBODZE MDUNE 2ND APPELLANT

AND

EVANS OTWALA RESPONDENT

RULING

1. The appellants filed a Memorandum of Appeal dated 28/4/2022 and filed on 11/5/2022, against the Judgment of Hon. Stephen K. Ngii, Principal Magistrate, delivered on 30/3/2022 in Mariakani PMCC No 323 of 2019. The Respondent filed a Notice of Preliminary Objection dated 24/6/2022 stating that the appeal was filed out of time contrary to section 79G of the *Civil Procedure Act*. He prayed that the appeal be struck out with costs.
2. The Appellants filed their Record of Appeal on 1/11/2022. Thereafter, the filed a Notice of Motion dated 20/1/2023 and filed on 23/1/2023 seeking to leave to enlarge time of filing the appeal, and that the Memorandum of Appeal be deemed as timeously filed, and that the Record of Appeal be admitted out of time.
3. The Respondent filed Grounds of Opposition dated and filed on 20/2/2023 stating that the application was filed 10 months after delivery of the lower court judgment, 8 months after the appeal and 7 months after the Respondent's Notice of Preliminary Objection was filed. No good reason was demonstrated to warrant the extension of time.
4. Directions were taken that the Notice of Preliminary Objection and the Notice of Motion be disposed of by way of written submissions. Both parties complied citing authorities in support of the rival submissions.



5. The Appellants submitted that the Memorandum of Appeal was supposed to have been filed by 30/4/2022. It is dated 28/4/2022, and when they presented it for filing, the registry assessed the filing fees on 11/5/2022 and that it when the appeal was filed. They submitted that the delay in filing the Memorandum of Appeal was not deliberate. They also blamed the many public holidays in the months of April and May, 2022.
6. The Respondent submitted that filing of proceedings without leave and thereafter seeking leave to admit the filed documents out of time is an illegality, and the court should not accept an invitation to sanitize an illegality.

Analysis and Determination

7. Having considered the submissions by both parties. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

8. At page 701, Sir Charles Newbold, P added: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

9. For a preliminary objection to succeed the following tests ought to be satisfied;
 - a. It should raise a pure point of law
 - b. It is argued on the assumption that all the facts pleaded by the other side are correct
 - c. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
 - d. A valid preliminary objection should, if successful, dispose of the suit or application.
10. The basis of the Respondent’s objection that filing of the appeal was time barred. In this case the Judgment was delivered on 30/3/2022. The appeal was filed on 11/5/2022. The appeal is clearly filed out of time. Section 79G of the *Civil Procedure Act* 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.’

11. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuira Mwangi v Kenya Airways Ltd* [2003] eKLR. They include the following: -

- i. The period of delay;
- ii. The reason for the delay;
- iii. The arguability of the appeal;
- iv. The degree of prejudice that will be suffered by the Respondent if the extension is granted;
- v. The importance of compliance with time limits to the particular litigation or issue;
- vi. The effect if any on the administration of justice or public interest if any involved.

12. The Appellants submitted that it is the High Court Registry that delayed in assessment of filing fees. The appeal was filed before the launch of the e-filing system. Whenever the documents were presented for filing, assessment of filing fees was done immediately. However, giving the Appellants the benefit of doubt, if that was the case, they ought to have sought for the issuance of the Certificate of Delay from the court specifying the time taken in assessing the fees for purposes of exclusion during computation.

13. Further on the reasons for delay, the Appellants submitted that there were many public holidays in the months of April and May, 2022 that interfered with the normal operations of the court. Section 57 (b) of the *Interpretation and General Provisions Act* states as follows;

“In computing time for the purposes of a written law unless the contrary intention appears;

- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days) the period shall include the next following day, not being an excluded day”

14. Further, Order 50 Rule 4 of the *Civil Procedure Rules* provides as follows;

“When time does not run

- (4) Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first the day of December in any year and thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect to a temporary injunction.”



15. From the above provisions, the Appellants have failed to establish that the delay was not intentional since the mentioned holidays do not fall under the above mentioned provisions of the law. I find that the Notice of Preliminary Objection has merits.
16. On the Notice of Motion dated 20/1/2023, it was filed 7 months after the P.O was filed. Without any explanation why it took them so much time to file the application, I find that the delay is inexcusable. The Appellants were just sleeping on their rights. I therefore dismiss the application for it is an afterthought and not merited.
17. On the issue of costs, it is trite that the same follows the event. That is the import of Section 27 of the Civil Procedure Act. However, the court can exercise its discretion as to award of costs. I order that the Respondent having been the successful party, costs shall be awarded.
18. Flowing from the foregoing, I proceed to make the following orders: -
 - a. That the Notice of Preliminary Objection dated 24/6/2022 is hereby upheld and subsequently, the appeal is hereby struck out.
 - b. The Notice of Motion dated 20/1/2023 is hereby dismissed.
 - c. Costs to the Respondent.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 27TH DAY OF OCTOBER, 2023.

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F. WANGARI

JUDGE

In the presence of:

Waweru Advocate for Appellants

Mugambi Advocate for the Respondent

Barile, Court Assistant

