



**Dofa & another v Dofa & another (Civil Appeal E005 of 2021)  
[2023] KEHC 25555 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 25555 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CIVIL APPEAL E005 OF 2021  
JN NJAGI, J  
OCTOBER 26, 2023**

**BETWEEN**

**HUSSEIN ABDI DOFA ..... 1<sup>ST</sup> APPELLANT**

**SADIQ MUSTAFA DOFA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DAHABO ABDI DOFA ..... 1<sup>ST</sup> RESPONDENT**

**MOHAMED WOCHÉ ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Respondents have filed a Preliminary Objection dated 19<sup>th</sup> June 2023 against the Appellants' appeal in this matter on the ground that the appeal was filed 7 months after judgment was delivered on 29<sup>th</sup> October 2020 without first seeking for leave of court to file the appeal out of time.
2. The P.O. was opposed by the Appellants on the ground that a preliminary objection needs to raise legal issues only necessary to determine the issue in dispute with finality, as opposed to belaboring on alleged facts or assumptions.
3. The P.O. was canvassed by way of written submissions. The 2<sup>nd</sup> Respondent submitted that the appeal was not filed within 30 days of the delivery of the judgment as required by section 79 G of the *Civil Procedure Act*. That the appeal was filed without seeking for enlargement of time as required by Order 50 Rule 6 of the *Civil Procedure Rules, 2010*. The Respondent relied on the case of *Gerald Mlimbine v Joseph Kangangi [2009]* eKLR where the court held that:

My understanding of the proviso to Section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek the Court’s leave to have such an appeal admitted out of the statutory period of time



4. The Respondent submitted that the appeal should be struck out and for failure to seek leave to file it out of time. The respondent in that respect relied on the case of *Nick Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 7 others (2014)* eKLR where the Supreme Court held that:  
  
By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.  
  
To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.
5. The Appellant on the other hand submitted that the appeal has a good chance of succeeding and there is no prejudice on the respondents. That the P.O. has no merit and ought to be dismissed. The Appellant cited Article 159 (2)(d) of *the Constitution* that requires courts of law to administer justice without undue regard to procedural technicalities.
6. I have considered the issues raised in the P.O. and the submissions by the respective counsels for the parties. A Preliminary Objection is required to only raise points of law. In *Mukhisa Biscuit Manufacturers Ltd v West End Distributors Ltd. [1969] E.A. 696* the Court of Appeal said:-  
  
“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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.
6. The Appellants in this matter have not disputed that the appeal was filed out of time and neither have they disputed that no leave was sought from the court to file the appeal out of time. The facts pleaded by the appellants are therefore correct. The appeal therefore raises a pure point of law on the competency of the appeal.
7. Section 79G of the *Civil Procedure Rules* require appeals from subordinate courts to be filed with the High Court within 30 days of the delivery of the judgment or decree. The judgment in this case was delivered on the 29<sup>th</sup> October 2020 and the appeal herein filed on 4<sup>th</sup> June 2021 which was over 7 months after the delivery of the judgment. Section 79G of the *Civil Procedure Rules* has a proviso 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 out of time.
8. An Appellant can only satisfy the requirement of this section by filing an application seeking leave to file an appeal out of time. In this case the Appellants did not seek leave of the court to file the appeal out of time. The appeal is therefore incompetent and improperly before the court. As held by the Supreme court in the case of *Nick Kiptoo Arap Korir (supra)* an appeal filed out of time without leave of the court is a nullity. Consequently, the appeal filed herein without leave of the court is incompetent and a nullity.
8. The upshot is that the Preliminary Objection is upheld and the appeal herein is struck out with costs to the 1<sup>st</sup> Respondent.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 26TH OCTOBER 2023**

**J.N. NJAGI**



## **JUDGE**

### **In the presence of:**

No appearance for Appellants

No appearance for 1st Respondent

1st Respondent - present

Court Assistant – Jarso

30 days R/A.

