



REPUBLIC OF KENYA



KENYA LAW
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**John v Safaricom Limited (Civil Appeal 422 of 2019)
[2023] KEHC 26505 (KLR) (Appeals) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26505 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

APPEALS

CIVIL APPEAL 422 OF 2019

AN ONGERI, J

DECEMBER 15, 2023

BETWEEN

PENNA WANJIRU JOHN APPELLANT

AND

SAFARICOM LIMITED RESPONDENT

RULING

1. The appellant filed an application dated 16/6/2023 seeking leave to amend the memorandum of appeal.
2. The respondent opposed the application and filed a preliminary objection dated 7/8/2023 on the ground that;
 - a. Judgment was delivered on 11th July 2019.
 - b. Even though the memorandum of appeal was filed on 24th July 2019 the same was served on 18th July 2023 being four (4) years later together with the application dated 16th June 2023 seeking its amendment.
 - c. The Certificate of Delay bespeaking the Record of Appeal was issued on 1st November 2023 and Record of Appeal filed on 22nd December 2022
 - d. The record of appeal was however served on 18th July 2023 being seven (7) months later
 - e. Under section 79B of the *Civil Procedure Act*, and Order 42 Rule 11 and 12 of the *Civil Procedure Rules* the whole appeal has abated.



3. The court gave directions that both the preliminary objections and the application be canvassed simultaneously. The appellant submitted that the preliminary objection is misconceived and unwarranted.
4. Further, that Section 79B allows the court to dismiss an appeal summarily where on perusal of the appeal the court is of the opinion that there are no sufficient grounds in the memorandum of appeal to warrant interfering with the court findings. It was the appellant argument that the said section does not provide for the abatement of the appeal for want of prosecution.
5. The appellant argued further that Order 42 rule 11 of the *Civil Procedure Rules* stated that where an appeal is not summarily dismissed the judge on perusal as provided under section 79B of the *Act*, the registrar shall notify the appellant who shall then serve the Memorandum of Appeal upon the Respondent within seven days of the receipt of the notice from the registrar in accordance with order 42 rule 12 of the *Civil Procedure Rules*. Neither section 79B nor Order 42 Rule 11 & 12 provide for the abatement of an appeal and in the circumstances the preliminary objection by the respondent should therefore fail.
6. The appellant submitted that the law relating to the dismissal of an appeal cannot be taken in isolation. It presupposes that at the time of dismissal the appeal shall have been admitted and direction given thereon and further it had been scrutinized as provided under section 79B.
7. The appellant argued that it has demonstrated that the delay in filing the record of appeal was occasioned by the delay in obtaining the typed proceedings.
8. The appellant submitted that the respondent has failed to demonstrate the prejudice that they stand to suffer if the appeal is heard on merit.

Further, that every person is entitled to a fair trial as envisaged under Article 50 (1) of the *constitution* of Kenya. It follows therefore that every person ought not to be shut out from accessing the court or having his day in court.
9. The respondent alternatively submitted that there has been tremendous delay in filing and/or service of the appeal and the record of appeal.
10. Further, that the four-year delay has not been satisfactorily explained and consequently is unreasonable and the prosecution of the appeal herein will infringe upon the rights of the respondent to a fair trial. The appellant has blamed the registrar for the delay and a notification under Order 42 was never issued.
11. The respondent submitted that Article 159 (2) (d) of the *constitution* provides that justice shall be delivered without undue regard to procedural technicalities but the appellant cannot seek refuge in this article for reasons that the delay has been inordinate.
12. The respondent argued that order 42 rule 12 has been couched in mandatory terms "shall", and the court has not been left with room to exercise discretion much less under article 159.
13. Further, that no extension of time was ever sought to extend the period of service, neither has any explanation be tendered to explained the delayed service. As such the memorandum and record of appeal are fatally defective.
14. The issues for determination in this application and preliminary objection are as follows;
 - i. Whether the appeal should be dismissed summarily.
 - ii. Whether the appellant should be granted leave to amend the memorandum of appeal.



15. The Court has a discretion to allow an appeal out of time under Section 79G of the *Civil Procedure Act* which states 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”

16. The reason for the delay has been explained by the Appellant as unavailability of proceedings.

17. On the issue as to whether the appeal should be dismissed summarily, I find that the Appellant’s suit was dismissed and the Appellant should be granted an opportunity to challenge the decree.

18. In the case of *Nzioki versus Kitusa* (1984) KLR 487, the Court of Appeal ruled inter alia that;

“Section 78B of the *Civil Procedure Act* empowers the High Court to summarily dismiss an appeal where the court considers that there is no sufficient ground for interfering with the decree appealed from. Secondly that the power of summary dismissal should be used sparingly and only in the clearest of cases, such as an appeal based entirely on points of facts, raising no questions of law”

19. In the case of *Martin Weru Gichuru & another v Beatrice Wambui Mwaura (suing as next of kin and personal representative of the Estate of Michael Kinyua Thomas (Deceased))* [2020] eKLR it was held that;

“It is thus clear that the Court has wide discretion to allow any party to amend its pleadings at any stage of the proceedings on such terms as to costs or otherwise as may be just and in such manner as it may direct under Order 8 Rule 3 of the *Civil Procedure Rules*. The overriding consideration in an application for leave for amendment is whether the amendments sought are necessary for determining the real question in controversy and whether any delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.”

20. The respondent will not be prejudiced by the amendment since they will have the chance to submit in the appeal and respond to all issues raised.

21. Since the amended memorandum of Appeal has been served, the same be and is hereby granted as properly filed.

22. The preliminary objection dated 7/8/2023 is dismissed for want of merit with no orders as to costs and the Application dated 16/6/2023 is allowed with no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF DECEMBER, 2023.

A. N. ONGERI

JUDGE

