



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. E041 OF 2020**

**JOHN KAMONJO MWAURA.....APPELLANT**

**VERSUS**

**KENYA INDUSTRIAL PROPERTY INSTITUTE.....1<sup>ST</sup> RESPONDENT**

**THE MANAGING DIRECTOR, KENYA INDUSTRIAL PROPERTY INSTITUTE...2<sup>ND</sup> RESPONDENT**

**AND**

**COMMERCIAL BANK OF AFRICA**

**(NATIONAL COMMERCIAL BANK OF AFRICA).....1<sup>ST</sup> INTERESTED PARTY**

**SAFARICOM PLC.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The suit herein is an appeal initiated through the Memorandum of Appeal filed by **John Kamonjo Mwaura** (hereafter the Appellant) on 4<sup>th</sup> August 2020. It appears that due to the classification of the matter in the said memorandum as a civil suit, the High Court Registry of the Civil Division where the appeal was lodged, assigned it the same erroneous classification, hence it was registered as HCCC No. E041 of 2020. The error is liable to cause some confusion and must be addressed.

2. Be that as it may, the motion before the Court for determination is one by **Safaricom PLC**, the 2<sup>nd</sup> Interested Party herein (hereafter the Applicant) and is dated 17<sup>th</sup> May 2021. The motion seeks two key orders, namely that the appeal filed on 4<sup>th</sup> August, 2020 by the Appellant be struck out for being time barred and that the court lacks jurisdiction to hear and determine the appeal. The motion is expressed to be brought under Section 79G of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules.

3. The motion is premised on the grounds on the face of the motion as further amplified in the supporting affidavit of **Isaac Njoroge Kibere**, who describes himself as the Applicant's Senior Legal Counsel, Financial Services and conversant with the facts in issue and duly authorized to swear the affidavit. The gist of his affidavit is that the present appeal emanates from the judgment of the Industrial Property Tribunal, in **IPT Appeal No.21 of 2018 John Kamonjo Mwaura v Kenya Industrial Property Institute and 3 Others** delivered on the on 1<sup>st</sup> July, 2020 and that the appeal filed on 4<sup>th</sup> August 2020, was time-barred having been filed outside the stipulated period for lodging appeals. He contends therefore that this court lacks jurisdiction to entertain it and ought to strike it out.

4. The motion was opposed through a lengthy replying affidavit deposed by Appellant that is not just confined to the motion, but also prematurely addresses matters connected to his appeal. So far as the motion is concerned the Appellant has invoked the provisions of Order 50 Rule 2 of the Civil Procedure Rules to assert that the period between the delivery of the judgment Industrial Property Tribunal (hereafter the Tribunal) on 1<sup>st</sup> July, 2020 and 4<sup>th</sup> August, 2020 when he filed the memorandum of appeal there were five days excluded from reckoning, namely four Sundays and one public holiday; that by this computation, he filed the appeal within the stipulated period 30days.

5. The 1<sup>st</sup> Interested Party, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents though served with the motion neither filed responses thereto nor participated in the hearing.

6. The motion was canvassed through oral submissions. Counsel for the Applicant reiterating the affidavit material in support of the motion submitted that the appeal was filed out of time. Further citing **Longinus Oroni Murunga v David Masika Mafumbo [2017] eKLR**, **Thuranira karauri v Agnes Ncheche [1997] eKLR**, **Gathoni v Kenya Co-operative Creameries Ltd [1982] eKLR**, **Francis Njenga v James Muraya & Another [2021] eKLR** and **Benedicta Kinya Mutuamwari v Public Service Commission & Another [2018] eKLR** he argued that the issue of time bar is not a technicality as it goes to jurisdiction; and that the provisions of Order 50 Rule 2 of the Civil Procedure Rules are not applicable in this instance because Section 79G of the Civil Procedure Act provides for 30 days within which an appeal may be filed. The court was thus urged to strike out the appeal.

7. The Respondent on his part anchored his submissions on the provisions of Order 50 Rule 2 of the Civil Procedure Rules which he asserted excludes Sundays and public Holidays from reckoning in this case. Hence the appeal was filed after the lapsing of 28 days since judgment, thus within the prescribed statutory period. He termed the motion as one founded on technicalities stating that this court is properly seized of the matter and ought to dismiss the motion.

8. The court has considered the material canvassed in respect of the motion. The factual matters leading up to the motion are agreed. The judgment of the Tribunal from which the instant appeal proceeds was delivered on 1<sup>st</sup> July 2020, and the Appellant lodged his memorandum of appeal on 4<sup>th</sup> August 2020, some 34 days later. The time for the filing of appeals to this court is prescribed by statute, specifically Section 79G of the Civil Procedure Act which provides:

**“Time for filing appeals from subordinate courts  
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.”**

9. Under the above provision, the only time specifically excluded from reckoning is time taken up with the preparation of the record, and a certificate to that effect issued by the court appealed from. Order 50 Rule 2 of the Civil Procedure Rules applies where “*any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings*”. This provision as stated in the case of **Longinus Oroni Murunga v David Masika Mafumbo** (supra) applies where a limited time of less than six days is provided for the doing of any act. It is clearly inapplicable to the matter at hand where statute prescribes 30 days for the filing of an appeal. The inescapable conclusion therefore is that the Appellant filed his appeal outside the stipulated period, and without leave of the Court.

10. This failure is not a matter of technicality; it goes to the appellate jurisdiction of this Court. In **Kakuta Maimai Hamisi v Peris Pesu Tobiko & 2 Others [2013] eKLR** the Court of Appeal held that the right of appeal goes to the court’s jurisdiction, is a fundamental matter and that the question of the absence of statutory conferment of such right is not a mere technicality. That case related to an appeal filed, without leave, regarding a decision from which an appeal did not lie as of right. Similarly, **Sewe J**, held in **Edith Wairimu Njoroge v Brooks Holdings Co. Ltd [2018] e KLR** that where an appeal does not lie as of right from an order but only with leave, such leave “*was a prerequisite to the assumption of jurisdiction by this court on appeal.*” The same logic applies where an appeal or action is time-barred, as demonstrated by dicta in the authorities cited by the Applicant on the point.

11. In this case, the Appellant’s right of appeal against the Tribunal decision stood extinguished as of 1<sup>st</sup> August 2020, and thereafter, he could not invoke the appellate jurisdiction of this Court without obtaining leave as contemplated in the proviso to section 79G of the Civil Procedure Act. His appeal is therefore incompetently before this Court and the court cannot assume its appellate jurisdiction thereon.

12. In considering the consequent orders that the court ought to make in the circumstances, the Court notes that the proviso to section 79G of the Civil Procedure Act accommodates a prospective and retrospective application, hence leave to appeal out of time may be sought before or after the filing of the memorandum of appeal. Secondly, it is not lost on the Court that the Appellant is a layman acting in person, and that he has expended resources to bring the appeal, which was only four or five days late. The court is therefore not without sympathy for the Appellant. However, it would be unhelpful, inefficacious, and imprudent in this case to consider granting time for the Appellant to regularize his appeal. For two important reasons set out below.

13. The first reason is that the Court upon a cursory perusal of the memorandum of appeal is of the view that it is poorly drafted, imprecise and contains evidential and argumentative material, thereby running afoul of Order 42 Rule 1 (2) of the Civil Procedure Rules which provides that the “*memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without argument or narrative, and such grounds shall be numbered consecutively.*”

14. The second reason is no less significant. As this Court earlier noted, it is confounding that this cause is designated as a civil suit rather than an appeal. The Appellant himself admits in his submissions that this designation is erroneous and that he had made attempts, albeit unsuccessfully, to rectify the error. Pursuant to the Civil Procedure Rules governing appeals and suits, each category of cause is subject to a different procedure and course. Therefore, it is foreseeable that if the present memorandum of appeal is allowed to stand, and despite any order made for the re-designation of the matter, the confusion engendered by the initial erroneous designation may not be fully dispelled and will likely continue to haunt the proceedings. More so given the busy environment of the courts and registry in the Civil Division. If he successfully applies for leave to appeal out of time, the Appellant’s best option would appear to me to be a fresh start, on a clean slate, initiated through filing a proper appeal by way of a memorandum of appeal that is compliant with Order 42 Rule 1(2) of the Civil Procedure Rules.

15. In the circumstances, the Court hereby allows the motion dated 17<sup>th</sup> May 2021 but will order that each party bears its own costs.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF FEBRUARY 2022.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the 2<sup>nd</sup> Interested Party/ Applicant: Mrs Kithinji h/b for Mr Opiyo**

**Ms. Omondi for the 1<sup>st</sup> Interested Party**

**Appellant: N/A**

**C/A: Carol**