



Mencia Management Limited v Matu t/a Eva Marie Surgicals & 3 others (Civil Appeal E122 of 2021) [2022] KEHC 12208 (KLR) (Commercial and Tax) (22 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E122 OF 2021**

DAS MAJANJA, J

AUGUST 22, 2022

BETWEEN

MENCIA MANAGEMENT LIMITED APPELLANT

AND

MARY MATU T/A EVA MARIE SURGICALS 1ST RESPONDENT

SABRINA HOLDINGS LIMITED 2ND RESPONDENT

FAMILY BANK LIMITED 3RD RESPONDENT

CO-OPERATIVE BANK OF KENYA LIMITED 4TH RESPONDENT

(Being an appeal from the Ruling and Order of Hon. S. A. Opande, PM dated 11th November 2021 at the Magistrates Court at Nairobi, Milimani in CMCC No. 5654 of 2013)

RULING

1. This is an appeal from the ruling and order of the Subordinate Court dated 11th November 2021 where the court rejected the Appellant’s application dated 25th May 2021 and made under, “the inherent powers and jurisdiction of the court and all other enabling provisions of the law and Articles 35(1), (b), 50(k) of the Constitution of Kenya (2010)” seeking to compel the 3rd and 4th Respondents, who were interested parties before the Subordinate Court, to produce the 1st and 2nd Respondent’s statements of account.
2. At the hearing of the appeal, counsel for the 4th Respondent challenged the validity of the appeal on the ground that the appeal was filed out of time and without leave of this court. This is a preliminary issue that goes to the court’s jurisdiction which must be considered first.



3. The order appealed from was made on 11th November 2021 while the Memorandum of Appeal was filed on 17th December 2021. Section 79G of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) provides as follows:

79G. 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.

4. The memorandum of appeal, which constitutes the appeal under Order 42 rule 1 of the [Civil Procedure Rules](#), ought to have been filed on 13th December 2021 latest but it was filed four days outside the time permitted without leave as required by the provision to section 79G aforesaid. This appeal having been filed out of time is therefore incompetent.
5. The application from which this appeal was preferred is not appealable as of right under Order 43 rule 1 of the [Civil Procedure Rules](#). An application made under “the inherent powers and jurisdiction of the court and all other enabling provisions of the law and Articles 35(1), (b), 50(k) of the [Constitution of Kenya \(2010\)](#)” does not fall under the Orders and Rules enumerated under Order 43 rule 1 of the Rules from which appeal is a matter of right. Order 43 rule 1(2) of the [Civil Procedure Rules](#) provides that an appeal against a decision where an appeal is not as of right shall lie with leave granted under section 75 of the [Civil Procedure Act](#). It is apparent from the record that the Appellant did not apply for leave to appeal, either from the Subordinate Court or from this Court.
6. This appeal is incompetent as it was filed out of time and without leave. Further, even if the court were to grant extension of time, the appeal would still fail for want of leave to appeal. The appeal is struck out with costs to the Respondent. The Appellant shall pay costs of KES. 20,000.00 to the 1st and 2nd Respondents and KES. 20,000.00 to the 3rd Respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF AUGUST 2022.

D. S. MAJANJA

JUDGE

Mr Jaoko instructed by Nchoe, Jaoko and Company Advocates for the Appellant.

Mr Waudu instructed by Migos Ogamba and Waudu Company Advocates for the 1st and 2nd Respondents.

Mr Orende instructed by Orende and Associates Advocates for the 3rd Respondent

