



**Chumo v Korir & another (Environment and Land Appeal
E002 of 2022) [2023] KEELC 18451 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18451 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E002 OF 2022**

MC OUNDO, J

JUNE 29, 2023

BETWEEN

SAMARI CHELANGAT CHUMO APPELLANT

AND

JOSEPH KIPKIRUI KORIR 1ST RESPONDENT

CHARLES KORIR 2ND RESPONDENT

RULING

1. In the response to a record of Appeal filed by the Appellant herein on May 12, 2022, the Respondents filed their notice of Preliminary Objection dated September 12, 2022 intimating that the Appeal was statute barred pursuant to the provisions of Section 79(G) of the *Civil Procedure Act* because the Appellant had not sought for leave to file the same out of time. That the court therefore lacked jurisdiction to hear and determine the Appeal which ought to be struck out with costs.
2. In response thereto, the Applicant had stated that the said application was premised on a glaring misapprehension of the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 42 Rule 13 of the *Civil Procedure Rules*. That the same was defective, misconceived, frivolous, and vexatious and a flagrant abuse of the court process and ought to be dismissed with costs.
3. The application was disposed of by way of written submissions to which the Respondents framed their issues for determination as follows;
 - i. Whether the Appellants claim is statute barred.
 - ii. Whether the court has jurisdiction to entertain the present claim.
 - iii. Who bears the cost of the preliminary objection?



4. The Respondents then relied on the East African Court of Appeal decision in the renowned case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited* [1969] to submit on the first issue for determination that the Appellant's claim was indeed statute and time barred. That the same had been filed via a Memorandum of Appeal on the May 12, 2022 whereas Ruling had been delivered by the Bomet Principal Magistrate's Environment and Land case No E18 of 2021 on the 4th of April 2022.
5. That it was trite that the Appeal ought to have been filed within a period of thirty (30) days from the date of ruling and therefore the last day of filing would have been the May 4, 2022. That despite the expiry of this period, the Appeal was nonetheless filed without seeking an extension of time.
6. That the provisions regarding the filing of Appeals as stipulated under Section 79G of the *Civil Procedure Act* were mandatory and therefore the filing of the same out of time and without leave was fatally incompetent and a nullity as was held by the Nakuru High Court in Civil Appeal No 117 of 2012 *Godfrey Kariuki Gathingi v Gladys Njeri Kirongo & 2 Others*.(sic)
7. On the second issue as to whether the court had jurisdiction to entertain the suit, it was the Respondents' submission that the Appellant's suit offended a host of statutorily legislations and judicial precedents and could not be salvaged by invoking the overriding objectives. That Section 79G of the *Civil Procedure Act* was couched in mandatory provisions, with a window for the Appellant to explain the cause of delay, by adducing of a certificate of delay. There was no explanation for the delay. That the question on limitation touched on the jurisdiction of the court to wit that once a suit was statutorily barred, the court would lack the jurisdiction to entertain it. Reliance was place on the decision in the case of *Bosire Ongero vs Royal Media Services* [2015] eKLR (as quoted with approval in Machakos Environment and Land Court, ELC No 50 of 2020, *Sohanlaldurgadass Rajput & Another v Divisional Integrated Development Programmes Co Ltd*)
8. On the last issue as to who would bear the costs of the Preliminary Objection, the Respondents' submitted that it was trite that costs follow the event and since Appellant's suit could not succeed, she be slapped with costs as was held in the *Sohanlaldurgadass Rajput (supra)*

Appellant's Submissions.

9. In opposition to the Respondents' Preliminary Objection, the Appellant framed her issue for determination as to whether the Appeal herein was ready for striking out to which she referred to the provisions of Section 79(G) of the *Civil Procedure Act* and Section 57 of the *Interpretation and General Provisions Act* to submit that she conceded that an Appeal from the lower court to the Environment and Land Court ought to be filed within 30 days from the date of the decree or order Appealed against excluding such period as may be certified as having been requisite for the preparation and delivery of a copy of the order/decre to the Appellant.
10. That in the instant case, the Ruling and Orders Appealed against were delivered on April 4, 2022, and whereas the Appeal herein was filed on May 12, 2022, there was no certification as to when a copy of the order was availed to the Appellant so as to allow for computation of the excluded period/days.
11. It was the Appellant's contention that even if the Appeal was filed out of time, it would be premature to strike it out as the directions under Section 79B as read with Order 42 of Rule 17 of the *Civil Procedure Act* were yet to be taken and the lower court file was yet to be transmitted to the honorable court. Reliance was placed in the decision in the case of *Masoud M Y Noorani vs General Tyre Sales Limited* [2014] eKLR on the findings in *Bell Atlantic Communications Limited vs Ephraim Maina Rwingo* [2021] eKLR.



12. The Appellant also relied on the findings in *Francis Likhabila vs Barclays Bank of Kenya* [2020] eKLR to submit that in appropriate cases, the court could exercise its discretion under the proviso to Section 79 G of the *Act*, or invoke its inherent power under Section 3 A of the *Act* and admit the Appeal out of time if the ends of justice so required and by doing so, it would assist the court in achieving the overriding objective of the *Civil Procedure Act*.
13. Further Submissions were to the effect that the Respondents' invitation to strike out the Appeal ought to be rejected as the Appeal could still be sustained by an application for leave to have it deemed to have duly filed so as to avoid undue costs, prejudice, hardship and injustice being visited upon the Appellant, and thus meeting the overriding objective of Civil Procedure as spelt out under Sections 1A & 1B of the *Civil Procedure Act* and Article 159 of the *Constitution* and as was held by the Court of Appeal in the case of *Abdirahman Abdi vs Safi Petroleum Products Ltd & 6 others* [2011] eKLR.
14. That procedural improprieties ought not to be ignored altogether, but that the court ought to weigh the prejudice that was likely to be suffered by the innocent party as against the prejudice to be suffered by the offending party if the court strikes out its document and thereafter exercise judicial discretion.
15. The Appellant sought for the dismissal of the Preliminary Objection with cost as it was clearly premised on a glaring misconception of the law.

Determination.

16. The law on preliminary objections was succinctly stated in the locus classicus case in *Mukisa Biscuits Manufacturing Co Limited v West End Distributors Limited* [1969] EA 696 wherein it had been held as follows:

“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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The Court considers that this improper practice should stop.”
17. I have considered the Preliminary Objection herein and the submissions by Counsel for both parties as well as the authorities filed herein. It is not in dispute that the Appellant filed their Record of Appeal dated the August 17, 2022, on the May 12, 2022. It is also not in dispute that the impugned Ruling in the Bomet Principal Magistrate's Environment and Land Court in case No E18 of 2021 sought to be appealed against, was delivered on the April 4, 2022 wherein the Record of Appeal was filed on the May 12, 2022 which was about 38 days later.
18. The Respondents have raised a Preliminary Objection to the effect that the Appellant had filed this Appeal out of time and without leave of the court and therefore the same was time barred, the court lacked the jurisdiction to hear and determine it and therefore it should be dismissed all together.
19. The law governing the filing of Appeals from the subordinate court to the High Court (read Environment and Land Court) is Section 79(G) of the *Civil Procedure Act* which 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.”

20. Having said as herein above, I find the issue for determination as being whether or not the Appellant’s Appeal was filed within the time prescribed by the law?
21. From the above provision, it is clear that all Appeals from the subordinate court to the High Court (read Environment and Land Court) must be filed within 30 days from date of the decree or order Appealed against but in computing the 30 days, the time the lower court certified as having been requisite for preparation of the decree or impugned order and delivery to the Appellant should be excluded.
22. If I were to calculate the time period within which the Appeal ought to have been filed, I find that the same fell due on the May 4, 2022 and therefore the Appellant had been eight (8) days late in filing the Appeal. However, the time which the lower court certified as having been requisite for preparation of the decree or impugned order and delivery to the Appellant and which time ought to have been excluded in the arithmetic in instant case, has not been disclosed and/or computed meaning that the Appellant can benefit from a benefit of doubt that the Appeal herein was filed within the time stipulated by the law.
23. In applying the inherent power donated to the court by virtue of the provisions of Section 3A of the Civil Procedure Act, I find that the Preliminary Objection dated September 12, 2022 is without merit and is dismissed. Consequently, this Appeal is properly and competently before this court. Costs of the Preliminary Objection to abide by the outcome of the Appeal.

Dated and delivered via Microsoft Teams at Kericho this 29th day of June 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

