



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. 108 OF 2019**

**CHEBUT TEA FACTORY CO. LTD.....1<sup>ST</sup> APPELLANT**

**PAUL KANGETHE GICHOHI.....2<sup>ND</sup> APPELLANT**

**VS.**

**PENINA NDUNGE MUTHOKA..... RESPONDENT**

*(Appeal from the judgment of the Chief Magistrate's court at Thika, M.W. Wanjala, SRM, CMCC No. 939 of 2014 dated 4<sup>th</sup> July, 2019)*

**JUDGMENT**

1. This is an appeal filed against the judgment of **Thika Chief Magistrate Court Civil Case No. 939 of 2014**. Directions were given by the court for parties to file their written submissions, which they did and on 6<sup>th</sup> July, 2021 judgment date was fixed for today.
2. What however is before me is an incompetent appeal. Why do I say so? It is because **Section 79G** of the Civil Procedure Act, Cap 21 has not been complied with by the appellant.
3. **Section 79G of Cap 21** provides thus:-

***“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.”*** (emphasis mine)

4. The judgment of Thika Chief Magistrates court was delivered on 23<sup>rd</sup> May, 2019. This is obvious from pages 120-124 of the record of appeal where that judgment is to be found. It is also obvious at page 150 of the record of appeal where the trial court's decree is. The appellants, by their written submissions to this appeal dated 13<sup>th</sup> April, 2021 acknowledge the fact that the appeal relates to *“The judgment and decree of Hon. M. Wanjala, (SRM) delivered on 23<sup>rd</sup> May, 2019 Thika CMCC No. 939 of 2014.”*
5. This appeal was filed on 16<sup>th</sup> July, 2019. The appeal was obviously filed out of the thirty days provided under section 70G of cap 21. The thirty days expired on 24<sup>th</sup> Jun, 2019. It follows that although the appellants filed a certificate of delay as provided under section 79G of Cap 21, the period of delay stated in that certificate is from 12<sup>th</sup> July, 2019 to 6<sup>th</sup> February, 2020 which does not cover the thirty days. That certificate of delay does not therefore assist the appellants, as was stated by the Court of Appeal in the case **GREGORY KIAMA KYUMA VS. MARIETTA SYOKAU KIEMA [1988] eKLR** as follows:-

***“This submission in my judgment is not sustainable on a proper construction of Section 79G of the Act.***

***A certificate of delay issued in accordance with the terms of that section covers only the period requisite for the preparation and delivery to the appellant of a copy of the decree or order appealed against. It does not and cannot be used to cover a period, as is suggested in the certificate, which may be required to obtain copies of proceedings and judgment. So the certificate of delay filed and relied upon by the appellant was absolutely worthless ad totally incapable of remedying the delay that had occurred. It must follow from this that the appellant's appeal No. 104 of 1987 filed on 29th April, 1987 was hopelessly out of time and consequently incompetent.”***

6. I would therefore as the Court of Appeal state in that case GREGORY KIEMA KYUMA (supra) also state thus:-

*“The upshot of this, was that the appellant did not file a memorandum of appeal from the order appealed from within thirty days and had no valid certificate of delay within the true contemplation of section 79G. So he cannot appeal as of right, not having complied with the strict requirement of section 79G. He could only set on foot a competent appeal by the grace of the Court if the Court in exercise of its discretion, under the provision granted him extension of time.”*

**DISPOSITON**

7. This appeal filed on 16<sup>th</sup> July, 2019 against the trial court’s judgment delivered on 23<sup>rd</sup> May, 2019 is incompetent for having been filed out of the statutory provided period without leave. It is therefore dismissed with costs.

**JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 21ST DAY OF OCTOBER, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant: Ndege

For 1<sup>st</sup> & 2<sup>nd</sup> Appellant: Mr. Mwangi

For Respondent: Miss Mideva

**COURT**

Judgment delivered virtually.

**MARY KASANGO**

**JUDGE**