



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO E50 OF 2021**

**JUNE CHRISTINE NYAMOITA ODHIAMBO.....APPELLANT**

**VERSUS**

**JAMII BORA BANK LTD T/A KINGDOM BANK LTD.....1<sup>ST</sup> RESPONDENT**

**VINCENT KIMU T/A KIMU AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**(Being an Appeal from the Ruling of Hon E. Rashid (RM))**

**delivered at Winam in Principal Magistrate's Court**

**Case No E033 of 2021 on 16<sup>th</sup> April 2021)**

**RULING**

1. On 18<sup>th</sup> May 2021, the Appellant herein filed a Notice of Motion application and Memorandum of Appeal both dated 17<sup>th</sup> May 2021. In response to the said application, on 4<sup>th</sup> June 2021, Jackson Kimathi swore a Replying Affidavit on behalf of the Respondents herein. The same was filed on even date. On 13<sup>th</sup> July 2021, the Appellant filed a Further Affidavit that she swore on 5<sup>th</sup> July 2021.
2. On 27<sup>th</sup> May 2021, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Preliminary Objection dated 24<sup>th</sup> May 2021. The grounds in the said Preliminary Objection were that the said Memorandum of Appeal was incompetent, having been filed out of time and without leave of court, contrary to the provisions of Section 79G of the Civil Procedure Act which prescribes thirty (30) days for filing appeals from the subordinate court to the High court. The other ground of the Preliminary Objection was that said Notice of Motion application was misconceived and misplaced since there was no competent appeal before this court.
3. On 22<sup>nd</sup> June 2021, this court directed that the aforesaid Preliminary Objection would be heard in priority to the aforesaid Notice of Motion application.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Written Submissions were dated 24<sup>th</sup> May 2021 and filed on 27<sup>th</sup> May 2021 while those of the Appellant were dated 5<sup>th</sup> July 2021 and filed on 13<sup>th</sup> July 2021.
5. This Ruling is based on the said parties' Written Submissions which they relied upon in their entirety.

**LEGAL ANALYSIS**

6. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents argued that the jurisdiction of this court to hear and determine the Appellant's application dated 17<sup>th</sup> May 2021 emanates from there being a competent Memorandum of Appeal on the court's record. They were emphatic that that was not the case in this matter.
7. They argued that the Ruling appealed from by the Appellant was delivered on 16<sup>th</sup> April 2021 and the Appellant filed her Memorandum of Appeal on 18<sup>th</sup> May 2021 which was out of the statutory limit of thirty days within which to file an appeal.
8. They invoked Section 79 G of the Civil Procedure Act and asserted that the Appellant's appeal was filed without leave of court and therefore ought to be struck out for being incompetent.

9. They were categorical that for the foregoing reasons there was no competent appeal before this court to warrant the hearing of the application dated 17<sup>th</sup> May 2021.

10. In response to the Respondents' assertions the Appellant argued that exclusive of the gazetted Public Holiday (Eid ul Fitr) which was 14<sup>th</sup> May 2021, the deadline for filing her Memorandum of Appeal was 18<sup>th</sup> May 2021. It was her contention that her Memorandum of Appeal was therefore filed within time.

11. The time for filing appeals from Subordinate Courts in respect to civil suits is prescribed in Section 79(G) of the Civil Procedure Act. This is what that Section provides:

**“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.”**

12. The Civil Procedure Act is silent on how the time in Section 79(G) ought to be computed. The court therefore resorts to Section 57 of the provisions of The Interpretation and General Provisions Act Cap 2 (Laws of Kenya) that provides that:-

**“In computing time for the purposes of a written law, unless the contrary intention appears-**

**a. A period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;**

**b. If the last day of the period is Sunday or a public holiday or also official non-working days which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;**

**c. Where an act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;**

**d. Where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”**

13. In view of Section 57 (a) of the Interpretation and General Provisions Act, 16<sup>th</sup> April 2021 was excluded from the computation being the day when the Ruling sought to be appealed from was delivered. However, as the following day was not an excluded day as envisaged in Section 57 (b) and (d) of the Interpretation and General Provisions Act, time started running from 17<sup>th</sup> April 2021 which was a Saturday.

14. The Appellant therefore ought to have her Memorandum of Appeal between the 17<sup>th</sup> April 2021 and on or before the 17<sup>th</sup> May 2021. However, it was evident that public holidays were excluded in computing the period within which the Appellant ought to have filed her Memorandum of Appeal.

15. It was not disputed that 14<sup>th</sup> May 2021 was a public holiday (Eid ul Fitr). The 1<sup>st</sup> May 2021 was Labour Day and also a public holiday in Kenya. In line with Section 57 (c) of the Interpretation and General Provisions Act, the Appellant had until 19<sup>th</sup> May 2021 to file her Memorandum of Appeal. It was therefore this court's view that the Appellant's Memorandum of Appeal was duly filed within the statutory prescribed period. In view of this finding, the second limb of the Respondent's Preliminary Objection was therefore rendered moot.

#### **DISPOSITION**

16. For the foregoing reasons, the upshot of this court's decision was that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Preliminary Objection dated 24<sup>th</sup> May 2021 and filed on 27<sup>th</sup> May 2021 was not merited and the same be and is hereby dismissed with costs to the Appellant.

17. It is so ordered.

**DATE AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF NOVEMBER 2021**

**J. KAMAU**

**JUDGE**