



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISCELLANEOUS APPLICATION NO: 54 OF 2019**

**SIMON KIMUTAI.....APPELLANT**

**VERSUS**

**ANNAH WANJA MARUI.....RESPONDENT**

**INVESCO ASSURANCE CO. LTD.....JUDGMENT - DEBTOR**

**RULING:**

The appellant filed a memorandum of appeal dated 25<sup>th</sup> July, 2019 he has filed an appeal against the ruling and orders issued by G. K. Odhiambo on 21<sup>st</sup> June, 2019 in the PMCC Court at Gichugu Civil Case No. 57 of 2018.

The appellant also filed a Notice of Motion on the same date, seeking orders that there be an interim order of stay of any further proceedings in the lower court including attendance to court by the appellant and on 31<sup>st</sup> July, 2019 to be cross examined by the respondent.

Pending the hearing and determination of the appeal the court be pleased to order a stay of any further proceedings in the lower court including attendance to court by the appellant to be cross-examined by the respondent herein as per the summons dated 20<sup>th</sup> July, 2019.

The respondent has filed notice of Preliminary objection to the application dated 25<sup>th</sup> July, 2019 and the entire appeal contending that the appeal was filed out of time and without leave of the court.

No substantive application can be made in an appeal filed out of time and hence incompetent ab initio.

The preliminary objection was argued by way of written submissions,

I have considered the application.

**The issue for determination is;**

- Whether the appeal was filed out of time and without leave of the court.

The applicant is submitting that the delay in filing the appeal was not inordinate. The respondent assertion that the appellant filed the appeal five days outside the stipulated period of 30 days is false. This is because the latest day of filing the appeal ought have been on the 21<sup>st</sup> July, 2019. However, 21<sup>st</sup> July, 2019 was a Sunday and therefore the appeal could not have been filed and the delay in filing is less than four days.

**For the respondents;**

- The memorandum of appeal indicates that the appeal is against the ruling delivered on 21<sup>st</sup> June, 2019. **Section 79 (g)** provides **that;**
- “ **An appeal against the orders and judgment of the lower court should be filed within 30 days.**
- Thirty days lapsed on 20<sup>th</sup> July, 2019 and the appeal was filed five (5) days outside time.

- There is no doubt that the appeal was filed outside time, as the applicant has admitted that the period of delay was less than four (4) days.
- The applicant filed the appeal outside time and **Under Section 79 (g)** he did not seek leave of the court to file the appeal out of time or to extend the time for filing the appeal.
- Article 159 of the Constitution enjoins the court to do Justice, to do substantial justice other than rely on procedural technicalities. Article 159 (2) (d) of The Constitution states as follows;

**“ Justice shall be administered without undue regard to procedural technicalities.**

- The court has discretion to extend time. **Order 50 Rule 6** of The Civil Procedure rules gives the court power to enlarge the time and the court may order the time to be extended, though no application to extend time has been made.
- Striking out of pleadings has been stated to be draconian and rules of procedure are hands maiden of justice and where court is confronted with fraud pleadings it should seek to do substantive justice other than rely on procedural technicalities.

There are various provisions which allow the court to admit the appeal out of time. **Article 159 (2) (d) ,Section 79 (g) of CPA and Order 50 Rule 6.**

- The Court has power under this provisions to admit the appeal which is filed out of time.
- I find that the delay in filing the appeal was not in ordinate.
- I should exercise discretion by not striking out the appeal and give the applicant leave. But give the applicant time to file an application for leave to admit the appeal out of time.
- The application for leave to file out of time be filed within 21 days.

**Dated, Signed at Kerugoya this 29<sup>th</sup> day of May 2020.**

**L.W. GITARI**

**JUDGE**