



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL APPEAL NO. 163 OF 2017

JOSEPH MICHAEL MWENJA.....APPELLANT

VERSUS

WOOLMATT LIMITED.....RESPONDENT

(An appeal from the Judgment of Hon. L. Gicheha in Nakuru

CMCC Number 662 of 2009, delivered on 13th October 2019)

RULING

1. By a Notice of Motion dated 7th June 2018, the Applicant sought an order to strike out the Memorandum of Appeal dated 13th December 2017 and filed on the same day.

It is brought under the provisions of **Section 79G of the Civil Procedure Act** that requires that an Appeal from a subordinate court to the High Court to be filed within a period of 30 days from the date of the decree or order appealed from.

2. It further provides that the 30 days is exclusive of the period that 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.

The section also provides that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for the delay.

3. The judgment of the subordinate court was delivered on the 13th October 2017.

It was not typed. I have seen the handwritten judgment. As at date of filing the Memorandum of Appeal, the delay was for 30 days and the present application was filed on the 11th June 2018 a period of six months after filing the Memorandum of Appeal.

4. It is submitted by the applicant that as at the time of filing this application the trial court's proceedings and judgment/Decree had not been typed and therefore made it difficult to file the Appeal within the statutory period.

5. The Respondent opposes the application on numerous grounds. That the handwritten judgment was sufficient to facilitate preparation and filing of the Memorandum of Appeal within 30 days, that no evidence was adduced by way of exhibits to the supporting affidavit to demonstrate any efforts made to obtain the typed proceedings and judgment nor any letters to the executive officer requesting for them.

Further no evidence of payment for the proceedings was exhibited.

It was thus submitted that the Appeal should be struck out.

6. There is no dispute over the facts stated above.

The applicant has not filed an application for extension of time within which the appeal may be filed nor for leave to file the appeal out of time. No reason at all has been stated for this failure save to state that the applicant is in the process of filing such application.

7. As at the date of arguing this application before me in October and November 2018, no such application had been filed. None has been

filed today.

The court has discretion whether or not to extend time for filing an appeal out of time. However such discretion ought to be guided by factors such as the period of the delay, reasons for the delay, arguability of the appeal, degree of prejudice that may be suffered by the Respondent if extension is granted – **Samuel Mwaura Muthumbi –vs- Josephine Wanjiru Ngugi & Another (2018) e KLR.**

8. **Section 79G CPA** proviso provides 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. **Asma Ali Mohamed –vs- Fatime Mwinyi Juma CA 75/2014 and Gerald M’limbine –vs- Joseph Kanganyi (2009) e KLR** both decisions cited in the case **APA Insurance Ltd –vs- Michael Kinyanji Muturi (2016) e KLR.**

9. The period of delay in this Appeal is 30 days. The reason for the delay in my opinion has not been sufficiently explained coupled with the applicant’s failure to apply for leave for extension of time.

10. It is true that a party does not require copies of the proceedings to file a Memorandum of Appeal but only a certified copy of the decree or order sought to be appealed from which may also be filed later.

The applicant did not say that he did not have a copy of the judgment though hand written.

11. The documents that must be filed within the statutory 30 day period are the Memorandum of Appeal, a copy of the formal or judgment/Decree, which may also be filed later or as the court may order under **Order 42 Rule 2 CPR.** In – **M.G. & Another –vs- JKG (2015) e KLR** the court observed that an appeal from a subordinate court would be incomplete without the order or decree appealed from, hence if the order/decrees are not readily available they must be filed to the earliest opportunity or as the court may order.

12. As at the time of filing this application, no such order/decrees had been filed.

I am minded that **Article 159(2) (d) of the Constitution** enjoins the court to dispense justice without regard to procedural technicalities. Where there are clear statutory provisions guiding when and how an act is to be taken in plain and clear language like **Section 79G of the Civil Procedure Act**, the party cannot be allowed to take advantage of its failures and hide behind the Article which is not made to whitewash all procedural failures without any sufficient reasons –

Telkom Kenya ltd -vs- Johnson Ochanda (2014) e KLR.

13. I find that the applicant’s failure and delay to file the appeal within the statutory period and its default in obtaining leave of court to file the appeal out of time by extending the period inexcusable. No sufficient reasons have been adduced.

14. Accordingly I find the Memorandum of Appeal filed on the 13th December 2017 to be fatally defective, incompetent and a nullity *ab initio*.

It is struck out with no orders as to costs.

Dated, signed and delivered this 28th Day of February 2019.

J.N. MULWA

JUDGE