



**Kabugi v Davies & another (Environment and Land Appeal
4 of 2023) [2023] KEELC 21094 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21094 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 4 OF 2023
LC KOMINGOI, J
OCTOBER 26, 2023**

BETWEEN

MOSES KABUGI APPELLANT

AND

ERIC DAVIES 1ST RESPONDENT

BEATRICE SOILA SWAKEI 2ND RESPONDENT

RULING

1. Coming up for determination is a Preliminary Objection dated 15th February 2021 by the Respondents which raised the following issues:
 1. The Appeal is filed out of time without leave of court and also in contravention of the mandatory provisions of Section 79G of the *Civil Procedure Act*. No such leave has been sought to date.
 2. Spent
 3. The Appeal being fatally defective and an abuse of the court process, ought to be struck out with costs.
2. The application was canvassed orally on 30th October 2020.
3. Counsel for the Respondents submitted that the Judgement was delivered on 6th March 2020 but the Appeal although dated 5th April 2020 was filed on 10th June 2020 contrary to Section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments)*. Counsel relied on *Gilbert Mwangi Njuguna vs Judicial Service Commission & another* (2020) eKLR and *Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR.



4. Counsel for the Appellant while acknowledging that the judgement was delivered on 6th March 2020 submitted that the Appeal was filed late due to the Covid19 pandemic which rocked the country on 11th March 2020 a few days after the judgement. Following this, the country was put on a lockdown and a moratorium stopping Court activities was also issued. It was until May 2020 when the Practice Directions for filing and serving during the pandemic came into effect that the Appellant was able to file the Appeal. As such, the days under the moratorium should not be taken into consideration because it was impossible to file any documents.

Analysis and Determination

5. This court having considered the application, submissions and authorities finds that the issue for determination is:

i. - Whether the Preliminary Objection dated 15th February 2021 is merited.

6. It is trite law that a Preliminary Objection should be raised only on a point of law which can be argued on the face of it. This was the holding in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696 Law JA (as he then was) stated, "... So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit..." It was buttressed by the Supreme Court of Kenya in Kenya *National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR on paragraph 83 as follows, "... we find it quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law..."
7. From the foregoing, this court is satisfied that the Preliminary Objection is on a matter of law which consists of an undisputed fact on the face of the pleadings.
8. It is not in contention that Section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments)* provides that:
“
“(1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court:
Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.”
9. It is not in dispute that the Appeal was filed past the thirty day period stipulated in Law. This court takes cognisance of Counsel for the Appellant’s submissions that the delay in filing was due to the Covid 19 pandemic and should be taken into consideration. While the issue of the pandemic is not in contention, the fact is the Appeal was filed in June 2020 which was after the legally stipulated time without leave.



10. On this issue, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR pronounced:

“... it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record.”

11. The Appeal herein was filed out of time without leave of court. The same cannot be allowed to stand.
12. I find merit in the Preliminary Objection and the Appeal is therefore struck out with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF OCTOBER, 2023.

L. KOMINGOI

JUDGE.

In the presence of:

Ms. Amondi for Ms. Wanyonyi for the Appellant.

Ms. Kariuki for the Respondents.

Court Assistant – Mutisya.

