



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 3 OF 2018**

**BONFIDE GENERAL CONTRACTORS COMPANY LIMITED..APPELLANT**

**VERSUS**

**JOHNSTONE MWANTHI MBINDYO.....1<sup>ST</sup> RESPONDENT**

**BONFIDE CLEARING & FORWARDING CO LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. In the Notice of Motion dated 11<sup>th</sup> January 2018, the 1<sup>st</sup> respondent ( the applicant) prays that the appellant's appeal be dismissed with costs for being incompetent or alternatively, that the appeal be struck out for having been filed out of time without leave of the court.
2. The application is expressed to be made under the inherent jurisdiction of the court and *Section 79G* of the *Civil Procedure Act (the Act)*. It is supported by the grounds stated on its face which in effect advance the view that the appeal was filed late by one day without leave of the court and was hence incompetent.
3. It is the applicant's contention that the decision appealed from was rendered on 30<sup>th</sup> November 2017; that under *Section 79G* of the *Act*, the appeal ought to have been filed within 30 days of that date; that the last day for filing of the appeal was 3<sup>rd</sup> January 2018 which fell on a working day and that since the appeal was filed on 4<sup>th</sup> January, 2018, it was filed out of time without leave of the court; and, that time limited by statute cannot be extended by subsidiary legislation.
4. The application is opposed. The appellant filed grounds of objection dated 31<sup>st</sup> January 2018 contending that the appeal was filed within time because the period of time between 21<sup>st</sup> December to 13<sup>th</sup> January of the following year is excluded from computation of time; that the application was brought in bad faith and that the applicant did not stand to suffer any prejudice if the appeal was admitted. In a nutshell, the appellant asserted that the application was not merited and it should be dismissed with costs.
5. At the hearing of the application, learned counsel for the parties made brief oral submissions expounding on the grounds espoused in their pleadings in support and in opposition to the motion. Learned counsel *Mr Masolia* held brief for *Mr Kaburu* for the applicant while learned counsel *Ms Janmohamed* represented the appellant/respondent. In his submissions, *Mr Masolia* besides maintaining that the appeal was filed out of time appears to have departed from the position taken earlier by the applicant that the appeal was filed late by only one day. He claimed that the 30 day period allowed for filing of the appeal expired on 30<sup>th</sup> December, 2017 and not 3<sup>rd</sup> January 2018 as stated in the application.
6. *Ms Janmohamed* on her part denied the applicant's claim that the appeal was filed out of time for the reasons stated in her grounds of objection. In the event that the court was persuaded to find that the appeal was indeed filed out of time by one day as alleged by the 1<sup>st</sup> respondent, counsel made an oral submission requesting the court to exercise its discretion by extending the time limited for filing of the appeal by one day since doing so would not occasion any prejudice to the applicant.
7. I have carefully considered the application, the rival submissions made on behalf of the parties and the authorities cited by the applicant. I find that it is not disputed that the judgment of the lower court was delivered on 30<sup>th</sup> November 2017. The memorandum of appeal was lodged on 4<sup>th</sup> January 2018. Under *Section 79G* of the *Act*, the appeal should have been filed within 30 days from the date of the decree excluding the period of time within which the lower court may have certified as having been necessary for the preparation and delivery to the appellant of a copy of the decree or order appealed against. No such certificate has been availed by the appellant in this appeal.
8. *Rule 4 of Order 50* of the *Civil Procedure Rules* which was relied on by *Ms Janmohamed* in her submissions regarding how the 30 day statutory period ought to be computed states as follows:

***“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: Provided that this rule shall not apply to any application in respect of a temporary injunction.”***

9. A plain reading of this rule clearly shows that it applies only to time limited under the Rules or by an order of the court. I entirely agree with *Waweru J* when he held in *St Mary’s Academy Ltd & Another V Ann Nyambura Karega, HCCA No. 8 Of 2007* that the aforesaid rule cannot apply to time limited by statute such as the time limited by *Section 79G* of the *Act* – see also *Patrick John Okoch V Maureen Akoth Delewa (2013) eKLR*. This is because subsidiary legislation cannot override or vary the express provisions of a statute. It therefore means that appeals from the magistrates’ court to the High Court must be filed in strict compliance with the provisions of *Section 79G* of the *Act*.

10. That said, the only issue that emerges for my determination in the instant application is whether the appeal herein was indeed filed out of time as alleged by the 1<sup>st</sup> respondent. From the appellant’s submissions, it would appear that the appellant has admitted the applicant’s claim that the appeal was indeed filed late by one day.

11. It is important to note that the *Civil Procedure Act* is silent on how time limited by *Section 79G* should be computed. In the circumstances, the court must be guided by the formula provided by *Section 57* of the *Interpretation and General Provisions Act* which is in the following terms:

***“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 all 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.”***

12. Applying the above principles to the present case, the appeal ought to have been filed on or before 2<sup>nd</sup> January, 2018 since the 30 day period within which the appeal should have been filed expired on 30<sup>th</sup> December 2017 which fell on a Saturday, a day which is excluded from the computation of time.

13. Given the foregoing, I agree with both parties albeit for different reasons that since the appeal was filed on 4<sup>th</sup> January, 2018 instead of 2<sup>nd</sup> January, 2018, there was a delay of one day in filing the appeal.

14. The appellant’s counsel in her submissions implored me to exercise my discretion and extend the time for filing the appeal by one day so that the appeal can be deemed to have been filed and served within time.

15. The proviso to *Section 79G* of the *Act* gives the court discretion to admit an appeal out of time if the appellant satisfies the court that there was good and sufficient cause for not filing the appeal within the time prescribed by the law. I must however add that such applications should be made formally as substantive motions and not in the course of arguments or submissions in response to an application such as the instant one. This is important so that the respondent is given sufficient notice and an opportunity to respond to the application. Be that as it may, it is unfortunate that in this case, not a single reason was given by the appellant for its failure to file the appeal within the prescribed time with the result that even if the court was inclined to salvage the appeal, it does not have a basis to justify the exercise of its discretion in the appellant’s favour.

16. Having found that the appeal was filed out of time without leave of the court, I find merit in the application dated 11<sup>th</sup> January, 2018 and it is hereby allowed in terms of the alternative prayer.

17. As costs follow the event, the 1<sup>st</sup> respondent is awarded costs of the application.

It is so ordered.

**DATED, DELIVERED and SIGNED at NAIROBI this 21<sup>st</sup> day of June, 2018.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr Kiptum for Mr Kaburu: for the 1<sup>st</sup> respondent/appellant

N/A: for the appellant/respondent

Mr Fidel Salach: Court Clerk