



**REPUBLIC OF KENYA**

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

**HCCA NO. 30 OF 2018**

**MULTIPLE HAULIERS (E.A) LTD.....1<sup>ST</sup> APPELLANT**

**DUNCAN MAINA NGUGI.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**PETER MUNYAO GEDION.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Respondent raises a Preliminary Objection dated 18/04/2018 on the grounds:-

- 1) **That** the appeal is time barred and contrary to the provisions of Section 79 G of the Civil Procedure Act Cap 21 Laws of Kenya.
- 2) **That** the appeal was not filed within a period of thirty days from the date of the Decree/Judgement appealed against.
- 3) **That** the judgement sought to be appealed against was given by Honourable Patrick Wambugu Mwangi on the 9<sup>th</sup> March 2018 and Section 79 G of the Civil Procedure Act Cap 21 Laws of Kenya requires that a party wishing to appeal against any decision of the subordinate court has to file the memorandum of appeal within 30 days from the date of the judgement and in this suit the Appellant was supposed to file the memorandum of appeal by the 8<sup>th</sup> April 2018; they filed it on 9<sup>th</sup> April 2018.
- 4) **That** the Appellant has not filed a memorandum of appeal under the Civil Procedure Act as required by section 79 G of the Civil Procedure Act Cap 21 Laws of Kenya.
- 5) **That** the Appellant did not seek leave of court for the memorandum of appeal dated 9<sup>th</sup> April 2018 to be filed and heard out of time contrary to Section 79 G of the Civil Procedure Act Cap 21 Laws of Kenya.
- 6) **That** the appeal is prejudicial and an abuse of the Court process and will cause the Respondent injustice.

2. The parties agreed to canvass the same Preliminary Objection via Written Submissions which they filed and exchanged.

**RESPONDENT'S SUBMISSIONS**

3. In the case at hand, the judgement sought to be appealed against was given by Honourable Patrick Wambugu Mwangi on the 9<sup>th</sup> March 2018, it therefore follows that the Appellant ought to have filed the memorandum of appeal by the 8<sup>th</sup> April, 2018. However, they filed the same on 9<sup>th</sup> April 2018.
4. Pursuant to Section 79 G of the Civil Procedure Act, an appeal from a subordinate court to the High Court, is to be filed within 30 days from the date of the decree or order appealed against.
5. However, in computing the 30 days, the period of time which the lower court certifies as having been requisite for the preparation and the delivery, to the Appellant, of a copy of the decree or order, is to be excluded.
6. In this case, the Applicant has not provided the court with a copy of the certificate, if any, issued by the lower court, indicating that the said court needed more than 30 days to prepare and deliver the decree or order to the Applicant.

7. In any event, the Applicant has not demonstrated that she was waiting for the lower court to prepare the decree or order appealed against.
8. The provision to Section 79 G of the Civil Procedure Act allows the court to admit an appeal out of time if the Appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. No such leave was sought and we submit that the appeal filed herein is therefore incompetent and does not lie.
9. It is submitted that the Appellant has not given any reason why the appeal was not filed within the required period of 30 days. Further the Appellant has not filed any response to this Preliminary Objection to explain why the appeal was filed out of time.
10. It is submitted that the time for filing appeal is prescribed by Section 79G of the Civil Procedure Act and not by the Civil Procedure Rules and therefore the provisions of Order 50 of the Civil Procedure Rules cannot be invoked in computation of time for filing an appeal. They therefore urge this Honorable Court to find that Order 50 of the Civil Procedure Rules does not apply in computation of time for purposes of filing an appeal.
11. It is their further submission that although Section 79 G of the Civil Procedure Act allows the court to admit an appeal out of time if the Appellants satisfy the court that he had good and sufficient cause for not filing the appeal in time. No such leave was sought before this appeal was filed and they therefore submit that the appeal filed herein is therefore incompetent and does not lie.
12. They rely in the case of **Andrew Nganga Ndungu –Vs- Godfrey Karuri & Another (2006) eKLR** where the court held that;

***“From the foregoing there was no reason why the appeal was not filed within the required period of 30 days. The explanation for the delay given by Mr. Kaya is not sufficient. The time for filing appeal is prescribed by Section 79 G of the Civil Procedure Act and not by the Civil Procedure Rules and therefore the provisions of Order XLIX (now Order 50) of the Civil Procedure Rules cannot be invoked in computation of time for purposes of filing an appeal. The Provision to Section 79 G of the Civil Procedure Act allows the court to admit an appeal out of time if the Appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. No such leave was sought and the appeal filed herein is therefore incompetent and does not lie. The court cannot grant any orders sought pursuant to an incompetent appeal and the application for stay of execution must therefore fail. Having found that the appeal was filed out of time and without leave for doing so. I strike it out altogether. See page 9 of the bundle.”***

#### **APPELLANTS’ SUBMISSIONS WERE THAT:-**

13. It is submitted that the circumstance of this appeal lie within the exceptions set forth under order 50 Rule 3. The rule states:-

***“Where the time for doing any act or taking any proceeding expires on Sunday or other day on which the offices are closed. And by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the tie of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.”***

14. The 30<sup>th</sup> day for filing the memorandum of appeal was 8<sup>th</sup> April 2018. However, this date was falling on a Sunday and consequently the next day when the court’s registry would be open was the 9<sup>th</sup> April 2018.
15. By applying the Order 50 Rule 3, Thus it is submitted that the memorandum of appeal was filed properly and that the preliminary Objection is a waste of the court’s time. It lacks merit and should thus be dismissed with costs to the Appellant.

#### **ISSUES, ANALYSIS AND DETERMINATION**

16. After going through the material before court, I find that the only issue is;

- ***Was instant appeal filed within time?***

17. Computation of time under provisions of CAP. 2 Interpretation and General Provisions Act [Rev. 2014] section 57

##### **1. 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.

2. [Orders 50, rule 3.] C P R has same provisions. Time expiring on Sunday or day offices closed.

3. Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

18. The aforesaid provisions are replicated under order 50 Rule 3 CPR. The rule states:-

*“Where the time for doing any act or taking any proceeding expires on Sunday or other day on which the offices are closed. And by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the tie of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.”*

19. It is not disputed that the last day computing 30 days from 8<sup>th</sup> March 2018 to 8<sup>th</sup> April 2018. However 8<sup>th</sup> April 2018 as a Sunday thus that being an excluded day vide above cited provisions, the last day falls on 9<sup>th</sup> April 2018. Therefore the Preliminary Objection fails with no orders as to costs.

**SIGNED, DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF JULY 2018, IN OPEN COURT.**

.....

**C. KARIUKI**

**JUDGE**