



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 40'A' OF 2015**

**FRANCIS MUGO MUTETHIA.....APPELLANT**

**V E R S U S**

**BENARD MURIUKI GATURUKU**

**T/A BENSURE AUCTIONEERS.....RESPONDENT**

**R U L I N G**

1. This is a ruling on a notice of a preliminary objection dated 3/05/2017 based on Section 79G of the Civil Procedure Act as regards time lines of filing an appeal.
2. The parties agreed that the objection was to be argued by way of written submissions. The respondent filed its submissions on 9/10/2017. However, no submissions were received from the appellant.
3. The respondent submitted that this appeal arises from the judgment in Embu CMCC No. 237 of 2010. The said judgment was delivered on 29/05/2015 and the appeal filed on 15/09/2015.
4. Section 79G provides:-

*Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which 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:*

*Provided 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.*

5. The respondent further submits that the use of the word “shall” in the section connotes a mandatory obligation on the part of the appellant to file the appeal within 30 days of the judgment. There is no evidence that the appellant applied for extension of time.
6. The applicant argued that the respondent was indolent in that the letter requesting proceedings is dated 7/05/2015 which was before the judgment was delivered. There is no certificate of delay by the subordinate court to ascertain whether it was responsible for the delay.
7. The respondent relied on several authorities in support of his submissions. In the case of Embu High Court Civil Appeal Case No. 61 of 2010 in which the court dismissed the appeal for being out of time and rejected the invoking of Article 159 of the Constitution and Section 3A and 3B of the Civil Procedure Act relied on by the appellant to save his appeal.

8. It is not in dispute that this appeal was filed out of time about three and half months after the judgment and was admitted on 29/09/2016. There is no evidence that the appellant applied for extension of time which was his legal right. The provisions of Section 79G are mandatory and the appellant was bound to strictly comply with the time lines.

9. At the time the court admitted the appeal, there was an assumption that it was filed on time. The matter of non-compliance with the time lines has been brought to the attention of the court in this objection. I therefore find that the orders for admission were erroneously made for the same ought not to have been made.

10. The appellant did not file any response to oppose the objection. It is my finding that the objection is merited and it is hereby upheld. The orders for admission of the appeal are hereby nullified by this court on its own motion.

11. I find this appeal incompetent and it is hereby struck out with no orders as to costs.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF DECEMBER, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Okwaro for Appellants**

**Mr. Njoroge for Ithiga for Respondents**