

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 23 OF 2016

KENYA COMMERCIAL BANK LTD.....APPELLANT/RESPONDENT

V E R S U S

FREDRICK MALLYA.....RESPONDENT/APPLICANT

RULING

1. The applicant, **Fredrick Mallya** took out a motion dated 22nd February 2016 which sought for prayers that:

1. THAT the court be pleased to strike out the appeal dated 25th January 2016 and filed on 25th January 2016.

2. THAT the cost of this application be provided for.

2. When the matter came up for interpartes hearing on 18th July 2016, the applicant sought to rely on the grounds stated on the face of the motion and the facts deponed in the supporting affidavit. The respondent also sought to rely on its replying affidavit which I have taken into consideration.

3. The applicant contends that the appeal filed herein is filed outside the statutory limitation period provided under Section 79G of the Civil Procedure Act. According to the applicant, judgement in the subordinate court vide civil suit number 258 of 2013 was delivered on 2nd December 2015 and decree issued on 27th January 2016. However, he contends this the appeal, was filed on 25th January 2016 and as such the same should be struck out for being filed out of the limitation period.

4. The respondent on the other hand argues that the judgement was delivered by **Hon. Kassam** on behalf of **Hon. A Lorot (SPM)** in favour of the respondent in the sum of kshs.3,078,347.89 in the absence of both parties. It claims that the judgment had been pending for a while as **Hon. Lorot** had been transferred from Milimani Law Courts to Thika Law Courts. It deponed further that it was not served with a judgment notice informing them on the delivery of the judgment which was delivered on 8th January 2016 and that it only discovered that it was delivered upon writing a letter to the advocates for the plaintiff. It averred that the appeal was filed on time given that under Order 50 Rule 4 of the Civil Procedure Rules; the period between 21st of December to 13th of January are to be omitted from any computation of time. It further cited Article 59(2) (d) which provides that justice shall be administered without undue regard to procedural technicality and that directions as per section 78B of the Civil Procedure Act and Order 42 Rule 13 of the Civil Procedure Rules 2010 have not been given. It argued that a party who wishes to raise an objection in relation to an appeal can only do so when the appeal is set down for directions. Therefore, the application is premature, misconceived and is filed in bad faith.

5. I have considered the arguments advanced by the parties. It is evident from the court record that the ruling was delivered on 2nd December 2015 in CMCC 258 of 2013, and a decree issued by the trial court on 27th January 2016. It is also clear that the respondent filed a Memorandum of Appeal on 25th January 2016. According to Section 79G of the Civil Procedure Act, a party that wishes to lodge an appeal is required to do so within thirty days from the date of the decree or order appealed against. The appellant/respondent in this case lodged the appeal on 25th January 2016 which was approximately 53 days later, this was more than the time limit of 30 days required under the law. In his defence the

appellant claims that the judgement was delivered in its absence since it was not served with a judgment notice. As a result, it claims that it only became aware of the judgment on 18th January 2016. It urged the court to take into consideration the provisions of Order 50 Rule 4 of the Civil Procedure Rules.

6. Order 50 Rule 4 of the Civil Procedure Rules provides that the period between the 21st day of December in any year and the 13th day of January in the year next following shall be omitted from computation of time. Taking this provision into consideration, the appellant ought to have lodged its appeal on 26th January 2016. The appellant filed its Memorandum of Appeal on 25th January 2016. Even without considering the reasons given by the appellant for the purported delay in filing the Appeal, it is apparent that it was well within the time limit contrary to the assertions made by the Respondent.

7. On the basis of the above ground I find no merit in the application, it is dismissed with costs abiding the outcome of the appeal.

Dated, Signed and Delivered in open court this 16th day of September, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent