



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 9 OF 2010

COOK 'N' LITE LIMITED..... APPELLANT

V E R S U S

SILVESTER MUTIA JONATHANRESPONDENT

(Being an appeal from the Judgment and Decree of the Senior Resident Magistrate Court at Mombasa delivered by Hon. Mrs. Teresia Mwangi (SRM) on 8th December 2009)

RULING

1. This Court by its judgment, in this matter, of 18th September 2014 struck out this appeal for being filed in contravention of Section 79G of the Civil Procedure Act, Cap 21. That Section provides that an appeal from the Magistrate's Court should be filed within 30 days of the date of the judgment, however a party may seek leave for an appeal to be admitted out of time. The Sections states as follows-

“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.”

2. Appellant has filed a Notice of Motion dated 19th September 2014 seeking review of that judgment. The main ground upon which review is sought is that the Court in striking out the appeal overlooked the provisions of Order 50 Rule 4 of the Civil Procedure Rules, which is in the following terms-

“4. 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.”

3. Respondent opposed the application on the ground that Section 79G Cap 21 was in mandatory terms and that Appellant failed to seek leave for the appeal to be admitted out of time. Respondent also opposed the application on the ground that Appellant had not extracted and annexed a copy of the order the subject of the review.

ANALYSIS

4. In my view the latter opposition raised by Respondent, that the application should fail for not having the order extracted and annexed is rejected. In my view in the light of the double ‘O’ principle or the overriding objective in Section 1A and 1B of Cap 21 and more specifically in view of the provisions of Article 159 (2) (a) which requires Courts be guided by the principle “***justice shall be administered without undue regard to procedural technicalities***” that opposition should be rejected. I call the need to extract and attach the order under review as a technicality because neither Section 80 of Cap 21 nor Order 45 of the Civil Procedure Rules specifically requires that to be done. The requirement therefore will not hinder the Appellant’s application. This finding is tandem with the Court of Appeal’s finding in the case **SADRUDIN KURJI & ANOTHER –Vs- SHAUMAR LIMITED & 2 OTHERS [2008]eKLR** where the Court stated-

“Starting with the point raised concerning the non-inclusion of an extracted order sought to be reviewed, no provision was cited which require an application to include such a copy in an application for review. That being our view of the matter, we do not think the point is one of Law. If there was a need for its inclusion that would merely be a procedural requirement.”

5. A careful reading of Order 50 Rule 4 shows that the time does run from 21st December to 13th January where time is specified in the Rules or is as a result of a Court order, with the exception to applications for temporary injunctions. It is therefore my view that Order 50 rule 4 does not assist the Appellant.
6. But more importantly subsidiary legislation cannot contradict an Act of Parliament. It is so stated in Section 31(b) of the Interpretation and General Provisions Act Cap 2. That Section provides-

“General provisions with respect to power to make subsidiary legislation. Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation-

- a.
- b. **No subsidiary legislation shall be inconsistent with the provisions**

of an Act.”

7. The Court of Appeal in its decision delivered on 9th April 2014 considered the issue of subsidiary legislation vis-à-vis an Act of Parliament in the case **WAVINYA NDETI –Vs- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC) & 4 OTHERS [2014]eKLR** and stated thus-

“In Maitha v Said & Another – Civil appeal No. 292 of 1998 (2008)2KLR (EP 33) the Court by majority rejected the argument that the Court of Appeal Rules applied and held-

“If an Act giving the right of appeal from the High Court to the Court of Appeal has set out the time limit within which such right should be exercised, failure to comply with such time limit would extinguish the right of appeal and an appeal would not lie

outside the time limit

“In Jyoti Basu & Others v Debi Ghosal & Others [1982]AIR 983; 1982 SCR (3) 318 the Supreme Court of India held, among other things, that the provisions of the Civil Procedure Code cannot be invoked to permit that which the Representation of the People Act 1951 does not permit, and that the Civil Procedure Code applies subject to the provisions of the Representation of the People Act 1951 and any rule made there-under.

It is an established principle of construction of statutes that no subsidiary legislation shall be inconsistent with the provisions of an Act (See Section 31(b) of the Interpretation and General Provisions Act – Cap 2 Laws of Kenya). A subsidiary legislation cannot repeal or contradict express provisions of an Act from which they derive their authority.”

Bearing the above in mind it becomes clear that Order 50 Rule 4 cannot contradict the provisions of Section 79 of the Civil Procedure Act. The order is subsidiary to the Act.

8. It follows that the Appellant must and does fail. Accordingly the Notice of Motion dated 19th September 2014 is dismissed with costs to the Respondent.

DATED and DELIVERED at MOMBASA this 26TH day of FEBRUARY, 2015.

MARY KASANGO

JUDGE