



Kirema & 2 others (Sued as Administrators of the Estate of Jane Wanjiku Mburu) v Gachanja & 3 others (Environment and Land Appeal 59 of 2024) [2025] KEELC 3384 (KLR) (24 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3384 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 59 OF 2024**

**JM ONYANGO, J
APRIL 24, 2025**

BETWEEN

**STANLEY MBURU KIREMA 1ST APPELLANT
TIMOTHY KIEREMA MBURU 2ND APPELLANT
MOSES KARONGA MBURU 3RD APPELLANT
SUED AS ADMINISTRATORS OF THE ESTATE OF JANE WANJIKU MBURU**

AND

**DAVID WANJOHI GACHANJA 1ST RESPONDENT
TERESIAH WANJIRU WAMBAA 2ND RESPONDENT
THE LAND REGISTRAR, RUIRU 3RD RESPONDENT
THE HON ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. This ruling determines the 2nd Respondent's Preliminary Objection dated 31st July 2024 in which she raised the ground that the appeal was filed out of time without leave contrary to section 79G of the *Civil Procedure Act*.
2. The court directed that the Preliminary Objection be canvassed by way of written submissions and the 2nd Respondent and Appellant filed their submissions.

Analysis and Determination.

3. The only issue for determination is whether the appeal ought to be struck out for having been filed out time.



4. Before delving into the merits of the Preliminary Objection, it is important to determine whether the Preliminary Objection raised meets the legal threshold of a P.O. In the case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696* is clear on the the Court of Appeal observed that:

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

5. In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

6. From the above decision, it is clear that the question as to whether the appeal was filed contrary to the provisions of section 79G of the *Civil Procedure Act* is a pure point of law.

7. The said section provides as follows:

Section 79G: Time for filing appeals from subordinate courts

“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”.

8. It is not in dispute that the appeal was filed on 27th June 2024, whereas the judgment of the lower court was delivered on 23rd May 2024. This means that the appeal was filed after period of 34 days from the date of the judgment.

9. In his submissions learned counsel for the Appellant has argued that the in computing time the court should take into account the fact that the 1st of June was a public holiday (Madaraka Day), while the 17th Day was gazetted as a public holiday to mark Eid-Al -Adha, a Muslim holiday. Additionally, the chief Justice declared the 18th of June 2024 a day of national mourning to mourn Hon. Monica Kivuti, Principal Magistrate who was fatally wounded while on duty on 13th June 2024. It is therefore his contention that the three days should not be counted which means that the appeal was filed within the stipulated time of 30 days. Counsel has also submitted that the date of judgment was inadvertently indicated on the Record of Appeal as 27th May 2024.



10. The exclusion of Sundays and Public Holidays is provided under Order 50 Rule 2 of the Civil Procedure Rules which stipulates as follows:

“Where any limited time less than six days from or after any time or event is appointed or allowed for any act or taking any proceedings, Sunday, Christmas Day and Good Friday, and any other day appointed as a public holiday shall be reckoned in the computation by calendar months unless otherwise expressed.”

11. In considering whether the public holidays should be excluded while computing time for filing of an appeal, the court in the case of Shadrack Munyao v Kennedy Muthoka Maluki and Another Civil Appeal No. E018 of 2024 held as follows:

“The court notes that the time given for filing the appeal under section 79G of the *Civil Procedure Act* is 30 days from the date of the ruling or judgment. The said days are not less than six days as provided above and thus the exclusion of public holidays and weekends does not apply.

12. The court further observed that:

“The above section is couched in mandatory terms and the Applicant herein had an obligation to file the appeal within a period of thirty days. Contrary to the argument raised by the Applicant, Section 79G of the *Civil Procedure Act* does not mention exclusion of public holidays or weekends”

13. Similarly, in the instant suit, the question of excluding public holidays does not arise as the number of days within which the appeal was to be filed in not less than six days.

14. The question as to whether the date of the judgment was inadvertently indicated as 27th May 2024 instead of 23rd may 2024 is neither here nor there. Suffice is to say that the mistake (if it was a mistake) does not help the Applicant. What emerges is that the appeal was filed out time without the leave of the court and I am constrained to find that the Preliminary Objection is merited.

15. Accordingly, the Preliminary objection is upheld and Memorandum of Appeal dated 27th June 2024 together with the undated Record of Appeal filed on 24th July 2024 are hereby struck out with costs to the 2nd Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF APRIL 2025.

J. M ONYANGO

JUDGE

