

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO 5 OF 2014

TRUFOODS LIMITED.....APPELLANT

V E R S U S

MILLICENT KAGEHA ALUMASA.....RESPONDENT

R U L I N G

1. The appeal herein is against the judgment of the lower court delivered on 22nd November, 2013. The appeal should have been filed within the time set out in **section 79G** of the **Civil Procedure Act, Cap 21** - that is, **on or before 21st December, 2014**. The memorandum of appeal was filed out of time on 14th January, 2014 and without leave of the Court.

2. By **notice of motion dated 24th January, 2014** the Respondent applied for the appeal to be struck out upon the ground that the same is incompetent for having been filed out of time without leave. That application is the subject of this ruling.

3. I have considered the submissions of the learned counsels appearing. The Appellant's response to the application is that it withdrew the appeal by **notice of withdrawal dated 24th January, 2014**. It is doubtful that an appeal can be withdrawn in this way as there is no provision for such withdrawal under **Order 42** of the **Civil Procedure Rules, 2010** (the **Rules**). That is the Order that deals with appeals. It is to be noted that a procedure for withdrawal of suits is provided for under **Order 25, rule 1** of the Rules. Although the definition of the term "**suit**" under **section 2** of Cap 21 is

"all civil Proceedings commenced in any manner prescribed...",

if the **Rules Committee** intended that appeals be amenable to withdrawal by notice, they would have made provision for the same in Order 42. At any rate no order has been made upon the purported notice of withdrawal.

4. The appeal is still in place, and I so hold.

5. The Appellant also contended that the appeal was in any event compromised in **Nairobi HC Misc Application No. 38 of 2014**. No evidence of such compromise was tendered.

6. The Appellant concedes that the appeal was filed out of time without leave of Court. The appeal is thus incompetent and not properly in court. It is hereby struck out with costs to the Respondent. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF MAY 2014

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2014