



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 123 OF 2010

(Being an appeal from the Decree of the Learned Magistrate's Court H. B. Yator in RMCC NO. 544 of 2006 of the Resident Magistrate's Court, Mombasa dated 9th February, 2010)

MASOUD M. Y. NOORANI APPELLANT

V E R S U S

GENERAL TYRE SALES LIMITED RESPONDENT

RULING

1. Judgment in Mombasa **SRMCC No. 544 of 2006** was delivered on 9th February 2010. That Judgment was in favour of the Appellant. The Appellant filed a memorandum of appeal on 25th June 2010.
2. The Respondent has filed a Notice of Motion dated 12th October 2010. That Notice of Motion seeks that the appeal filed herein be struck out with costs for having been filed out of time and without leave of the Court contrary to Section 79G of the Civil Procedure Act Cap 21.
3. The Respondent relied on written submissions filed in respect of that Notice of Motion. It was submitted on behalf of the Respondent that Section 79G was in mandatory terms and that the filing of the appeal out of the thirty (30) days stated in that Section rendered the appeal incompetent. The Respondent stated that the Appellant should have obtained the leave of the Court before filing the appeal.
4. Appellant's learned Counsel in reply relied on the replying affidavit and the written submissions. It is the submission of the Appellant that the Application is premature because the appeal had not yet been considered for admission as provided under Section 79B of Cap 21. That Section provides as follows-

“Before an appeal from a Subordinate Court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding Section 79C, reject the appeal summarily.”

Further Appellant submitted that since proceedings of the lower Court had not been certified the time set out in Section 79G of Cap 21 had not started to run and accordingly the appeal was filed within time.

5. Appellant also submitted that to strike out an appeal is a draconian action and that the Court should consider applying the overriding principle (oxygen rule) as provided in Sections 1A and 1B of Cap 21.
6. The Respondent in response to the above submission submitted that the Appellant inordinately delayed in filing the appeal. Further that Section 79G does not refer to proceedings but to decree or order.
7. The Appellant did attack the Respondent's affidavit in support of the application on the ground that it was sworn by the Respondent's General Manager who Appellant argued had failed to state that he was authorized to swear it and who according to the Appellant failed to file such authorization in the form of a resolution of the Board of Directors. In this regard the Appellant relied on the holding **ELITE EARTHMOVERS LTD -VS- KRISHA BEHAL & SONS [2005]IKLR** as follows-

“1. It is now a matter of judicial notoriety that an affidavit by a

corporation, whether of verification of a plaint or an application thereunder, will be struck out on the ground of being defective and incompetent if it is not authorized and signed by a person who is not only an officer of the corporation, but must also be authorized to so sign.

2. **The deponent of the affidavit, as General Manager of the Plaintiff – decree holder was required under Law to say in that capacity of General Manager, he is or has been authorized to sign the affidavit failing which, the law will regard his affidavit as defective and incompetent.”**
8. I will first deal with that issue whether the affidavit in support of the Application ought to be struck out for failing to show the authority of the Respondent's Board of Directors. I consider it first because if the objection by the Appellant does succeed and the affidavit is struck out the Notice of Motion being considered in this Ruling would fail because it will not be supported by evidence.
9. Firstly contrary to the submissions of the Appellant the Affidavit of PARAS SHAH in support of the Notice of Motion does indeed state that Shah was authorized to swear the affidavit. This is what he stated-

“THAT I am the General Manager of General Tyre Sales Ltd, the Respondent/Defendant herein wherefore I am competent and duly authorized to make this affidavit on the Respondent's behalf.”

10. In that regard the affidavit of Paras Shah satisfies the requirements set out in the case **ELITE EARTHMOVERS LTD** (supra) and accordingly part of the Appellant's objection is rejected. Mr. Shah was authorized to swear the affidavit.
11. Secondly I make a finding that at interlocutory stage any party can swear an affidavit in an action whether or not such a party is a party in the suit subject to such a party indicating he is authorized to swear such an affidavit. But I will add that even without such authority such an affidavit is not necessarily incompetent and can be considered. In my view an admission of such an affidavit which lacks such authority does depend on the circumstances of each case. However I will state that that would not apply to verifying affidavit to an action because in that case authority in the form of a resolution of the Board is necessary to confirm that the Corporation has authorized the filing of a suit.
12. Thirdly Appellant was wrong to submit that a General Manager is not an officer of a Corporation. That restricted definition by the Appellant is not supported by Section 2 of the Companies Act

Cap 486 which defines an officer to include “**Director, Manager or Secretary**”.

13. It follows that the submission that the affidavit of Shah should be struck out is rejected. The affidavit is competent.

14. Section 79G provides 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.”

15. That Section is divided into two parts. In the first part as rightly argued by the Appellant stops the running of time for the filing of an appeal to the High Court until the lower Court does certify the period that was required to supply a certified decree or order. From the date of such certification an appeal should be filed within 30 days.

16. Although the Appellant argued that the first ambit of that Section applied to this appeal I beg to differ. As correctly submitted by the Respondent, the only thing sought by the Appellant from the lower Court were certified copies of proceedings and judgment and not decree or order as envisaged in that Section. The record shows that the Appellant orally applied for certified proceedings and judgment when the judgment was pronounced by the lower Court. Thereafter Appellant seems to have typed the handwritten proceedings and judgment through his Advocate. Those typed proceedings and judgment were returned by the said Advocate to the lower Court on 21st June 2010 and the learned Counsel Mrs. Moolraj for the Appellant did state from the bar that the Appellant had not obtained certified copy of those proceedings and that there was no evidence that the proceedings had been proof read. I have checked the lower Court file and although the proceedings seem to have been corrected they have not been certified.

17. The Respondent is in my view correct in submitting that the first ambit of Section 79G only allows extension of time to file an appeal where a party applies for certified copy of the decree or order appealed against. Indeed that Section provides that the time required to obtain the certified decree or order is disregarded in the computation of time that is the 30 days. As stated before the appellant to date has not sought certified copy of the decree. Appellant cannot therefore shield himself under the first ambit of Section 79G. This was discussed by Justice Ngaah Jairus in the case **KULWANT SINGH ROOPRA –Vs- JAMES NZILI MASWILI (2014)eKLR** as follows-

“In this case the Applicant was caught out by time such that he could not file his appeal against orders issued by the magistrate’s court without extension of time. He had applied for a “certified copy of the proceedings and judgment/orders.” He ultimately got the certified copies of the proceedings and judgment and was also issued with a certificate of delay that certified the period required to prepare the proceedings and the judgment, apparently it is the delay in preparation and delivery of these documents that occasioned the delay in filing of the applicant’s appeal.

When the appellant filed his appeal, the learned Judge (Shields J, as he then was) held that the certificate of delay which was filed with the appeal was not the one contemplated under Section 79G of the Act 21. He struck out the appeal and when the appellant appealed to the Court of Appeal, the latter upheld the High Court’s judgment and said at page 187.

“The appellant was entitled to appeal to the High Court against these orders if he felt

aggrieved by them. Section 65(1) of the Civil Procedure Act confers a right of appeal on him. But in order to set on foot a competent appeal, the appellant must have filed his appeal within thirty days from the date of the order ... This period may be extended provided he obtained from the magistrates court a certificate of delay within the meaning of Section 79G of Act 21. The section allows the thirty days to be extended by such period as was required to make a copy of the “decree or order of the court”. As the appeal was to be filed beyond the 30 days prescribed by the rules, the appellant ought to apply and file with the memorandum of appeal, not only the order of the court but also a certificate of delay.” (underlining mine)

This means that whenever one intends to file an appeal under Section 79G it is incumbent upon the intended appellant to apply for an order or a decree which he will file together with the memorandum of appeal, apart (sic) the memorandum of appeal and the decree the applicant must obtain and file a certificate of delay certifying the time taken to prepare and deliver the order or the decree should his appeal be filed outside the 30 day period. The court explained this better in its judgment. It said at page 187:

“The question is what documents must the appellant file within thirty days or within the time lawfully extended by the certificate of delay? Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available, Rule 1A of Order 41 permits this latter document to be filed as soon “as possible and in any event within such a time as the court may order.” Therefore a certificate of delay within the true intendment of Section 79G must certify the time it took to prepare and deliver to the appellant “a copy of the order” of the magistrate.

But the certificate of delay exhibited by the appellant, did not speak of a decree or order. No such order was sought or extracted. What the appellant, in error, sought and what the court dutifully supplied, were “the proceedings and judgment.”

18.It follows that the first ambit of Section 79G does not assist the Appellant.

19.I do however find that the proviso the second ambit of that Section can be of assistance to the Appellant. That proviso begins by stating “... **provided that an appeal may be admitted out of time ...**” In my view the use of the word 'admit' connotes both the act of allowing an appeal to be filed out of time and also the act of allowing an appeal already filed to be admitted out of time. The later scenario was the finding in the case GERALD M'LIMBINE -Vs- JOSEPH KANGANGI (2009)eKLR where the Court stated-

“My understanding of the proviso to Section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek the Court’s leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the Court’s permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the Court’s process under Section 79B.”

20.If that be so what should be fate of the Appellants appeal filed out of time without leave of the Court.

21.Firstly I am of the view that until the appeal is admitted as provided

under Section 79B it is premature to order the appeal to be struck out. In my view the Appellant has upto then to apply for the Court to admit the appeal filed out of time. If no application is made by then the Court would summarily dismiss the appeal as provided under that Section.

22.To also decline to strike out the appeal as sought by the Respondent is in keeping in my view with the overriding principle of Sections 1A and 1B of Cap 21 as rightly submitted by the Appellant. The Court of Appeal in the case **NICHOLAS KIPTOO ARAP KORIR SALAT -VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS [2013]eKLR** was considering an application to strike out an appeal on the ground that the Appellant had failed to serve the Notice of Appeal within the days required under Rule 77(1) of the Court of Appeal Rules, that is within seven (7) days. The Court declined to strike out the appeal and in discussing the overriding principle stated as follows-

“I will demonstrate this paradigm shift by citing three recent decisions of this Court. In Abdirahman Abdi also known as Abdirahman Muhumed Abdi V. Safi Petroleum Products Ltd. & 6 Others, Civil Appliation No. Nai. 173 of 2010 where a notice of appeal was served on the Respondent out of time and without leave of the court, upon being asked to strike it out, the Court (Omolo, Bosire and Nyamu JJ.A) observed that:-

‘The overriding objective in civil litigation is a policy issue which the Court invokes to obviate hardship, expense, delay and to focus on substantive justice’

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159(2)(d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”

23.Bearing the above finding the Notice of Motion dated 12th October 2010 is dismissed with costs to the Appellant.

24.It has also become clear that the lower Court matter which is the subject of this appeal related to the employment of the Appellant. In view of that therefore the appeal ought to be heard by the Industrial Court. Accordingly I do order that this appeal be, and is hereby transferred to Mombasa Industrial Court for determination.

DATED and DELIVERED at MOMBASA this 31ST day of JULY, 2014.

MARY KASANGO

JUDGE