



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.144 OF 2013

GEORGE MUNYAKA

**GIKONYO.....
APPELLANT**

VERSUS

- 1. DAVID NGUGI NG'ANG'A**
- 2. ARTHUR NJIRIRI KIMUNYA**
- 3. RAHAB MUMBI KAIRU(Sued as the officials of TARAMBANA-KAMANDURA WATER TRUST).....RESPONDENTS**

RULING

1. Before me is the respondents' Notice of Motion dated 15th May, 2014. The motion seeks that the appeal herein be struck out since it was filed out of time without the leave of court.
2. The 1st respondent swore a supporting affidavit on 15th May, 2014. He averred that the appellant was given thirty (30) days right of appeal on 5th February, 2013 when judgment he intends to appeal against was delivered. The respondents' gravamen is that the appellant filed the memorandum of appeal on 18th March, 2013 i.e. after the prescribed thirty (30) days. The deponent further stated that the appellant has not also bothered to take the necessary steps to list the appeal for directions and/or hearing. He averred that the appellant seems to have lost interest in prosecution his appeal and should therefore be struck out.
3. The appellant filed a replying affidavit sworn on 29th October, 2014 in opposition to this application. The appellant explained that he subsequent to delivery of judgment on 5th February, 2013, applied for proceedings on 6th February, 2013 which were only ready for collection on 14th March, 2013.He thereafter sought for a certificate of delay.
4. When this application came up for hearing on 5th November, 2014, Miss. Wachanga, Learned Counsel for the respondents submitted that the appeal was incompetent having been filed after the prescribed time without the leave of court. She submitted further that the certificate of delay was not the one contemplated under Section 79G of the Civil Procedure Act since it does not explain the time it took to prepare the decree and order. The appellant on the other hand relied entirely on his replying affidavit.
5. The respondents herein call upon this court to strike out the appeal which has been filed out of time without leave of this court. It is thereby upon this court to examine whether such a technicality attracts the consequence of striking out. It is the duty of this court under Sections 1A and 1B of the Civil Procedure Act and Article 159 (2)(d) of the Constitution to sustain rather than strike out pleadings purely on technical grounds. In other words the overriding objective is to do justice without *undue regard* to technicalities. I am fortified by the sentiments of the Court of Appeal in *Abdirahman Abdi alias AbdirahmanMuhumed Abdi v. Safi Petroleum Products Ltd. & 6 Others (2011) eKLR* where the court while dealing with a similar application observed:

“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 delay likely to be occasioned, the costs 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 interest 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 or 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 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.”

6. In *Joseph Kiangoi v. Waruru Wachira & 2 Others (2010) eKLR* the Court of Appeal stated as follows:

“The cure would come about because in the circumstances justice is to be found in sustaining the appeal for it to be heard on merit instead of striking it out on a technicality. Indeed, in our view, there cannot be a better case for the invocation of the overriding objective principle that this case. Courts should, in our view, lean more towards sustaining appeals rather than striking them out as far as is practicable and fair...”

7. Under the proviso to Section 79G, an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time. The court shall also exercise discretion if there will be no prejudice to the applicant. I have taken the liberty to read the record. The certificate of delay dated 14th March, 2013 indicates that the proceedings were ready for collection by 8th March, 2013. The appeal was to be filed by 6th March, 2013 that is a delay of twelve (12) days. Such a delay is in my view not inordinate.

It is also excusable considering that the delay has been satisfactorily explained and the respondents have not demonstrated that they will suffer any prejudice in the event the appellant proceeds with the appeal. In view of the foregoing I dismiss the application.

Costs shall be borne in the appeal.

Dated, Signed and Delivered in open court this 18th day of December, 2014.

J. K. SERGON

JUDGE

In the presence of:

.....
....for the Appellant

.....
for the Respondents

