



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL APPEAL NO.8 OF 2013

PATRICK JOHN OKOCH.....1ST APPELLANT

STEVE BIKO OKOTH2ND APPELLANT

VERSUS

MAUREEN AKOTH DELEWARESPONDENT

R U L I N G

1. The Respondent's Notice of Motion dated 6th March 2013 is an invitation to this Court to determine this singular issue; do the provisions of Order 50 Rule 4 of the Civil Procedure Rules apply the time stipulated in Section 79(G) of the Civil Procedure Act? That Notice of Motion seeks the following prayers:
 - a. This appeal be consolidated with BUSIA HCCA NOS.4, 5, and 7 all of 2013 for purposes of this application only.
 - b. The Memorandum of Appeal filed herein and in the said BUSIA HCCA NOS.4, 5 and 7 all of 2013 be and are hereby struck out and the appeals dismissed with costs to the Respondents.
 - c. Costs of this application be provided for.
2. The facts forming the backdrop of the application are not disputed. A judgment in Busia CMCC.No.470 of 2010 was delivered on 7th of December 2012. The Appellants being aggrieved by that decision, filed this appeal on 25th of January 2013. The Respondent takes the stand that the appeal was filed out of time without leave of Court. The Appellants, invoking the aid of Order 50 Rule 4 of the Civil Procedure Rules, are emphatic that the appeal was filed timeously. The provisions of Order 50 Rule 4 are as follows:-

“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. The time for filing appeals from Subordinate Courts in respect to civil suits is prescribed in

Section 79(G) of the Civil Procedure Act. This is what that Section provides:

“79.G. 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.”

4. The Civil Procedure Act is silent on how the time in Section 79(G) ought to be computed. Given that silence, one must resort to Section 57 of the provisions of The Interpretation and General Provisions Act.

“57. In computing time for the purposes of a written law, unless the contrary intention appears-

- a. **A period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;**
 - b. **If the last day of the period is Sunday or a public holiday or also official non-working days which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;**
 - c. **Where an act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;**
 - d. **Where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”**
5. It must be common cause that no subsidiary legislation shall be inconsistent with the provision of an Act (Section 31 (b) of the Interpretation and General Provisions Act.). If this Court were to agree with the Appellants Counsel that Order 50 Rule 4 is applicable to the provisions of Section 79 (G) then there would be conflict between the Rule and the express provisions of Section 57 of The Interpretation and General Provisions Act. The conflict would be that Section 57 does not exclude the period excluded by Order 50 Rule 4 in the computation of time. And, the Provisions of Order 50 Rule 4 being subsidiary legislation, would have to bow to the Provisions of the Act.
6. That said, I am unable to find that the Rule is in fact applicable to Section 79 (G). It helps to reproduce the Provisions of Order 50 Rule 4.

“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.”
(my emphasis).

- 7) As it is clear from the underlined portion to the rule the computation provided thereunder is only in respect to time which is prescribed or allowed under the Civil Procedure Rules or by an Order of the Court. It does not extend to time which prescribed or allowed by the Act itself. The Rules Committee in using those words must have been alive to the principle that no subsidiary legislation shall be inconsistent with the Provisions of an Act of Parliament. If my view needs any support then I find it in the decision of Musinga J.(as he then was) in Civil appeal No.198 of **2005 Andrew Nganga Ndungu -vs- Godfrey Karuri & Another [2006]eKLR.**

“The time for filing appeals is prescribed by Section 79G of the Civil Procedure Rules and therefore the provisions of Order ZLIX of the Civil Procedure Rules cannot be invoked in computation of time for purposes of filing an appeal.”

8) That being my view, the appeal was filed out of time as it ought to have been filed on or before 7th January 2013. Sadly, for the Appellant must suffer for his misapprehension of the Law. I allow the application dated 6th March 2013 in its entirety. Costs to the Appellant.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 23RD DAY OF JULY 2013.

IN THE PRESENCE OF:

KADENYICOURT CLERK

.....FOR APPELLANTS

.....FOR RESPONDENT

F. TUIYOTT

J U D G E