

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

CIVIL APPEAL 8 OF 2007

1. ST. MARY'S ACADEMY LTD

2. EPHANTUS MUGO MBURIAAPPELLANTS

V E R S U S

ANN NYAMBURA KAREGARESPONDENT

R U L I N G

The Respondent in this appeal seeks by notice of motion dated 7th February, 2007 an order to strike out the appeal upon the ground that the same was lodged out of time without leave of the court. The application is brought under section 3A of the Civil Procedure Act (the Act).

It is common ground that the decree appealed against was passed on 4th December 2006 and that the memorandum of appeal was filed on 10th January, 2007. The Appellant contends that the appeal was lodged well-within time because under Order 49, rule 3A of the Civil Procedure Rules (the Rules), except where otherwise directed by a judge for reasons to be recorded in writing the period between the 21st day of December in any year and the 6th day of January in the year next following, both days included, shall be omitted from any computation of time (whether under the Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act. The rule does not apply to any application in respect of a temporary injunction. Learned counsel for the Appellant relied on the Court of Appeal case of **SULEIMAN –vs- KARASHA** (1989) Kenya Law Reports, page In holdings thereof Gachuhi, JA restated the aforesaid rule.

The issue that arises in this application is whether rule 3A aforesaid of Order 49 can affect the period of time statutorily limited by section 79G of the Act. That section provides that every appeal from a subordinate court to the High Court shall be filed within a period of 30 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. Under the proviso to that section, 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.

By its very wording, operation of rule 3A of Order 49 is limited to computation of time under the Rules or any order of the court. It cannot at all affect the computation of time limited by the express statutory provision in section 79G of the Act. Gachuhi, JA did not, in the aforesaid decision of a single Judge of Appeal, decide that rule 3A of Order 49 can affect the period of time limited by section 79G aforesaid. That issue was not before him. What was before that court, *inter alia*, was an application to extend time to file notice of appeal under the Court of Appeal Rules against an order of the High Court.

In the present case, the decree appealed against having been passed on 4th December, 2006, the appeal should have been lodged within 30 days as provided under section 79G of the Act, that is on or before 3rd January, 2007. It was lodged out of time on 10th January, 2007. No certificate of delay duly issued by the lower court has been placed before this court. There is also not before the court any application for admission of the appeal out of time. In any event, the Appellants have not satisfied the court that they had good and sufficient cause for not filing the appeal in time.

In the event I must allow this application. The appeal herein is hereby struck out with costs to the Respondent for having been filed out of time without leave of the court. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 27th DAY OF FEBRUARY, 2008