

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

Civil Case 610 of 2006

THE LEGAL REPRESENTATIVES OF

ANNA MUTHIKE MWASYA & 3 OTHERS.....PLAINTIFFS

VERSUS

MWANGI MUHWANGA.....1ST RESPONDENT

SOCFINAF COMPANY LIMITED.....2ND RESPONDENT

RULING

The Applicants who are the 1st and 2nd Respondents to the appeal have come to this court by way of Notice of Motion dated 23rd day of March 2007 and filed on 28th March 2007 brought under Section 79 G of the Civil Procedure Act, Order 6 rule 13(1) (c) and (d) and order 50 rule 1 of the Civil Procedure Rules seeking an order that the memorandum of appeal dated 5th September, 2006 and filed in Court on 7th September, 2006 be struck out and the appellants to pay the applicant/respondent costs of this application.

The grounds in support are that the grieving orders giving rise to this appeal were made on 7.6.2006 where as the appeal was filed on 7th September, 2006, a period of 90 days which is in excess of 30 days allowed by Section 79 G of the Civil Procedure Act. Further that the appellant had an option to file the memo of appeal before waiting for the proceedings. But after choosing to await for the proceedings and obtaining the certificate of delay from the court, he was obligated to seek leave to file the appeal out of time. In the absence of that the appeal filed is incompetent and it should be struck out.

In response Counsel for the appellant submitted that the appeal is proper and within the ambit of Section 79 G because the time taken to compile the record is to be excluded. That the proceedings were paid for and taken possession of on 28.8.2006 and the appeal was filed on 7.9.2006 within the 30 days allowed by the said section. They have a certificate of delay to support their case. Further that issues raised by the applicant are to be gone into at the directions stage and on that ground the application is premature and it should be disallowed on that account.

On the courts assessment of the facts herein it is clear that Section 79 G of the Civil Procedure Act is central to this application. The applicant has taken refuge under it in wanting to fault the appeal and have it struck out for the reasons given. The Respondent on the other hand has maintained that they are within the said Section. Section 79 G of the Civil Procedure Act states “*Every appeal from a subordinate court to the High Court shall be 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”

The reading of this Section makes it mandatory for an appeal from the subordinate court to the High Court to be filed within 30 days from the date the grieving order is made. However where the appeal is not filed within the 30 days time room exists for it to be filed out of time. The days between the date of

delivery of the order or judgment and the date when it was ready to be filed have to be excluded. The exclusion of those days is not automatic. A party cannot avail himself/herself or itself of the said exclusion as of right. The provision provides guidance as to how and by whom the exclusion of days is to be made. This is to be made by no other than a "court." In this case it will be the court appealed to. The affected applicant is to go before this court and show cause why time for filing of the appeal should be extended for him. He has to show that he has good reasons for failing to file the appeal in time. After showing the good cause is when the court to which the good cause has been shown does the exclusion of days in between and then allow the affected party to file the appeal out of time.

On the basis of the above the applicant is right. The Respondent has a good reason or cause as to why they did not file the appeal in time. But he has not rightfully availed himself benefit of that good cause as he has not moved the court as required by the provision. The application is not premature it is well founded.

The applicant had two options had he moved before the applicant moved. Firstly, to seek leave to appeal out of time before filing of the appeal. Secondly, upon realizing that the appeal has been filed out of time file an application in this very appeal file and seek validation orders. That has been overtaken by events. He will have to be forced to go back on to the drawing board and come up with a miscellaneous application for leave to appeal out of time.

Mention was made to the effect that these issues should await the time of taking of directions. Time of taking directions arises where the appeal is competent and what remains is the taking of procedural steps to perfect it. This does not arise like in the current case where the appeal is incompetent.

For the reasons given. The application dated 23.3.2007 and filed on 28.3.2007 be and is hereby allowed as prayed with costs.

The appeal is struck out as being incompetent with leave to the applicant to file separate proceedings to seek leave to file appeal out of time if he so wishes.

DATED, READ AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY 2007.

R. NAMBUYE

JUDGE