



**REPUBLIC OF KENYA**

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

**Civil Appeal 736A of 2006**

**DOLPIN COACHES LTD .....APPELLANT**

**V E R S U S**

**1. BENSON KAMAU MIGWI (SUING AS THE LEGAL REPRESENTATIVE**

**OF THE ESTATE OF JUDY WAIRIMU KAMAU – DECEASED)**

**2. JOHN KURIA KINUTHIA .....RESPONDENTS**

**R U L I N G**

This is an application (by notice of motion dated 24<sup>th</sup> November, 2006) by the 1<sup>st</sup> Respondent seeking two main orders:-

1. That the memorandum of appeal herein be struck out for having been filed out of time.
2. That the decretal sum held in the joint names of the advocates for the parties in A/C No. 001D411062920001 at **I & M Bank Ltd**, Kenyatta Avenue, Nairobi be released to the 1<sup>st</sup> Respondent together with interest accrued thereon.

The deposit of the funds was made pursuant to an order of the lower court of 19<sup>th</sup> September, 2006 as a condition for the grant of stay of execution of decree made pending intended appeal.

The application is stated to be brought under sections 3A and 79G of the Civil Procedure Act, Cap. 21 (the Act), and also under Order 6, rule 13 and Order 50, rule 1 of the Civil Procedure Rules (the Rules). It is supported by the 1<sup>st</sup> Respondent's affidavit sworn on 24<sup>th</sup> November 2006 annexed thereto.

The Appellant has opposed the application as set out in the replying affidavit sworn by its Financial and Administrative Controller on 8<sup>th</sup> and filed on 9<sup>th</sup> February, 2007. The grounds of opposition emerging therefrom are:-

1. That the application is bad in law, incurably defective and an abuse of the process of the court.
2. That the lower court granted an extension of time to lodge the appeal; the appeal was thus lodged within time.
3. That the reliefs sought in the application are not available to the 1<sup>st</sup> Respondent.

There is a further replying affidavit filed on 12<sup>th</sup> March, 2007 sworn by the same Financial and Administrative Controller. It was filed with the leave of the court. To it is annexed a copy of the hand-written ruling of the lower court of 19<sup>th</sup> September, 2006.

I have considered the submissions of the learned counsels appearing, including the case cited. The present application simply raises the issue whether or not the court has jurisdiction to hear the appeal. The 1<sup>st</sup> Respondent's case is that there is no proper appeal before the court that the court can hear as the appeal was lodged out of time without leave; the court therefore has no jurisdiction to hear it.

Ordinarily, objection to jurisdiction of the appellate court is taken before the judge gives directions for hearing of the appeal under rule 8B of Order 41 of the Rules. Such objection will normally be raised orally. But I see nothing wrong with the objection being raised by way of an application to strike out the appeal under section 3A of the Act. However, such application may not be made under Order 6, rule 13 of the Rules. That rule has no application to appeals; it applies to pleadings (plaint and defence) which may be struck out or amended on the ground that they disclose no reasonable cause of action or defence, or that they are scandalous, frivolous or vexatious, or that they may prejudice, embarrass or delay the fair trial of the action, or that they are otherwise an abuse of the process of the court. I therefore hold that, in as much as the application is brought under section 3A of the Act, it is properly before the court.

The right of appeal from a subordinate court to the High Court is conferred by section 65 of the Act. The time for filing such appeal is prescribed by section 79G of the Act which provides:-

**“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.”**

The decree appealed against herein was passed on 4<sup>th</sup> July, 2006. So, the appeal ought to have been lodged on before 3<sup>rd</sup> August, 2006, which was a working day. The appeal herein was lodged on 27<sup>th</sup> October, 2006, way out of time. There is not exhibited any certificate by the lower court to the effect that any time was requisite for the preparation and delivery to the Appellant of a copy of the decree or order. Had there been such certificate, such time would have been excluded from the period of thirty days within which the appeal had otherwise to be lodged. There is also not before the court any application for an order to admit the appeal out of time for good and sufficient cause; at any rate no such good and sufficient cause has been demonstrated.

It was argued for the Appellant that the lower court granted the Appellant an extension of time to lodge the appeal. Indeed the Appellant applied before the lower court by chamber summons dated 14<sup>th</sup> August, 2006 for such an extension of time, *inter alia*. A copy of the hand-written ruling of the lower court is annexed to the further replying affidavit. I have endeavoured to read the same. The lower court granted only stay of execution of decree upon the condition that the Appellant do deposit within 30 days the decretal sum in an interest-earning account in the joint names of the advocates for the parties. The lower court did not grant any extension of time to file the appeal, though it did not dismiss that prayer in terms. It could not have granted such extension of time for the simple reason that it had no jurisdiction to do so. The wording of the proviso to section 79G of the Act (under which an appeal may be admitted out of time) is such that it is the appellate court that can admit the appeal out of time, not the court appealed against. How could the subordinate court admit out of time an appeal that is not before it?

I am satisfied that the appeal herein was lodged out of time without leave of this court. There is no proper appeal before the court; the court has no jurisdiction to hear it. The same must therefore be struck out. It is hereby struck out with costs (including costs of the application) to the 1<sup>st</sup> Respondent. That disposes of the first prayer of the application. Regarding the second prayer, as the order for deposit of the

decretal sum was made by the lower court, and its original record is not before this court, I cannot grant the order. Let an appropriate application be made before the lower court. Those will be the orders of the court.

**DATED AT NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER, 2007**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 14<sup>TH</sup> DECEMBER OCTOBER, 2007**