



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Appeal 269 A of 2005**

MODERN DISTRIBUTORS LTD

T/A KEROKA EXECUTIVE BUS SERVICE..... PLAINTIFF

VERSUS

MARY WANJIRU GICHUHI..... 1ST RESPONDENT

LIMURU MILK PROCESSORS LTD.....2ND RESPONDENT

R U L I N G

On 12/7/05, the Applicant/Respondent moved to this court, by way of a Notice of Motion, under Order 6 rule 13, Order 50 rule 1 of the Civil Procedure Rules, and Section 3A and 79(g) of Cap. 21, Laws of Kenya, seeking orders that the Memorandum of Appeal herein be struck out as having been filed out of time; then costs of this application and of the appeal.

The application is supported by an affidavit of the Applicant/1st Respondent, filed on 12/7/05, and on the grounds that: the lower court judgment was delivered on 25/1/05 while the appeal herein was filed on 27/4/05 and the Memorandum of Appeal was thus clearly filed out of time and without leave. Further, the appeal is vexatious and an abuse of the court process and purely meant to deny the applicant the fruits of her lawful judgment.

I have carefully considered both the pleadings and the submissions by the Learned Counsels. In the course of hearing this application, I had to adjourn the proceedings and call for the file from the lower court, to verify when the judgment, at that level, was actually delivered because counsels were not sure whether the Judgment was on 25/1/05 or 19/4/05. The importance of this is when the 30 days within which the appeal had to be filed, as per the provisions of Section 79G of the Civil Procedure Act, Cap. 21, begin to run.

Upon perusal of the lower court's file, the position is that the judgment appealed against was delivered on 25/1/05, and not on the 19/4/05, as claimed by learned counsel for the Appellant/Respondent. What happened on the 19/4/05, was delivery of the judgment on a Review application whose purpose was to include the award for medical expenses which had advertedly been omitted in the computation and judgment, even though they had been prayed for.

In brief, the appeal should, by law, have been filed within 30 days from 25/1/05, not from 19/4/05, with respect to any issue or issues touching on the liability and the award of general damages by the lower court. By the 27/4/05, the appeal against the lower courts findings and judgment on the liability and general damages, was time barred.

The only way any appeal against that judgment, on those issues, could be lodged was with leave of the court, to file the appeal out of time. That was neither sought, nor obtained by the appellant herein. This

would seem to have been a misconception based on the Review application whose judgment/ruling was delivered on 19/4/05. But as held earlier on, that Review was confined to the special damages on medical expenses and future medical expenses.

Turning to the Memorandum of Appeal, filed on 27/4/05, I have perused through the six grounds raised therein, and I agree, in light of the above findings and conclusions, with the learned counsel for the Respondent/Applicant that only ground No. 4 can stand the test. The other five grounds, 1, 2, 3, 5, and 6 were time barred, by virtue of the provisions of Section 79 G of Cap. 21, Laws of Kenya.

Accordingly I strike those five grounds out in terms of the provisions of Order 6 rule 13(1) of the Civil Procedure Rules. Those grounds of appeal are incompetent and frivolous and or vexatious in that they are based on the judgment of 25/1/05, for which a challenge on those grounds should have been lodged within 30 days from the date of the lower court's judgment or with the leave of the court. That was not done and the appeal on those grounds is time barred.

If the appellant so wishes, it can amend the Memorandum of the appeal to cover only ground No. 4 of its present appeal.

All in all therefore, I grant the following orders:

1. Grant the application to the extent of striking out grounds of appeal Nos. 1,2,3,5, and 6 of the Memorandum of Appeal filed, on 27/4/05.
2. Order that the appellant/respondent do pay costs of this application to the applicant herein.

DATED and delivered in Nairobi, this 16th Day of November, 2005.

O.K. MUTUNGI

JUDGE