



REPUBLIC OF KENYA



KENYA LAW
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**Auto Industries Limited v Pengo (Civil Appeal E042 of 2023)
[2025] KEHC 3441 (KLR) (10 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E042 OF 2023
TA ODERA, J
MARCH 10, 2025**

BETWEEN

AUTO INDUSTRIES LIMITED APPELLANT

AND

ESINA MORAA PENGO RESPONDENT

RULING

1. The respondent filed the notice of motion dated 24.5.24 seeking:
 - a. That the Honourable Court be pleased to strike out the Appeal on the grounds that it contravenes section 79G of the Civil Act Cap 21 being filed out of time without leave of the court.
 - b. That the Honourable Court be pleased to strike out the Appeal on the grounds that it has no chances of success, hence an abuse of the process of the court.
 - c. The appeal is out to delay justice.
 - d. That costs of this application be provided for.
2. The application is based on the grounds that;
 - i. The applicant was granted leave to file appeal on 29.3.2023 Vide High Court Misc Civil Application No. E059 of 2023.
 - ii. The appeal was filed on 10.5.2023 after the stipulated period of 30 days as per *Civil Procedure Act*.
 - iii. The applicant has never sought leave to validate the instant Appeal as properly filed.



- iv. The respondent is likely to have a lot of prejudice as the instant appeal shall cause the respondent to incur costs and wastage of the precious time of the court.
 - v. The appellant's appeal is meant to delay justice and enjoyment of the first of the judgment in SPMCC no. 259 of 2019.
3. The Application is based on the annexed affidavit of Elijah Okemwa advocate who deponed that leave was granted to the appellant to file the appeal out of time on 29.3.2023 as per the order EO -10 issued in Kisii High Court Misc. Application No. E059 of 2023. Also, that the memorandum of appeal was not served within 7 days as provided for under order 42 rule 12 of the Civil Procedure Rules.
 4. The application is fatally defective and incurable under Article 159 of *the Constitution*. Further that the applicant is not interested in prosecuting the appeal.
 5. The respondent also filed a notice of preliminary objection dated 1.2.24 on the grounds that;
 - a. The appeal herein was filed out of time and without leave of the court.
 - b. The appeal is an abuse of the proceed of the court is mischievous and contemptuous.
 - c. The appeal has no chances of success.
 - d. The memorandum of appeal was not served as per order 42 rule 12 of the Civil Procedure Rules.
 - e. No application has been filed to validate the appeal.
 - f. The appeal was filed in bad faith to delay justice in the matter.
 6. The respondent filed an affidavit by Salman Cocker who told the court that the application for leave to file the appeal out of time was filed on 23.3.23 and was allowed by consent and that the issue raised by the applicant is an afterthought having consented to the extension of time.

Determination

7. I have carefully considered the application and the preliminary objection the reply and the submissions. The issues arising for determination are;
 - i. Whether the appeal was filed outside time upon leave being granted to the appellant to file the appeal out of time.
 - ii. Whether service of the memorandum of appeal herein offends Order 42 rule 12 of the CPR.
 - iii. Whether court ought to strike out the appeal.

Whether the appeal was filed outside time upon leave being granted to the appellant to file the appeal out of time

8. The respondent /applicant averred that the appellant did not file the appeal within time upon obtaining the order to file the same out of time. The appellant alleged that the leave was granted by consent and thus the objection is an afterthought and that Article 159 of *the Constitution* cures procedural technicalities. Section 79G of the *Civil procedure Act* provides that; -

“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.”

Section 95 of the *Civil Procedure Act* provides that;

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired”.

9. Section 58. of the *Interpretation and General provisions Act* provides that “Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises.”

The applicant having been granted leave to appeal out of time on 29.3.23 and proceeded to file the same on 10.5.23 which was about 41 days later. Considering that the appellant was late in filing the appeal in the first instance, having been granted leave he ought to have filed the same within a reasonable time. Where no time line has been set in an order to do what ought to have been done, courts in Kenya have interpreted reasonable time to be 14 days from the date of the order. The appeal was filed 41 days after the leave was granted to file it out of time was unreasonable and showed lack of seriousness on the part of the appellant. No attempt has been made to explain the delay in filing the appeal out of time. Appellant ought to have sought leave to have the appeal be deemed as properly filed under the proviso to Section 79B of CPA but has not done so.

10. On whether the appeal was not served within time, the respondent/ applicant alleged that the appellant did not comply with Order 42 Rule 12 of the Civil Procedure Rules. The same provides that”.

Where the Judge admits the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.” The appeal herein is yet to be admitted and thus rule 12 does not apply to it .

11. On whether the appeal ought to be struck out, the appeal was filed out of time and in non-compliance with the orders of the court. Court orders are not issued in vain. The appellant urged this court to apply Article 159 of *the Constitution* to salvage the matter. Article 159 enjoins the courts not to decide cases on technicalities of procedure but the substance. In *Raila Odinga & 5 Others v IEBC & 3 Others* in the Supreme Court Petition No. 5 of 2013 the Court stated:

“Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of *the Constitution* which obliges a Court of law to administer justice without undue regard to procedural technicalities. The article simply means that a court of law should not pay attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.”

12. Kiage, JA in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR states:

“... I am not in the least persuaded that article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an



anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

13. The Supreme Court in the case of *Moses Mwigigi & 14 Others v IEBC 75 Others* [2016] eKLR where on procedures stated as follows: -

“This court has on a number of occasions remarked upon the importance of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with substance of the case that it benefits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent.”

14. The Court of Appeal was of similar view in the case *Kakuta Maina Hamisi v Peris Pesi Tobiko & 2 Others* [2013] eKLR where it observed as follows: -

“...the right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of *the Constitution*. We do not consider Article 159 (2) (d) of *the Constitution* to be a panacea, nay, a general white-wash that cures and mends all ills, misdeeds and default of litigation”.

15. The court already appreciated and applied Article 159 (2) (d) of *the Constitution* in allowing the application for leave to file the appeal out of time. The said Article is not a solution to non-compliance with clear court orders.

Conclusion

16. The application dated 24.5.24 is merited and I proceed to allow it. The appeal is dismissed with costs.

T.A ODERA

JUDGE

10.3.25

Delivered Virtually Via Teams Platform in the presence of:

Miss Muriuki hold brief for Mr. Karanja for appellant

N/A for respondent

Court Assistant: Oigo

