



REPUBLIC OF KENYA



KENYA LAW
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**Wainaina v Muendo & another (Civil Appeal E937 of 2022)
[2025] KEHC 10935 (KLR) (Civ) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10935 (KLR)

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

CIVIL

CIVIL APPEAL E937 OF 2022

JM OMIDO, J

JULY 17, 2025

BETWEEN

GEORGE MUHORO WAINAINA APPELLANT

AND

DR JUSTIN MUENDO 1ST RESPONDENT

MOLARS DENTAL PRACTICE LIMITED 2ND RESPONDENT

*(Being an appeal from the Judgement and Decree of Hon. J.W. Munene,
Resident Magistrate/Adjudicator delivered on the 15th September,
2022 in Milimani Small Claims Court Case No. E385 of 2022)*

JUDGMENT

1. The Appellant, George Muhoro Wainaina brought this appeal, being aggrieved by the judgement of Hon. J.W. Munene, Resident Magistrate/Adjudicator, delivered on 15th September, 2022 in Milimani Small Claims Court No. E385 of 2022.
2. The Appellant lodged the memorandum of appeal dated 10th November 2022, on 14th November, 2022.
3. The Respondent challenged the validity of the appeal and to that end filed a two-pronged notice of preliminary objection dated 22nd December, 2023 contending that:
 - a. There is no competent appeal before the court for determination the Memorandum of Appeal dated 10th November, 2022 having been filed outside the statutory 30 days of reading of the judgement.



- b. That at the time of filing the Memorandum of Appeal dated 10th November, 2022 the firm of Soweto & Company Advocates was not properly/lawfully on record for the alleged Appellant George Muhoro Wainaina.
4. The Appellant's Advocate Ms. Julie Soweto Aulo, resisted the preliminary objection by filing a replying affidavit which she swore on 9th July, 2024.
 5. The preliminary objection was canvassed by way of written submissions.
 6. With regard to the first point taken in the preliminary objection, the Respondents state in their submissions that the judgement from which the instant appeal emanates was delivered on 15th September, 2022 and that under Section 79G of the *Civil Procedure Act*, the Appellant had 30 days from the date of the judgement within which to file the appeal, excluding such period as the lower court may certify as having been requisite for the preparation and delivery of the decree/order appealed from.
 7. It is instructive from the Judiciary CTS system that the memorandum of appeal was filed on 14th November, 2022. The position the Respondents then take is that an appeal that is filed after the expiry of the 30 days that the above provision of statute provides is invalid, unless the Appellant first obtains leave of the court to file the same out of time; or files a certificate of delay that accounts for the period of delay. In the instant case, the Respondents submit that the time for filing the appeal expired on 15th October, 2022.
 8. The Respondents urge that there is no valid appeal, in the circumstances as there was neither an application filed prior to the lodging of the memorandum of appeal seeking leave to appeal out of time nor one presented after the filing of the memorandum of appeal, for the appeal to be admitted out of time.
 9. To the second point raised in the preliminary objection, the Respondents proffer the position that the law firm of Soweto & Co. Advocates ("Soweto") was not properly on record for the Appellants at the time the said firm filed the present appeal, for the reason that the said firm did not obtain leave of the court, or the consent of the law firm of Wanjiru Kinyanjui Advocates LLP ("Wanjiru"), which was previously on record for the Appellant (the Claimant in the Small Claims Court) in the matter before the trial court, as is mandatorily required under Order 9 Rule 9 of the Civil Procedure Rules.
 10. The Respondents thus submit that the memorandum of appeal, which was filed before the firm of Soweto properly came on record for the Appellant is incompetent.
 11. On the basis of the foregoing grounds, the Respondents seeks that the instant appeal be struck out with costs.
 12. Ms. Soweto explained in her affidavit that her firm formally took over the matter from the previous Advocates on 10th of November, 2022 and to that end filed a notice of change of advocates.
 13. Counsel for the Appellant further stated in her affidavit that although the judgement in the trial court, subject to which the instant appeal is preferred, was rendered orally, virtually on 15th November, 2022, it was not until 14th October, 2022 that the copy of the judgement was supplied to the Appellant, following numerous follow-ups by the Appellant's erstwhile Advocates. She explained that the memorandum of appeal was filed on 14th October, 2022, within 30 days of receipt of a copy of the judgement and that the appeal was therefore presented within time.
 14. Ms. Soweto further stated that it was not possible for the Appellant to lodge his appeal before the Appellant was supplied with a copy of the judgement and decree, noting that the latter emanated from



the former. She added that the decree was extracted on 17th January, 2023 after numerous requests had been made.

15. Counsel for the Appellant deposed that the appeal was technically filed within a period of thirty days from which the judgement was actually delivered to the Appellant and that the court ought to admit it for good and sufficient cause if found to have been filed out of time, as the delay (if any) was not occasioned by the Appellant.
16. I have considered the preliminary objection, the replying affidavit and the submissions by the two sides. The issues that abound for this court to determine are as follows:
 1. Whether the notice of preliminary objection raises pure points of law that if allowed can dispose of the appeal.
 2. Whether the Appellant's appeal was filed within the time prescribed by the law.
 3. Whether the law firm of Soweto was properly on record for and on behalf of the Appellant as at the time the appeal was lodged.
 4. Subject to 1, 2 and 3 above, whether the appeal herein is competent.
 5. A determination as to costs.
17. I will proceed to address the above issues seriatim.
18. The first point for me to determine is whether the notice of preliminary objection raises pure points of law that if allowed, can dispose of the appeal.
19. What constitutes a preliminary objection was addressed in the celebrated case of Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited [1969] EA 696 in which Sir Newbold observed as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
20. In the same case, Law JA held as follows:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.
21. Thus then, for a preliminary objection to succeed, the following tests ought to be satisfied;
 - a. It should raise a pure point of law.
 - b. It is argued on the assumption that all the facts pleaded by the other side are correct.
 - c. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
 - d. A valid preliminary objection should, if successful, dispose of the suit or application.



22. The Respondents have raised an objection claiming that the Appellant filed this appeal out of time and without leave of the court and further that the Appellant's Advocates lacked locus at the time of filing the instant appeal as they were not properly on record.
23. On perusal of the record of the lower court, the record of appeal and the supplementary record of appeal, I note that the appeal is filed against the judgement that was delivered on 15th September, 2022 by Hon. J.W. Munene. It is not disputed that the copy of the judgement and the extracted decree were made available to the Appellant on 14th October, 2022 and 17th January, 2023 respectively. It is also instructive from the CTS, which reflects the record of this court, that the Appellant lodged his memorandum of appeal dated 10th November, 2022 on 14th November, 2022.
24. The record of the trial court and the instant record also indicate that the firm of Soweto filed a consent executed by the said firm and that of Wanjiru, by virtue of which the former took over the conduct of the matter from the latter for and on behalf of the Appellant.
25. The foregoing being the position, it is my persuasion that all the matters relating to the preliminary objection are ascertainable from the record and the court does not require to look further into evidentiary material to determine or ascertain the same. Notable too is the fact that should this court reach the determination, on the basis of the arguments presented by the parties, that there is no competent appeal (as urged by the Respondents), then the preliminary objection will have the effect of disposing of the instant appeal.
26. To that end then, I am persuaded that the preliminary objection as presented by the Respondents satisfies the test in *Mukisa Biscuits*.
27. I will now move to address the second point, which is whether the Appellant's appeal was filed within the time prescribed by the law.
28. The provision of law that governs the filing of appeals from the subordinate courts to the High Court is Section 79G of the *Civil Procedure Act*. Let us read the said provision:

79G. 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.

(Underlined emphasis).
29. From the above provision, it is clear that all appeals from the subordinate court to the High Court must be filed within 30 days from date of the decree or order appealed against, but in computing the 30 days, the time the lower court certifies as having been requisite for preparation of the impugned decree or order and delivery to the Appellant should be excluded. I will add that, although not specifically provided under Section 79G of the *Civil Procedure Act*, the time that is certified as having been taken for the copy of the judgement to be available to the parties should also be excluded in the computation of such period. I say so because the practice that we have embraced is that draft decrees are prepared by the parties and submitted to the court for approval and endorsement. It then follows that without a copy of the judgement, a party may not be able to prepare a draft decree for consideration for endorsement.
30. What then I understand Section 79G to say is that the Appellant, in order to set on foot a competent appeal, must file his appeal within thirty days from the date of the judgement/ruling (or decree/order),



or in the event the same is filed after 30 days, obtain leave of the court to file the same out of time or account for the delay by obtaining a certificate of delay from the court.

31. Judgement in the matter before the lower court was delivered on 15th September 2022 and the Appellant, in an ideal situation, should have filed his appeal on or before 15th October 2022. The appellant did not do so. There is also no dispute that the Appellant neither obtained leave of the court to lodge the same out of time nor a certificate of delay accounting for the time of delay.
32. By bringing his appeal on the 10th November, 2022, the Appellant delayed in filing the appeal by twenty-six (26) days. The Appellant faults the trial court in delaying to supply him with a copy of the judgement after the delivery of the judgement and states that he required the same in order to be able to extract a decree. The Appellant has however not filed within the record of appeal the certificate of delay prepared by the trial court that would then account for the period of delay. Section 79G of the Act requires that the trial court certifies that there was delay which period of delay was requisite for the preparation and delivery to the Appellant of a copy of the judgment, ruling, decree or order, in which event the period of the delay is excluded in computing time.
33. There being no certificate of delay filed within the appeal, the delay remains unexplained. This court cannot in the circumstances exclude the period alleged by the Appellant as having been taken for the him to be supplied with the judgement and decree. The provisions of Section 79G of the Act are mandatory and the Appellant was bound to strictly comply with the time lines. I therefore reach the finding that the instant appeal was filed out of time.
34. But then, the Appellant proffers the position that should this court be of the view that the memorandum of appeal was lodged out of time, the court can exercise its discretion and admit the appeal out of time as there is good and sufficient cause demonstrated by the Appellant.
35. There is no doubt that, under Section 79G of the *Civil Procedure Act*, the court has discretion to enlarge the time within which to file the appeal, where the party seeking for such enlargement of time satisfies the court that he had good and sufficient cause for not filing the appeal in time. Such discretion must be exercised judiciously.
36. It is however my view that the issue of extension is not for consideration before this court as no application has been made by the Appellant specifically seeking the leave of the court to extend the time within which to file the appeal, or for the appeal to be deemed as having been filed within time. In the absence of an application for extension of time or for the filed appeal to be deemed as having properly been lodged within time, this Court cannot grant an order for extension of the period beyond the 30 days provided by statute.
37. I will now turn to the to the third point, which is whether the law firm of Soweto was properly on record for and on behalf of the Appellant as at the time the appeal was lodged.
38. Order 9 Rule 9 and 10 of the Civil Procedure Rules stipulate as follows;
 - 9 (9). When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
 - (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.



10. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.
39. The appeal herein was filed on 14th November, 2022. It is instructive from the supplementary record of appeal that the firm of Soweto obtained the consent of the firm of Wanjiru to come on record for the Appellant. The same is dated 10th November, 2022 and was filed before the trial court. The consent forms part of the supplementary record of appeal.
40. That being the position, the firm of Soweto properly came on record in the place of the firm of Wanjiru, pursuant to Order 9 Rule 9(b) of the Civil Procedure Rules which provides the option that an advocate can come on record for a party after the delivery of judgement upon a consent being filed between the outgoing advocate and the incoming advocate.
41. The fourth issue for me to determine is whether the appeal herein is competent. The answer to this issue lies in the determination I have made above that the appeal herein was filed out of time. It follows then that there is no competent appeal capable of being determined.
42. The upshot is then that the appeal herein is struck out for being incompetent.
43. With regard to the last issue, which is a determination as to costs, Section 27 of the *Civil Procedure Act* dictates that costs ought to follow the event. Accordingly, the Appellant shall bear the Respondents' costs of this appeal.
44. This file is hereby closed.
45. Orders accordingly.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 17TH DAY OF JULY, 2025.

JOE M. OMIDO

JUDGE

For Appellant: Ms. Soweto.

For Respondent: No Appearance.

Court Assistants: Mr. Ngoge & Mr. Juma.

