



Amadi v Ogwasi (Civil Appeal 94 of 2021) [2023] KEHC 22175 (KLR) (14 July 2023) (Ruling)

Neutral citation: [2023] KEHC 22175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

CIVIL APPEAL 94 OF 2021

F WANGARI, J

JULY 14, 2023

BETWEEN

PHINEAS OMONDI AMADI APPELLANT

AND

CHARLES OWINO ODEYO OGWASI RESPONDENT

RULING

1. The Appellant filed this appeal on July 23, 2021. The appeal is against a decision given on May 6, 2021 by Hon. Maureen Nabibya in Mombasa CMCC No 2086 of 2019. These were some 87 days after entry of judgment. The dates are indicated in the memorandum of appeal.
2. The Respondent raised a Preliminary Objection to the effect that the Memorandum of Appeal dated July 21, 2021, was filed out of time contrary to Section 79 G of the *Civil Procedure Act*, hence an abuse of the court process. It was directed that the Preliminary Objection be disposed of by way of written submissions. I have considered the rival submissions filed and the authorities relied on.
3. I shall ignore the time limit as the same is not a pure point of law. On abuse of the court process is dealt with under Order 2 Rules 15, *Civil Procedure Rules* which provides that;

‘At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- a. it discloses no reasonable cause of action or defence in law; or
- b. it is scandalous, frivolous or vexatious; or
- c. it may prejudice, embarrass or delay the fair trial of the action; or
- d. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.



- (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
- (3) So far as applicable this rule shall apply to an originating summons and a petition.’

4. I was surprised when parties filed submissions. Matters of this nature, when a party is stating that he was not aware of a decision, then the only thing they can do is not to oppose but file an application under order 50 rules for extension of time.

Analysis

5. A preliminary objection is in the nature of what used to be a demurrer. It must be a pure point of law pleaded or arising from the pleadings. In *Mukisa Biscuits Manufacturing Co. Ltd -V- West End Distributors Limited* (1969) Ea. 696 in which Sir Charles Newbold P 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 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.”

6. In this case the Judgment was delivered on May 6, 2021. The appeal was filed on July 23, 2021. The appeal is clearly filed out of time. Section 79 G of the [Civil Procedure Act](#) provides as follows;

‘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.’

7. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in [Thuita Mwangi V Kenya Airways Ltd](#) [2003] eKLR. They include the following: -

- i. The period of delay;
- ii. The reason for the delay;
- iii. The arguability of the appeal;
- iv. The degree of prejudice that will be suffered by the Respondent if the extension is granted;
- v. The importance of compliance with time limits to the particular litigation or issue;
- vi. The effect if any on the administration of justice or public interest if any involved.

8. The Appellants submitted that the judgment was to be delivered on notice, and the court proceedings bears him witness. The judgment was eventually delivered but in the absence of the parties. The Applicants became aware of the delivery of judgment on 16/7/2021. The Respondent admits that he



informed the Appellant of the entry of judgment through a Notice of Judgment dated June 29, 2023. By that time the Applicant knew time had run out.

9. In the exercise of my inherent jurisdiction and in view of the circumstance of the case. In any event the court has not admitted or rejected the appeal before filing the Preliminary Objection. Given the clear admission by the Respondent that the Appellant was informed of the delivery of the judgement late and filed this appeal without delay, I find no prejudice will be suffered by the Respondent if extension of filing of appeal is granted.
10. On the issue of costs, it is trite that the same follows the event. That is the import of Section 27 of the Civil Procedure Act. However, the court can exercise its discretion as to award of costs, I order that each party shall bear its costs.
11. Following the foregone discourse, the upshot is that the following orders do hereby issue;
 - a. The appeal filed on July 21, 2021 is deemed as properly filed and proceed to admit the same for hearing. The same shall be listed for direction immediately after this ruling.
 - b. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF JULY, 2023.

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F. WANGARI

JUDGE

In the presence of;

Wanyama Advocate for the Appellant

Kiboss Advocate for the Respondent

Abdullahi, Court Assistant

