



REPUBLIC OF KENYA



KENYA LAW
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**Mwakabwana & another v Mwakireti (Civil Appeal 155 of 2021)
[2023] KEHC 22215 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 22215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 155 OF 2021**

F WANGARI, J

JULY 7, 2023

BETWEEN

SWALEH RASHID MWAKABWANA 1ST APPELLANT

HAMISI KASALA 2ND APPELLANT

AND

SELINA MWAKIRETI RESPONDENT

*(Being an appeal from the ruling of Hon. D. Mochache SPM
delivered on 14/3/2018 in Mombasa SRMC No. 642 of 2011)*

JUDGMENT

1. This is an appeal from the Judgment and decree of the Learned Senior Principal Magistrate (as she then was) Hon D Mochache in Mombasa SRMC No 642 of 2018 given on March 14, 2018.
2. The appellant set out 11 grounds of appeal on both against the ruling delivered by the Court where the learned Magistrate departed from the findings in her judgment delivered on September 19, 2017 where she had dismissed the suit with costs to the Defendants (now Appellants), but upon the ruling on the application for review of judgement, judgment was entered in favour of the Plaintiff (now Respondent).
3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.



4. This was aptly stated in the cases of *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

5. The judgment in the lower court was delivered on September 19, 2017 in favour of the Appellants. An application was made to review the judgment and the ruling subject to this appeal was delivered on March 14, 2018.
6. The Memorandum of Appeal was filed on 01/10/2021, over 3 years after the ruling was delivered. Through the Notice of Motion dated January 21, 2021 which was filed in the lower court proceedings, the Respondent sought for orders *inter alia* to have the appeal filed out of time. Leave to appeal out of time was granted via the ruling dated September 3, 2021 by Hon Francis Kyambia, Chief Magistrate.
7. In this appeal, directions were given that the appeal be disposed off by way of written submissions. Both parties complied. I have perused through the written submissions by both parties.
8. To begin with, the Respondent submitted that this appeal ought to be struck out as it was filed out of time without leave of this court. It was further submitted that the leave granted by the lower court was null and void as the Magistrate’s Court had no jurisdiction to grant the said leave.

The issue raised amount to a point of law which if found in the affirmative, it is capable of disposing off the entire appeal. It falls within the four corners enunciated in the celebrated case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696, where at pg 700 paragraphs D-F Law JA as he then was had this to say:

‘..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. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.’

At page 701 paragraph B-C Sir Charles Newbold, P added the following:

‘A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...’(emphasis added)

Issue for determination

9. From the submissions by the Respondent, the issue raised need to be addressed as it shall determine whether or not this appeal shall be determined on merit or it stands to be struck out. The issues for determination are;
- a. Whether the trial court had jurisdiction to grant leave to appeal out of time.
 - b. Who bears the costs

Analysis



10. Section 79G of the [Civil Procedure Act](#) provides as follows;

Time for filing appeals from subordinate courts

‘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’

11. From the above, every appeal from the lower court ought to be filed within 30 days from the date of order or decree appealed against. Leave may however be granted to file the appeal out of time subject to the ‘Appellant’ satisfying the court that there were good and sufficient cause for not filing the appeal on time.

12. From section 79G of [CPA](#) as quoted above, it is the ‘Appellant’ who seeks the leave to appeal out of time. This shows that the application should be done to the Appellate Court and not the Trial Court as it was done in this case. If it was to be to the contrary, nothing would have stopped the drafters of the Act to state in clear terms, that either the ‘Plaintiff’ or the ‘Defendant’ should seek leave out of time.

13. The locus classicus on jurisdiction is the celebrated case of Owners of the [Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Ltd](#) [1989] KLR 1. Nyarangi, JA relying, *inter alia*, on the above cited treatise by John Beecroft Saunders held as follows:

‘Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction’.

14. The Magistrate’s Court having no jurisdiction to grant leave to appeal out of time, any decision made was null *ab initio*. In the case of [Macfoy v United Afric Ltd](#) (1961) 3 All FR 1169, Lord Denning in pg 1172 stated;

‘If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is need no for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse’

15. The proceedings before the lower court in relation to the grant of leave to appeal out of time, and subsequent proceedings arising out of the said leave are null and void *ab initio*, and I thus return a negative finding in relation to the first issue.

16. On the issue of costs, Section 27 of the [Civil Procedure Act](#) decrees that the same follows the event. In the circumstances, I see no reason to deny the successful party their cost, and in this case, the Respondent is successful and thus, she is awarded costs.

Disposition

17. From the discussion herein above, the findings of the court are as follows;



- a. That the lower court had no jurisdiction in terms of Section 79G of the *Civil Procedure Act* to grant the purported leave.
- b. As a consequence of (a) above, the Memorandum of Appeal dated September 30, 2021 and the subsequent Record of Appeal lodged on December 20, 2021 are hereby struck out.
- c. Costs are awarded to the respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 7TH DAY OF JULY, 2023.

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F. WANGARI

JUDGE

In the presence of:

Umara Advocate h/b for Mutugi Advocate for the Appellants

N/A for Respondents

Barile, Court Assistant

