



Wandera t/a Odindiko & Company Advocates & another v Amus Communication Limited (Civil Appeal 210 of 2021) [2023] KEHC 22182 (KLR) (14 July 2023) (Ruling)

Neutral citation: [2023] KEHC 22182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 210 OF 2021**

F WANGARI, J

JULY 14, 2023

BETWEEN

**ARON O WANDERA T/A ODINDIKO & COMPANY
ADVOCATES 1ST APPELLANT**

IGARE AUCTIONEERS 2ND APPELLANT

AND

AMUS COMMUNICATION LIMITED RESPONDENT

RULING

1. The Memorandum of Appeal was filed on November 8, 2021. The Ruling being challenged was issued on April 8, 2022. This is a time lapse of 7 months. Earlier the appeal was filed in Mombasa HCCA No 58 of 2021 but apparently withdrawn. The said Memorandum of Appeal was dated April 23, 2021 and filed the same day.
2. The applicant has again filed an appeal vide a Notice of Motion. There is no Memorandum of Appeal what is present. It is only a receipt for payment of the same. It is important to note that in the response to the Preliminary Objection, dated January 30, 2023, a Memorandum of Appeal dated April 23, 2021 and filed the same day was attached as an annexure. It is the same as that in the withdrawn appeal No 58 of 2021.
3. I have taken steps to ask for the High Court Appeals Register for year 2021. Appeal No 58 of 2021 was registered on April 27, 2021. The Appeal under No 210 of 2021 (this appeal) was registered on November 8, 2021. It therefore beats logic how the Memorandum of Appeal which was filed on November 8, 2021 bears the receiving stamp of April 23, 2021. I shall go by the court record, and that is this appeal was filed on November 8, 2021.
4. Therefore, an appeal cannot exist without a memorandum of Appeal. Secondly, the memorandum of Appeal should be filed within 30 days of the decision, unless a certificate related to the delay in getting



the decree is in issue. Section 79 G of the Civil Procedure Act provides the 7 rules for filing appeal 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."

5. Though this this matter was for hearing of a Preliminary Objection, I note that there is nothing to hear. There is no Appeal filed. Order 42 Rule 1 provides as follows: -

"Every person detained in prison in execution of a decree shall be so detained—

(a) where the decree is for the payment of a sum of money exceeding one hundred shillings, for a period not exceeding six months; and

(b) in any other case, for a period not exceeding six weeks:

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the prison; or

(ii) on the decree against him being otherwise fully satisfied, if the court so orders; or

(iii) on the request of the person on whose application he has been so detained, if the court so orders; or

(iv) on the omission of the person, on whose application he has been so detained, to pay subsistence allowance.

6. What we have is an application being passed as an appeal, and which was filed 6 months out of time without leave. I do not find any need to deal with the issues raised for the Preliminary objection. I therefore strike out the entire application with costs to the Respondent

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

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F. WANGARI

JUDGE

In the presence of;

Wandera Advocate for the Appellant

N/A for the Defendant

Abdullahi, Court Assistant

