



REPUBLIC OF KENYA



Kibera & another v Mudoga (Suing as administrator ad litem of the Estate of Innocent Kamadi Anyangi) (Civil Appeal E134 of 2021) [2023] KEHC 23210 (KLR) (19 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E134 OF 2021
DO CHEPKWONY, J
SEPTEMBER 19, 2023**

BETWEEN

FRANCIS KIBERA 1ST APPELLANT

UNIVERSITY OF NAIROBI 2ND APPELLANT

AND

NATHAN ANYANGE MUDOGA APPLICANT

**SUING AS ADMINISTRATOR AD LITEM OF THE ESTATE OF INNOCENT
KAMADI ANYANGI**

RULING

1. For determination before this court is a notice of preliminary objection dated August 15, 2022 in which the respondent is seeking this court to find:-
 - a. The instant appeal is incompetent and deserving to be struck out for having been filed contrary to section 79G of the *Civil Procedure Act*, cap 21 of the Laws of Kenya.
2. The objection is premised on authorities attached thereto which will be taken into consideration in the determination of the same.
3. According to the respondent, the judgment of the subordinate court was delivered on December 17, 2019 and a decree issued on December 24, 2019.
4. He states that under section 79G of the *Civil Procedure Act*, an appeal was to be lodged within thirty (30) days which lapsed on February 12, 2020. He avers that the appeal herein was filed on July 29, 2021 *vide* a memorandum of appeal dated July 28, 2021 and thus it was file out of time and without leave of court.



5. Further, it is the respondent's contention that the appeal was admitted on September 16, 2021 but as at June 15, 2022, the record of appeal had not yet been filed. Therefore, the respondent objects to the appeal being maintained on the ground that it is incompetent, hence an abuse of the court process.
6. He also holds that the subordinate court has no jurisdiction to grant leave to file an appeal. The respondent has urged that the appeal be struck out for having contravened the provisions of section 79G of the *Civil Procedure Act*.
7. On March 14, 2023, the parties were given directions by the court whereby the appellant was granted leave to file and serve a response and thereafter, they were to file and exchange written submissions on the notice of preliminary objection. By July 3, 2023, the appellant had neither filed a response nor submissions and the matter was fixed for delivery of ruling.

Analysis and Determination

8. To determine the notice of preliminary objection, the main issue for consideration is whether the objection falls under the issues raised thereunder fall within the meaning of what a preliminary objection is.
9. Preliminary objection was defined in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 which stated as follows:-

“A preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.”
10. In the instant case, the objection is based on a plea of limitation where the appellants are faulted for having filed the appeal out of time and the jurisdiction of the subordinate court whereby it faulted for having granted leave for the appeal to be filed out of time, which is a preserve of the superior court.
11. In considering the preliminary objection raised herein, the appeal was filed *vide* a memorandum of appeal on July 28, 2021 for a judgment that was delivered on December 17, 2019 which was more than one and half years later. This having been the case, the appellants ought to have sought leave of the superior court to have the appeal filed out of time as provided for under section 79G of the *Civil Procedure Act*.
12. The law under section 79G of the *Civil Procedure Act* provides for the timelines for filing an appeal which is Thirty (30)days from the time the decree is issued. However, it goes on to state that the court has discretion to admit an appeal out of time where there are clear justifications demonstrated. It provides:-

“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 a good and sufficient cause for not filing the appeal in time.” [Emphasis added].



13. It is trite law that where there are laws on procedure, the said procedures should be adhered to so as to avoid an abuse of the rules and procedures of law. This was the decision in the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR in which it was stated as follows:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

14. Similarly, the Court of Appeal in the case of *Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & another* [2015] eKLR, held that: -

“It has often times been stated that rules of procedure are handmaidens of justice; where there is a clear procedure for redress of any grievance prescribed by an Act of Parliament, that procedure should strictly be followed. In the instant case, the *Elections Act* stipulates that the procedure to challenge membership to the County Assembly is by way of Petition. The appellant having chosen the wrong procedure cannot turn around and rely on Article 159 of the *Constitution*. Article 159 was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiating a cause of action before courts. The statutory procedure stipulated for determining the question of membership to the County Assembly is by way of Petition.”

15. It is the court’s finding that the appeal herein ought to have been lodged within thirty (30) days of the judgment and decree, and after the stipulated period of thirty (30) days had lapsed, leave ought to have been sought from the superior court for an appeal to be filed. In view of this finding, the notice of preliminary objection dated August 15, 2022 has merit therefore the appeal having been filed out of time and without court’s leave should be struck out.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 19TH DAY OF SEPTEMBER..., 2023.

D.O CHEPKWONY

JUDGE

