



**Christian Broadcasting Network (Cbn) Kenya v Almak Aqua Drillers Limited (Civil Appeal 165, 166, 167, 168 & 169 of 2021 (Consolidated)) [2022] KEHC 88 (KLR) (7 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 88 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 165, 166, 167, 168 & 169 OF 2021 (CONSOLIDATED)**

**MW MUIGAI, J**

**FEBRUARY 7, 2022**

**BETWEEN**

**CHRISTIAN BROADCASTING NETWORK (CBN) KENYA ..... APPELLANT**

**AND**

**ALMAK AQUA DRILLERS LIMITED ..... RESPONDENT**

*(Machakos Chief Magistrates Court, Civil Case No. 97 of 2019, 649 of 2019, 650 of 2018, 651 of 2018 & 652 OF 2018 delivered on the 23rd of September)*

**RULING**

Notice of Preliminary Objection

1. The Appeal is against judgment[s] purportedly delivered on the 23<sup>rd</sup> of September, 2021 in the Machakos Chief Magistrates Court, Civil Case No. 97 of 2019, 649 of 2019, 650 of 2018, 651 of 2018 & 652 of 2018 which judgments is [are]non- existent.
2. The Right of Appeal in the said judgement lapsed on the 21<sup>st</sup> October, 2021 which is clear statutory term of the 30 days as per the Section 79G of the *Civil Procedure Act*.
3. The appeal was drawn on the 27<sup>th</sup> October, 2021 long after the statutory term of 30 days had lapsed and no leave to file the appeal out of time sought before the appeal was drawn and filed.

Replying Affidavit[s]

4. That the Applicant has filed an application dated 26/10/2021 under certificate of urgency seeking orders that pending the hearing and determination of the application and the appeal, there be stay of execution of the judgement, decree and any consequential orders issued in Machakos CMCC No. 97 of 2019; 649 of 2019, 650 of 2018, 651 of 2018 & 652 OF 2018.



5. That, first and foremost, no judgments were delivered on the 23<sup>rd</sup> day of September as alleged by the Applicant herein. The said judgments are non-existent. It is imperative to note that the judgments that were delivered by the Trial Court in the said CMCC No. 97 of 2019 649 of 2019, 650 of 2018, 651 of 2018 & 652 of 2018 were delivered on the 22<sup>nd</sup> day of September, 2021. Consequently, there are no judgments to stay.
6. That, the defendant informed their advocates on record and which information they verily believe to be true that even though the Applicant has a right of appeal as provided for in the law, that right has since been extinguished as the appeal has been filed without following the mandatory statutory timelines as the appeal has been filed out of time.
7. That the judgments were delivered on the 22<sup>nd</sup> day of September, 2021 and the applications are dated the 26<sup>th</sup> October, 2021 and the same have been filed on the 27<sup>th</sup> October, 2021. It is imperative for this Court to note that the Memorandum of Appeal is dated the 27<sup>th</sup> October, 2021 while the same is purportedly filed on 22<sup>nd</sup> October, 2021. It is quite surprising how the Memorandum of Appeal could have been filed way earlier before its date a clear intent to mislead this Honourable court.
8. The Memorandum of Appeal even if filed on 22<sup>nd</sup> October 2021, it was still out of time as the requisite timelines for filing an appeal lapsed on 21<sup>st</sup> October 2021.
9. The Appellant has not sought any leave to file appeal out of time and therefore both appeal and application are incompetent and the only recourse is to strike them out.
10. The Appellant was granted 30 days stay of execution by the Trial Court which lapsed on 21<sup>st</sup> October 2021. The Appellant was indolent enjoying the stay of execution orders.

#### Submissions

##### Applicants' Submissions:

11. The Appellant filed appeals on 22<sup>nd</sup> October 2021 and application for stay of execution was filed on 27<sup>th</sup> October 2021.
12. The Trial Court delivered judgments on 22<sup>nd</sup> September 2021 but the Appellants inadvertently and incorrectly quoted 23<sup>rd</sup> September 2021; a typographical error capable of amendment and would not prejudice parties to the appeal.
13. Similarly, the Memorandum of Appeal was filed on 22<sup>nd</sup> October 2021 and bears the Court stamp of the same date and receipt of payment is of the same date and the Court files were opened on 22<sup>nd</sup> October 2021. The date of 27<sup>th</sup> October 2021 in ink is a bonafide mistake by the Appellants advocate.
14. The Appellant relied on Article 159 *Constitution of Kenya 2010* and the cases of  

Patriotic Guards Ltd vs James Kipchirchir Sambu [2018] eKLR where it was observed that a mistake by Counsel should be excusable and not attributed to the detriment of the client....

Phillip Chemwolo & Anor vs Augustine Kubende 1982-1988 KAR where the Court noted that blunders will continue to be made from time to time and a party should not suffer the penalty of not having his case heard on merit.

##### Respondent's Submissions

15. The fact of an appeal being brought within the requisite timelines was further emphasized by Justice G. V. Odunga when the court considered the case of *Velji Shamad – Vs- Shamji Bros. And Popatlal*



*Karman & Co. [1957] EA 438* when handling the case of *Diplack Kenya Limited V William Muthama Kitonyi [2018] eKLR* which is stated as hereunder:

“In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgment has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgment which ought, except under very special circumstances, to be made effectual and the Legislature intended that appeals from judgments should be brought within the prescribed time and no extensions of time should be granted except under very special circumstances.”

#### Determination

16. The issue for determination is whether there are competent appeals for hearing and determination or whether they filed out of statutory timelines without application to seek leave to file appeals out of time?
17. The essence of a preliminary objection was given by Law, JA and Sir Charles Newbold P. In *Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) EA 696*. At page 700, Law, JA stated that:

“..... 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.”

Sir Charles Newbold P. added as follows at page 701:

“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.”

18. The Respondent’s Preliminary Objection raised a pure point of law that is by virtue of Section 79 G of *Civil Procedure Act*, the Appellant ought to file [an] appeal[s] within 30 days of the judgment, ruling, decree or orders of the Trial Court.
19. The Court Record, confirms that the impugned Judgments in the above listed files were delivered on 22<sup>nd</sup> September 2021, the Appellant sought stay of execution for 30 days and was granted.
20. The Memorandum of Appeal in HCCA E165 of 2021 is dated 22<sup>nd</sup> October 2021 was/is stamped 22<sup>nd</sup> October 2021 and attached receipt/duplicate shows it was issued on 22<sup>nd</sup> October 2021. The Application for stay of execution under Certificate of urgency pending appeal was/is dated 15<sup>th</sup> November 2021. The Court notes with concern that there is also another application dated 26<sup>th</sup> October 2021 filed on 27<sup>th</sup> October 2021 for stay of execution pending appeal.
21. The Memorandum of Appeal in HCCA E166 of 2021 is dated 22<sup>nd</sup> October 2021 was/is stamped 22<sup>nd</sup> October 2021 and attached receipt/duplicate shows it was issued on 22<sup>nd</sup> October 2021. The Application for stay of execution pending appeal under Certificate of urgency was/is dated 15<sup>th</sup> November 2021 filed on 16<sup>th</sup> November 2021. The Court notes with concern that there is also another application dated 26<sup>th</sup> October 2021 filed on 27<sup>th</sup> October 2021 for stay of execution pending appeal.



22. The Memorandum of Appeal in HCCA E167 of 2021 is dated 22<sup>nd</sup> October 2021 was/is stamped 22<sup>nd</sup> October 2021 and attached receipt/duplicate shows it was issued on 22<sup>nd</sup> October 2021. The Application for stay of execution pending appeal under Certificate of urgency was/is dated 15<sup>th</sup> November 2021 and filed on 16<sup>th</sup> November 2021. The Court notes with concern that there is also another application dated 26<sup>th</sup> October 2021 filed on 27<sup>th</sup> October 2021 for stay of execution pending appeal.
23. The Memorandum of Appeal in HCCA E168 of 2021 is dated 22<sup>nd</sup> October 2021 was/is stamped 22<sup>nd</sup> October 2021 and attached receipt/duplicate shows 22<sup>nd</sup> October 2021. The Application for stay of execution pending appeal under Certificate of Urgency was/is dated 15<sup>th</sup> November 2021 and filed on 16<sup>th</sup> November 2021. The Court notes with concern that there is also another application dated 26<sup>th</sup> October 2021 filed on 27<sup>th</sup> October 2021 for stay of execution pending appeal.
24. The Memorandum of Appeal in HCCA E169 of 2021 is dated 22<sup>nd</sup> October 2021 was/is stamped 22<sup>nd</sup> October 2021 and attached receipt/duplicate shows it was issued on 22<sup>nd</sup> October 2021. The Application for stay of execution pending appeal under Certificate of Urgency was/is dated 15<sup>th</sup> November 2021 filed on 16<sup>th</sup> November 2021. The Court notes with concern that there is also another application dated 26<sup>th</sup> October 2021 filed on 27<sup>th</sup> October 2021 for stay of execution pending appeal.
25. The Appellant deposed that the appeal was filed within 30 days; after Trial Court's judgment of 22<sup>nd</sup> September, 2021 the Appellant's Advocate erroneously indicated the judgment as delivered on 23<sup>rd</sup> September 2021 as indicated in the Certificate of Urgency Application. The Judgments were delivered on 22<sup>nd</sup> September, 2021. There were 8 days remaining in September 2021 and 22 days between 1<sup>st</sup> - 22<sup>nd</sup> October, 2021 and cumulatively came to 30 days in line with the statutory requirement.
26. The Respondent objected to the tabulation of 30 days in filing the appeal and deposed that the Appellant filed appeal on 27<sup>th</sup> October 2021 way after 30 days and not 22<sup>nd</sup> October 2021 as alleged. The Court has found Memorandum of Appeal filed on 22<sup>nd</sup> September 2021 but application of stay of execution filed on 27<sup>th</sup> October, 2021.
27. Order 50 [Civil Procedure Rules](#) set out the process of computation of time in compliance with statutory requirements; of importance a month is evidenced as follows;
  - Month means calendar month [Order 50, rule 1.]

Where by these Rules or by any judgment or order given or made, time for doing any act or taking any proceedings is limited by months, and where the word "month" occurs in any document which is part of any legal procedure under these Rules, such time shall be computed by calendar months unless otherwise expressed.
  - Exclusion of Sundays and public holidays [Order 50, rule 2.]

Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day and Good Friday, and any other day appointed as a public holiday shall not be reckoned in the computation of such limited time.
28. This Court finds that taking into account the computation of 30 days from the date of judgment of 22<sup>nd</sup> September 2021, and taking into account a month means a calendar month which excludes, Sunday and any public holiday, the Memorandum of Appeal filed in each of the Court files was filed within the requisite 30 days and there are valid and competent appeals before this Court.



29. Secondly, the Appellant referred to the judgment of 23<sup>rd</sup> September 2021 which the Respondent stated is non-existent in each of these Court files. Judgments were rendered on 22<sup>nd</sup> September 2021 and not 23<sup>rd</sup> September 2021 and the reference of 23<sup>rd</sup> September 2021 was typographical error, but as a matter of fact and law there is in existence a valid and legal judgment in each of these matters of 22<sup>nd</sup> September 2021 that is the subject of the appeals pending.
30. Section 100 *Civil Procedure Act* envisages mistakes errors on the record and donates the general power to amend as follows;
- “The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.
31. As to the filing of applications under Certificate of Urgency on 27<sup>th</sup> October 2021 and later on 16<sup>th</sup> November 2021 it means that the Appellant filed another application seeking interim stay of execution pending appeal as on 28<sup>th</sup> October 2021 this Court did not grant stay of execution pending appeal in the application of 27<sup>th</sup> October, 2021 but ordered the applications served to Respondents who were to respond. Instead the Respondent pursued execution and the Appellant filed another application seeking stay of execution pending appeal in light of imminent execution of the decree. On 16<sup>th</sup> November 2021, this Court granted interim stay of execution pending appeal pending hearing and determination of the application and/or appeal.

#### Disposition

1. The Preliminary Objection is dismissed the Court finds there are competent appeals filed within statutory requirements and valid judgments delivered on 22<sup>nd</sup> September 2021.
2. The Pending Application and/or appeal shall be canvassed within 30 days from date of delivery of Ruling.
3. Costs in the Cause.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 7<sup>TH</sup> FEBRUARY 2022 (VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**Mr. ORONGA - FOR THE APPELLANT**

**MR. MUSYA - FOR THE RESPONDENT**

**GEOFFREY - COURT ASSISTANT**

