



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E004 OF 2020

KENYA POWER & LIGHTING LIMITED.....APPELLANT

VERSUS

KAYSER INVESTMENT LIMITED RESPONDENT

RULING

1. The respondent has raised a preliminary objection dated 27/4/2021 to the appellants appeal and claimed that the appeal herein was filed out of time without leave in breach of Section 79G of the Civil Procedure Act, Cap 21 Laws of Kenya. The appeal is therefore incurably defective and therefore the court lacks jurisdiction over the appeal.
2. The objection was opposed by the appellant who filed grounds of opposition where it stated that the respondent's preliminary objection is premature since Section 79G of the Civil Procedure Act excludes such a period which the lower court may take to certify as having been requisite for the preparation and delivery to the appellant a copy of the decree or order.
3. The appellant further stated that the respondent seeks to obstruct justice as it endeavors to rely on non-existent technicalities.
4. The court ordered that the application be disposed of by way of written submissions.
5. The respondent in its submission argued that the appellant filed this appeal against the ruling delivered by the lower court on 27/11/2020 on 7/1/2021 without leave of court.
6. Section 79G of the Civil Procedure Act provides that every appeal from the subordinate court to the High Court shall be filed within 30 days from the date of the decree or order appealed against. The appellant should have therefore filed their appeal by 27/12/2020 and having failed to do so makes the appeal a non-starter and should fail on arrival.
7. The appellant on the other hand argued that the appeal was filed on 26/12/2021 but due to the challenges of the E-filing system it was indicated that it was filed on 7th January 2021 nonetheless they are guided by order 50 Rule 4 of the Civil procedure Rules which provides for the exclusion of the period between 21st December and 13th January in the next year in computing time.
8. In support the appellant cited **Kenya Commercial Bank Ltd v Fredrick Mallya [2016] eKLR** where the court held;

“Order 50 Rule 4 of the Civil Procedure Rules provides that the period between the 21st day of December in any year and the 13th day of January in the year next following shall be omitted from computation of time. Taking this provision into consideration, the appellant ought to have lodged its appeal on 26th January 2016. The appellant filed its Memorandum of Appeal on 25th January 2016. Even without considering the reasons given by the appellant for the purported delay in filing the Appeal, it is apparent that it was well within the time limit contrary to the assertions made by the Respondent.”
9. I have perused the application, affidavits, submissions and the record in its entirety and the issue for determination is **whether or not the appellant's appeal was filed within the time prescribed by the law?**
10. The law on preliminary objections was succinctly stated in the locus classicus **Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited [1969] EA 696**. There, Newbold President of the Court stated:

“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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The Court considers that this improper practice

should stop.”

11. The respondent has raised an objection claiming that the appellant filed this appeal out of time and without leave of the court. On perusal of the record, this court notes that the appeal is filed against the ruling delivered on 27/11/2020 by Hon. D.M Kivuti in CMCC 486 of 2020 in favour of the respondent. The appellant being dissatisfied by the ruling filed, its memorandum of appeal on 7/1/2020.

12. The law governing the filing of appeals from the subordinate court to the High Court is **Section 79 G** of the **Civil**

Procedure Act which provides that:

“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.”

13. From the above provision, it is clear that all appeals from the subordinate court to the High Court must be filed within 30 days from date of the decree or order appealed against but in computing the 30 days, the time the lower court certified as having been requisite for preparation of the decree or impugned order and delivery to the appellant should be excluded.

14. The appellant however has relied on the case of **Kenya Commercial Bank Ltd v Fredrick Mallya (supra)** and asked this court to be guided by the provisions of order 50 rule 4 and find that the appeal was filed within the required time.

15. I think it is important at this stage to reproduce the provisions of **Order 50 Rule 4** of the **Civil Procedure Rules** in order to understand its full import. It states as follows:

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act Provided that this rule shall not apply to any application in respect of a temporary injunction.”

16. On this issue this court is guided by **Gabriel Osimbo V Chrispinus Mandare, [2020] eKLR**, where the court of appeal held that

“I have read the draft judgment prepared by J. Mohammed JA. I am in agreement that this appeal should be allowed. With due respect, the learned Judge misconstrued the purport of Order 50 Rule 4 of the Civil Procedure Rules. The rule simply provides the manner of computing time. It does not provide for any specific time for doing or taking any action. Thus, Order 50 Rule 4 does not contradict section 75G of the Civil Procedure Act, which provides a time limit of 30 days for filing an appeal. Order 50 Rule 4 simply provides how these days are to be computed if the period falls within the High Court vacation.

Taking into account Rule 4 in computing the 30 days, it is evident that the appellant’s appeal which was filed on 7th February, 2011 was filed within time as it was affected by the High Court vacation and the period, 21st December, 2010 to 13th January, 2011 had to be excluded in computing the time. The learned Judge was therefore wrong in dismissing the appeal.”

17. In view of the foregoing, I find that since the impugned order was made on 27/11/2020, the 30 day period prescribed under Section 79 G of the Act fell within the court’s Christmas Recess.

18. Consequently, the days falling between 21/12/2020 and 13/1/2021 ought to be excluded when computing the time within which the appellant was required to file his appeal.

19. When calculated, I find that the 30 day period expired on 20/1/2021 and the appellant filed this appeal on 7/1/2021 meaning that it was filed within the time stipulated by the law.

20. This court subsequently finds that the preliminary objection dated 27/4/2021 is without merit and is dismissed. Consequently, this appeal is properly and competently before this court. Costs of the preliminary objection to abide by the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17TH DAY OF SEPTEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent