



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 31 OF 2020

FRANCIS LIKHABILA.....APPELLANT

VERSUS

BARCLAYS BANK OF KENYA RESPONDENT

RULING

1. By an undated Notice of Motion filed on 9th April 2020, *Barclays Bank of Kenya*, the respondent in this appeal moved this court seeking that the memorandum of appeal and the record of appeal filed by the appellant be struck out on grounds that they were incompetent having been filed out of time without leave of the court.
2. The application is supported by the grounds stated on its face and the facts set out in the supporting affidavit sworn by *Mr. Michael Massawa*, Legal Counsel in the respondent's Legal and Secretarial Services. The respondent contends that the appellant's suit in the lower court was dismissed in a ruling dated 11th July 2019 which upheld its preliminary objection to the effect that the appellant's suit was statute barred; that an application seeking to review that ruling was dismissed in a ruling dated 19th December 2019 which is the subject matter of this appeal.
3. The respondent asserts that since the appeal was filed on 24th January 2020, it was filed 36 days after the order dismissing the appellant's application for review was made and it was therefore outside the 30 day period prescribed under *Section 79 G* of the *Civil Procedure Act* for filing of appeals to the High Court; that since the appellant did not seek and obtain leave to have the appeal admitted out of time, the appeal was incompetent and ought to be struck out together with the record of appeal filed on 4th March 2020.
4. The application is contested through grounds of opposition dated 11th May 2020 in which the appellant denied the respondents claim that the appeal was incompetent. The appellant claimed that the appeal was filed well within time given the provisions of *Order 50 Rule 4* of the *Civil Procedure Rules* which provides that time does not run between the 21st day of December in any year to the 13th day of January of the following year both days inclusive; that if the days falling within the Christmas Vacation of the year 2019 were excluded in the computation of time, the court will find that the appeal was filed within ten days of the date the impugned ruling was delivered. It was the appellant's view that the application was vexatious, devoid of merit and designed to delay hearing of the appeal and ought to be dismissed with costs.
5. Following consent of the parties, the application was disposed of by way of written submissions which both parties duly filed.
6. I have given due consideration to the application, the supporting affidavit, the grounds of opposition as well as the parties' rival written submissions and the authorities cited. I have also read the court record. Having done so, I find that the only issue arising for my determination in this application is whether or not the appellant's appeal was filed within the time prescribed by the law.
7. The law governing filing of appeals from the subordinate court to the High Court is governed by *Section 79 G* of the *Civil Procedure Act* (the 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.”

8. 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.

9. In this case, it is not disputed that the ruling subject matter of this appeal was delivered on 19th December 2019 and that the appellant filed his memorandum of appeal on 22nd January 2020. It is also not disputed that a certificate of delay was not issued to the appellant by the trial court as envisaged in *Section 79 G* of the Act. Relying on the recent authority of ***Gabriel Osimbo V Chrispinus Mandare, [2020] eKLR***, the appellant urged me to find that the appeal was filed within time since the days falling within the Christmas Vacation, that is, between 21st December 2019 and 13th January 2020 should be excluded in the computation of the 30 days within which he was required to file the appeal.

10. To counter the appellant's submissions, the respondent relied on the persuasive authority of ***Cook 'N' Lite Limited V Silvester Mutia Honatha, [2015] eKLR***, to support its submission that *Order 50 Rule 4* of the *Civil Procedure Rules* cannot come to the aid of the appellant since it forms part of subsidiary legislation which cannot supersede or override the express provisions of *Section 79 G* of the *Civil Procedure Act* which is the parent Act.

11. Before proceeding any further, I think it is important 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.”

12. It is apposite to note that the *Civil Procedure Act* is silent on the formula courts should use in computing time limited under the Act. The respondent has urged me to be persuaded by the holding of my sister *Kasango J* in ***Cook 'N' Lite Limited V Silvester Mutia Honatha, [supra]*** and hold that the freezing of time from 21st December of any year to the 13th January of the following year does not apply to computation of time limited under *Section 79 G* of the Act but only applies to time limited in the *Civil Procedure Rules* or in a court order with the exception of applications for injunctions. With much respect, though I agree with the Hon. Judge that *Order 50 Rule 4* is indeed subsidiary legislation formulated under the *Civil Procedure Act*, I must say that I am not persuaded by the above holding because upon close scrutiny of the provision, I am not convinced that it contains anything that contradicts the provisions of *Section 79 G* of the *Civil Procedure Act*. In my view, *Section 79 G* of the Act prescribes the time within which appeals from decisions of the lower court should be filed in the High Court while *Order 50 Rule 4* provides the formulae for computation of that time.

13. I am fortified in the above finding by the Court of Appeal's decision in ***Keziah Stella Pyman & 2 Others V Paul Mwololo Mutevu & 8 others, [2013] eKLR*** and its recent decision in April this year in the case of ***Gabriel Osimbo V Chrispinus Mandare, [Supra]*** where the court allowed an appeal which challenged the High Court's decision to strike out an appeal for being filed out of time after finding that *Order 50 Rule 4* was not applicable in the computation of time limited under the *Civil Procedure Act*. In agreeing with the decision of *J. Mohammed, JA, Okwengu JA* held as follows:

“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.”

14. In view of the foregoing, I find that since the impugned order was made on 19th December 2019, the 30 day period prescribed under *Section 79 G* of the Act fell within the court's Christmas Recess gazetted in the year 2019. Consequently, the days falling between 21st December 2019 and 13th January 2020 ought to be excluded when computing the time within which the appellant was required to file his appeal.

15. When I calculate 30 days from 19th December 2019 excluding the days between 21st December 2019 to 13th January 2020, I find that the 30 day period expired on or about 11th February 2020. The court record shows that the appellant filed his appeal on 22nd January 2020 which means that the appeal was filed well within the time stipulated by the law.

16. Even where an appeal is not filed within time, my considered view is that such an appeal is not an automatic candidate for striking out. In appropriate cases, the court can exercise its discretion under the proviso to *Section 79 G* of the Act or can invoke its inherent power under *Section 3 A* of the Act and admit the appeal out of time if the ends of justice so require and if doing so will assist the court in achieving the overriding objective of the *Civil Procedure Act*.

17. That said, before I pen off, there is an observation I would like to make regarding the prayers sought in the motion. Looking at the application together with the averments in the supporting affidavit and the respondent's submissions, it is apparent that the respondent was under the impression that the 30 day period prescribed under *Section 79 G* of the Act applied to the filing of the memorandum of appeal and

the record of appeal. This is not the legal position. The law is that appeals to the High Court are instituted by way of filing a memorandum of appeal and it is not mandatory for an appellant to file a memorandum of appeal together with the record of appeal. The record of appeal can always be filed later after the memorandum of appeal has been served on the respondent and before the appeal is listed for directions under *Order 42 Rule 13* of the *Civil Procedure Rules*.

18. Unlike service of the memorandum of appeal which under *Order 42 Rule 12* is required to be effected on the respondent within 7 days of notice by the Deputy Registrar that the appeal had been admitted for hearing, the *Civil Procedure Rules* do not provide a specific timeline within which the appellant should file a record of appeal. However, *Order 42 Rule 13* of the *Rules* leaves no doubt that ideally, the record of appeal should be filed soon after service of the memorandum of appeal to pave way for fixing of a mention date for the purpose of giving directions on hearing of the appeal.

19. For all the foregoing reasons, I find no basis upon which I can accept the respondent's invitation to strike out the record of appeal filed herein on 4th March 2020.

20. In the result, I find no merit in the respondent's application and it is hereby dismissed with costs to the appellant.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 10th December 2020.

C. W. GITHUA

JUDGE

In the presence of:

Ms Ndirangu holding brief for Mr. Monari for the respondent/appellant

Ms Masai holding brief for Mr. Anzala for the appellant

Ms Mwinzi: Court Assistant