



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 120 OF 2019

JULIUS GIDEON KITILI.....APPELLANT/APPLICANT

VERSUS

SIDIAN BANK.....RESPONDENT

RULING

1. The appellant/applicant herein has taken out a Notice of Motion dated 4th March, 2019 seeking a stay of execution of the judgment delivered by Honourable S.G. Gitonga (Mrs.) (Resident Magistrate) on 1st February, 2019 in CMCC NO. 3138 OF 2019 pending the hearing and determination of an intended appeal against the said judgment.

2. The respondent has now put in a Notice of Preliminary Objection dated 28th March, 2019 and currently before me for determination. The same raises the following grounds of objection as against the Motion:

1) The memorandum of appeal has been filed contrary to the provisions of Section 79G of the Civil Procedure Act.

2) Order 40, Rule 6 of the Civil Procedure Rules is not applicable herein as there are no injunctive orders in CMCC NO. 3138 OF 2017.

3) The appellant/applicant has not complied with the express provisions of Order 42, Rule 6 (1) and (2) of the Civil Procedure Rules.

3. In his oral arguments on the preliminary objection, *Mr. Malaba* advocate for the respondent restated that the memorandum of appeal was filed out of time and without leave of the court, thus making it improperly on record as it were.

4. In his response, *Mr. Wakwaya* counsel for the appellant/applicant submitted that taking into account the fact that February typically has 28 days, the 30th day from the date of judgment fell on a weekend and hence the time would continue to run from the next working day. Consequently, *Mr. Wakwaya* took the position that the memorandum of appeal has been properly filed.

5. *Mr. Malaba* responded to the above by contending that based on his computation of time, the last day ought to have been 3rd of March, 2019 which date fell on a Wednesday.

6. I have considered the grounds articulated in the Preliminary Objection together with the rival oral arguments by the respective counsels.

7. The essence behind preliminary objections is well illustrated in *Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696* as follows:

“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 in any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. In addressing the first ground of objection, the timelines for lodging an appeal from a subordinate court to the High Court are espoused under Section 79G of the *Civil Procedure Act* as hereunder:

“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...”

9. Similarly, *Order 50, Rule 3* of the *Civil Procedure Rules* expresses the following:

“Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.”

10. Given that the impugned judgment was delivered on 1st February, 2019 whereas the memorandum of appeal was filed on 4th March, 2019, the question that remains is whether or not the memorandum of appeal was filed within the strict statutory timelines.

11. Going by the provisions of *Rule 3* hereinabove, I have computed the time and found that the 30th day from 1st February, 2019 falls on a Saturday, which happens to be a day in which the courts are closed. This would therefore mean that the next working day fell on a Monday, 4th March, 2019, which is the date on which the memorandum of appeal was filed. In the premises, the memorandum of appeal is properly on record. *Ground 1)* thus fails.

12. It is also my observation that the last two grounds of objection are premised on the orders sought in the application. That being the case, whether or not the appellant/applicant has met the conditions set out under the relevant provisions can only be determined following the hearing of the application. Resultantly, *ground 2 and 3) are untenable.*

13. The upshot is that the Preliminary Objection has no merits and is hereby dismissed.

Dated, signed and delivered at **NAIROBI** this 9th day of April, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent