



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 18 OF 2015

EASTERN PRODUCE (K) LIMITED

(KIPKOIMET TEA ESTATE).....APPELLANT/RESPONDENT

VERSUS

MUSA ISENDI JAMOKO.....RESPONDENT/APPLICANT

RULING

1. The applicant filed this application under notice of motion dated 12/3/2015 for orders that the Appellants Memorandum of Appeal dated 2nd February 2015 be struck out for being filed out of time.
2. The said application is based on the grounds that there is no valid appeal herein. The Memorandum of Appeal dated 2nd February 2015 was filed in court on 5th February 2015 out of time without leave.
3. The appeal was filed within a period of 44 days from the date of delivery of judgment hence the same is invalid.
4. The application is supported by a supporting affidavit sworn by one MUSA ISENDI JAMOKO and the grounds that the Appellant is aggrieved by the decision of *Honorable B.N MOSIRIA* delivered on 23rd December 2014 in Kapsabet PMCC NO 46 of 2011 of MUSA ISENDI JAMOKO Vs EASTERN PRODUCE (K) LIMITED and preferred an appeal to this court.
5. That he learnt of this appeal upon service of an application for stay of execution pending appeal in the subordinate court and upon perusal, he found out that the Memorandum of Appeal was filed on 5th February 2015 which is out of time.
6. The Appellant is legally mandated to file an appeal within 30 days but filed an appeal within a period of 44 days and as such the appeal is incompetent and a nullity.
7. Lastly, that this application ought to be allowed, to strike out the appeal.
8. The application was opposed through a replying affidavit sworn by DAVID KIRUI on 17th December 2018. He stated that he is the finance and administration manager of the Appellant herein.
9. That the application lacks merit and the same is actuated by malafides and that the applicant intends to deny, frustrate and delay the applicant from prosecuting the appeal against the judgment made by Hon. B N MOSIRIA delivered on 23rd December 2014.
10. The Memorandum of Appeal which was filed on 5th February 2015 was filed on time, within the timelines prescribed by the law, with specific emphasis with the timeline prescribed by the Civil Procedure Rules.
11. *Order 50 rule 4* explicitly provides that the period between the 21st December 2014 and 13th January 2015 be excluded for purpose of computing time within which this appeal should have been filed.
12. Based on the provisions of *Order 50 Rule 4* of the *Civil Procedure Rules 2010*, the time within which the appeal would have been filed expired on 13th February 2015, yet the Memorandum of Appeal was filed by the Appellant on 5th February 2015.
13. The Appellant stands to suffer great loss and damage in the event that the prayers sought are allowed, since the Appellants appeal raises various critical issues with overwhelming chances of success.

14. Lastly, that it is in the interest of justice and equity that the Appellant be accorded opportunity to prosecute the appeal herein and consequently the application dated 12th March 2015 be dismissed with costs.

ISSUES FOR DETERMINATION

15. The only issue for determination is whether the Memorandum of Appeal was filed within time.

16. *Order 50 Rule 4* is generally headed “**Time**” while rule 4 is headed “**when time does not run.**” Rule 4 provides:

“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 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.”
(Emphasis)

17. *Order 50 Rule 4* which is couched in mandatory terms shows that the period between Twenty first December and Thirteenth January of the following year cannot be taken into account when computing time.

18. Computation of time under provisions of *CAP. 2 Interpretation and General Provisions Act [Rev. 2014] Section 57*, provides:-

1. In computing time for the purposes of a written law, unless the contrary intention appears-

(a) A period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) If the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) Where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) Where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

2. [Orders 50, rule 3.] C P R has same provisions. Time expiring on Sunday or day offices closed.

3. 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.

19. The aforesaid provisions are replicated under *Order 50 Rule 3 CPR*. The rule states:-

“Where the time for doing any act or taking any proceeding expires on 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.”

From the foregoing provisions it is explicit that the days from 2st December 2014 to 13th January 2015 are excluded in the 30 days within which an appeal ought to be lodged. In this case the period of filing the appeal was to expire on 13th December 2015. The Memorandum of appeal filed on 5th February 2015, is within time. The application is therefore unmerited and is dismissed with costs to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th day of October, 2019

In the absence of

Mr. Yego for Respondent

Mr. Ramayan for Applicant

And in the presence of Ms Abigael - Court assistant