



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CIVIL APPEAL NO. 20 OF 2018**

**TRIDENT INSURANCE CO. LTD.....APPELLANT**

**VERSUS**

**BAMA HOSPITAL LLP.....RESPONDENT**

*(Being an appeal from the Judgment and decree of Siaya PMCC No. 28 of 2018*

*dated 11.7.2018 before Hon. T.O. OLANDO – S.R.M.)*

**JUDGMENT**

1. This appeal arises from the Ruling and Order of T. O. Olando, SRM delivered on 6.7.2018 in Siaya P.M's Court Civil Suit No. 28 of 2018.
2. Upon delivering of the Ruling dismissing the Appellant's application dated 9/4/2018 seeking orders that the trial Court stays all proceedings in the suit and that all disputes and issues arising in the suit and the application be referred to arbitration in terms of clause 15 of the Standard Service Agreement entered into by the parties on 30.8.2016, and upon dismissal of the said application, the Appellant's Counsel sought leave to appeal and the said leave was granted.
3. I observe that after the application subject of this appeal was heard on 13.6.2018 the trial magistrate reserved the ruling for delivery on 11.7.2018.
4. However, after careful perusal of the trial court record, as the typed ruling is not dated on the face of it, I note that the ruling was delivered earlier than scheduled date. It was delivered on 6.7.2018. This is as per the handwritten Ruling which is signed by Hon. T. Olando.
5. Therefore, when the Respondent filed an application challenging the competency of this appeal which application was heard on 6.3.2019 and a ruling delivered on the same day, the Court declined to strike out the appeal on the belief that the impugned ruling was made on 11.7.2018 as that is the date that was visible in the proceedings after the trial magistrate heard the parties and set the date for the ruling.
6. As I was writing this judgment and perusing the original trial court record, I discovered that the impugned ruling was delivered on **6.7.2018** and not **11/7/2018**.
7. The appellant sought and was granted instant leave to appeal but it did not file an appeal until **9.8.2018**. I have consulted the calendar for the year 2018 and found that 6<sup>th</sup> July 2018 was a Friday. Leave having been granted to appeal, the appellant was expected to lodge the appeal within the shortest time possible and in any case, not later than 30 days from the date of the ruling or the date when leave to appeal was granted. This is pursuant to **Section 79G of the Civil Procedure Act** which stipulates the period within which an appeal lies from the lower court to the High Court in civil matters. Thirty (30) days from **6.7.2018** lapsed on **5.8.2018**, excluding the date of ruling and including the last day hence this appeal ought to have been filed on or before **6.8.2018** which was a Monday and the next working day after the 30<sup>th</sup> day which was a Sunday.
8. Instead, the appellant herein filed the appeal on **9.8.2018** as per the Memorandum of Appeal dated **2.8.2018**. This was after 30 days had lapsed.
9. The appellant did not seek leave of court to enlarge the time for filing the appeal after the initial period lapsed, and even misled this court into believing that indeed the impugned Ruling by the trial court was delivered on 11.7.2018 hence my ruling of **6.3.2019**.
10. Filing an appeal out of the stipulated timeframe cannot be a small anomaly. This court made orders of 6.3.2019 on the competency of

this appeal per incuriam and it reserved inherent jurisdiction to review or recall its own order made in error and this is one of the incidents when the court can recall its judgment or decision which was made per incuriam I am fortified by the decision in **Biren Amritlal Shah & Another vs Republic & 3 Others Civil Appeal No. 186/2004 [2013] eKLR and Nakumatt Holdings Ltd vs Commissioner of Value Added Tax [211] eKLR** where the Court of Appeal held that the High Court had residual power to correct its own mistake in the exercise of its inherent jurisdiction where such mistake is remediable by the Court. The Superior Court held:

*“Mr. Ontweka for the Respondent in his submissions to us, seemed to suggest that whereas Law is silent on whether review is sought. While we agree with him that Judicial Review is a special Jurisdiction, we do not agree that in clear cases, courts should nonetheless fold their hands and decline jurisdiction. The process of review is intended to obviate hardship and injustice to a Party who is otherwise not to blame for the circumstances he finds himself in. This court in the earlier case we cited of Aga Khan Education Services Kenya V. R. (supra) expressed the view that review jurisdiction in cases as the present one should be exercised sparingly and in very clear cases.”*

11. Per incuriam is defined by **Black’s Law Dictionary 10<sup>th</sup> Edition** as:

*“Of a judicial decision, wrongly decided, because the judge or judges were ill informed about the applicable Law.”*

12. Thus, where the judge is misdirected or is misdirected on a matter such as this where the dates in the trial court record were confusing following the hearing of the application by the trial court which set the ruling date as 11.7.2018 but such date of delivery was not in the typed Ruling and could only be traced to the handwritten ruling, my view is that by this court referring to a ruling dated 11.7.2018 which was non-existent, it was an error, and this court has residual inherent jurisdiction to vacate its orders on its own motion. In **James Kanyiita Nderitu & Another v. Marios Philotas Ghikas & Another [2016] eKLR** citing other decisions namely **Chumo Arap Songok V. David Kibiego Court of Appeal 141/2004 Nakuru and Ali Bin Khamis V. Salim Khamis Korobe & 2 Others [1956] 23 EACA 195**, the Court of Appeal made it clear that *a Court of Law is not powerless in the face of an illegality and is duty bound to correct the illegality and to do substantive justice.*

13. Accordingly, I hereby invoke inherent jurisdiction of this court and recall the Order of 6.3.2019 made by this court and set it aside. In its place, I substitute it with a finding that the appeal herein was filed out of time without leave of the court. Such error is not a mere procedural technicality. It goes to the core or root of the appeal. It goes to the jurisdiction of this court to hear and determine the appeal.

14. In **Patrick Kithinji V. Victor Mugira Marete [2015] eKLR**, the Court of Appeal held:

*“In our view whether or not an appeal is filed out of time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159 of the Constitution.”*

15. It is now well settled that a Court of Law draws its jurisdiction from Statute and the Constitution, and therefore it cannot arrogate itself jurisdiction where none exists. To hear and determine on its merits an appeal which is filed out of time stipulated in Statute [ **Section 79G of the Civil Procedure Act** ) or leave granted by virtue of an order of the Court without any order enlarging the time is tantamount to exercising jurisdiction which the court is deprived of (see **owners of motor vessel “Lilian S” Vs. Caltex Oil (K) Ltd [1959] eKLR**).

16. For the above reasons, and without being provoked by any party, albeit the Respondent raised the issue of the appeal being filed out of time and the Appellant’s Counsel brushed it as a small anomaly, I find and hold that this appeal having been filed out of time without leave of Court, is amenable for striking out and the same is hereby struck out with costs to the Respondent.

**Dated, signed and delivered at Siaya this 11<sup>th</sup> day of December, 2019**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr. ODUOR Advocate h/b for Mr. Muma for the Appellant

N/A for the Respondent

CA: Brenda and Modestar