



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.16 OF 2018

SUNFLAG TEXTILE & KNITWEAR MILLS LTD....APPELLANT

VERSUS

PETERSON KARIUKI GACHOKA.....RESPONDENT

(Appeal from the Judgment of Chief Magistrate's Court at Kiambu by Honourable D. Mburu, (Principal Magistrate) delivered on 7th December, 2017 in CMCC No. 1851 of 2016)

RULING

The Respondent/Applicant has moved this court by way of a Notice of Motion dated the 7th day of February, 2018 under Section 79G of the Civil Procedure Act Cap. 21 Laws of Kenya seeking orders that;

1. *This appeal be dismissed with costs for being incompetent.*
2. *Alternatively the appeal be struck out for having been filed out of time without leave of court.*
3. *Costs of the appeal and of the motion be paid by the appellant on the grounds inter alia, that-*
 - a. *The decision appealed from was given on 7/12/2017. Appeal therefrom ought to have been filed within 30 days per Section 79G of Chapter 21. The last day was 8th January 2018 which was a working day. Appeal was filed on 16/1/2018 out of time.*
 - b. *The foregoing facts are on the face of the court record herein and require no affidavit.*
 - c. *Time set by a statute cannot be extended by subsidiary legislation.*
 - d. *No leave of court to file appeal out of time is alluded and only Order 42(1) is cited.*

The application is premised on the following grounds;

- a) *The decision appealed from was given on the 7th December, 2017. The Appeal therefrom ought to have been filed within 30 days per section 79G of Civil Procedure Act but the Appeal herein was filed on 16th January 2018 out of time.*
- b) *The foregoing facts are on the face of the court record herein and require no affidavit.*
- c) *Time set by a statute cannot be extended by subsidiary legislation.*
- d) *No leave of the court to file appeal out of time is allowed and only Order 42(1) is cited.*

The application is not supported by any affidavit.

The respondent filed grounds of opposition dated the 6th day of March, 2018.

It is opposed on the following grounds;

1. *The application lacks merits and seeks to unjustly deny the Appellant a right of Appeal.*

2. The Application is an abuse of the court process

3. The application is defective as it unduly prejudices the Appellant.

4. No basis or sufficient basis has been shown why this Application should be favourably considered by this Honourable Court.

5. The Applicant comes to court with unclean hands.

When the application came up in court on the 19th day of March, 2018 Counsel for the Applicant opted not to make any submissions and relied on the list of authorities.

On the part of the Respondent, it was submitted that the computation of time in the Civil Procedure Act is set out in Order 50 Rule 4.

According to that order, time stopped to run from the 21st day of December 2017 to 13th January, 2018. He contends that the Appeal was filed on time and there was no need to seek leave of the court. They pray that the Application be dismissed.

The court has considered the Application and the grounds of opposition. I note that the application is not supported by an affidavit and counsel for the Applicant avers that it was not necessary as it raises a pure point of law. While I fully concur with that position, in my view, it would be good practice to file a preliminary objection rather than application.

On the merits of the same, the Applicant has relied on several authorities and I confirm that I have read through them. My view on the matter is that though section 79G is a provision in the substantive Act, the computation of time is provided for under Order 50 rule 4 of the Civil Procedure Rules and it is clear on when time does not run.

For avoidance of doubt it provides 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 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.

I am persuaded by the submissions by the counsel for the Appellant/Respondent with regard to the computation of time as set out under Order 50 Rule 4.

In the premises, I find that the Appeal was filed within time. The application dated 7th February 2018 is hereby dismissed with no order as to costs.

Dated, Signed and Delivered at Nairobi this 5th day of November, 2018

.....

L. NJUGUNA

JUDGE

In the presence of:-

..... **For the Appellant**

..... **For the Respondent**