

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CIVIL APPEAL NUMBER 7 OF 2016

BENJAMIN MOILEM.....PETITIONER

VERSUS

SAMWEL TAMBO OTIENO.....1ST RESPONDENT

WAIS CAPITAL LIMITED.....2ND RESPONDENT

MAMBO LEO WINES SPIRIT SUPPLIERS LIMITED....3RD RESPONDENT

RULING

The plaintiff's application dated 22.1.2014 was dismissed by Hon. D. M. Machage on 2.6.2016. The plaintiff dissatisfied with the said ruling filed a memorandum of appeal on 8th July, 2016. There was also an application for stay of execution, under certificate of urgency, filed by the plaintiff/applicant on 1.7.2016. It was heard *ex parte* and some orders granted on 26.7.2016. Interparte hearing was for 17.8.2016. the 2nd Respondent filed a Notice of Preliminary Objection on 16th day of August, 2016 on the grounds that the appeal was filed out of time contrary to **Section 79G of the Civil Procedure Act**, of which deprives the court jurisdiction to entertain the appeal and the applications arising therefrom.

On 17.8.2016 the parties agreed the preliminary objection be heard first on 27.9.2016. On this date parties indicated of their intention to settle the matter out of court and requested for hearing on 17.10.2016. On 17.10.2016 the application was not heard. On 15.11.2016 the applicant filed yet another application seeking various orders of which one was for extension of time with which to file a memorandum of appeal and that the memorandum of appeal filed and served on 8.7.2016 be deemed as properly and duly served. The applicant wanted this application heard before the preliminary objection, arguing that it will determine the issue raised in the preliminary objection. The said request was rejected by the court and preliminary objection was heard.

Parties are in agreement that the appeal was filed out of time and leave was not sought. It was therefore filed contrary to the provisions of **Section 79G of the Civil Procedure Act**. The application dated 15.11.2016 was aimed at circumventing the issue raised in the preliminary objection. Rules of procedure are in place to ensure order and fair play in conduct of suits for integrity of the process. Provisions of **Article 159(2)(d) of the Constitution** which reads that:-

“Justice shall be administered without undue regard to procedural technicalities”

is not a panacea for procedural defects meant to ensure speedy and fair trial. The applicant had a better option of withdrawing the application and the appeal and following the right procedure. I am persuaded that this court has no jurisdiction to hear an application founded on an appeal filed out of the allowed time in law, without leave of the court. The preliminary objection is allowed. The appeal and the applications founded on it are dismissed with costs to the 2nd respondent.

Ruling read and signed in the open court in presence of Mr. Mark for the State and the Appellant in person this 24th day of January, 2017.

S. M. GITHINJI

JUDGE