



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS SUIT NO. 12 OF 2014

AMUGA & CO. ADVOCATES.....APPLICANT

VERSUS

JOYCE NZISA.....1ST RESPONDENT

MONICA NDUNGE MWONGELA.....2ND RESPONDENT

CONNIE MBITHE MUIA.....3RD RESPONDENT

MARY MUSUKI MUDACHI.....4TH RESPONDENT

JOSEPH LOMBA MWONGELA.....5TH RESPONDENT

RULING

1. On 15th January 2016 Hon. E. Tanui Deputy Registrar, delivered a Ruling, pursuant to which the client's application for stay of proceedings, was dismissed.
2. The learned Deputy Registrar held that the issues which the client was raising, had already been determined by the court.
3. By the same Ruling, the Deputy Registrar settled the Terms of Sale, in respect to **L.R. No. 209/7196/113**.
4. The client was dissatisfied with the said decision and therefore decided to lodge an appeal to challenge it.
5. The Notice of Appeal is dated 28th January 2016, and it was lodged in court on the same date.
6. Thereafter, the client lodged the appeal, which bore the title of;

“REFERENCE TO THE HIGH COURT?.

7. The said appeal was filed in court on 15th February 2016.
8. In response to the said appeal, the Advocate filed a Notice of Preliminary Objection.

9. In the main, the Advocate asserted that the appeal had been lodged late, and that, therefore, it ought to be struck out.

10. On 1st February 2017, Mr. Amuga advocate submitted that pursuant to the provisions of Order 49 Rule 7 (2) of the Civil Procedure Rules, an appeal arising from the decision by the Deputy Registrar, must be made within 7 days of the date when the Deputy Registrar delivered his/her decision.

11. Considering that the Ruling in question was delivered on 15th January 2016, the Respondent insists that an appeal arising from it should have been brought by 22nd January 2016.

12. Instead of bringing the appeal within the prescribed time, it was lodged on 15th February 2016. It was for that reason that the Advocate asked the court to strike out the appeal.

13. The second ground which the advocate canvassed was that the appeal was an abuse of the process of the court.

14. The Advocate's position was that the Taxing Officer had already delivered her decision on the issue concerning the quantum of costs which were payable by the client.

15. As there had been no "*appeal?* preferred against the Ruling on Taxation, and also because there was no appeal against the resultant judgement and Decree, the Advocate feels that the process of challenging the decision dated 15th January 2016 was an abuse of the court process.

16. After the advocate had made oral submissions, the client sought, and was granted leave to file written submissions.

17. On 9th February 2017, the client filed her submissions. She confirmed that the Ruling which she was appealing against is dated 15th January 2016, and that the appeal was filed in court on 15th February 2016.

18. She then points out that the advocate's Preliminary Objection was founded upon the provisions of Order 49 Rule 7 (2) and (3) of the Civil Procedure Rules.

19. However, the client then only recites sub-rule (2) which says;

“An appeal from a decision of the registrar under the order referred to in sub-rule (1) shall be to a Judge in chambers?.

20. Sub-rule (3) provides as follows;

“The Memorandum of the appeal, setting out the grounds of the appeal shall be filed within seven days of the decision of the registrar?.

21. According to the client, her appeal was filed in "*good time*". She accused the advocate of attempting to prompt a trick, which was meant to delay the entire process of determining the issues at hand, and which also meant to divert this court's attention from the issues before it.

22. It is interesting to note that notwithstanding that contention, the client did expressly acknowledge that one of the issues which was for determination by this court was;

“i) Whether the reference/appeal herein was filed out of time”.

23. In the circumstances, there is no basis in the contention that the Advocate simply wanted to either set up a trick or planned to direct the court's attention from the issues before it.

24. It is clearly acknowledged that pursuant to Article 159 (2) of the Constitution of Kenya, Courts and

Tribunals are required to administer justice without undue regard to procedural technicalities.

25. However, that principle was not intended to do away with Rules and Regulations which govern the way Courts and Tribunals operate.

26. Systems and procedures are useful tools in ensuring orderliness; which in turn facilitates expedition in the delivery of justice.

27. Rules and Regulations are therefore supposed to be an ally in the dispensation of justice. It is in that spirit, that the people of Kenya resolved that if there are procedural technicalities which might hinder the administration of justice, then the Courts and Tribunals shall not pay undue regard to them.

28. In my considered opinion, one way that Courts and Tribunals can ensure that justice shall not be delayed is by generally striving to get parties to comply with the time-limits specified by law.

29. If parties were allowed absolute freedom to take action such as in the filing of pleadings, as and when they wished, that would breed anarchy.

30. For example, if there was no limit to the length of time when a defendant could lodge and then serve his Defence, it is conceivable that the plaintiff would be unable to take steps to apply for default judgement even when there had been considerable delay.

31. The requirement that specified action or steps be taken within the time specified by the statute or by rules, is not a procedural technicality.

32. It is the client's contention that there was no delay in filing the appeal. That contention is factually inaccurate, as the rule stipulates that appeals arising from the decisions of the deputy registrars, should be filed within seven days of the decision. In this case, neither the Notice of Appeal nor the "*Reference To the High Court*" were filed within 7 days of the decision.

33. I appreciate the fact that the client is not an advocate, and she was acting for herself.

34. Whilst the client was not an expert on the law, that is not sufficient reason to justify the failure to comply with the law.

35. It is so very obvious that the intended process of appeal was commenced late. In those circumstances, the client could have asked the court for an extension of time, so that the appeal could thereafter be deemed to have been filed within time, as had been extended by the court.

36. However, the client has not asked the court for any extension of time. She has also not tendered any explanation for the delay in filing both the Notice of Appeal and the Reference to the High Court.

37. Instead, the client has reiterated that her appeal meets the provisions of Order 49 Rule 7 (2) and (3) of the Civil Procedure Rules. In truth, the appeal did not meet the fundamental requirement relating to the time within which it ought to have been filed.

38. Therefore, even though the client could possibly have had an arguable appeal, she arrived at the airport after her designated flight had already taken-off. She has missed her flight. In the circumstances, the ticket she is holding onto cannot get her on board.

39. Accordingly, I uphold the Preliminary Objection, and do now strike out the Reference to the High Court or the appeal filed on 15th February 2016.

40. The client will pay to the Advocate, the costs of the appeal together with the costs of the Notice of Preliminary Objection.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of July 2017.

FRED OCHIENG

JUDGE

Ruling read in open court in the presence of

Ogegu for Amugo for the Applicant

1st Respondent in person

No appearance for the 2nd Respondent

No appearance for the 3rd Respondent

No appearance for the 4th Respondent

No appearance for the 5th Respondent

Collins Odhiambo – Court clerk.