



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**

**CIVIL APPEAL NO. 3 OF 2011**

**GABRIEL OSIMBO.....APPELLANT**

**VERSUS**

**CHRISPINUS MANDARE.....RESPONDENT**

*(Being an Appeal from the ruling and Order of the Resident Magistrate at Busia by M. Munyekenye  
on the 24<sup>th</sup> December 2010 in Civil Case Number Busia PMCC No. 69 of 2010)*

**BETWEEN**

**CHRISPINUS MANDARE.....PLAINTIFF**

**VERSUS**

**GABRIEL OSIMBO.....DEFENDANT**

**J U D G M E N T**

1. This Appeal will have to suffer an early setback for contravening the provisions of section 79G of The Civil Procedure Act which prescribes the time for filing an Appeal from a Subordinate Court to the High Court.
2. The Appeal is a challenge to two Decisions by the Subordinate Court which were both made on 24<sup>th</sup> December 2010 and in one Ruling. The first was a decision in respect to the Appellants' Application of 27<sup>th</sup> July 2010 for the setting aside of an Ex-parte Judgment and all consequential orders therefrom. The other was in respect to the Appellants Notice of Motion of 16<sup>th</sup> September 2010 which principally sought the discharge, variation or setting aside of a certain Consent Order. Both Applications were dismissed by the Learned Resident Magistrate and in regard to the latter Application, she granted the Appellant a Right of Appeal within 21 days. An Appeal from an order refusing to set aside a Judgment lies as a matter of Right while that for setting aside, discharge or varying a Consent would, it seems, require Leave of the Court.
3. Section 79G of The Civil Procedure Act prescribes the time for filing an Appeal from the Subordinate Court to the High Court and provides:-

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order”.**

From the wording of the provision it is the law in respect to all such Appeals, be they arising as a matter

of Right or with Leave. The period prescribed is 30 days and I would very much doubt that the Learned Trial Magistrate was correct in constricting the time for filing of the Appeal from the decision on the Application of 16<sup>th</sup> September 2010 to 28 days. Anyhow, whether the period allowed is 30 days or 28 days does not change the fate of this Appeal.

4. If it is taken that the Appeal was to be filed within 30 days of the date of the decision being 24<sup>th</sup> December 2010, then the Appeal ought to have been filed at least by 24<sup>th</sup> January 2011. Instead, the Appellant filed the Appeal out of time on 7<sup>th</sup> February 2011 and that was without leave of Court.
5. The Appellant cannot take solace and comfort in the provisions of Order 50 Rule 4 of The Civil Procedure Rules which in certain instances, provides for the exclusion of the period between 21<sup>st</sup> December and 13<sup>th</sup> January in the year next following (both days included) in computing of time for the amending, delivering and filing of any pleading or doing of any other act. The Rule reads as follows:-

**“4. 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 the amending, delivering or filing of any pleading or the doing of any other act”.**

The decision of the Subordinate Court was made on 24<sup>th</sup> December 2010 and if order 50 rule 4 were applicable to it then the present Appeal would be well within time. But the reality is that the period for filing of Appeals from the Subordinate Court to the High Court is prescribed by the Act itself and the Act does not have similar provisions as those of Order 50 Rule 4 excluding certain days from the computation of time. As it is trite that Subsidiary Legislation cannot be construed to contradict the provisions of an Act, the provisions of Order 50 Rule 4 cannot be availed in the computation of time prescribed by section 79G of The Civil Procedure Act. (see also the Decision of **Musinga J** (as he then was) in **Andrew Nganga Ndungu –vs- Godfrey Karuri & Another [2006] eKLR**).

6. Unfortunately for the Appellant, his Appeal dated 4<sup>th</sup> February 2011 and filed on 7<sup>th</sup> February 2011 must run aground. It is now hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 4<sup>TH</sup> DAY OF MARCH, 2015**

**F. TUIYOTT**

**J U D G E**

**IN THE PRESENCE OF:**

**KADENYI.....COURT CLERK**

**.....FOR THE APPELLANT**

**.....FOR THE RESPONDENT**