



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 127 OF 2012

WASINI ISLAND LIMITED APPELLANT

V E R S U S

FARWAYS SAFARICENTRE LIMITEDRESPONDENT

(Being an appeal from the Judgment of the Senior Magistrate's Court at Mombasa Hon. Mr. E. Michieka (SRM) dated 16th May, 2012 in SRMCC No. 143 of 2011)

RULING

1. Appellant's Notice of Motion dated 25th September 2014 is unopposed. Appellant has brought it under the provisions of Section 79G of the Civil Procedure Act Cap 21 viz-

“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:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

Appellant seeks leave to admit its appeal out of time.

2. This appeal was filed on 2nd August 2012 against the lower Court's decision of 16th May 2012. It is obvious that this appeal was out of time as provided under Section 79G of Cap 21.
3. Appellant filed a Notice of Motion in the Magistrate's Court seeking leave to file the appeal out of time. The Magistrate's Court granted that leave on 31st July 2012.
4. I am of the considered view that both application and the order of leave to file an appeal out of time, filed before the Magistrate's Court was in great error. Looking at Section 79G it provides-

“...Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
(underlining mine)

5. I underline the word '**Court**' for purpose of emphasis. The Court in my view can only be the

Court to which the appeal is preferred. It cannot be the Court from which its order is the subject of the appeal. If the Legislature had intended that that jurisdiction be entertained by the Court appealed from the Legislature would have so stated. That is what the Legislature did in regard to appeals from the High Court to the Appeal. Section 7 of the Appellant Jurisdiction Cap 9 provides-

“7. The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”

That provision is not in Section 79G Cap 21. The Legislature in my view intended that leave could only be given by the Court appealed to, in this case the High Court.

6. The Learned Counsel for the Appellant deponed that the delay in filing this appeal was due to Appellant spending time filing the application [erroneous] application for leave to appeal out of time before the Magistrate. That explanation is sufficient and excuses the delay.
7. The present application is in tandem with the holding in the case **GERALD M’LIMBINE –Vs- JOSEPH KANGANGI [2009]eKLR** viz-

“My understanding of the proviso to Section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek the Court’s leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the Court’s permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the Court’s process”

8. The Appellant’s Notice of Motion dated 25th September 2014 is merited and is granted in the following terms-
 - a. **Appellant is granted leave to file its appeal against the decision in Mombasa SRMCC No. 143 of 2011 of 16th May 2012 out of time. In that regard the appeal filed herein is admitted out of time.**
 - b. **There shall be no costs in regard to Notice of Motion dated 25th September 2014.**

DATED and DELIVERED at MOMBASA this 3RD day of MARCH, 2015.

MARY KASANGO

JUDGE