

REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL NO. E074 OF 2024

BONIFACE KIOKO

NZIVO.....APPELLANT/RESPONDENT

-VERSUS-

MERCY MUENI NZUVA

.....RESPONDENT/APPLICANT

RULING

Introduction

1. The Preliminary Objection (P.O) before me is dated 16/09/2024 and brought on the following grounds:

- a) The Memorandum of Appeal is fatally and incurably defective.*
- b) This honorable Court lacks jurisdiction to hear and determine the appeal.*

- c) *The Memorandum of Appeal filed offends the provisions of section 79G of the Civil Procedure Act.*
- d) *Consequently, the Memorandum of Appeal ought to be dismissed or struck out with costs.*
2. The P.O is opposed through the Replying Affidavit sworn on 29/10/2024 by A.P Ochieng' Ogotu the Advocate in conduct of the matter on behalf of the Appellant . He deponed that, the judgment in the matter was delivered on 14/12/2023 and the Appellant's previous Advocates, M/S Thomas Geoffrey Onyancha & Co. requested certified copies of proceedings and decree on 31/01/2024, and attached copies judgment and letter addressed to Executive Officer as **APO 1 & 2** respectively.
3. That the appeal was filed on 17/07/2024 and that under section 79G of the Civil Procedure Act, the period between 31/07/2024 and 14/06/2024, being the time taken to prepare and deliver certified copies is excluded from the 30 days for filing an appeal. That, the court vacation from 21/12/2023 to

13/01/2024 is also excluded. That, the appeal was therefore filed within the required timelines stipulated by law.

4. The P.O was canvassed through written submissions.

Submissions by the Applicant/Respondent

5. It was submitted that judgment was delivered on 14/12/2023 and Memorandum of Appeal was filed on 17/07/2024 without leave of court as per section 79G of the Civil Procedure Act (CPA). That, the use of the word 'shall' in the provision means that an appeal must be filed within 30 days but there is a proviso of admitting an appeal out of time if applicant gives a satisfactory cause for not filing on time. Reliance was placed on the following cases;

a) **Josephine Wambui Mwangi -vs- Michael Mukundi Ngugi; (2021) eKLR** where the court stated;

“The net result is that the appeal herein is struck out for having been filed more than one year out of time and without an order enlarging the time for filing the

appeal. The Appellant shall bear costs of the appeal.”

b) Hamisa Swaleh -vs- Rama Swaleh Mauwa Swaleh (2019) eKLR where the court stated;

“In my view, the Appellant cannot hide under the cover that he learnt about the dismissal of the case some two months later. The Appellant ought to have made an application and satisfied the court that he had good and sufficient cause for not filing the appeal on time. Instead, the appellant went ahead and filed the appeal out of time and without leave of court. The Appellant cannot also hide under the cover that he was let down by the counsel. This court cannot shut its eyes to the blatant non observance of the provisions of the law and the rule. The upshot of the above is that the Memorandum of Appeal dated 8/8/2017 and Record of Appeal dated 26/2/2018 are hereby struck out with costs to the Applicants.”

c) Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral & Boundaries Commission & 7 Others (2014) eKLR where the Supreme Court of Kenya stated;

“No appeal can be filed out of time without leave of court. such a filing renders the documents so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of court. It is unfortunate that petition No 10 of 2014 has been accorded a reference number in this court registry. This is irregular as that document is unknown in law and the same should be struck out.”

d) Wambasi -vs- Frodak Kenya Limited & Another (Employment and Labour Relations Appeal E051 of 2022) [2023] KEELRC 781 (KLR) (23 March 2023) (Ruling) where the court stated;

“18. The appellant filed the memorandum of appeal outside the 30 days allowed by section 79G without

the leave of the court. The court finds that the said memorandum of appeal filed outside the statutory time limit of 30 days without leave of the court was thus incompetent and fatally defective. The court upholds the cited authorities in Patrick Kiruja Kithinji v Victor Mugira Marete (2015)e KLR where the court held that whether or not an appeal is filed on time goes to the jurisdiction of the court and that an appeal filed out of time was not curable under article 159 of the Constitution and in Trade Bank Limited(in Liquidation)v L Z Engineering Construction Limited(1997) eKLR Where the court held that an appeal must be struck out if an essential step is not taken leaving the party concerned to take such corrective steps as it may wish to take.”

6. Consequently, it was contended that there is no competent appeal before this court as the Memorandum of Appeal dated 17/07/2024 is fatally defective and incompetent.

Submissions by the Appellant/Respondent

7. The Appellant/Respondent set out the following issues for determination:

a) Whether the Appellant's appeal was filed within the required timelines stipulated by Section 79G of the Civil Procedure Act, considering the period for obtaining certified copies of the decree and typed proceedings and the court vacation.

b) Whether the Memorandum of Appeal ought to be struck out

c) Who bears the costs of the preliminary objection?

8. On whether the appeal was filed within the required timelines, reliance was placed on section 79G of the CPA for the submission that every appeal from a subordinate court to the High Court shall be filed within 30 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.

9. It was submitted that certified copies, in this case, were collected on 14/06/2024 as evidenced by the Certificate of Delay dated 17/07/2024 and the appeal was subsequently filed on 17/07/2024. That, the period from 31/01/2024 to 14/06/2024, being the time taken to prepare and deliver the certified copies, is excluded from the 30 days for filing an appeal. That, the court vacation from 21/12/2023 to 13/01/2024 is also excluded from the calculation of the 30 days stipulated for filing an appeal.

10. It was submitted that exclusion of the stated periods shows that the appeal was filed within the required timelines stipulated by the law. That, the Respondent's reliance on cases such as Josephine Wambui Mwangi -vs- Michael Mukundi and Hamisa Swaleh -vs- Rama Swaleh Mauwa Swaleh is misplaced as the appeals therein were filed significantly out of time without any attempt to seek leave of the court or provide a valid explanation for the delay. That, in contrast, the Appellant in this case has provided a Certificate of Delay and has adhered to the statutory provisions of Section 79G, which

explicitly allows for the exclusion of time taken to obtain certified copies of the decree and proceedings.

11. Reliance was placed on the case of **Richard Ngetich & Anor -vs- Francis Vozena Kidiga (2014) KEHC 74 (KLR)** where the court stated that it was unfair to penalize the Appellant for the scenario obtaining and invoked the provisions of section 1A of the CPA regarding the overriding objectives of the rules which intended to facilitate the just and proportionate resolution of civil disputes; and further declined to dismiss the appeal on the basis that it was not just or proportionate to do so.

12. It was submitted that the Memorandum of Appeal should not be struck out as sought by the Respondent.

13. Reliance was placed on section 27 of the CPA for the submissions that costs follow the event hence the Respondent should pay costs of the P.O after the court dismisses it.

14.I have considered the P.O, the replying affidavit and the rival submissions, the only issue for determination is whether the P.O is sustainable.

Analysis & Determination

15.The *locus classicus* in determination of a preliminary objection is the case of **Mukisa Biscuit Manufacturing Ltd -vs- West End Distributors (1969) E.A 696** which posits that a P.O must be a pure point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

16.The P.O in this case is that the appeal was filed out of time and without leave of court.

17.The trial court judgment was delivered on 14/12/2023 and the appeal was filed on 17/07/2024. Section 79G of the CPA provides that;

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.

18. The Respondent exhibited a certificate of delay from Makindu Law Courts which states as follows at paragraph 3;

“The time taken for preparation and delivery of the certified copies of the proceedings and decree was 137 days from 31/01/2024 to 14/06/2024.”

19. It is therefore evident that the said period is excluded from the 30-days requirement as per section 79G of the CPA. The Respondent contended that the court vacation from 21/12/2023 to 13/01/2024 is also excluded from computation. Order 50 Rule 4 of the CPR provides that;

“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:

Provided that this rule shall not apply to any application in respect of a temporary injunction.”

20.It is therefore accurate that the period from 21/12/2023 to 13/01/2024 is also excluded from 30-days requirement.

21.The Appellant applied for the proceedings on 31/01/2024 which was within the 30-days requirement after exclusion of the December vacation. Consequently, the 30-days requirement starts to run from 14/06/2024 when the certified copies were ready.

22.The certificate of delay indicates that the typed proceedings and decree were ready for collection on 14/06/2024 but there is nothing to show that the Makindu Court registry actually informed the Appellant to collect them on the said date. On the other hand, the certificate of delay was issued on 17/07/2024 and the Memorandum of Appeal was filed on the same day. It follows therefore the period up to 17/07/2024 would be included in the time taken by the Makindu Court

registry to prepare and deliver certified copies of relevant documents to the Appellant.

23. Taking into consideration this calculation of time it appears to me that the appeal was filed out of time but the explanation given by the appellant places it within time as envisaged by Section 79G of the CPA and Order 50 Rule 4 of the CPR.

24. In the circumstances the P.O is unsustainable and is overruled with costs to the appellant.

Dated signed and delivered via CTS on 24th November 2025

Mumbua T Matheka

Judge

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