

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO. E265 OF 2024

MOTOR CARE LIMITED
APPELLANT

VERSUS

JUBILEE INSURANCE COMPANY.....
.....RESPONDENT

RULING

1. The Appellant filed the **Motion dated 11/07/2024** pursuant to provisions of **Section 79G of the Civil Procedure Act** seeking orders for :
 - a) *Extension of time within which to file an appeal arising from the trial courts judgment delivered in SCCCOMM/E8314 of 2023 on 28/12/2023 and the memorandum of Appeal filed be deemed as validly filed.*
2. The motion is premised on **Order 50 of the Civil Procedure Rules**, more specifically on the matter of computation of time from which the Applicant deems to have started to run from 14/01/2024 with a delay of 8 days that it deems as excusable as stated on its grounds for the motion, and in its

supporting affidavit sworn on 11/07/2024 by its advocate, Henry Karanja.

3. In opposition to the motion, the Respondent filed a Notice of **Preliminary Objection dated 11/06/2024** and a Replying affidavit sworn on 14/10/2024 by the Appellant's Claims Manager, Lucy Kiriuki. The parties also filed submissions on the Preliminary Objection.

Analysis and Determination

4. Three issues are not in dispute:-

- 1) *That the appeal as filed was so filed out of time without leave of court*
- 2) *That filing the appeal out of time without leave is inappropriate.*
- 3) *That proviso to section 78G of the Civil Procedure Act provides that an appeal may be admitted out of time if the appellant satisfies the court that they had a good and sufficient cause for not filing the appeal in time.*

From the above, one issue concerns the determination of the motion and the Preliminary Objection.

The Preliminary Objection

5. It is based on the issue that the appeal is time barred, having been filed 30 days after the decree without leave of court contrary to **Section 79G of the Civil Procedure Act**.

Directions were issued that both the **Preliminary Objection** and the motion shall be argued together by way of the written submissions.

Analysis and Determination

6. The lower court's judgment was delivered on 28/12/2022.

Order 50 Rule 4 of the Civil Procedure Rules provides when time stops to run as between:

The 21st day of December in any year and the 13th day of January in the next following both days included - for delivering or filing of any pleading or the doing of any act.

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

7. By the above calculation of time, the judgment having been delivered on 28/12/2023, time stated running from 14/01/2024 and 30 days prescribed at **Section 79G of the Act lapsed on 14/02/2024**. The appeal was filed on 23/02/2024, being 8 days out of time and without leave of court.

In the case of **Zachary Njanja Mugo & Another v. Kimemia Geoffrey Majumi [2021] eKLR; Joseph Mbaabu Marete and Nairobi Bottler Ltd vs. Ndungu & Another [2023] eKLR**, the thread across the decisions is that an appeal filed out of time without leave of court and the appellant approaching court for extension of time and to legalize the appeal is not only inappropriate illegal but also a nullity and of no legal effect.

8. On the motion seeking leave to file an appeal out of time, as I have rendered is anchored under Provisions of **Section 79G, Provis**; if the court is satisfied with reasons for the 8 days delay, the orders sought may be granted. What reasons have been advanced for the delay?

In its supporting affidavit the Applicant states that the delay was inadvertent on its advocates part, that the client ought not suffer due to the advocates mistake, that it is willing to comply with conditions that the court may impose, it is in the interest of justice that the application is granted, and delay of 8 days is excusable in the circumstance.

9. The Applicant has provided to the court a Memorandum of Appeal - annexure HK-1 to state that the intended appeal has good chances of success as supported in the cases of **First American bank of Kenya Ltd v. Gulab P. Shah & 2 Others [2002] IEA 65; Nicholas Kiptoo Arap Korir Salat**

vs. Independent electoral and Boundaries commission & 7 OThres [2014] eKLR.

10. Upon consideration, the court finds that the delay of 8 days soon after the December Holidays and court recess may not be too long not to be excusable in the interest of fair trial and justice more so that it was purely inadvertence of the applicant's advocates. The court cites the case of **First American Bank case (supra)** for the holding that a court of law should be very hesitant to close the door to the corridors of justice prior to a litigant being heard on his complaint as held in the case of the Court of Appeal in **Charles Karanja Kiiru K. Charles Githinji Mwigwa [2017]eKLR**
11. The upshot is that:-
- a) The Applicant is granted leave to file an appeal out of time.**
 - b) The memorandum of appeal shall be filed and served within 7 days of this ruling**
 - c) The Record of Appeal shall be filed within 60 days.**
 - d) The Applicant shall pay to the Respondent throw away costs of Kshs. 20,000/= within 30 days. In default of the orders above, these orders shall lapse automatically.**

Orders accordingly.

**Delivered Dated and Signed at Nairobi this 30th day of
January, 2026.**

.....

JANET MULWA.

JUDGE

ORIGINAL