



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**HCA 134 OF 2013**

**SERAH WANJIRU MIGWI .....1<sup>ST</sup> APPELLANT**

**KENYA KAIRI FARMERS CO. LTD.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**NJOKI NJENGA .....RESPONDENT**

**RULING**

***(Application to strike out Memorandum of Appeal as having been filed late; same filed one day late; court in exercise of its discretion allows the appeal but subject to payment of throw away costs).***

1. The application before me is that dated 13 April 2015 filed by the respondent. It seeks the following orders:-

- (i) That the Memorandum of Appeal dated 16 August 2013 be struck out on ground of being filed out of thirty (30) days time limit as required by Section 79G of the Civil Procedure Act.
- (ii) That costs of this application be provided for.

2. I have perused the record. It shows that on 16 August 2013, the subject Memorandum of Appeal was filed. The appeal is from the judgment of Hon. J. N. Mwaniki, Senior Principal Magistrate, Nakuru, and is in respect of Nakuru CMCC No. 2126 of 2005. In that case, the appellants had been sued by the respondent herein, over certain land. Judgment was entered on 16 July 2013, in favour of the plaintiff in the case (respondent herein) hence the appeal.

3. There is no contest that an appeal from the Magistrate's Court needs to be filed within 30 days of the decision. This is brought out in Section 79G of the Civil Procedure Act, which provides as follows :-

***79G. Time for filing appeals from subordinate courts***

*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.*

4. Counsel for the applicant has argued that Section 79G is couched in mandatory terms. He submitted that the appeal was filed out of time without the leave of the court and should be dismissed. He relied on the cases of *Postal Corporation of Kenya vs Job Gachenge Njagi (2004) eKLR* ; *Godfrey Kariuki Gathing'i vs Gladys Njeri Kirongo & 2 Others (2015) eKLR* ; *Sammy K. Kirui vs Remmy K. Korir (2015) eKLR*; and *MG & Another (Children Appealing through FWM) vs JKG (2015) eKLR*.

5. The respondents have opposed the application through the Affidavit of Sarah Wanjiru Migwi the 1st appellant. She has explained that she did not know that her former firm of advocates, M/s Karanja Mbugua & Company Advocates, had actually filed this appeal and she had on her part filed in person an application dated 20 June 2014 in Nakuru HCCC Misc. Application No. 130 of 2014, for leave to appeal out of time. She has deposed that she is of the view that the appeal was filed within time, and if not, she has asked the court to exercise its discretion to extend time and deem the appeal as properly filed.

6. I have considered the matter. I am not in doubt that the Memorandum of Appeal was filed one day late. Judgment was delivered on 16 July 2012, and given that the month of July has 31 days, then the appeal needed to be filed on 15 August 2012 at the latest. The Memorandum of Appeal in our case was filed on 16 August 2012.

7. However, considering the totality of circumstances, it being easy to confuse the months that have 30 days with those which have 31 days, and the fact that it is only one day late, in my discretion, and in order to do justice to the parties, I will extend time so that the Memorandum of Appeal is deemed to have been filed within time, but this will be subject to payment of costs. I do so in exercise of my discretion given the surrounding circumstances.

8. The respondent cannot however be faulted for filing this application and I will award him costs of the same. I will award throw away costs of Kshs. 10,000/= which must be paid within 30 days. In default, the Memorandum of Appeal will stand struck out.

9. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> day of July, 2016**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT NAKURU**

**In the presence of:**

Ms. Gitau holding brief for Mr. Karanja for applicant.

Ms. Ngere holding brief for Mrs. Magana for respondent.

Court Assistant: Janet.

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT NAKURU**