



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: GITHINJI, OKWENGU & J MOHAMMED, J.J.A)**

**CIVIL APPEAL NO. 86 OF 2015**

**BETWEEN**

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

**VERSUS**

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

(Appeal from the Judgment and Decree of the High Court of Kenya

at Busia, (Tuiyott, J.) dated 4th *March*, 2015

in H.C.C.A NO. 3 OF 2011)

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**JUDGMENT OF J. MOHAMMED JA**

**Background**

1. This is an appeal against a ruling delivered by the High Court (**Tuiyott, J.**) dismissing the appellant's appeal for the reason that it was filed out of time. A brief background of the suit is that the respondent herein, **Chrispinus Mandare**, initiated the suit against the appellant, **Gabriel Osimbo** by way of plaint dated 5th February, 2010 claiming rent arrears of Kshs. 77,000/- and interest thereon at court rates as well as costs of the suit. On 21st May, 2010, the court entered judgement in favour of the respondent against the appellant for Kshs. 77,000/- as the appellant had failed to file a memorandum of appearance and defence despite having been duly served.

2. On 26th July, 2010, a consent entered into between the respondent's advocate and **Judith Florence Akinyi (Judith)**, the surety to the appellant was adopted as an order of the court. The terms of the consent, among others, were that motor vehicle registration number KTK 857 is offered as security for the performance of the decree against the appellant who was serving 30 days in civil jail; and that in default, the said motor vehicle which was under the custody of Kuronya Auctioneers be sold to realize the balance of the decretal sum and costs.

3. The appellant filed an application dated 27th July, 2010 under certificate of urgency seeking orders that the *exparte* judgment and all consequential orders be set aside, motor vehicle registration number KTK 857 seized in execution of the said judgement be released and Kshs. 60,000/- paid by the defendant's wife to secure his release from prison be released to her; and that unconditional leave be granted to the appellant to file his defence.

4. The appellant also filed a Statement of Defence dated 27th July, 2010 in which he denied the respondent's claim. He denied that he had at any time been the respondent's tenant. He further denied that he was indebted to the respondent in the sum of Kshs. 77,000/-.

5. The respondent filed a replying affidavit dated 6th August, 2010 opposing the appellant's application.

6. After hearing the parties, the court in its Ruling of 24th December, 2010 dismissed the appellant's application dated 27th July, 2010 with costs to the respondent as it found that summons to enter appearance was properly served upon the appellant. Moreover, the court dismissed the appellant's application dated 13th September, 2010 as it found that the application was not brought under any enabling provisions of the law; and that the supporting affidavit by **Florence Akinyi** was undated. Finally, the court granted the Appellant a right to appeal in 28 days.

7. Dissatisfied with the decision of the Resident Magistrate's Court Busia, (**M. Munyekenye**) the appellant filed a memorandum of appeal dated 4th February, 2011 in the High Court on grounds that the learned Resident magistrate erred in law in dismissing the appellant's application dated 16th September, 2010; in holding that the consent order entered into by **Judith** was valid and binding on the appellant; in allowing the sale of motor vehicle registration number KTK 857 during the pendency of the application dated 16th September, 2010; and in finding that the summons to enter appearance was duly served upon the appellant, among others.

8. Upon hearing the parties, the learned Judge, (**Tuiyott, J.**) dismissed the appellant's appeal with costs. With regard to the decision to dismiss the appellant's application of 16th September, 2010, the learned Judge noted that the learned magistrate granted the appellant a right of appeal within 28 days. However, the learned Judge found that 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 require leave of court.

9. Further, the learned Judge found that the appellant filed the appeal out of time on 7th February, 2011 without leave yet the appeal ought to have been filed at least by 24th January, 2011 as per **section 79G of the Civil Procedure Act**. Further, the learned Judge found that the provisions of **Order 50 Rule 4 of the Civil Procedure Rules** cannot be availed in the computation of time prescribed by **section 79 G of the Civil Procedure Act**.

10. Aggrieved by that decision, the appellant preferred this appeal on grounds that the learned Judge of the High Court gravely erred in law in deciding the appeal on the basis of an issue which had not been pleaded or raised before him by any of the parties and in respect of which the appellant had not been given an opportunity to be heard; misdirected himself in law in holding that the appeal before him was filed in contravention of 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; and gravely misdirected himself in law in holding that the provisions of **Order 50 Rule 4 of the Civil Procedure Rules, 2010**, which provides for the exclusion of the period 21st December and 13th January in the next year in computing time, does not apply to the filing of appeals from the subordinate court to the High Court.

11. The appellant sought that the appeal be allowed and the Judgement and Order of 4th March, 2015 be set aside and/ or varied and that the appellant's appeal be reinstated for hearing and determination on the merits and that costs of the appeal and the costs of the High Court be awarded to the appellant.

#### **Submissions**

12. When this appeal came before us for hearing, learned counsel, **Mr. Orengo** appeared for the appellant while learned counsel, **Mr. Ipapu** appeared for the respondent.

13. **Mr. Orengo** relied on the appellant's list of authorities.

Citing the case of **Keziah Stella Pyman & 2 Others v. Paul Mwololo Mutevu & 8 Others**, counsel submitted that the period from 21st December to 13th January should have been excluded from computing time. Counsel further submitted that neither party raised the issue that the appeal was filed out of time and for this reason the learned Judge erred in deciding the appeal on the basis of an issue which had not been pleaded or raised before him by any of the parties and in respect of which the appellant had not been given an opportunity to be heard. He further contended that this was a proper case in which to enlarge time and that **Article 159(2) (d) of the Constitution** requires that substantial justice be administered without undue regard to procedural technicalities.

14. Conversely, **Mr. Ipapu** contended that **Section 79G of the Civil Procedure Act** is a specific statutory provision which provides that appeals from the subordinate court to the High Court should be filed within 30 days from the date of the decision appealed. He further contended that the provisions of **Order 50 Rule 4 of the Civil Procedure Rules** cannot be taken to supersede the Act. Finally, he submitted that the appeal was clearly filed out of time and that for this reason the learned Judge could not entertain the matter.

#### **Determination**

15. I have considered the grounds of appeal, the submissions, the authorities cited and the law. This being a second appeal we take note of the following words of Onyango Otieno J.A. in this Court's decision of **Kenya Breweries Ltd. vs. Godfrey Odoyo CA No. 127 of 2007** :-

**“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”**

16. The issue for determination on whether the learned Judge was right in dismissing the appellant's appeal for being filed out of time. Thus, in determining this appeal, we are to satisfy ourselves whether the learned Judge properly applied the laid down principles in dismissing the appellant's suit. In this regard, this Court, in the case of **Mbogo & Another v Shah [1968] EA 96** stated as follows:-

**“I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion...”** (Emphasis added)

17. The time for filing appeals from the subordinate court to the High Court is governed by **section 79G of the Civil Procedure Act** which

provides as follows:-

**“79G. 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. From the above, it is clear that an appeal from a subordinate court to the High Court is to be filed within 30 days from the date of the decree or order appealed against. Though, in computing the 30 days, the period of time which the lower court certifies as having been requisite for the preparation and delivery, to the appellant, of a copy of the decree or order is to be excluded.

19. From the record, I note that the appellant filed the appeal on 7th February, 2011, which according to the respondent was out of time and was without leave of court. However, the appellant argues that, applying the provisions of **Order 50 Rule 4 of the Civil Procedure Rules**, the appeal was filed timeously.

20. Therefore, one of the issues that emerges for determination in this appeal is whether the provisions of **Order 50 Rule 4 of the Civil Procedure Rules, 2010**, which provides for the exclusion of the period 21st December and 13th January in the next year in computing time, applies to the filing of appeals from the subordinate to the High Court. **Order 50 Rule 4** of the Civil Procedure Rules provides:-

**“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.”**

21. In determining this issue, I am guided by **Section 57(b)** of the **Interpretation and General Provisions Act** which provides that:-

**“In computing time for the purposes of a written law, unless the contrary intention appears-**

**b. If the last day of the period is Sunday or a public holiday or also official non-working days which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day”**

22. Regarding the vacations to be observed by the Courts and the offices of the High Court, **Rule 2(2)(b)** of the **High Court Practice and Procedure Rules**, made pursuant to **Section 10** of the **Judicature Act**, provides that the Christmas vacation shall commence on 21st December and shall terminate on 13th of January.

23. Therefore, applying the above to the instant matter, I find that the appeal to the High Court was filed in time as the Christmas vacation period is excluded for purposes of computation of time stipulated for filing of documents. See, **Keziah Stella Pyman & 2 Others v. Paul Mwololo Mutevu & 8 Others** (supra).

24. Further, I find merit in the appellant’s contention that the learned Judge erred in deciding the appeal on the basis of an issue which had not been pleaded or raised before him by any of the parties and in respect of which the appellant had not been given an opportunity to be heard. In the instant matter, the learned Judge out rightly dismissed the appeal on the basis that it had been filed out of time without allowing the parties the right to be heard.

25. This Court, in the case ***Kamlesh Mansukhalal Damji Pattni vs. Director of Public Prosecutions & 3 others [2015] eKLR*** observed that:-

**“It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial Officers are also State officers, and consequently are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve.”**

26. I also find that the learned Judge erred by failing to take into consideration the fact that an appeal filed out of time can be later validated by way of leave. This Court has severally deliberated on the essence of the proviso to **Section 79G of the Civil Procedure Act** and has arrived at a broad interpretation of the said provision. In this respect, this Court in the case of **Charles Karanja Kiiru v. Charles Githinji Muigwa [2017] eKLR** adopting the position of **Aburili J.** in the case of **Martha Wambui v. Irene Wanjiru Mwangi & Another [2015] eKLR**, observed that an appeal can be filed out of time and validated later by way of seeking and obtaining leave of court to admit it out of time. See also ***Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] Eklr.***

27. I further find merit in the appellant's contention that the learned Judge erred by failing to take into consideration the principle enshrined under **Article 159(2)(d) of the Constitution** as well as the overriding objective. In **Abdirahman Muhumed Abdi v Safi Petroleum Products Ltd. & 6 others, Civil Application No. Nai. 173 of 2010**, a notice of appeal was served on the respondent out of time and without leave of the court, upon being asked to strike it out, this Court stated as follows:-

**“In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”**

28. Accordingly, I would allow this appeal but with no orders as to costs. The Judgment and Decree of the High Court dated and delivered on 4th March, 2015 is hereby set aside and Busia High Court Civil Appeal No. 3 of 2011 is hereby remitted back to the High Court for hearing by a Judge other than Tuiyott J.

**Dated and delivered at Nairobi this 3rd day of April, 2020.**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

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**JUDGMENT OF H. OKWENGU, JA**

I have read the draft judgment prepared by J. Mohammed JA. I am in agreement that this appeal should be allowed. With due respect, the learned Judge misconstrued the purport of **Order 50 Rule 4** of the Civil Procedure Rules. The rule simply provides the manner of computing

time. It does not provide for any specific time for doing or taking any action. Thus, Order 50 Rule 4 does not contradict **section 75G** of the Civil Procedure Act, which provides a time limit of 30 days for filing an appeal. Order 50 Rule 4 simply provides how these days are to be computed if the period falls within the High Court vacation.

Taking into account Rule 4 in computing the 30 days, it is evident that the appellant's appeal which was filed on 7th February, 2011 was filed within time as it was affected by the High Court vacation and the period, 21st December, 2010 to 13th January, 2011 had to be excluded in computing the time. The learned Judge was therefore wrong in dismissing the appeal.

For this reason, I would concur with J. Mohammed, JA that this appeal be allowed, the judgment and orders made by the learned Judge on 4th March, 2015 be set aside, and that the appellant's appeal that was filed in **H.C.C.A. No. 3 of 2011** be reinstated; heard and determined on merit by a Judge of competent jurisdiction other than Tuiyott, J; and that costs of this appeal be awarded to the appellant.

Those shall be the orders of the Court.

This judgment is delivered in accordance with **Rule 32(3)** of the Court of Appeal Rules, as Githinji, JA has retired from service.

**Dated and delivered at Nairobi this 3rd day of April, 2020**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**