



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: O’KUBASU, GITHINJI & NYAMU, J.J.A.)**

**CIVIL APPLICATION NO. NAI. 372 OF 2009**

**BETWEEN**

**HEBBY ONDIEKI .....APPLICANT**

**AND**

**BARCLAYS BANK OF KENYA LIMITED .....RESPONDENT**

*(Application to strike out notice of appeal dated 16<sup>th</sup> October, 2008 from the judgment of the High Court of Kenya at Nakuru*

*(Maraga, J.0 dated 3<sup>rd</sup> October, 2008*

**in**

**H.C.C.SUIT NO. 432 OF 1999)**

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**RULING OF THE COURT**

This is an application by way of Notice of Motion brought under **Rule 80** of the Court of Appeal Rules in which the applicant, **HEBBY ONDIEKI** seeks an order that the respondent’s notice of appeal dated 16<sup>th</sup> October, 2008 be struck out. It would appear that the application is brought on the grounds that the notice of appeal was filed out of time and that it was not served on the applicant.

When the application came up for hearing before us on 24<sup>th</sup> February, 2011, Mr. G.O. Ogola, the learned counsel for the applicant, submitted that since the judgment of the superior court was delivered on 3<sup>rd</sup> October, 2008 and the notice of appeal was lodged on 17<sup>th</sup> October, 2008, then there was no competent notice of appeal before the Court.

In response to the foregoing Mr. Githiru, the learned counsel for the respondent, submitted that the notice of appeal was filed within time.

**Rule 75(2)** of this Court's Rules provides:-

***“Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date the decision against which it is desired to appeal.”***

From the foregoing, it is clear that a notice of appeal has to be lodged within **14 days** of the date of the judgment/ruling to be challenged. In the present application, the judgment was delivered on 3<sup>rd</sup> October, 2008 and the notice of appeal lodged on 17<sup>th</sup> October, 2008. In our view, the notice of appeal was lodged within the time prescribed by the Rules.

**Rule 3(a)** of the Court of Appeal Rules provides:-

***“3. Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions-***

*(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or that act or thing is done”*

In view of the foregoing, it is clear to us that this application to strike out the notice of appeal is devoid of any merit. The application falls under the category of abuse of the court process. We have no hesitation in rejecting it.

Accordingly, the applicant's application dated 23<sup>rd</sup> November, 2009 is hereby dismissed with costs to the respondent. It is so ordered.

***Dated and delivered at Nakuru this 25<sup>th</sup> day of March, 2011.***

***E.O. O’KUBASU***

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***JUDGE OF APPEAL***

***E.M. GITHINJI***

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**JUDGE OF APPEAL**

**J.G. NYAMU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**