



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL  
AT NAIROBI**

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

**CIVIL APPEAL APPLI 149 OF 2002**

**BETWEEN**

**RUAHA CONCRETE**

**COMPANY LIMITED .....  
APPLICANT/RESPNDENT**

**AND**

**MIDDLE EAST BANK OF**

**KENYA LIMITED .....  
RESPONDENT/APPLICANT**

**(Appeal from the ruling and order of the High Court of Kenya at**

**Milimani Commercial Court (Hewett, Commisjoner Of Assize) dated  
27th January, 2000**

**in**

**H.C.C.C. NO. 636 OF 1999)**

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**RULING OF THE COURT**

This is a preliminary objection by the appellant *Ruaha Concrete Company Limited* to the respondent’s application seeking an order that the appeal be struck out on the four grounds enumerated on the body of the application. The appeal is against the ruling of the superior court (Hewett, Commissioner of Assize (as he then was) dated 27th January, 2000 whereby the appellant’s suit was struck out as being frivolous and an abuse of the process of the court. By the plaint which was struck out the appellant had sought judgment against the respondent bank for Shs.29,520,000/= allegedly paid out from the appellant’s account with the bank through a forged cheque.

The appeal was filed on 13th June 2002. The application to strike out the appeal was filed on 25th July 2003. On 17th November, 2003, the respondent was given leave to amend the application. The amended application was filed on 18th November 2003. At the hearing of the application Mr. Owino, the learned counsel for the appellant contended that the application is incompetent as it was filed outside the 30 days

stipulated in the proviso to **Rule 80** of the Rules of the Court. Mr. Esmail for the applicant on his part submitted that the time limitation in the proviso to **Rule 80** applies to the appeals filed after the rule was introduced. In addition he contended that the granting of leave by the court to amend the application automatically extended the time for the filing of the application.

Rule 80 before repeal allowed a party served with a notice of appeal to make an application to strike out the notice of appeal or the appeal “at any time, either before or after the institution of the appeal”. By a Legal Notice No. 152 of 2002, published in the Kenya Gazette on 30th August 2002, Rule 80 was deleted and replaced by the current Rule 80 whose proviso states: -

**“Provided that an application to strike out a notice of appeal or an appeal should not be brought after the expiry of thirty (30) days from the date of service of the record of appeal on the respondent.”**

According to Mr. Owino the respondent’s advocates were served with the record of appeal on 17th June 2002. That is not denied by the respondent’s counsel.

As provided by **Section 27(1)** of the **Interpretation and General Provisions Act (Cap 2)** the new **Rule 80** came into operation on 30th August, 2002 when **Legal Notice No. 152 of 2002** was published in the Kenya Gazette. Further, as provided by **Section 22 of Cap 2** since **Rule 80** was deleted wholly and replaced by a new rule, the old **Rule 80** could only have remained in force until the new Rule 80 came into operation.

A “**written law**” as defined at page 14 of Cap 2 includes any subsidiary legislation for the time being in force. It follows therefore that the old Rule 80 ceased to exist on 30th August 2002 when the new rule was published in the Kenya Gazette. The present application to strike out the appeal could not be based on a non-existent rule. It is logically made under the new rule.

It is trite that the time limitation of 30 days became operational on 30th August 2002.

The application to strike out the appeal was filed on 25th July 2003 almost one year after the new **Rule 80** came into existence. It was filed grossly out of time and without leave. By giving leave to the respondent to amend the application the court could not have given a seal of validity to the application as the issue was not then before the court.

We uphold the preliminary objection and strike out the application as incompetent. The appellant is entitled to the costs of the application.

**Dated and delivered at Nairobi this 15th day of July, 2005.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**