



**Mogo Auto Limited v Oyugi (Civil Appeal E069 of 2023)
[2024] KEHC 3275 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E069 OF 2023
MS SHARIFF, J
MARCH 20, 2024**

BETWEEN

MOGO AUTO LIMITED APPELLANT

AND

MOSES OCHIENG OYUGI RESPONDENT

RULING

1. The Respondent filed a notice of preliminary objection dated 21st June 2023 wherein he prays that the appeal herein be struck out on grounds that it was filed out of time without leave of court, that it is bad in law and fatally defective.
2. The Appellant has resisted the preliminary objection by way of a replying affidavit sworn dated 4th August, 2023 wherein the delay in filing is attributed to delay by the court in furnishing the Appellant with the impugned ruling.
3. Directions were taken for the canvassing of the preliminary objection by way of written submissions. The Respondent complied. The said submissions have been considered.

Analysis and Determination:

4. Section 79G of the *Civil Procedure Rules* sets the limitation period for filing of appeal thus:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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”.



5. Upon perusal of the record of this appeal file I note that the memorandum of appeal dated 5th May 2023 was filed on 17th May 2023. The same seeks to challenge a ruling of Hon. Oruo delivered on 24th April 2023. The trial court's record has no proceedings for that date and no ruling was delivered on 24th April 2023, save for one delivered on 5th April 2023. The memorandum of appeal is thus fatally and incurably defective as it seeks to challenge nonexistent ruling.
6. In any event even if the memorandum was intended to assault the ruling delivered on 5th April 2023, it would still be bad in law for having been filed out of time without leave of court (see *Josephine Mwangi vs Michael Ngugi* (2021) eKLR).
7. Premised upon the above finding, the Appellant's appeal cannot be salvaged by article 159 (2) (d) of the *Constitution* of Kenya 2010 as the filing of a memorandum of appeal in respect of a nonexistent ruling is not a mere technicality but a fatal defect as I have already found.
8. On the balance I do hereby uphold the Respondent's preliminary objection and I thus proceed to strike out the Appellant's memorandum of appeal herein with costs to the Respondent assessed at Kshs.25,000.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 20TH DAY OF MARCH, 2024.

MWANAISHA. S. SHARIFF

JUDGE

