



**Njuguna v Mossi & another (Suing as the personal representative
the estate of Vivian Makori Zipporah (deceased)) (Civil Appeal
70 of 2022) [2024] KEHC 4170 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 70 OF 2022
HI ONG'UDI, J
APRIL 26, 2024**

BETWEEN

SARAH NJERI NJUGUNA APPELLANT

AND

DANIEL ONDIEKI MOSSI 1ST RESPONDENT

SAMSON MAKRI ODINGA 2ND RESPONDENT

**SUING AS THE PERSONAL REPRESENTATIVE THE ESTATE OF VIVIAN
MAKORI ZIPPORAH (DECEASED)**

RULING

1. This ruling is in respect of a Preliminary Objection dated 6th October, 2022 filed by the respondent/ applicants herein against the appellant's Appeal filed vide a memorandum of appeal dated 14th May 2022 on the grounds that;
 - i. The appeal is incompetent, bad in law and fatally defective for it has been filed out of time and without leave of the Honourable Court in breach of Section 79G of the *Civil Procedure Act*, Cap 21 Laws of Kenya.
 - ii. The Appeal was filed on 25th May 2022 which is more than 30 days after the Judgement was delivered on 7th April 2022.
 - iii. It is an abuse of the Court process and the same ought to be struck out with costs to the respondent.
2. The appellant did not file any response to the preliminary objection.



3. The preliminary objection was disposed of by way of written submissions but only the respondent/applicants complied.
4. The respondent/applicant's submissions were filed by Kerandi Manduku Advocates and are dated 3rd November, 2022. Counsel submitted that the appeal was filed beyond the 30 days set by section 75G of *Civil Procedure Act* and that the appellant needed to seek leave to file the appeal out of time. He placed reliance on the case of *Eldoret Steel Mills Limited v Jacob O. Ndambuoro* [2019] eKLR, *Rono v Rabab Wanjiku Ndirangu & another* [2018] eKLR and *Chase Bank (K) v Coninx Industries Limited* [2021] eKLR where the Court stated that:

“24. Being guided by the law and the above decision by the Supreme court of Kenya I find that the appellant/respondent's action of filing the memorandum of appeal without seeking leave to further extend time for filing of the memorandum of appeal to be irregular. There is therefore no proper Appeal before this court.”

5. He urged the court to allow the preliminary objection.

Analysis and Determination

6. I have considered the application herein and the submissions by the respondent/applicant. I find the issue arising for determination to be whether the preliminary objection dated 6th October 2022 is merited.

7. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, Law JA stated as follows:

“So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

8. In view of the authority cited above, it is evident that for a preliminary objection to be valid; firstly, it must raise a pure point of law. Secondly, the objection must be argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Lastly, an objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
9. In applying the above principles to the objection herein, I find that the grounds therein raise points of law. The respondent/applicant contends that the appeal is incompetent, bad in law and fatally defective for the same was filed out of time and without leave of the honourable court in breach of Section 79G of the *Civil Procedure Act*, Cap 21 Laws of Kenya.
10. In addressing the same, this court is guided by the provisions of Section 79 G of the *Civil Procedure Act* which stipulate as follows:-

“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.”

11. From the above provision, it is clear that appeals from the subordinate court to the High Court must be filed within 30 days from date of the decree or order appealed against. The judgment of the subordinate court was delivered on 7th April, 2022. The appellants herein filed their memorandum of appeal without leave on 25th May, 2022, therefore the delay in this case is about nineteen (19) days. It is obvious that the appeal no 70 of 2022 was filed out of time without leave of the court.
12. In *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015] eKLR, the Court of Appeal articulated 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 interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.” (emphasis added).

13. There is no doubt that the discretion of this court to enlarge time for filing of a late appeal is unfettered. However, that discretion must be exercised judiciously and not capriciously. In my opinion, the nineteen (19) days delay is not inordinate or unreasonable. This is not to say that this court would condone or forgive inordinate delays but that it must do whatever is necessary to rectify mistakes where it serves the interests of justice.
14. Upon the above consideration I find that in the interest of justice the preliminary objection should not be allowed. Allowing it would bar the court from hearing the Notice of Motion dated 18th October, 2022 filed herein on merit.
15. I therefore disallow the Preliminary Objection with no order as to costs.
16. Orders accordingly.

DELIVERED VIRTUALLY, THIS 26TH DAY OF APRIL, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

