



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 171 OF 2014
BEDOUIN ENTERPRISES LIMITED.....APPELLANT
VERSUS
1. CHARLES NJOGU LOFTY
2. CHARLES MUIGAI GIKONYO
T/A GARAM INVESTMENTS.....RESPONDENTS

RULING

1. The Deputy Registrar ('D.R.'), F. R. Wangila delivered a ruling on 1st April, 2014 in Milimani CMCC No. 1756 of 2000 in which she ordered that the officers of the 2nd Respondent and the Appellant do appear in court for cross-examination as to the property or means of satisfaction of the decree and that the officers do appear in court to produce all the books of accounts relating to the Appellant for the period 1986 and 2012. Aggrieved by the ruling, the Appellant filed this appeal and subsequently an application dated 9th June, 2014 seeking stay of execution of the orders of the DR.

2. The Respondent then intercepted the application vide a preliminary objection dated 16th June, 2014. The objection is on grounds that this court lacks jurisdiction to hear the said application and this appeal for the reason that this appeal and application have been filed out of time without the leave of court.

3. I have considered the 1st Respondent written submissions on record. It is his gravamen that the application for stay of execution and this appeal was filed out of time and without leave of court. It was contended that while the ruling was delivered on 1st April, 2014, the Appellant filed the memorandum of appeal on 2nd May, 2014 and the application for stay of execution on 10th June, 2014. It was argued that an appeal filed without leave where such leave is required is void and the court therefore has no jurisdiction to entertain it. To illustrate the argument the Respondent cited The Registered Trustees of Mombasa v. Mushin Abdulkarim Ali (2000) eKLR and Cecilia Wanjiru Kimwere v. Attorney General & Another (2014) eKLR where the court was of the view that it was not disposed to exercise its discretion in favour of the applicant since leave to appeal out of time had not been sought. It was submitted that the application was filed 69 days late and therefore the application for leave was also out of time raising a question of jurisdiction as was held in Carmella Wathugu Karigaca v. Mary Nyokabi Karigaca (1997) eKLR. It was held as follows in the said case:-

"A question of jurisdiction is, however, a matter of which the court can and should take cognisance whether or not the matter is raised in argument... A party cannot rely on

leave which is in plain defiance of the Rules. In the present case, the true position is that the appellant seeks to appeal to this Court relying on leave to do so which she can only establish by relying upon leave declared by law to be invalid for lack of having been obtained within the prescribed time. In such a case the jurisdiction of this Court has not been validly invoked..."

4. A similar position was held in **Daima Bank Ltd v. K.H. Osmond (2001) eKLR** where the court ruled that:-

"The appeal not having been lodged in time the fate of the notice of appeal in question is clear. It is spent."

5. The Respondent further argued that the application to seek leave ought to have been filed before the court that made the order being appealed against.

6. I have read and considered the depositions in this objection. Two questions arise for this court's determination; whether or not this court has jurisdiction to hear the application for leave to appeal out of time and whether or not the application was made before the right court. In the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** the Court of Appeal held as follows:-

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. '(Emphases own).

7. It is also stated in **Words and Phrases Legally defined – Volume 3: I – N at page 113** as follows:-

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

8. While I appreciate the dispositions in the cases of **Carmella Wathugu, The Registered Trustees of Mombasa** and **Cecilia Wanjiku** (supra), I wish to respectfully move away from the reasoning therein bearing in mind the overriding objective in civil litigation and the provision of Article 159 (2) (d) of the current Constitution. There has been a shift in the theory of striking out an appeal filed out of time. In **Nairobi Civil Application No. 173 of 2010., Abdirahman Abdi alias Abdirahman Muhumed Abdi v. Safi Petroleum Products Ltd. & 6 others**, the Court of Appeal had this to say where a notice of appeal was served on the respondent out of time and without leave of the court:-

"The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...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.”

9. And in Civil Appeal (Application) No. 130/2008., Joseph Kiangoi v. Waruru Wachira & 2 others, held as follows:-

“The cure would come about because in the circumstances justice is to be found in sustaining the appeal for it to be heard on merit instead of striking it out on a technicality. Indeed, in our view, there cannot be a better case for the invocation of the overriding objective principle than this case. Courts should, in our view, lean more towards sustaining appeals rather than striking them out as far as is practicable and fair... the substantive aspect of sustain the appeal must in the interest of justice override the procedural rule requiring the striking out of the notice of appeal and the record...”

10. With those principles in mind, I now advert to the preliminary objection. No reasons or submissions have been tendered in opposition to the objection before me. It was incumbent upon the Appellant to explain the reason for the delay complained of by the Respondent. Due to lack of the explanation, I uphold the preliminary objection. I am fortified by the decision in Ratnam v. Cumarasamy [1964] 3 All E R 933 where it was stated as follows:-

*“The rules of court must, *prima facie*, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”*

11. The upshot is that this appeal is ordered struck out with costs to the Respondent.

Dated, Signed and Delivered in open court this 13th day of March, 2015.

J. K. SERGON

JUDGE

In the presence of:

Gitonga for the Appellant.

Miss Nyaga h/b for Wambui for the Respondents.