Case Number:	Civil Appeal 319 of 2013
Date Delivered:	16 Nov 2017
Case Class:	Civil
Court:	Court of Appeal at Eldoret
Case Action:	Judgment
Judge:	Erastus Mwaniki Githinji, Hannah Magondi Okwengu, Jamila Mohammed
Citation:	Longinus Oroni Murunga v David Masika Mafumbo [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Uasin Gishu
Docket Number:	-
History Docket Number:	Judicial Review Application No. 22 Of 2012
Case Outcome:	Appeal dismissed
History County:	Busia
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 319 OF 2013

BETWEEN

LONGINUS ORONI MURUNGA.....APPELLANT

AND

DAVID MASIKA MAFUMBO.....RESPONDENT

(Appeal from the ruling of the High Court

of Kenya at Busia, (Kibunja, J.)

dated 23rd April, 2013

in

BUSIA JUDICIAL REVIEW APPLICATION NO. 22 OF 2012)

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JUDGMENT OF THE COURT

[1] This is an appeal from the ruling of the High Court of Kenya, (Kibunja, J.) whereby the High Court allowed a preliminary objection to an application for judicial review and struck out the judicial review application as having been filed outside the time limited by Court.

[2] The following facts emerge from the record of appeal. By a written agreement dated 10th April, 2003, made between the appellant, **Longinus Oroni Murunga** and the respondent, **David Masika Mafumbo,** the appellant sold five acres of land from his land Title **No. south Teso/Chakol/357** comprising of 4.8 Hectares *(approximately 12 acres)* at a consideration of Kshs.175,000/=. The purchase price was fully paid and the purchaser given possession but the consent of the Land Control Board was not obtained. In about the month of August, 2011, the children of the appellant claimed the land from the purchaser. A dispute ensued and the respondent filed Land D. T. case No.011 of 2011 before the Chakol Land Disputes Tribunal. After hearing the parties and their witnesses, the tribunal allowed the respondent's claim and awarded the respondent the 5 acres claimed. The award was filed in the Chief Magistrate's Court at Busia as Land Dispute Case No.131 of 2011. On 29th November, the tribunal's award was adopted as a judgment of the Court.

[3] The appellant being aggrieved by the order of the Chief Magistrate's Court, filed **Miscellaneous Application No.13** of **2012** before the High Court at Busia seeking, *inter alia*, leave to apply for an order

of certiorari to quash the award. The application was made under **Order 53 rule 2(1)** of the **Civil Procedure Rules (CPR)**. The High Court (Muchemi, J.) duly granted leave on 29th February, 2012 and ordered that the substantive motion be filed within 21 days. The appellant filed the substantive application, being Judicial Review Application No.11 of 2012 on 28th March, 2012.

[4] On 27th October, 2012 M/s A. W. Kituyi & Company Advocates for the respondent, filed a notice of preliminary objection dated 19th September, 2012 to the application for Judicial Review. They claimed that the Judicial Review Application was bad in law and defective as it was filed outside the time required by law. The applicant through the firm of A. G. Etyang & Company Advocates, filed a reply dated 12th November, 2012 to the notice of the preliminary objection.

[5] By the reply, the appellant claimed that although on 29th February, 2012 he was given 21 days to file the application and although he filed the judicial review application on 28th March, 2012, nevertheless, the application was filed within the 21 days.

[6] At the hearing of the preliminary objection, Mr. Etyang, learned counsel for the appellant submitted in part that:

"I submit that if time is computed to include public holidays Saturdays and Sundays, then the interested party's submissions would be sustainable. We submit that the 21 days contemplated in order 53 is the court days. The court do not sit on weekends and public holidays and the 21 days ends on 29/3/2012".

[7] The High Court after referring to provisions of **order 50**, Civil Procedure Rules stated:

"In computing the time in this case, the court will leave out the 29.2.2012 which is the day the leave was granted and start counting from the following day which was 01.03.2012. By the time the substantive notice of motion on (sic) was filed on 28.03.2012, 27 days had passed and it was filed on the 28th day. Even if the Sundays were left out for the sake of argument, only four days would be removed and still the exparte applicant would have taken more than 21 days to file the application… I therefore find the interested party preliminary objection is meritorious …"

[8] The decision of the High Court is challenged in this appeal on two grounds namely; that the learned judge erred in law in the computation of time as provided by order 50 CPR and in striking out the application without due regard to **Article 159** of the **Constitution** of **Kenya, 2010** and **sections 1A** and **3A** of the **Civil Procedure Act.**

[9] At the hearing of the appeal Christine Kituyi who had been appearing for the appellant did not attend the hearing although she had been served with a hearing notice long before the hearing date. She sent her court clerk to the Court who approached Mr. D. O. Teti, advocate, to apply for adjournment on behalf of the appellant counsel. The application for adjournment was rejected for reasons recorded in the order of the Court made on 20th May, 2017. Upon the rejection of the application for adjournment, Mr. Teti stated that he had no further instructions in the appeal. The appellant who was present in Court elected to proceed with the appeal and made brief submissions. Similarly, the respondent whose counsel did not also attend the hearing made a brief reply.

[10] Regarding the first ground of appeal, the time within which an application for judicial review should be made after leave has been granted, is governed by order **50 Rule 3(1)** which provides:

"When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the

application shall be made within twenty-one days …"

[11] The order of the High Court dated 29th February, 2012 requiring the appellant to file the judicial review application within 21 days was a condition for the grant of leave made in conformity with the requirements of **Order 53 rule 3(1)** of **CPR**. If the day on which the order was made is excluded from computation of time as the rules require, then it is obvious that the application was filed on the 28th day from the date of the orders which was outside the 21 days limited by the order of the Court.

[12] The appellants counsel conceded in the High Court that the application would be out of time if public holidays and weekends are included in the computation of time. The appellant's case was that public holidays and weekends should be excluded from computation of time. The excluded days are stipulated by provisions of order 50 which in sub-rule (2) excludes, *inter alia,* Sundays and public holidays, from computation of time only when the period for doing an act is less than six days. That means that had the High Court granted the appellant less than six days within which to file an application for judicial review, Sundays and public holidays would be excluded. The requirement by **order 50 rule 2 CPR** that Sundays and public holidays are not excluded in the computation of time where the time allowed for taking action is more than six days is a general provision in the laws dealing with computation of time. **Section 57(d**) of the Interpretation and General Provisions Act has an identical provision. So is **Rule 3(d)** of the Court of Appeal Rules and **Article 259(6**) of the Constitution.

[13] From the foregoing, we are satisfied that the High Court computed time correctly in accordance with **Order 50 rule 2** of the **Civil Procedure Rules.**

[14] As regards the second ground of appeal, it is true that **Article 159 (2) (d)** of the Constitution, provides that justice shall be administered without undue regard to technicalities of procedure. It is also true that the High court was required to apply the overriding objective principle which is to facilitate the just, expeditious, proportionate and affordable resolution disputes. The High court had also inherent jurisdiction. However those principles do not apply to the time limited by law for instituting court proceedings. They apply to competent court proceedings which a court has jurisdiction to entertain. The time limited by the court which was in conformity with the law for institung judicial review applications, goes to the competence of the application and to the jurisdiction of the High Court to entertain the application. Since the application was filed out of time and the time had not been extended by the court, the decision of the High Court to strike out the application was correct.

[15] For the foregoing reasons, the appeal is dismissed with costs to the respondent.

Dated and Delivered at Eldoret this 16th day of November, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.