

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISC.APP. NO. 64 OF 2008

JAMES FINLAY(K) LTD.....APPLICANT

AND

RICHARD KENYANYA ONYANCHA.....RESPONDENT

RULING

The subject matter of this ruling is the summons dated 3rd June 2008 in which **James Finlay (K) Ltd** seeks for the following orders:

- a. **That service of his application be dispensed with in the first instance.**
- b. **That this Honourable Court be pleased to enlarge within which the Applicant can file an appeal against the judgment of Honourable Mwaniki Resident Magistrate delivered on 23rd April 2007 in Kericho Civil Case No.33 of 2003.**
- c. **That there be stay of execution of the judgment and decree in Kericho PMCC No.33 of 2003 pending the hearing and determination of this application and thereafter pending the hearing of an intended appeal.**
- d. **That this court be pleased to issue interim orders of stay of execution in terms of (c) above pending hearing of this application inter-partes.**
- e. **That costs of this application be in the cause.**

The Summons is supported by the affidavit of M. Nyolei sworn 3rd June 2008.

I have considered the grounds stated on the face of the summons plus the facts deponed in the supporting affidavit. I have further considered the oral submissions of Mr. Mutai learned counsel for the Applicant and those of Mr. Koko learned advocate who held brief for Miss. Mitei, learned advocate for **Richard Onyanya Onyancha**, the Respondent. The main ground argued in support of the summons is that judgment was entered and delivered against the applicant on 23rd April 2008 and that the Applicant had no notice hence time to appeal lapsed. The Applicant learnt about the delivery of judgment when the Respondent's advocate wrote to the Applicant's advocate. The Applicant avers that it made several attempts to trace the court file in vain until time to appeal lapsed. Mr. Koko, learned advocate holding brief for Miss. Mitei for Respondent urged this court to reject the application because there was an unexplained delay to prosecute the Application. Mr. Koko also took issue with the affidavit sworn by learned advocate for the Applicant. He further attacked the proposed memorandum of appeal claiming the same does not raise triable issues. Mr. Mutai upon noticing the defects pointed out by Mr. Koko sought for time to file a further affidavit. He was however overruled by Justice Mutava who heard the application. Mr. Mutai urged this court to find that the learned advocate who swore the supporting affidavit did not depone on matters in dispute between the parties but on facts within his knowledge. He also beseeched this court to look at the substantive justice of the Application.

In my view, the Respondent has basically raised technical issues which this court has been directed to overlook pursuant to the provisions of **Article 159** of the **Constitution**. A critical examination of the facts deponed in the supporting affidavit will reveal that M. Nyolei, learned advocate has deponed on facts within his knowledge and not matters in dispute. He has averred that the Applicant's advocate was

not notified of the judgment date but only came to learn of the delivery of judgment when time to appeal had lapsed. The Respondent did not deem it fit to controvert the aforesaid facts. The deponent has also averred that the court file could not be traced. I am convinced the Applicant has given sufficient reasons to enable this court to grant the order. The draft memorandum of appeal attached to the supporting affidavit in my view raised triable issues. In paragraph 1, it is clearly stated that when the appeal comes up for hearing the Applicant will show that the Respondent was not injured in the course of his employment with the Respondent. It is also alleged that the award of damages is manifestly excessive. In the end, I find the Motion to be with merit. I grant the applicant leave of 15 days to file an appeal out of time. This court has been asked to issue an order staying execution of the decree pending the filing and determination of the intended appeal. I think it is important to maintain the ring evenly pending appeal by granting the order. The order is given as sought. Costs of the application shall await the intended appeal.

Dated, Signed and delivered in open court this 31st day of July, 2014.

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J.K.SERGON

JUDGE

In the presence of:

N/A for Kibichy for Applicant

Miss.Maritim for the Respondent