



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Miscellaneous Civil Application 248 of 2011**

**MONICA MORAA ..... APPLICANT**

**VERSUS**

**PREMIER FLOUR MILLS ..... RESPONDENT**

**RULING**

By a notice of motion dated **6<sup>th</sup> July 2011** made pursuant to **Section 79G** of the **Civil Procedure Act**, the applicant prays that leave be granted to file appeal out of time, against a judgment delivered in Nakuru **CMCC No.1026 of 2005** on **21<sup>st</sup> October 2010**, and that costs be provided for.

The application is premised on grounds that the applicant is aggrieved and dissatisfied with the aforementioned judgment. The judgment was delivered without notice to the parties or their respective counsel, so applicant only became aware of the judgment when a Notice to Show Cause was served on her son **ORORI MENGE** at **KEROKA**, on **29<sup>th</sup> June 2011**. The applicant travelled to the U.S.A. sometime in December, before getting wind of the judgment. It is her contention that a visit to court revealed that judgment should have been delivered on **16<sup>th</sup> September 2010** but thereafter the file could not be traced for perusal. The applicant contends that she has an arguable appeal as the suit was filed outside the period of limitation and had a notice of delivery of judgment been sent to the Applicant's counsel, he would have attended delivery of judgment and sought prompt instructions.

The affidavit in support of the application is sworn by the applicant's counsel **CYRUS MINDA** in which he states that although judgment was set for **16<sup>th</sup> September 2010**, it was not delivered because the court did not sit and he was advised that judgment would be delivered on notice. However, he did not receive any notice and attempts to trace the file in the registry were not fruitful.

When he learnt that a Notice to Show Cause had been served on the applicant's son, he immediately got in touch with her in the USA and she instructed him to prefer an appeal against the decision, so appellant cannot be faulted for failing to file appeal timeously.

The application is opposed – the Respondent's counsel filed a replying affidavit which was served on the morning of hearing the application - he eventually gave up relying on it as the applicant's advocate objected on grounds of late service. He therefore addressed the court on points of law saying the application has no merit and should be dismissed as it is only intended to frustrate the Respondent and prevent him from enjoying the fruits of the judgment.

It is argued that although this application was filed in July 2011 under certificate of urgency there is no

explanation as to why it has taken so long to prosecute, and despite being told that judgment would be delivered on notice, the applicant made no effort to find out what was happening. Further, that it is not disclosed when the Notice to Show Cause was received so as to enable the court to determine whether the applicant acted in a timely manner.

Mr. Kimani, on behalf of the Respondent urges this court that if leave sought is granted, then certain conditions should be attached.

From the record, a Notice to Show Cause was served on the applicant's son on **29<sup>th</sup> June 2011** – this application was filed on **06/07/2011**. I agree with Mr. Minda that there was no delay on the part of the applicant in taking steps to seek redress.

When the matter came up for hearing under certificate of urgency, the judge directed the matter be heard interpartes on 26/07/2011. On 26/07/2011 it seems the matter was before the Deputy Registrar, then on 27/07/2011, it was placed before the judge who directed that the application be served and hearing be on 10/10/2011. Again it is not clear what happened on the due date, as it seems the file was not before the court, and applicants counsel took a fresh date for 24/04/2012. So really the applicant cannot be blamed for want of diligence, there was a reasonable demonstration of intention to prosecute the application.

Secondly, it is apparent that judgment was not delivered on the date the trial court had given, and an indication given was that judgment would be on notice – my understanding is that it was up to the court to notify parties that judgment was ready and also alert them of the date for delivery. It is clear that no such notice was ever sent to the applicant or her counsel, so that by the date when the applicant became aware that judgment had been delivered – the period for filing appeal had lapsed. I do not detect any fault on the part of the applicant for this lapse and my view is that she deserves a chance to pursue her grievance regarding the decision. I therefore allow applicant to file an appeal out of time, within the next 21 days. I find no justifiable reason to warrant attaching condition to the leave granted.

I award costs of this application to the applicant.

**Delivered and dated this 27th day of July, 2012 at Nakuru.**

**H.A. OMONDI  
JUDGE**