



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Miscellaneous Civil Application 21 of 2009

WILLIAMSON TEA (K) LTD APPLICANT

VERSUS

PATRICK OYUGI MOCHECHE RESPONDENT

RULING

Leave to appeal out of time application dated Chamber Summons 12.5.09

I: Background

1. A trial commenced before the magistrate's court in PMCC. NO. 216/06 at Kericho. The trial magistrate delivered judgment on the 30th January, 2009. According to the defendant/applicant at the time the judgment was delivered they had notice of the same and therefore were not able to file an appeal within the requisite time. By the time the intended appellants/applicants instructed their advocates the time to appeal had lapsed.
2. The applicant therefore filed this application of 12th May, 2009 under order XLIX r 5, order L r 1 Civil Procedure Rules Section 3A, 63 E and 79G of the CPA and all enabling provision of the law, seeking for leave to enlarge time in which to file the appeal.
3. The respondent raised an objection in reply stating that the application had been filed under the wrong provisions of the law. Namely the application has been filed under chamber summons instead of a notice of motion and the same ought to be struck out. I will first address myself to the rules.

II: Technicalities

4. The orders relied upon to file this application are correct. What was irregular was the wordy "*chamber summons*" heading. This was inconsistent with **Order L r 1** Civil Procedure Rules which specifically states that where the rules do not state the manner an application is to be brought in then this ought to be by way of notice of motion to be heard in open court.
5. I believe in this situation it appears to be a genuine mistake and or error on the part of the applicant. Nonetheless I have discretion to not regard technicalities in pleadings in regard of want and form (*order VI r 12*) Civil Procedure Rules) where the heading or title is incorrect yet the substance of order relied on is correct this may be corrected orally. The applicant did not do so, as he was caught by surprise at the submission by the respondent.
6. A chamber summons if correctly filed under **order L r 10** Civil Procedure Rules may be adjournment to be heard in open court or a motion may be adjourned to be heard in chambers. In either case this is not the situation at hand.
7. I would accordingly *suo moto* amend the summons to read a motion duly so amended as not having any miscarriage of justice or prejudice to the respondent.

II: Application to enlarge time

8. I did call up the principal magistrate's court file 216/06 and perused the same. The court file was originally a part

heard of a magistrate who is no longer in the station as of 26th September, 2007. The matter was adjourned for a defence hearing to 12th October, 2007. The defendant was absent. The hearing on 6th February, 2008 continued by the plaintiff. On 4th June, 2008 the Plaintiff was absent. The case was adjourned to 30th July, 2008. On the 17th November, 2008, the trial magistrate left. A new trial magistrate took over the conduct of the case (*order 17 r 10 Civil Procedure Rule*)

9. On 1st December, 2008 the two parties through their advocate filed written submission (*This is really not a suitable way of presenting evidence*. The written submissions are filed but no advocate addresses the court. Though written submissions are desirable it is imperative that a summary of the submission be made to the presiding judicial officer together with a reply from the other side).

10. As it stands in this matter the new trial magistrate reserved the judgment for 7th December, 2008. It was adjourned to 5th December, 2008. On 19th December, 2008 the case was mentioned and not on 5th December, 2008 for the reading of the judgment. This was not done.

11. Judgment was adjourned to 9th January, 2009 but not delivered. It was adjourned to 30th January, 2009 and was delivered in the absence of the defendant.

12. I further perused the file and noted that there was no notice to either party to attend to the reading of the judgment.

13. The trial magistrate concerned is no longer in the service of the judiciary and has since left.

14. I would hold on the issue of enlargement of time that at the time of judgment was delivered the said applicant may not have been aware and thus may not have filed the appeal on time.

15. I would accordingly give leave for the applicant to file their appeal out of time. They are to do so within 30 days from to-days date.

16. As to the second prayer for an application of stay of execution I believe the applicant herein is being mischeivous. This same application for stay of execution was heard inter parties on 26th May, 2009, having been filed on 12th August, 2008. The ruling before another trial magistrate is awaited for on 16.6.09.

17. The rules used to be prior to 2001 that a person would first make an application for stay of execution in the original court then apply to the High Court. This was repealed by the rules committee and allowed parties to come direct to the High Court. This though did not give licence to have two application simultaneously. I would decline this prayer on grounds of it being *res judicata* and pending before the subordinate courts.

18. I make no orders as to costs in this application.

DATED this 9th day of June, 2009 at **KERICHO**

M.A. ANG'AWA

JUDGE

Advocates

M. Nyolei advocate instructed by the firm of M/S Kibichiy & Co. advocates

for the applicant – present

E.M. Orina advocate instructed by the firm of M/S Orina & Co. advocates

for the Respondent - present