



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc. Application 63 of 2007

REGINA MUKUHI KINYUA.....APPLICANT

VERSUS

PRIVATE SECTOR FORUM LIMITED.....RESPONDENT

RULING

1. The applicant brought this application under Order 49 Rule 5, Order 41 Rule 27 of the Civil Procedure Rules Sections 65 and 79G of the Civil Procedure Act and all other enabling provisions of the law. The applicant prays for an order granting her leave to file an appeal out of time. The reasons advanced by the applicant are that unless leave is granted to her as prayed, her intended appeal, which has high chances of success will be rendered nugatory; that the delay in filing the appeal was beyond the applicant's control and that it is in the interest of justice that the application be allowed.

2. The applicant has also sworn an affidavit dated 31/01/2007 in which she says that she was aggrieved by the judgment of the court in Milimani CMCC No.14255 of 2004 in which her claim was dismissed with costs. That at the time of the judgment delivered on 9/10/2006 though the applicant said it was 19/06/2006, she was out of the country on official duty to Ethiopia and soon thereafter, she proceeded on leave and was thus not able to give instructions to her advocate on record before the expiry of the statutory period for filing appeals. She also says that the delay in filing the appeal was for reasons beyond her control and that this being the case, it would be in the interests of justice and fairness to allow her application.

3. The application was opposed. The Replying affidavit was sworn by Alfred Nyandieka advocate for the respondent herein. He avers that the applicant's suit was dismissed with costs on 19/10/2006 and not 19/06/2006 as alleged by the applicant. He says that because there was no judgment/order dated 19/06/2006, the applicant's application is hopelessly incompetent and an abuse of the due process of the court. He also avers that no sufficient or good reason has been given by the applicant for failure to file appeal within the time allowed for her to do so. It is also Mr. Nyandieka's contention that the applicant has clearly demonstrated that she is not serious with pursuing the appeal by the inordinate delay in even fixing the instant application for hearing. Mr. Nyandieka also says that though the applicant was out of the country between 7/09 and 13/10/2006 and on leave between 11/10 and 26/10/2006, he still believes she had more than sufficient time to give instructions for the intended appeal. Mr. Nyandieka accuses the applicant of laches and that in any event the applicant's intended appeal has no chance of succeeding whatsoever since her case in the lower court was hopelessly wanting.

4. The respondent and counsel were not present at the hearing of the application. Mr. Enonda for the

applicant urged the court to grant the orders sought on the grounds that the applicant has demonstrated that there were good reasons for the delay.

5. I have carefully considered the application, the affidavits in support and against it and the submissions made by counsel for the applicant in the absence of both counsel for the respondent and the respondent. Order 49 Rule 5 of the Civil Procedure Rules gives this court unlimited power to enlarge the time limited for the doing of any act or taking any proceeding under the Rules on such terms as the justice of the case demands, and such enlargement may be made even though the application for enlargement is made after the time appointed has expired. In such a case, costs for the application are to be borne by the party making the application unless the court so orders. The court also has a general power under Section 3A of the Civil Procedure Act to make such orders as would meet the ends of justice.

6. On the strength of the above provisions of the law, and recognizing that a party has a right to exercise its right of appeal whenever it so desires, I am inclined to allow this application. Accordingly I order that:?

(a) *Leave be and is hereby granted to the applicant to file an appeal out of time emanating from the judgment in Milimani CMCC No.14255 of 2004 (Miss Maina E).*

(b) *The said intended appeal be filed within fourteen (14) days from the date of this ruling.*

(c) *Costs of this application shall be in the cause.*

It is so ordered.

Dated and delivered at Nairobi this 16th day of May 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:?