



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO.3 OF 2012

JOSEPHINE NDUNDA MOSES.....APPELLANT/APPLICANT

VERSUS

MARTIN MUTISYA.....1ST RESPONDENT

MACMILLAN MBITHI.....2ND RESPONDENT

RULING OF THE COURT

1. The Appellant/Applicant filed an application dated 5th August, 2016 pursuant to Order 21 Rule 1, Order 50 Rule (1) of the Civil Procedure Rules Section 1A and 1B of the Civil Procedure Rules Section 1A and 1B of the Civil Procedure Act and other enabling provisions of the Law. It seeks for the following prayers:-

(a) THAT the Judgment delivered on 30th September, 2014 be set aside.

(b) THAT the appeal be heard De Novo before a different Judge.

(c) THAT the costs of the application be awarded to the Applicant.

The Application is supported by an annexed affidavit of the Applicant sworn on even date and further on the following grounds namely:-

1. THAT the Applicant filed the Memorandum of Appeal on 6th January, 2012 and Record of appeal on 26th November, 2012.

2. THAT the Appellant duly filed her submissions dated 16th September, 2013 and Respondent filed their submissions dated 23rd September, 2013.

3. THAT on 26th September, 2013 the parties highlighted submissions and the matter was fixed for judgment on 11th December, 2013.

4. THAT on 11th December Honourable Lady Justice Jaden was not sitting and parties were informed that Judgment would be delivered on notice.

5. THAT two (2) years lapsed before any communication had been received regarding when the judgment will be delivered.

6. THAT judgment was not delivered within 60 days of the conclusion of the hearing of the case.

7. THAT on 4th July, 2016 the Advocates of the Applicant received a letter from the Deputy Registrar informing them that judgment had been given on an earlier date.

8. THAT the judgment dismisses the appeal.

9. THAT the Applicant did not receive notice of the delivery of judgment.

10. THAT the Applicant has been denied justice by the delayed delivery of the judgment and the lack of notice of delivery.

11. THAT the Applicant's Advocates have severally written to the court enquiring about the Judgment with no response.

12. THAT the Applicant has been denied the right of Appeal.

2. The Applicant's case is that upon the hearing of this Appeal, she waited for the delivery of judgment which unduly took quite a long time and that she did not receive any notice of the delivery of the said Judgment. The Applicant contends that the delay has denied her justice and further that she has been denied a right of Appeal since the Judgment was delivered in her absence. She now wants the said judgment delivered on the 30/09/2014 set aside and the appeal be heard afresh before another Judge.

3. I have considered the Appellant's Application together with the grounds and affidavit and annexures in support thereof. The record shows that indeed this appeal was canvassed by both parties by way of written submissions and judgment reserved for the 11/12/2013. Apparently on the said date the judgment was not ready and parties advised that the same would be delivered on notice. The said judgment was finally delivered on the 30/09/2014. The Applicant maintains that she was never notified of the date for the delivery of the judgment despite several formal requests by her learned counsel. I have seen that indeed the Applicants counsel wrote several letters enquiring as to when the judgment would be delivered. The letters are addressed to the Deputy Registrar Machakos High Court. Although the Applicant and her counsel claim that no notice was sent, I find there is a notice dated 11/09/2014 from Machakos Law Courts addressed to both advocates for the parties informing them that the pending judgment would be delivered on the 30/09/2014. There is also another letter dated 3/10/2014 addressed to the Applicant's Advocates informing them that the judgment had been delivered on the 30/09/2014 and were advised to visit the registry for perusal and further action. There is also another letter dated 30/06/2016 addressed to the Applicant's Advocates further informing them of the delivery of the judgment and that earlier notices were attached. The postal address indicated on the notices are the same ones used by the Applicant's Advocates in all their correspondences.

4. The parties participated in the appeal and presented submissions and what remained was for the judgment to be delivered. The same was delivered albeit outside the time to which it had been reserved. The judgment that was delivered is lawful, regular and valid in all respects as both parties participated in the hearing of the appeal. The only issue of concern by the Applicant is that she has been denied a chance to appeal. Indeed the Appellant's appeal was dismissed and that she has a right to appeal against the judgment. The Applicant has not indicated that a request to file an appeal out of time has been refused. No such request has been made. Indeed all courts are courts of equity and most times allow parties leave to lodge appeals out of time if good and sufficient cause is shown. The correspondences from the Applicant's Advocate to the Deputy Registrar enquiring on the delivery of the judgment could be of good value in supporting a request to file appeal out of time. The Applicant has not faulted the judgment herein which then remains a valid judgment arrived at after both parties had been listened to and all issues in controversy addressed therein. As such I am unable to agree with the Applicant's request to set aside the judgment delivered on the 30/09/2014. She has not attacked the said judgment. Her only grouse is that the same was delivered in her absence or in the absence of her Learned Counsel. The letters and notice from the Machakos Law Courts seem to indicate that notices had been sent. If for any reasons that the same did not reach the Applicant's Advocates then the Applicant still has a right to apply to be

allowed to appeal out of time, if she is dissatisfied by the judgement of the court delivered on the 30/09/2014.

5. The first request by the Applicant having been denied, then it follows that the second request that the appeal be heard De novo before a different judge is not available. Indeed the appeal herein was heard and a judgment duly delivered. Hence for all intents and purposes the appeal herein has since been finalized and disposed of. The available avenue thereafter is for a party to appeal against the judgment or seek for an order of review as appropriate. The appeal was not partly heard so as to call for directions before another judge. The Appeal had been fully heard and judgement delivered. The Applicant's contention that because she was not present during the delivery of Judgment she should be allowed to have the Appeal start afresh is not tenable in law. The only recourse for her is to appeal against the judgment or seek for review as appropriate and that in the event that the period for lodging appeal has elapsed, an application could be made to the appellate court for leave to appeal out of time.

6. The upshot of the foregoing is that the Appellant's Application lacks merit. The same is ordered dismissed with no order as to costs.

It is so ordered.

Dated, signed and delivered at Machakos this 6TH day of APRIL 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Kyalo for Kethi Kilonzo for Applicant.....

C/A: Munyao.....