



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

MISC. APPLICATION NO. 3 OF 2018

(Before D. K. N. Marete)

RICHARD ONGERI ATIKA.....PLAINTIFF

VERSUS

JAMES FINLAY (K) LTD.....DEFENDANT

RULING

This is an application dated 21st February, 2018 in which the defendant/applicant seeks the following orders of court;

- a) *The court be pleased to grant leave to the Applicant to lodge an appeal from judgement and decree in Kericho CMCC No. 7 of 2004 delivered on 27th July 2017 out of time.*
- b) *That there be stay of execution pending the hearing and determination of the intended appeal.*
- c) *That such other additional, suitable and or alternative orders be made as are just and expedient all circumstances of the case and this application considered.*
- d) *Costs be in the cause.*

It is grounded as follows;

- i) *That the Applicant is aggrieved by the judgement of the Magistrate in Kericho CMCC No.7 of 2004 delivered on 27th July 2017.*
- ii) *That the applicant became aware of the judgement when they were served with proclamation notices by Hegeons Auctioneers on 5th December 2017.*
- iii) *That the Respondent has never served the Applicant with a draft decree for approval as provided for under the law.*
- iv) *That judgement was delivered in absence of both parties and no notice was issued to the parties.*
- v) *That failure to file Memorandum of Appeal was inadvertent*
- vi) *This application is made in good faith and in the interest of justice.*

The application is not defended, or at all. The respondent has not filed any response to the application.

When the matter came for hearing on 7th May, 2018, the applicant submitted a case for stay of execution pending hearing and determination of the intended appeal and also on extension of time to file on appeal against the judgement in Kericho CMCC No. 7 of 2004 delivered on 27th July, 2017.

The defendant/applicant in her submissions basically reiterated the contents of her pleadings and particularly her Supporting Affidavit sworn on 21st February, 2018 by I. L. J. Kipyego. It is her case that she was disabled from filing an appeal on time because judgement was delivered in the absence of the parties and that she became aware of the same when she was served with a proclamation by Hegeons

Auctioneers on 5th December, 2017. She had not been served with a draft decree as is required by the law. Her attempt to seek review of the judgement on 7th December, 2017 has been disallowed by court.

The plaintiff/respondent Respond concedes that judgement was issued in July, 2017 but adds that absence of parties on the date of judgement is no excuse for not acting on time. Again, no plausible reasons have been offered for this delay.

The plaintiff/respondent sought to rely on the equity maxim that *equity favours the vigilant and not the indolent*. The applicant has been indolent and is therefore not deserving of aid by equitable means. On the issue of absence of a response the respondent submitted that this occasioned by a loss of their file which mistake should not be visited on the litigant.

This application is not opposed. There is no Grounds of Opposition or Replying Affidavit filed by the respondent. The plaintiff/respondent only comes in to offer a response at the hearing. This is not serious attention to the contested matters raised in this application.

Overall, I would allow this application. This is because the respondent has not adduced any evidence of prejudice that would arise if the application was allowed. He would still have an opportunity to canvass the appeal to his interest and favour.

Further, the respondent has not established a concrete case of indolence on the part of the applicant. As submitted, judgement in this matter was heard on 27th July, 2017 in the absence of the parties. The applicant only learnt of this when she was served with a proclamation on 5th December, 2017. There is no evidence of prior warning of the attendant judgement in favour of the respondent to the applicant. That she filed this application on 21st February, 2017 under a Certificate of Urgency cannot be construed as inordinate delay. It does not amount to indolence as submitted. The maxim of equity as submitted may therefore not apply.

I am therefore inclined to allow the application with orders as follows;

- i. That leave be and is hereby granted to the applicant to launch an appeal from the judgement and decree in Kericho CMCC No. 7 of 2004 delivered on 27th July, 2017 out of time.
- ii. That stay of execution be and is hereby issued pending hearing and determination of the intended appeal.
- iii. That the intended appeal by the applicant be filed within fourteen days of these orders of court.
- iv. That the costs of this application be on cause.

Delivered, dated and signed this 18th day of May 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Kipyego instructed by Kibichiy & Company Advocates for the applicant.
2. Mr. Nyandimo holding brief for Gekong'a instructed by Gekong'a & Company Advocate for the respondent.