



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Misc Civil Appli 157 of 2005

JEREMIAH KIPROP APPLICANT

VERSUS

H. YOUNG (E.A.) LIMITED RESPONDENT

R U L I N G

Section 79 G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

Jeremiah Kiprop who is the applicant herein, who relies on the above provision of the law as well as on unspecified rules of Orders XLIX and L of the Civil Procedure Rules (‘CPR’) urges this court to grant him leave to file his appeal against a decision of 4/6/2004 by the Resident Magistrate, Iten.

His application for leave is dated 3/8/2005 and he has deponed to the effect that though the learned trial Magistrate had found that the agreement which he had relied upon in his suit against the respondent was null and void, he had however ordered that they enter into fresh negotiations on how he would be compensated; that time had however run out as he attempted to negotiate and settle the matter.

This application was opposed on the grounds that he had lodged an application for review in the subordinate court and that the said application, which was filed on 12/5/2005, is still pending and has yet to be heard and determined, a fact which is not denied.

Order XLIV rules 1 (1) and (2) of CPR provide that:

“1. (1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

As I understand it, the above provisions of the law clearly stipulate that a party to a suit who feels aggrieved by a decision has a choice between seeking an order for review and preferring an appeal. His choice would be between the two modes of procedure. In my humble opinion, a party who chooses to file an application for review of a decision cannot also file an appeal against the same decision, and in the circumstances, this applicant can not have his cake and eat it, for which reasons his application cannot lie. It is hereby struck out with costs .

Dated and delivered at Eldoret this 8th day of December 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Momanyi for the applicant

Mr. Mwinamo for the respondent



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