



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 452 OF 2014**

**ANDERSON NYAGA WACHIRA.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**SIMON NJUGUNA WAMBUGU.....DEFENDANT/APPLICANT**

**RULING**

1. The defendant/applicant has brought a Notice of Motion dated 4<sup>th</sup> September, 2018 supported by the grounds set out on the body thereof and the facts deponed in the affidavit sworn by *Simon Njuguna Wambugu*. The applicant seeks the following orders:

***i) Spent.***

***ii) Spent.***

***iii) THAT there be a stay of execution of the decree in HCCC NO. 452 OF 2014 pending the hearing and determination of the intended appeal.***

***iv) THAT the applicant be granted leave to lodge an appeal out of time against the ruling delivered by Lady Justice L. Njuguna on 7<sup>th</sup> June, 2018.***

***v) THAT the notice of appeal and memorandum of appeal annexed hereto be deemed as duly filed and served.***

***vi) THAT the costs of the application be provided for.***

2. The deponent, Simon Njuguna Wambugu, stated that a default judgment was entered against him on 25<sup>th</sup> November, 2016 following which, he filed an application seeking to set aside the same and to enable him file a defence. That this court vide its ruling delivered on 7<sup>th</sup> June, 2018 dismissed the aforesaid application thereby prompting the intended appeal.

3. The Motion stands opposed through the replying affidavit sworn by *Anderson Nyaga Wachira* on 27<sup>th</sup> September, 2018. Essentially, the respondent deponed that this court; having declined to grant a stay of execution in its ruling of 7<sup>th</sup> June, 2018; is functus officio. He added that the prayer for a stay can only be sought by way of a review or appeal, which has not been done.

4. The applicant in turn filed a further affidavit echoing the averments made in both his application and supporting affidavit.

5. The Motion was canvassed by way of oral arguments, which this court has considered together with the Motion, replying affidavit and further affidavit.

6. One of the substantive prayers sought is for leave to appeal out of time. In line with this subject, the respondent raised the issue of jurisdiction which I am compelled to address. Mr. Mwangi for the respondent argued that in accordance with *Rule 4* of the Court of Appeal Rules, the power to enlarge the time for filing an appeal from the High Court is a reserve of the Court of Appeal and hence this court cannot entertain such prayer. The applicant made no comment on the issue.

7. Rule 4 (supra) expresses that:

***“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”***

8. Section 7 of the Appellate Jurisdiction Act is clear on the jurisdiction of the High Court with regard to extension of time. It provides;

***“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal ...notwithstanding that the time for giving such notice or making such appeal may have already expired...”***

9. Suffice it to say, the order sought in the Motion is for leave to lodge Appeal out of time and to file Notice of Appeal out of time.

10. Section 79G of the Civil Procedure Act has been alluded to in the Motion as the guiding provision. I have taken note that the said provision relates to appeals from subordinate courts and is therefore irrelevant.

11. I take the view that when it comes to filing of an appeal out of time to the Court of Appeal, this court has no jurisdiction to grant the same as such power lies exclusively with the Court of Appeal. Section 7 (supra) explicitly provides that the High Court’s power is restricted to granting an extension of time to file and serve notice of Appeal and to grant leave to appeal. This particular provision in no way encompasses the power to grant leave to appeal out of time. A party intending to appeal to the Court of Appeal cannot seek leave to appeal out of time from the High Court. As such, I opine that the prayer sought cannot be granted by this court.

12. In the premises, this court is of the reasonable view that there is no basis for granting a stay of execution pending an appeal to the Court of Appeal since it has already been determined that this court does not have the jurisdiction to grant leave to appeal out of time.

13. In the end, this court finds that the Motion is improperly before this court and the same is struck out with costs to the respondent.

**Dated, signed and delivered at NAIROBI this 28<sup>th</sup> day of January, 2019**

**L. NJUGUNA**

**JUDGE**

In the presence of:

.....for the Defendant/Applicant

.....for the Plaintiff/Respondent