



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION 274 OF 2010**

**MOSES KAMAU NJUGUNA..... APPLICANT**

**VERSUS**

**DUNCAN KAMAU MWANGI.....1<sup>ST</sup> RESPONDENT**

**PETER MUKIRI GATERI.....2<sup>ND</sup>RESPONDENT**

**BROOKSIDE DAIRY LIMITED.....3<sup>RD</sup> RESPONDENT**

*(Appeal from the Ruling of Nakuru Chief Magistrate Hon. Gilbert Mutembei dated 27<sup>th</sup> February, 2006, in CMCC 1750 OF 2006)*

**RULING**

1. The application dated 4<sup>th</sup> June 2010 brought by Moses Kamau Njuguna under the provisions of **Section 79G of the Civil Procedure Act** and **Order 50 Rule 1 of the Civil Procedure Rules** seeks for leave to file an appeal out of time against the judgment of the trial court in **Nakuru CMCC No. 1750 of 2006** delivered on the 27<sup>th</sup> February 2008. A copy of the said judgment has not been furnished to this court. It is submitted that the said judgment cannot be executed and or enforced as it excludes the second and third Defendants, now the second and third Respondents. The said second and third respondents have not been served with this application to be able to respond to the issues raised in the application.

2. I have looked at the proposed Memorandum of Appeal. The second and third respondents in my considered opinion are necessary parties to the application.

I have also considered earlier proceedings in respect of the application. The applicant was directed by the court to serve the application to the respondents on the 16<sup>th</sup> November 2011. That was obviously not done as no affidavit of service or evidence of such service is evident from the court records.

3. I find that the application termed as *ex-parte* by the applicant's Advocate Ms.Ndung'u cannot be urged without the participation of the Respondents. The court would be doing and perpetuating an injustice towards the respondents were it to proceed to determine the merits of the application in the absence of the respondents.

For those reasons, the court directs that the applicant do serve the application upon the respondents after which a fresh hearing date may be taken at the registry. Costs of the application shall be costs in the cause.

**Date, signed and delivered in open court this 28<sup>th</sup> day of April 2016.**

**JANET MULWA**

**JUDGE**