



Editorial Summary

1. *Civil Appeal*
2. *Civil Procedure and Practice*
3. *Subject of Subordinate Court Case*

UNKNOWN

- 3.1 *Issue presumed of ownership of motor vehicle*
- 3.2 *Decision of subordinate court 9th December 2012*
- 3.3 *Advocate instructed to appeal against decision*
- 3.4 *Applicant prays for leave to appeal out of time.*
- 3.5 *Delay due to omission of the advocate*
- 3.6 *Further prayer for stay of execution*
- 3.7 *Application not served/certificate of urgency*

4. *Held:*

- i) *Application premature*
- ii) *Decision declined on 9th December 2010*
- iii) *Section 79B Civil Procedure Act required appeal to be filed within 30 days of decision.*
- iv) *Order 50 r 4 Civil Procedure Rules - decision made over Christmas vacation. Time does not run.*

5. *Case Law:*

6. *Advocates :*

- i) *V W Kimenyi instructed by M/s Rautta & Co Advocates for appellant/applicant*

ii) *M/s Manthi Masika & Co Advocates for respondent/ original respondent absent*

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS

Civil Appeal 10 of 2012

JOHNSON MUSENGI APPELLANT/APPLICANT

VERSUS

JOHN THUKU NDONGA RESPONDENT/RESPONDENT

(Being an appeal from the Judgment of Hon. Ole Keiwua Esq, Senior Resident Magistrate on 9th December 2011 in Civil Case No. 3455 of 2006 at Milimani Commercial Courts at Nairobi)

J U D G M E N T

I. INTRODUCTION

1. An application dated 12th January 2012 was filed to this High Court on 17th January 2012 seeking this court's orders for time:-

“To extend the time within while the applicant is allowed to file his memorandum of appeal ... and that [the consequently] the memorandum of appeal dated

10th January 2012 be duly filed within the statutory period.

That pending the hearing and determination of [the] application and of the applicant's intended appeal, the Hon. Court be pleased to stay the execution of the judgment and or decree arising therefrom.

4. ----

5. ----”

II FINDINGS

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2. This application is rejected on the following grounds:

2.1 *The decision of the Hon. Trial Magistrate was made on the 9th December 2011. The applicant being dissatisfied with this decision wished to appeal. “the application does not disclose the subject of the main suit but the decision is disclosed as a judgment.)*

2.2 *Under Section 79 B of the Civil Procedure Act, a party has a right to file an appeal within 30 days against a judgment of court.*

2.3 *According to the date of December 2011, the 30 days would be subjected to Order 50 r 4 Civil*

Procedure Rules as the decision was made during the period thereafter of 30 days commencing 21st December to 13th January of year.

3. Order 50 r 4 Civil Procedure Rules reads:

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty first December in any year and the 13th day of January in the year next following both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending delivering or filing of any pleadings or the documents of any other act.

Provided that this rule shall not apply to any application in respect of a temporary injunction.”

4. The interpretation of the rules therefore means that the applicant would not count the dates of 21st December to 13th January in computing time. These days would be excluded from the 30 days permitted to file an appeal.

5. The application therefore before me has been filed prematurely.

6. The second prayer is that of stay of execution.

7. Under Order 42 r 6(1) and (2) civil Procedure Rules, it lays the standards of when a stay of execution may be given. This court has not been given the details in the application on what the case is about. A judgment, pleadings or any cause to show why stay of execution should issue.

8. An appeal ought to be filed and application for stay of execution be sought in the subordinate court failure to, in the High Court.

9. This application is hereby struck out.

10. The respondent not having been served, there will be no orders as to costs.

DATED THIS 16TH DAY OF JANUARY 2012 AT NAIROBI

M.A. ANG’AWA

JUDGE

Advocates :

ii) *P Ongude instructed by M/s Walker Kontos & Associates for appellant/original plaintiff*

ii) *J Juma instructed by M/s Rachier & Amollo & Co Advocates for respondent/ original respondent absent*