



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

**Miscellaneous Application 491 of 2009**

**JOHN NGUGI KUNGU.....APPLICANT**

**VERSUS**

**KEN AFRIC BAKERY LTD. ....RESPONDENT**

**RULING**

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1. John Ngugi Kungu, hereinafter referred to as the applicant, has come to this Court under Order XLI Rule 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, seeking orders “that this Honourable Court be pleased to allow the plaintiff/applicant to appeal against the judgment dated 4<sup>th</sup> June 2009.
2. The application is based on the following grounds quoted verbatim on the Chamber Summons as follows:
  - (i) That the applicant intends to lodge an appeal in the High Court of Kenya at Nairobi against the judgment Hon. L.W. Gicheha dated 4<sup>th</sup> June, 2009.
  - (ii) That the advocates on record received the judgment on 18<sup>th</sup> June, 2009 since the judgment was read in the absence of all the parties and the advocates on record were not aware that judgment had been read.
  - (iii) That the advocates in record notified the plaintiff/applicant immediately.
  - (iv) That the plaintiff applicant had a slight delay before giving the advocates in record instructions to file this appeal on the 6<sup>th</sup> July, 2009 after the requisite period provided by law had expired.
  - (v) That the applicant intended appeal is not frivolous and has high chances of success.
  - (vi) That the application has been made without unreasonable delay.
3. The application is opposed through a replying affidavit sworn by John Ombati who is the advocate for the respondent. Mr. Ombati depones *inter alia*, that the Chamber Summons is fatally defective for failing to disclose any tenable or legitimate cause of action against the defendant/respondent. He further contends that no reasonable explanation had been advanced for the applicant’s failure to file an appeal in time.
4. I have carefully considered this application. From the order sought by the applicant, it is not clear whether the applicant is seeking leave of this Court to appeal, or whether the applicant is seeking extension of time within which to file his appeal. Be that as it may, an application for leave to appeal is provided for under Section 75 (1) of the Civil Procedure Act as read with Order XLII Rule 1(2) and (4) of the Civil Procedure Rules, while an application for extension of time is provided for under Section 79G of the Civil Procedure Act, and Order XLIX Rule 5 of the Civil Procedure Rules.
5. I concur with the counsel for the respondent that this application is fatally defective as it is brought under Order XLI Rule 4 of the Civil Procedure Rules which deals with applications for stay of execution or proceedings. Accordingly, the application is struck out as being incompetent.

**Dated and delivered this 29<sup>th</sup> day of October, 2010**

**H. M. OKWENGU**  
**JUDGE**

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In the presence of: -

Mureithi H/B for Kojwando for the applicant

Alibhai H/B for Mutie for the respondent

B. Kosgei - court clerk