



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO.187 OF 2007**

**ROBINSON MWANGI NJUGUNA..... APPLICANT**

**VERSUS**

**NELSON GACIHI GICHIMU ..... RESPONDENT**

**RULING**

The application before court is dated 16<sup>th</sup> November 2007. The application seeks that the court to grant leave to the applicant to file the appeal out of time. The proposed appeal is in respect of the judgment of Senior Resident Magistrate Civil Case No. 24 of 2006 Kigumo Court. The applicant argued that he was not satisfied with the Lower Court's judgment which was delivered on 23<sup>rd</sup> August 2007. Accordingly he applied for proceedings and paid for the same on 3<sup>rd</sup> September 2007. Thereafter he kept visiting the registry with a view to checking whether the proceedings were ready. On 28<sup>th</sup> October 2007 he was asked to make a further payment for the proceedings of Kshs.420/-. By the time the proceedings were availed to him the period for filing an appeal had expired. He stated that his advocate on perusal of the proceedings has advised him that he has overwhelming chances of success in the intended appeal. The application was opposed only on the basis that the date of the affidavit in support of the application was some days before the date of the application. The application is dated 16<sup>th</sup> November 2007 and the affidavit is dated 14<sup>th</sup> November 2007. The simple response to that argument is that the dating on an earlier date of the affidavit does not defeat the application. Order XVIII rule 9 of the Civil Procedure Rules provides as follows:-

***“Unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned.”***

Since the only objection raised was in regard to the date of the affidavit, the application is not opposed on merits. I find that the same is merited and I do hereby grant the following prayers:-

- 1. That the court does hereby grant leave to the applicant to file his appeal against the judgment of Senior Resident Magistrate's Civil Case No. 24 of 2006 Kigumo delivered on 23<sup>rd</sup> August 2007 out of time. The applicant shall file such appeal within 21 days from the date hereof.***
- 2. The court orders that the costs of the Notice of Motion dated 16<sup>th</sup> November 2007 do abide with the outcome of the proposed appeal.***

***Dated and delivered at Nyeri this 22<sup>nd</sup> day of April 2008.***

**MARY KASANGO**

**JUDGE**