



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Civil Suit 161 of 2005**

**WATATU DEVELOPMENT LIMITED.....PLAINTIFF**

**VERSUS**

**MALIBU SAFARIS LIMITED.....DEFENDANT**

**R U L I N G**

This is an application for stay of execution pending the filing and determination of the appeal which the Defendant wishes to prefer to the Court of Appeal against the judgment of this court delivered by Serгон J on 3<sup>rd</sup> November 2006.

It is not in doubt that anyone wishing to appeal to the Court of Appeal against any decision of the High Court has to file and serve a notice of appeal within the periods specified in Rules 74(2) and 76 of the Court of Appeal Rules. In this case it is admitted by the Applicant that it filed and served its notice of appeal out of time. So there is no valid notice of appeal.

Bearing in mind that a decree holder is entitled to enjoy the fruits of his decree, in an application like this the High Court must require and insist on proof of there being a valid notice of appeal. Failure to do that will mean entertaining frivolous applications intended to deny or delay the decree holders' enjoyment of the fruits of his decree.

Order 41 Rule 4 under which this application is brought requires in mandatory terms *inter alia* that the Applicant should not only expeditiously file the application but should also provide security for the due performance of the decree in event the appeal is dismissed. The Applicant has not met either of these requirements. He filed this application almost one month after the decision he wants to appeal against had been delivered and has not offered any security.

This application is not only frivolous but has also no merit at all and is accordingly hereby dismissed with costs.

DATED and delivered this 8<sup>th</sup> day of February 2007

**D.K. MARAGA**

JUDGE