

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC CIVIL APPLI 185 OF 2002 (OS)

**IN THE MATTER OF MOTOR VEHICLE REGISTRATION MARK NO. KAA 962A TOYOTA
HIACE MATATU**

BETWEEN

LUDAVICUS OCHULAPLAINTIFF

AND

HABARI ESSO SERVICES LTD.DEFENDANT

R U L I N G

The plaintiff herein, Ludavicus Ochula, has taken out a summons dated 9th May 2006 in which he sought for leave to appeal against the judgment of this court delivered on 28th April 2007. The summons is premised under Section 75 of the Civil Procedure Act and Order XLI rules 3 and 4 of the Civil Procedure Rules. The summons is supported by the affidavit the plaintiff swore. When served, Habari Ezzo Services Station, responded by filing the replying affidavit of Gulam Khaku. It is conceded in that affidavit that the plaintiff has no automatic right of appeal hence the application is properly before this court.

It is the submission of the plaintiff that he has an arguable appeal which should be heard and determined by the court on the issue as to whether this court had jurisdiction to hear and determine a matter already heard and determined by a court of a current jurisdiction. To me that is an arguable point hence it is in my humble view that the plaintiff should have his day before the court of appeal. On the other hand, it is the submission of the defendant that the appeal should be granted conditional leave to appeal by directing him to deposit a sum of Kshs.800,000 to cover taxed and untaxed costs.

I have considered the arguments for and against the summons. I have further considered the material placed before this court. I have already said that the plaintiff is entitled to have his day in court. It is his legal and constitutional right. I have been asked to deny him that right because he has failed to settle previous costs. I do not think that it is a consideration I should take into account in this matter. There are procedures and legal provisions which the defendant can use to agitate for those rights if any has accrued to the defendant. In the end I grant the plaintiff leave of 21 days to appeal against this court's judgment of 28/4/2007.

Dated and delivered at Mombasa this 29th day of June 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Jiwaji for Respondent

N/A Applicant.