



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

**Civil Misc Appli 133 of 2004**

**NDICHU NDAUTI .....APPLICANT**

**VERSUS**

**JEPHITHA MURIGU.....1<sup>ST</sup> RESPONDENT**

**ERENA WANGECHI MBUCIIMWE.....2<sup>ND</sup> RESPONDENT**

**RULING**

Chamber Summons dated 10<sup>th</sup> April, 2007 is brought by the appellant the application is brought under order XX1 Rules 22 and 91. It is also brought under order XLI of the Civil Procedure Rules. The application seeks the orders of the court that the orders given on the 19<sup>th</sup> June 2006 and orders of the Subordinate Court Kerugoya CMCC No. 84 of 2000 be stayed pending the hearing and final determination of the appeal before the court of the appeal. The application is supported by an affidavit sworn by the appellant. The affidavit in support is a short one and states as follows;

***“ That being entirely dissatisfied with the decision of this Honorable Court (Hon. Justice H. M. Okwengu) dated 19<sup>th</sup> June 2006, I immediately filed appeal in the Court of Appeal. That the appeal has been admitted and assigned Civil Appeal No. 253 of 2006. That the appeal is meritorious and stands overwhelming chances of success”.***

The background of this matter is that the appellant was aggrieved by the judgment of the Subordinate Court in Kerugoya delivered on 18<sup>th</sup> of May, 2004. The proceedings of that case were supplied to the appellant on 2<sup>nd</sup> July 2004. By that time the time of filing the appeal had lapsed. The appellant filed in the High Court an application for leave to file the appeal out of time. That application was by Notice of Motion dated 22<sup>nd</sup> July, 2004. It was heard and the court delivered its ruling on 19<sup>th</sup> June 2006 whereby the court dismissed the application. The application presently before court seeks to stay that order of dismissal. The application was opposed by the respondent and a replying affidavit was filed by the 1<sup>st</sup> respondent. In short the respondent opposes the application on the basis that there is nothing to be stayed from the order of 19<sup>th</sup> June 2006. Further the respondent deposed that the applicant/appellant has failed to state which orders of the proceedings before the Kerugoya Court he required to be stayed. The respondent therefore sought the dismissal of this case. The respondent counsel also sought the dismissal of the application on the basis that it is incompetent for having being filed by a counsel who was not in record.

In considering the application before court I would wish to respond to the respondent argument that the application is incompetent for being filed by the counsel not on record. On 24<sup>th</sup> of April 2007, when the appellant application first came for hearing the court granted an order for the advocate Gacheche Wa Miano to come on record for the appellant. Having so done the said advocate had a right of audience to appear for the appellant. The fact that the present application was filed before such leave was granted does not render the application incompetent. The mischief with which the Rule III of the Civil Procedure which relate to the representation deals with is the right of audience. In my view it does not relate to applications filed. Accordingly, the objection raised by the respondent on the competence of the

application is rejected. That has it may be I find that am in agreement with the respondent with regard to the order issued on 19<sup>th</sup> June 2006. That order dismissed the appellant application for leave to file an appeal out of time. That order is a negative order and is incapable of being stayed. It is not logical for stay to be granted when an application has been dismissed. I also find that I am in agreement with respondent that in the appellant failing to specify the date of the order of the Kerugoya court which he seeks stay. Looking at the proceedings of Kerugoya Court one notices many orders that were made there in. In the appellant failing to specify which order he require to stay the application is defeated.

Accordingly, for the reasons stated here in above the appellants application by way of Chamber Summons dated 10<sup>th</sup> May 2007, is hereby dismissed with costs to the Respondents.

Dated and delivered at Nyeri this 13<sup>th</sup> day of July, 2007.

**MARY KASANGO**

**JUDGE**