



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL 8 OF 2006**

**NAFTALY MEME ..... APPELLANT/TENANT**

**VERSUS**

**STANLEY K. MWITHIMBU & F.N.  
IMANENE.....RESPONDENT/LANDLORD**

**RULING**

On the 26<sup>th</sup> January, 2006, the Business Premises Rent Tribunal in Tribunal Case No. 8 of 2001 (Meru) ordered the applicant herein to vacate certain premises in favour of the respondents.

Being aggrieved, the applicant sought from this court (Sitati, J) an order staying the Tribunal's decision. That application was dismissed on 20<sup>th</sup> December 2006, prompting the present application in which the applicant seeks leave to appeal against the dismissal order of 20<sup>th</sup> December, 2006.

It is argued for the applicant that the applicant intends to appeal as he may be evicted before the appeal is heard. The respondents through their counsel filed grounds of opposition in which three points were raised – namely that the application is incompetent; that time is of essence in all applications for leave; and that the applicant has concealed material facts.

Arguing the first ground counsel for the respondent submitted that the application has been brought under Section 7 of the Appellate Jurisdiction Act, yet what it seeks is leave to appeal and not leave to appeal out of time. That this application ought to have been made at the time the order was issued or within 14 days after the order. Counsel further argued that it is an abuse of the court process for the applicant to seek leave to appeal while the notice of appeal has already been filed.

Finally, it was contended that the application has been brought too late in the day. Being an application for leave to appeal, the correct provision is Order 42 of the Civil Procedure Rules, under which there is no automatic right of appeal against an order of dismissal under Order 41 Rule (4) of the Civil Procedure Rules. In such a case, Order 42 Rule 1(3) of the Civil Procedure Rules stipulates that an application for leave shall be made in the first instance to the court making the order sought to be appealed from, either informally at the time the order is made, or within 14 days from the date of such order.

This provision clearly contravenes the substantive law legislated under Section 75(1) of the Civil Procedure Act which expressly allows the applicant to, either apply for leave to appeal from the court

which has made the order being appealed from or from the court to which an appeal would lie if leave were granted. The effect of this is that the applicant is properly before this court; save only to observe that he was required by dint of Order 42 rule 1(4) of the Civil Procedure Rules to bring the application by way of summons and not motion as is the case here.

The court's discretion in considering applications for leave to appeal is unfettered. It is a discretion that must be exercised judicially and not capriciously to deny a litigant a right to seek redress in the next level of court hierarchy.

But the applicant, on his part, must in the first place be deserving of the orders sought. The respondent has argued that the applicant cannot purport to seek leave to appeal when in fact he has lodged a notice of appeal. There is, indeed a notice of appeal filed on 21<sup>st</sup> January, 2007. Rule 74(1) of the Court of Appeal Rules provides:-

“(1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged with the registrar of the superior court.

(2) Every such notice shall, subject to rules 82 and 94, be so lodged within 14 days of the date of the decision against which it is desired to appeal.”

Order 41 Rule 4(4) of the Civil Procedure Rules, on the other hand states:-

“(4) For purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.”

It is clear from the foregoing that the applicant proceeded to lodge a notice of appeal before obtaining the necessary leave. The applicant cannot after lodging a notice of appeal purport to come to this court to seek leave. That is to taking the court for granted.

In Elijah C. Mwangi V. Panstine Akumu Seveje Civil appeal No. 88 of 1996 (Mombasa), the Court of Appeal dismissed an appeal which was lodged without leave. For my part, I find this application incompetent as being an abuse of the court process.

It is accordingly struck with costs to the respondent.

Dated and delivered at Meru this 21<sup>ST</sup> day of September,2007.

WILLIAM OUKO

JUDGE