



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 701 of 2002**

**(Being an appeal from a Ruling of the Senior Resident Magistrate Court Milimani  
Commercial Court Civil case No.5993 of 1996 at Nairobi by Honourable N.A. Owino  
(RM) dated 25.10.2002 between**

**NANCY WANJIRU NGUGI ..... PLAINTIFF**

**VERSUS**

**DUNCAN MWENJE ..... RESPONDENT**

**RULING**

**1. BACKGROUND OF APPLICATION**

1. The original defendant/appellant had been duly served with summons to enter appearance in a road traffic case filed against him but failed to enter appearance nor filed defence.
2. An ex parte hearing was heard and judgment entered against the original defendant/appellant. An application was thereafter filed (dated 5.7.02) seeking of stay of execution and for orders setting aside the ex parte judgment.
3. The trial magistrate rejected, on 25.10.02, the application to set aside the judgment.
4. The original defendant appealed.
5. When the appeal came for directions on 20.9.05 before Visram J the advocate for the appellant original defendant stated:-  
  
“I have just realized that I have not obtained leave to file appeal. I do not need leave under order 9 but the application in the lower court was based on other orders also a decision from which would require leave. I need to consider the matter further and pray for adjournment.”
6. The Advocate was granted his adjournment and took no action. The respondent/original plaintiff filed an application for striking out the appeal dated 1.12.05. It is this application that is the subject of this ruling.

**II: Application**

7. The application simply states that the appellant filed an appeal without the leave of the court.
  8. The appellant/original defendant and respondent in this application states that no leave was required where order 9a r 10, II; Order V
- r 1 Civil Procedure Rules. Section 3A and 63 of the Civil Procedure Act is made.

II: Finding

9. The advocate for the original defendant/respondent appellant conceded that he filed this application without the leave of the subordinate courts.

10. He required to obtain leave and did not do so. No action had been taken for almost 6 months since he discovered he had no leave to file suit.

11. The application of 1.12.05 be and is hereby granted. This appeal is duly struck out with costs to the applicant/respondent original plaintiff.

Dated this 18<sup>th</sup> day of May 2006 at Nairobi.

M.A. ANG'AWA

JUDGE

S.W. Ndirangu & Co. Advocates for the appellant

Meenye & Kirima & Co. Advocates for the respondent