



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**MISCELLANEOUS APPLICATION NO. 109 OF 2019**

**DANIEL NYABARO OMWEGA.....APPLICANT/ INTENDED APPELLANT**

**VERSUS**

**KENNEDY OMWEGA MAGACHI.....RESPONDENT/ INTENDED RESPONDENT**

**RULING**

1. By a Notice of Motion dated the 25<sup>th</sup> July 2019 the applicant/ intended appellant seeks to be granted leave to appeal out of time from a decision arising from civil suit no. 353 between **Daniel Nyabaro Omwega** versus **Kennedy Omwega Magachi**. The applicant also sought a stay of execution pending the determination of the appeal.
2. The application was not opposed, the respondent though served did not respond nor attend court.
3. In his affidavit in support of the application the applicant contends that he was the plaintiff in civil case number 353 of 2017 against the respondent. The trial court determined the matter and he was slapped with a bill of costs assessed at Kshs. 161,950/- . He was forced to pay Kshs. 85000/-. He claims that the court order was unlawful and that the execution unprocedural. He claims that the main suit was not heard and determined. He avers that he has a good case and that he will continue to suffer irreparable loss and that his appeal has a high chance of success, thus his application to stay the proceedings.
4. I have perused the proceedings attached to the application. The ruling which the applicant seeks to challenge was delivered on the 26<sup>th</sup> October 2018. In his application dated 25<sup>th</sup> July 2019 he states that he is aggrieved by the said ruling and seeks to appeal out of time. The application was brought nine months from the date the ruling was delivered. The reasons for delay as per his affidavit is that the file went missing and it could not be traced at the registry for perusal. The applicant has not attached anything to show that he was looking for the file in the said nine months and that the registry indicated that they could not trace the file. However I have considered what he has raised on the ruling that it was a ruling delivered before the main suit was heard and determined and that his appeal on the proceedings in court which led to execution was irregular.
5. I will exercise my discretion and grant the applicant leave to appeal out of time. The applicant shall file his appeal within 21 days from the date of this Ruling in default this order shall be set aside and execution shall proceed.
6. Having allowed the applicant leave to appeal, I will stay execution of the decree on condition that the applicant deposits a sum of Kshs. 50,000/- in court within 21 days in default execution to proceed. Costs shall be in the cause.
7. This matter will be mentioned in court on the 28<sup>th</sup> of October 2019 to confirm compliance and for further directions in the matter.

**Dated, signed and delivered at Kisii on the 1<sup>st</sup> of October 2019**

**R.E.OUGO**

**JUDGE**

In the presence of;

**Applicant**                      **In Person**

**Respondent**                   **Absent**

**Rael**                              **Court clerk**