



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MISC.CIVIL APPLICATION NUMBER 520 OF 2016**  
**DHL SUPPLY CHAIN EXPRESS LIMITED.....1<sup>ST</sup> APPLICANT**  
**FRANCIS MWILU MWINZILI.....2<sup>ND</sup> APPLICANT**  
**GEORGE K. MWAURA.....3<sup>RD</sup> APPLICANT**  
**VERSUS**  
**SIMON KIMANI NDUNG’U.....RESPONDENT**

**RULING**

By a Notice of Motion dated 4<sup>th</sup> day of October 2016, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants have moved this Honourable Court for orders that;

1. (Spent).
2. The application herein be certified urgent and heard ex parte in the first instance.
3. There be a stay of execution of the judgment entered on the 5<sup>th</sup> day of August 2016 and decree issued on the 16<sup>th</sup> September 2016 in Milimani Civil Suit No.5694 of 2013, pending the hearing and determination of this application inter parties.
4. There be a stay of execution of the judgment entered on the 5<sup>th</sup> day of August 2016 and decree issued on the 16<sup>th</sup> September in Milimani Civil Suit No.5694 of 2013, pending the hearing and determination of Applicants intended Appeal.
5. The court be pleased to grant the orders sought subject to any conditions as the court may deem fit.
6. That the auctioneer’s costs be borne by the Respondent.
7. That the costs of this application be provided for.

At the hearing of the application counsel for the applicants sought leave to amend the application to include a prayer No. 7 that

***“the 1<sup>st</sup> and 2<sup>nd</sup> applicants be granted leave to file appeal out of time”.***

The counsel for the respondent did not oppose the said application for leave to amend.

In response to the application dated 4<sup>th</sup> October 2016, the respondent filed a notice of preliminary objection dated the 14<sup>th</sup> October 2016 on points of law as follows:

- a. This Honourable court lacks jurisdiction to entertain the said application.
- b. The application is bad in law and the same should be struck out.

The preliminary objection was argued on the 17<sup>th</sup> October 2016.

On her part, counsel for the respondent argued that the court has no jurisdiction to hear the application and quoted section 65(i) of the Civil Procedure Act which gives powers to this court to sit as an Appellate court and Section 79(G) which re-affirms the jurisdiction of the court. She argued that by counsel for the applicants approaching the court by way of Misc. Application, the court lacks jurisdiction to entertain the same.

On her part, counsel for the applicants argued that the court has jurisdiction under Article 165 of the constitution and that under order 42 rule 1, the High court can grant a stay of execution. She also relied on the provisions of order 50 (5) of the Civil Procedure Rules and Sections 95 and 79 (G) of the Civil Procedure Act.

In her reply, counsel for the respondent argued that though the jurisdiction of the court to extend time is not disputed, without an appeal on record, the court has no jurisdiction.

The court has considered the preliminary objection and the submissions by the learned counsels. The relevant section to this preliminary objection is 79 (G) which provides as follows:

***“Every appeal from a subordinate court to the High court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order”.***

***“provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.***

***The operative words herein are “to admit out of time”.***

According to Macmillan English Dictionary the word admit means

***“to agree that something is true, especially when you are un happy, sorry or surprised about it”.***

In the Oxford advanced Learner’s Dictionary, the word admits means to agree, offer unwillingly, that something is true.

Under Section 79G the court has jurisdiction to admit the appeal out of time if the appellant satisfies the court that he had a good or sufficient cause for not filing the appeal on time. In my considered view, admission of appeal out of time can be done either by way of a Misc. Application or by filing the appeal first, then seeking leave to have it admitted out of time. To me, both are processes of admitting the appeal out of time and they are aimed at achieving the same goal.

In any event, with the advent of the new constitution and more particularly Article 159 (2) (d) thereof, justice shall be administered without undue regard to the procedural technicalities.

In the premises aforesaid, this court finds that it has jurisdiction to entertain the application and consequently the preliminary objection is hereby dismissed with no orders as to costs.

Dated and delivered at Nairobi this 19<sup>th</sup> Day of January, 2017.

.....

**LUCY NJUGUNA**

**JUDGE**

**In the Presence of**

..... for the Appellant

..... for the Respondent