



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL 88 OF 1996**

**ELIJAH C. MWANGI.....APPELLANT**

**AND**

**PAUSTINE AKUMU SEREJE.....RESPONDENT**

**(Appeal from a ruling of the High Court of Kenya at Mombasa**

**(Mr. Justice Mbogholi) dated 8<sup>th</sup> day of August, 1995**

**IN**

**H.C.C.C. NO. 57 OF 1995**

**\*\*\*\*\***

**RULING OF THE COURT**

On 8<sup>th</sup> August, 1995 the superior court (A. Mbogholi Msagha, J.) granted a conditional stay against execution of a decree passed by the Senior Resident Magistrate's Court in Senior Resident Magistrate's Civil Case No. 182 of 1995. This order was made in High Court Civil Appeal No. Miscellaneous 57 of 1995. The use of the word miscellaneous in numbering of the appeal is wrong as what was filed was a substantive appeal against refusal by the learned magistrate to set aside an ex-parte judgement entered against the present applicant which judgement was entered for non-appearance of the applicant in that court. As the learned judge has pointed out the crux of the matter was whether or not the applicant had been properly served. The superior court was moved by the applicant under Order 41 rule 4 of the Civil procedure Rules.

This appeal has been filed without any leave to appeal having been obtained as there is no automatic right of appeal under Order 42 the Civil Procedure Rules. See Order 42 rule 1 (1) (z). Rule 4 of Order 41 is not referred to therein. No appeal lies except with leave under Order 41 rule 4.

We have therefore no alternative but to strike out this appeal but as the point regarding failure to obtain leave was not taken at the first available opportunity by the respondent's counsel, we make no order as to costs. The applicant can of course still prosecute the appeal in the superior court if he wishes to.

Before parting with this appeal we would express our misgiving about judgement in default of appearance being entered when the summons was allegedly served on the applicant's driver. This is in direct

contravention of order 5 rule 9 of the Civil Procedure Rules. See Waweru v. Kirano (1969) EA. 172 wherein even service on the wife of the defendant without enquiring about the defendant's whereabouts was held to be bad service. A driver cannot be treated as a member of a defendant's family or an agent empowered to accept service within the meaning of order 5 rule 12 of the Civil Procedure Rules.

Dated and delivered at Mombasa this 18<sup>th</sup> day of July, 1996.

**R.O. KWACH**

.....

**JUDGE OF APPEAL**

**P.K. TUNOI**

.....

**JUDGE OF APPEAL**

**A.B. SHAH**

.....

**JUDGE OF APPEAL**

I certify that this is true copy of the original.

**DEPUTY REGISTRAR**