



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**  
**MISC. CIVIL APPLICATION NO. 172 OF 2004**

**SIMON TOWETT MARTIM.....APPLICANT**

**VERSUS**

**JOTHAM MUIRURI KIBARU.....RESPONDENT**

**RULING**

By a Notice of Motion made under **Section 7 of the Appellate Jurisdiction Act, Order L Rule 1, Order XLI Rule 4, Order XLI Rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** the Applicant has sought the orders of this Court to be granted enlargement of time to lodge a Notice of Appeal out of time. The Applicant has further prayed that the judgment and the decree of this Court in *Nakuru HCCC No. 253 of 1996* be stayed pending the hearing and determination of the intended appeal. The Application is grounded on the legal reasons stated on the face of the application which are that the Applicant had entrusted and his former Advocates on record to file the Notice of Appeal. The Applicant further states that he was ignorant of the fact that time had started running from the time the judgment was delivered on the 24th of July 2003. The Applicant states that the delay in filing the Notice of Appeal was occasioned by the mistake of his previous counsel on record. The Application is supported by the annexed affidavit of Simon Towett Maritim, the Applicant. The Application is opposed. The Respondent has filed a Notice of preliminary objection to the entire application. The Respondent has stated that the Application was incurably defective and was an abuse of the due process of the Court.

Mrs Odhiambo, Learned Counsel for the Applicant, at the hearing of this application submitted that the High Court had jurisdiction to grant the orders of extension of time to file a Notice of Appeal out of time. The Applicant submitted that he had an arguable appeal which had a high chances of success. The Applicant further argued that he did not file the Notice of Appeal in time due to the fact that after the said judgment was delivered, the file disappeared. The Applicant submitted that he was thus prevented from filing the Notice of Appeal. The Applicant further blames his former Advocates on record for not filing the Notice of Appeal in good time, although he had given instructions to the said former Advocates to file an Appeal against the said judgment of this court. The Applicant urged this Court not to punish him for the mistake of his former counsel. The Applicant submitted that this Court had jurisdiction to enlarge time to file Notice of Appeal out of time as provided by the **Appellate Jurisdiction Act**.

Mr Karanja, Learned Counsel for the Respondent opposed the Application. He submitted that this Court did not have jurisdiction to grant extension of time to file an Appeal to the Court of Appeal out of time. The Respondent submitted that this jurisdiction was solely vested in the Court of Appeal as provided by **Rule 74 of the Court of Appeal Rules**. The Respondent further submitted that in any event the Applicant had filed the Application after a period of eight months. It was the Respondents submission that there was undue delay on the part of the Applicant in filing this application. The Respondent further submitted that no cogent reasons were advanced by the Applicant for the delay in filing the Notice of Appeal in time. It was the Respondent's further submission that the Applicant was moved to take action after the Respondent had executed the judgment of the Court. The Respondent urged this Court to dismiss the Application.

I have considered the rival arguments made by the Counsel for the Applicant and the Counsel for the Respondent. I have also read the Application together with the annexed affidavit filed thereto. I have also read the decisions, both of the High Court and the Court of Appeal, referred to by the parties to this Application. The issue for determination by this Court is whether this Court has jurisdiction to grant extension of time to the Applicant to file an Appeal to the Court of Appeal. The Applicant has submitted that under **Section 7 of the Appellate Jurisdiction Act** this Court has jurisdiction to grant extension of

time to the Applicant to file an Appeal to the Court of Appeal. The Applicant has referred to the decision of **Geoffrey Mureithi Juma –versus- Robert Kariuki & 5 others Nakuru HC Misc. App No. 117 of 2002** (unreported) where the High Court granted an Applicant extension of time to file an Appeal to the Court of Appeal by applying **Section 7 of the Appellate Jurisdiction Act**. I have read the said decision. With due respect to the Counsel for the Applicant, the issue as to whether the High Court had jurisdiction to grant extension of time to an Applicant to file an Appeal to the Court of Appeal was not addressed in the said Application. Both parties proceeded on the basis that the High court had jurisdiction to entertain and grant the application for extension of time before it. The said Court did not therefore have the benefit of the argument by the parties to the Application on the issue of whether or not the High Court had jurisdiction to grant extension of time to a litigant to file an Appeal to the Court of Appeal. **Section 7 of the Appellate Jurisdiction Act** states as follows:-

*“The High Court may extend the time for giving Notice of Intention of Appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for Appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired;*

*provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”*

**Section 3(2)** of the said Act states:

*“For all purposes of and incidental to the hearing and determination of any Appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.”*

**Section 5** of the said Act states;

*(1) The Rules Committee may make rules of the Court for regulating the practice and procedure of the Court of Appeal with respect to Appeals and, in connection with such Appeal, for regulating the practice and procedure of the High Court.*

*(2) Without prejudice to the generality of subsection(1), rules of the Court for the Court of Appeal may be made for the following purposes -*

*(a) ....*

*(b) ....*

*(c) ....*

*(d) ....*

*(e) ....*

*(f) ....*

*(g) For prescribing the time with which any requirement of the rules is to be complied with;*

*(h) ....”*

Under **Section 5 of the Appellate Jurisdiction Act**, the Court of Appeal rules were enacted. Under the said rules, Rule 4 grants exclusive jurisdiction to the Court of Appeal to grant extension of time to file an Appeal to the Court of Appeal. Rule 41 was amended by *Legal Notice No. 11 of 1998* whose effect was to practically vest the exclusive jurisdiction to the Court of Appeal to grant extension of time to any litigant who wants to Appeal to the said Court of Appeal. Rule 41 was amended to provide that the Court of Appeal may entertain an Application for extension of time notwithstanding that an application had not been name in the first instance to the High Court. The plain reading of the above quoted sections of the **Appellate Jurisdiction Act** and the rules made there under clearly show that the provision of **Section 7 of the Appellate Jurisdiction Act** where it is provided that *“The High Court may (underlining mine) extend time”* has been rendered practically useless and legally untenable. It is with this developments of the law in mind and the interpretation made of the **Appellate Jurisdiction Act** and the rules made thereunder, that litigants invariably as a matter of practice and procedure make applications for extension of time to lodge a Notice of Appeal to the Court of Appeal itself and not to the High Court.

In the circumstances therefore I do find that this Court lacks jurisdiction to grant the Applicant the Application sought to extend time in which to lodge the Notice of Appeal to indicate his intention to file

an Appeal against the decision of this Court to the Court of Appeal. The Applicant has to make an appropriate application to the Court of Appeal. The Application herein therefore lacks merit and the same is dismissed with costs.

**DATED at NAKURU this 19th day of November 2004.**

**L. KIMARU**

**AG. JUDGE**