



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MISC. CIVIL APPL. NO. E003 OF 2020**

**HOUSING FINANCE COMPANY OF KENYA LIMITED.....APPLICANT**

**-VERSUS-**

**AMINA ACHIENG OCHIENG.....RESPONDENT**

**RULING**

The application dated 21<sup>st</sup> September 2020 was for leave to appeal out of time.

1. The Applicant has told this Court that on the date when the learned trial magistrate delivered her ruling on 24<sup>th</sup> July 2020, its advocate was not before the trial court.
2. The said advocate, Ms Sharon A. Omollo, was, on the material day, appearing before Hon. Nandi, the Principal Magistrate, Bondo.
3. However, Ms Omollo had arranged with Ms Onsongo advocate, who then held her brief before the trial court.
4. Ms Omollo has deponed in her supporting affidavit, that Ms Onsongo arranged for the Applicant's file to be returned to her office after the ruling was delivered. However, upon her return to her office, Ms Omollo failed to notice the Applicant's file, and therefore she also failed to notify the Applicant about the ruling.
5. The Applicant's advocate first notified her client about the ruling on 6<sup>th</sup> August 2020.
6. Thereafter, the Applicant reverted to their advocates on 14<sup>th</sup> September 2020, giving them instructions to institute an appeal.
7. However, by the time when the Applicant's advocates received the instructions to appeal, the time within which the appeal could have been lodged had already lapsed.
8. It was for that reason that the Applicant filed the application herein.
9. The Applicant asked the Court not to visit upon it, the inadvertent mistake of their advocate.
10. The Applicant described itself as an innocent and hapless party, who has moved the Court as soon as it had become aware of the inadvertent mistake of their lawyers.
11. It was the Applicant's contention that the Respondent would not suffer any prejudice if the Applicant was allowed to appeal out of time.
12. Pursuant to the provisions of **Section 79G** of the **Civil Procedure Act**, every appeal from a subordinate court, to the High Court shall be filed within 30 days from the date of the decree or of the order appealed against.
13. However, **Section 79G** also expressly empowers the Court to admit an appeal out of time, if the Appellant satisfied the Court that he had a good and sufficient cause for not filing the appeal in time.
14. As the Respondent noted, the following principles were set out in the case of **FIRST AMERICAN BANK OF KENYA LTD Vs GULAP P. SHAH & 2 OTHERS, HCCC NO. 2255 OF 2000**;

**(i) The delay in lodging the appeal must be explained;**

**(ii) The intended appeal ought to be arguable, at the least; so that it is deserving consideration in substance;**

**(iii) Whether or not the Respondent may be adequately compensated by an award of costs;**

**(iv) Whether or not the respondent would suffer prejudice, if the court extended time for the lodging of the intended appeal.**

15. In this case the ruling was delivered in the presence of a representative from the law firm representing the Applicant herein.

16. In the circumstances, the Respondent submitted that the said representative ought to have sworn an affidavit to corroborate the deposition of Advocate Sharon A. Omollo.

17. Having given due consideration to the supporting affidavit of Advocate Sharon A. Omollo, I find no reason in law or in fact, that would have required verification through the affidavit of Ms Onsongo Advocate, who had held brief at the material time.

18. An affidavit constitutes evidence on oath. Thus, Ms Omollo has testified on oath, that the case file was returned to the office, by Ms Onsongo; but that Ms Onsongo did not draw the attention of Ms Omollo to what had transpired in court.

19. There is nothing on the record in these proceedings, which could cause the Court to cast doubt about the contents of the supporting affidavit.

20. I find that just because Ms Onsongo had not filed an affidavit to support the affidavit of Ms Omollo, is not reason enough to conclude that

***“the averments in the affidavit in support of this application cannot be held to be true.”***

21. I further find that until the Applicant was told about the ruling, (by their advocates or by any other person), they could not have had reason to give instructions for an appeal.

22. As the ruling in issue was delivered on 24<sup>th</sup> July 2020, that meant that the Applicant had until 23<sup>rd</sup> August 2020 to lodge their appeal.

23. Accordingly, when the Applicant moved this Court by an application dated 21<sup>st</sup> September 2020, seeking leave to appeal out of time, I find that the delay was for about one month.

24. I hold the considered view that the delay in moving the Court was not inordinate.

25. Secondly, I find that the intended appeal is definitely arguable. I so hold because when the trial court grants a permanent injunction to restrain a chargee from exercising its statutory powers of sale, at the stage of an interlocutory application, it does appear that the trial court would have pre-judged the case as that relief is one of the substantive prayers in the suit. Indeed, the grant of a permanent injunction at the interlocutory stage may have the effect of determining the main suit, prior to hearing the said suit. To my mind, it is a very arguable issue, whether or not the court was right to have issued a *“final order”* at the interlocutory stage of the proceedings.

26. I cannot help wondering what would happen if, after the full trial the Court were to come to the conclusion that the Respondent owed the Applicant money, which was secured by a charge over the property that is the subject matter of the suit.

27. It appears to me that in that scenario, the Court may well tell the chargee that, provided it issued the required notices to the chargor, the said chargee may well be entitled to realize the security.

28. Such an eventuality would have the effect of reversing the permanent injunction which was granted at the interlocutory stage.

29. That is a reason that satisfies me that the intended appeal was arguable.

30. I further find that the grant of leave to appeal would not prejudice the Respondent, as she would still have the opportunity to canvass her suit, through which it was still possible to ultimately persuade the trial court to grant the permanent injunction.

31. In the result, leave is hereby granted to the Applicant to appeal out of time. The intended appeal shall be filed within the next **SEVEN (7) Days**.

32. Although the application is successful, I order that each party will meet his or her own costs thereof because the Respondent cannot be penalized when the necessity for the current application arose from the inadvertence of the Applicant's advocates.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF OCTOBER 2021**

**FRED A. OCHIENG**

**JUDGE**