



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 530 OF 2014

NATHANIEL NGURE.....APPELLANT

-VERSUS-

HOUSING FINANCE.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant filed a Notice of Motion under Certificate of Urgency dated 25th July, 2018 under Sections 1A, 1B and 75 of the Civil Procedure Act; Order 43, Rules 2 and 3 of the Civil Procedure Rules and Section 7 of the Appellate Jurisdiction Act. The motion is supported by the grounds set out on the body thereof and the facts deponed to, in the affidavit of **Walter Amoko** sworn on 25th July, 2018. The application seeks the prayers hereunder:

i) THAT time be extended for such period as this Honourable Court may deem fit and proper for the Respondent to lodge and serve a Notice of Appeal and Record of Appeal against the Judgment of this Honourable Court (Njuguna J) delivered on 7th June, 2018.

ii) THAT time be extended for the Respondent to apply for leave to appeal against the Judgment of this Honourable Court delivered on 7th June, 2018.

iii) THAT upon the granting of prayer 3 above, leave be granted to the Respondent to appeal against the Judgment of this Honourable Court delivered on 7th June, 2018.

iv) THAT the costs of and incidental to this application be awarded to the Respondent in any event.

2. The deponent, Walter Amoko stated that judgment was entered by the appellate court on 7th June, 2018 thereby setting aside the ruling delivered in CMCC NO. 2691 of 2013 between the parties and substituting it with an order dismissing the Preliminary Objection in the aforesaid suit and a further order that the suit be set down for hearing. The deponent averred that deliberations on whether to appeal took longer than expected and by the time instructions to appeal had been given to the advocate, the period for appeal had lapsed on 21st June, 2018; that the delay was caused by the advocate and in any case, the Appellant will not be prejudiced should the application be allowed. The deponent added that the intended appeal has high chances of success.

3. The Affidavit in Reply sworn by **Nathaniel Ngure Kihui** on 2nd August, 2018 was filed in opposition thereto. The averments made by the deponent are essentially that the application lacks merits since the supporting affidavit was sworn by an advocate who did not have conduct of the matter; that the time for filing the appeal has lapsed and the Applicant contributed to the delay; that active steps are already being taken to prosecute the main suit and the Appellant will be prejudiced if the application is allowed. The Appellant/Respondent also put in Grounds of Objection dated 2nd August, 2018 recapping the statements in the reply.

4. A further affidavit was sworn by **John Mbaluto** on 28th September, 2018 contending that the Applicant has a right to pursue an appeal. The deponent averred that upon delivery of the judgment that forms the basis of this application, he shared a copy thereof with his clients, who then sought a legal opinion regarding the appeal and by the time the same was prepared and availed, the time for filing a Notice of Appeal had run out.

5. Parties made oral arguments in respect of the abovementioned application.

6. I have considered the application, grounds of objection, the replying affidavit and oral arguments by the parties. Before I can delve into the merits of the application, I wish to address an issue raised by counsel for the Respondent concerning the supporting affidavit filed by the

Applicant. The Respondent alleged that the aforementioned affidavit was sworn by an advocate who did not have conduct of the matter thus violating the rules of evidence. My opinion on this is that much as an affidavit ought to be sworn by a person who is well versed with the facts in issue, I am inclined to agree with the Applicant that under Order 19 rule 3 of the Civil Procedure Rules, an affidavit may contain statements of information and belief showing the sources and grounds thereof. The deponent herein has disclosed the source of his information.

7. Now to the substance of the application, the same seeks an extension of time to lodge the notice of appeal and further seeks leave to file the Appeal. The relevant provision here is *Order 50, Rule 6* of the Civil Procedure Rules which grants the High Court the power to enlarge time. Similarly, *Section 7* of the Appellate Jurisdiction Act cited in the motion clothes the High Court with power to extend the time required for a party to give notice of intention to appeal. The timelines for filing a notice of appeal are clearly set out in **Rule 75 (1) and (2)** respectively of the Court of Appeal Rules as hereunder:

“Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

8. In determining whether the Applicant should be granted an extension of time to lodge the notice of appeal and file the appeal, I am led by the principles brought out in the Supreme Court case of **Nicholas Kiptoo Arap Korir Salat-v-Independent Electoral and Boundaries Commission & 7 others [2014] eKLR.**

9. On **whether the application is made without undue delay**, it was admitted by counsel for the Applicant during oral submissions that there was a delay of 21 days in bringing the application from the date of delivery of the judgment on 7th June, 2018. *Rule 75* of the Court of Appeal Rules cited hereinabove stipulates that a party intending to appeal shall lodge a notice of such intention within 14 days of the decision against which the appeal lies. To the court’s mind, there was evidently a delay of over one (1) month and not 21 days as alleged by the Applicant.

10. This brings us to the question of **whether the delay is reasonably excusable**. According to the Applicant, the delay resulted from a legal opinion that the advocate was required to undertake research on, prepare and forward to the Applicant for deliberations and further instructions; and that by the time the same was done and instructions to appeal were given, the time for lodging the appeal had lapsed. As a matter of fact, **Mr. Mbaluto** for the Applicant acknowledged that the fault was on the part of the advocate who did not file the appeal in good time and as such, the Applicant should not be made to suffer for the mistakes of his counsel. On the other hand, **Mrs. Kuria** for the Appellant submitted that no reasonable explanation had been presented by the Applicant and the argument that the mistake of an advocate should not be visited upon the client cannot stand in this instance.

11. The court has considered the arguments by the respective counsel and opines that indeed, the advocate for the Applicant were at fault in not advising his client on the strict timelines for lodging an appeal. The fact that the advocate was instructed to give a legal opinion in no way diminishes his duty to aptly inform the client of the recourse available to it. I agree with the Respondent’s counsel that the advocate was all along aware of the statutory timelines thereof.

12. To add on, the Applicant’s advocate did not explain why it took close to two (2) weeks from the date of obtaining a copy of the judgment for the legal opinion to be forwarded to the client. In the same way, it seems odd that the Applicant undertook deliberations for about one (1) week in spite of the desperate circumstances.

13. In relation to the above, counsel for the Respondent contended that the notice of appeal is a routine document and the same can be filed even without instructions. On the contrary, the Applicant’s advocate maintained that a party’s desire to appeal cannot be presumed. In this regard, the court rationally takes the view by the Applicant that it is unreasonable to expect an advocate to file a notice of appeal or other substantive document for that matter without obtaining instructions from the client.

14. As concerns whether **prejudice will be suffered** by the Respondent if an extension is granted, Mrs. Kuria submitted that allowing the motion will prejudice her client since he is a senior citizen and for whom, time is of the essence. Mr. Mbaluto’s converse submissions were that no such prejudice will be suffered since the two (2) matters can proceed together. My simple view on this ground is that the question of age should not come into play here. I am inclined to agree with the Applicant that the Respondent will not be prejudiced in any way that cannot be compensated by way of costs. However, I disagree with the Applicant’s argument that the two (2) matters can run concurrently. The purpose of the intended appeal is to challenge the decision made by the court in respect to the lower court case, meaning the outcome of the intended appeal will inevitably determine the course of the suit.

15. An issue was also raised as to whether the Applicant has an arguable appeal. It was submitted by Mr. Mbaluto that there is indeed an arguable appeal with high chances of success as shown in the draft memorandum of appeal. Mrs. Kuria, in opposition thereto, argued that the proposed appeal has no merits and no chances of success. None of the parties went ahead to expound on their averments. The court in turn noted that no draft memorandum of appeal was annexed to the motion; however, reference was made to the grounds of the appeal included in the supporting affidavit of Walter Amoko.

16. Drawing from the **Nicholas Kiptoo Arap Korir Salat** case cited hereinabove, this court is very much alive to the fact that extension of time is in no way an entitlement of any party; rather, it is an equitable remedy granted at the judge’s discretion. In this instance, it has already been established that the application was not brought timeously but the Respondent has not demonstrated how he stands to suffer prejudice should the application be allowed. While the court appreciates that the Respondent has a right to prosecute his case, the considered view is that it would likewise be fair to allow the Applicant its day in court pursuant to Article 48 of the Constitution on access to justice. The Applicant is undoubtedly aggrieved by the decision of 7th June, 2018 and it would not be in the interest of justice to shut it out.

17. In the end, prayers 1 and 3 of the motion dated 25th July, 2018 are granted. The Notice of Appeal to be filed within 14 days from the date hereof. The Applicant is granted leave to appeal against the Judgment delivered on the 7th June, 2018.

No order as to costs.

Dated, signed and delivered at NAIROBI this 29th day of November, 2018

L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent/Applicant