



**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPL. NO. 149 OF 2016**

**GRACE MUNGE.....PLAINTIFF**

**- V E R S U S -**

**DR. ANDREW KANYI GACHII..... 1<sup>ST</sup> DEFENDANT**

**HOUSING FINANCE COMPANY OF KENYA.....2<sup>ND</sup> DEFENDANT**

**NANCY MUTHONI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1) Grace Munge, the applicant herein, took out the motion dated 4.4.2016 in which she sought for the following orders:

- 1. THAT this application be certified urgent and be heard ex parte and service thereof be dispensed with in the first instance.***
- 2. THAT the honourable court be pleased to extend the time limited for filing of the appeal from the judgment in CMCC No. 1911 of 2009 delivered on the 18<sup>th</sup> day of November 2014.***
- 3. THAT the annexed memorandum of appeal be deemed duly filed and served upon payment of the requisite fees.***
- 4. THAT costs of this application be in the cause.***

2) The motion is supported by the affidavit of Patrick Kimathi Muchena. When served with the motion, Dr. Andrew Kanyi Gachii, the 1<sup>st</sup> respondent filed grounds of opposition while Housing Finance Company of Kenya and Nancy Muthoni, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed the replying affidavit of Martin Machira to resist the motion. When the motion came up for interpartes hearing, this court gave directions to have the motion disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further considered the grounds of opposition filed by the 1<sup>st</sup> respondent. I have also taken into account the rival submissions filed herein. At the time of writing this ruling the applicant was the only party who had not filed her submissions. It is the submission of the applicant that the trial magistrate delivered his judgment on 18.11.2014 and the applicant being aggrieved by the decision she applied to be supplied with typed copies of the proceedings and judgment. She stated that she paid for the proceedings on 27.11.2014 and even made a follow up with the court's executive officer. Despite the concerted efforts made, the applicant averred that she has never received the aforesaid

copies of typed proceedings and judgment until 11.8.2015. The same were sealed and signed on 8.12.2015 and were available for collection on 19.1.2016. It is for this reason that the applicant applied for extension to file an appeal out of time. It is submitted that the applicant has an arguable appeal with prospects of success.

4) It is the submission of the 1<sup>st</sup> respondent that the application was brought after inordinate and inexcusable delay to challenge a judgement that was delivered on 8.11.2014. It is argued that the application was made with the intention of frustrating the conclusion of litigation. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent on their part were of the view that the trial court issued a certificate of delay dated 8.12.2015 which shows that the proceedings were ready and available for collection as of 15.05.2015. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were also of the same view just like the 1<sup>st</sup> respondent that the delay to file the appeal is inordinate and inexcusable. The respondents were also of the submission that the intended appeal is frivolous with no prospect of success.

5) When dealing with an application for extension of time to file an appeal out of time, the court is given a wide discretion to extend time under Section 79G of the Civil Procedure Act so long as sufficient cause is shown. In this case, the main ground relied upon by the applicant is that she did not obtain typed proceedings and judgement within time. It is clear from the certificate of delay issued by the court is the period between 18<sup>th</sup> November 2014 to 15<sup>th</sup> May 2015. It is clear in my mind that the typed proceedings and judgment were ready for collection by 15<sup>th</sup> May 2015- but the applicant waited until 11.8.2015 to collect the same. The applicant ought to have filed her appeal upon receipt of the proceedings but she instead waited for another 9 months to file this motion. With respect, I find the delay inordinate, unexplained and inexcusable. I am unable to exercise my discretion in favour of the applicant who in my view was not vigilant in pursuing her appeal. In the end I find no merit in the motion. It is dismissed with costs to the respondents.

Dated, Signed and Delivered in open court this 27<sup>th</sup> day of January, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant