



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO.435 OF 2017**

**BIMALROY CHHOTALAL SHAH ..... 1<sup>ST</sup> PLAINTIFF**

**MEERA SHAH ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**I & M BANK LIMITED ..... DEFENDANT**

**RULING**

Before this Court is the Notice of Motion dated 12<sup>th</sup> July 2018, in which the Plaintiff/Applicants seek the following orders:-

**“1. THAT this Honourable Court be pleased to enlarge and extend time within which the 1<sup>st</sup> and 2<sup>nd</sup> Applicants may lodge and serve a Notice of Appeal against the Ruling of this Honourable Court delivered by Lady Justice Olga Sewe on 11<sup>th</sup> May 2018.**

**2. THAT cost be provided for.”**

The application, which was premised upon **Section 7 and Section 3A(1) & (2) of the Appellate Jurisdiction Act (Cap 9) Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Act** and all other enabling provisions of law, was supported by the affidavit of **BIMALROY CHHOTALAL SHAH** sworn on 12<sup>th</sup> July 2018.

The application was opposed by way of a Replying Affidavit dated 19<sup>th</sup> July 2018 sworn by **MR. ANDREW MUCHINA**, the Manager, Legal Department of the Respondent Bank.

This application arises from the Ruling delivered on 11<sup>th</sup> May 2018 by **Hon. Lady Justice Olga Sewe** in which she granted a temporary injunction restraining the Defendant/Respondent from attaching or advertising for sale by way of auction the piece of land situated along Manyani Road East Lavington, known as LR 209/7501 (hereinafter referred to as **“the suit property”**) pending the re-issuance and service of a valid statutory Notice pursuant to Section 90 and 96 of the **Land Act 2012**.

Following directions given by the court the application was disposed of by way of oral arguments. **Ms CHEPKOECH** for the Applicants urged the court to exercise its discretion and enlarge the time within which the applicants may lodge and serve a Notice of Appeal against the Ruling of 11<sup>th</sup> May 2018. Counsel submitted that the failure to lodge the Notice of Appeal within the stipulated time was not deliberate. She explained that after the court delivered its Ruling the Applicants engaged the Respondent Bank with a view to settling the matter in order to avoid tedious litigation. On their part the Respondent Bank were open to negotiations with a view to settling the matter. However once the Applicant tendered their proposal for a settlement by way of a letter dated 25<sup>th</sup> June 2018 the bank went silent and did not respond to indicate its acceptance or otherwise of said proposal. The Statutory Notice was re-issued on 24<sup>th</sup> May 2018. The applicants are therefore apprehensive that since the notice period expired on 24<sup>th</sup> August 2018 the bank may at any time proceed to sell the suit property.

Counsel further submitted that the delay in filing the appeal was not inordinate; that the Respondent does not stand to suffer any prejudice should the application is allowed whereas the applicants stand to lose a very valuable property.

**MR KIRAGU** for the Defendant/Respondent opposed the application. While conceding that parties were engaged in discussions with a view to settling the matter, counsel submitted that the ongoing discussions were not a bar to the filing a Notice of Appeal. Further the Respondent made it clear to the applicant that any negotiations held would be **“without prejudice”** to any of the Banks statutory rights. In any event the Respondent is yet to issue the 40 day notice required under **Section 96 of the Land Act** and as such any apprehension of an imminent sale of

the property misplaced.

Counsel for the Respondent submits that the applicants' in failing to file their appeal within the stipulated time, failed to act with diligence; the amount in arrears is now Kshs.120 million and the fact that to date no payment has been made at all is an indication of bad faith on the part of the applicants.

### **ANALYSIS AND DETERMINATION**

The only question for determination before this court is whether sufficient grounds exist to enlarge the period of time within which the applicants ought to have filed their Notice of Appeal.

Once the court delivered its ruling on **11<sup>th</sup> May 2018** time began to run immediately for the Applicants to file a Notice of Appeal if they so wished.

**Order 43r (1)(3)**, allowed the Applicants fourteen (14) days to file a Notice of Appeal against the impugned Ruling. They failed to do so and have now approached this court asking that it exercise its discretion in their favour by enlarging the period of time within which said Notice may be filed.

**Section 7 of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya** provides that:-

**“The High Court may extend the time for giving notice of intention to 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...**

In considering whether or not to grant the prayers sought the court must look into the circumstances leading to the failure by the applicants to file the Notice of Appeal within the required time frame.

It is not for this court to determine the merit or otherwise of the intended appeal. The Court is only being asked to determine if sufficient cause exists to enlarge the time allowed to file the Notice of Appeal.

The factors which the court ought to consider in deciding whether or not to grant such an application were highlighted in the case of **EDITH GICHUGU KOINE –VS- STEPHEN NJAGI ITHOITHI [2014]** eKLR where Hon. Justice Odek J/A held:-

**“There can be no doubt that the discretion I have to exercise under Rule 4 is unfettered and does not require establishment of “sufficient reasons”. Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including but not limited to the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application granted, and whether the matter raises issues of public importance amongst others.**

As soon as the ruling was delivered in fact barely one week thereafter on **16<sup>th</sup> May 2018** the Applicants did reach out to the Defendant Bank seeking to open discussions with a view to settling the matter [annexture **BSC 1**]. The Respondents did reply to this overture by their letter dated **23<sup>rd</sup> May 2018** [annexture **BCS 2**] and indicated their willingness to engage in negotiations but **“without prejudice”**. On **25<sup>th</sup> June 2018** the Applicants wrote to the bank giving their proposal for a settlement. The bank did not respond to this proposal thereby indicting their reluctance to accept said proposal. Instead on **24<sup>th</sup> May 2018** the bank re-issued the 90 day statutory notice as it had been directed to do in the Ruling.

From the above it can be seen that the applicants did not go to sleep after the Ruling of **11<sup>th</sup> May 2018**. They acted in haste and reached out to the bank seeking to settle the matter in order to avoid lengthy litigation. The Applicants were hopeful that these negotiations would bear fruit and thus probably saw no need to file a notice of intended appeal. By the time the negotiations fell through the period for filing the said Notice had expired.

In the case of **Hon JOHN MICHUKI & ANOTHER –VS- KENTAZUGA HARDWARE LIMITED [1998] KLR** the Court of Appeal observed as follows:-

**“Lastly we would like to observe that the discretion granted under Rule 4 of the Rules of this Court to extend time for lodging an appeals, as is well known, is unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this court has on several occasions granted extension for time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was prejudiced by it”.**

Although this court has not had the benefit of viewing the grounds of appeal intended to be relied upon by the applicants, it would be unjust to hinder the appellants access to justice by denying them this right to appeal.

Given the circumstances I would be loath to term the applicants as lacking in diligence or to term their failure to file a Notice of Appeal as deliberate or inexcusable. They had clearly anticipated that the negotiations would be fruitful.

The period of delay in filing the Notice of appeal was only about one and a half months. Such delay cannot in any way be said to inordinate. The amount in issue is Kshs.120 million. The Applicants stand to lose their investment and their property if this application is not allowed. I

am not persuaded that the filing of an appeal will prejudice the respondents. Should the appeal fail, the respondent remains at liberty to exercise its Statutory rights under the law.

On the whole, I am satisfied that the balance tilts in favour of allowing this application. I hereby extend by a further fifteen (15) days the period within which the Notice of Appeal may be filed. Costs of this application will be met by the applicants. It is so ordered.

**Dated in Nairobi this.....day of September, 2018.**

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**Justice Maureen A. Odero**

**Ruling delivered at the Nairobi High Court this...28<sup>th</sup> ..day of September, 2018.**

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**JUDGE**