



**Onyango v Housing Finance Company Limited & 3 others (Civil Application E219 of 2020) [2022] KECA 1018 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1018 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E219 OF 2020  
MSA MAKHANDIA, JA  
SEPTEMBER 23, 2022**

**BETWEEN**

**BEATRICE ATIENO ONYANGO ..... APPLICANT**

**AND**

**HOUSING FINANCE COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GARAM INVESTMENT AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**JAMES MWATHI KUNGU ..... 3<sup>RD</sup> RESPONDENT**

**ILEEN NJERI NDUNGU ..... 4<sup>TH</sup> RESPONDENT**

*(An application for extension of time to lodge a notice of appeal from the judgment of the High Court of Kenya at Nairobi (Majanja, J.) dated 10th July 2020 in HCCC No. E417 of 2019)*

**RULING**

1. Before me is a notice of motion dated 29<sup>th</sup> July 2020 brought by the applicant under Section 1A, 1B, 3A and 79G of the *Civil Procedure Act*, Orders 22, 42 Rule 6 and 51 Rule 1 of the *Civil Procedure Rules* and Rules 5, 41 and 75 of the *Court of Appeal Rules*, substantively seeking an order for the extension of time within which to lodge a notice of appeal against the ruling and order of Majanja, J. delivered on July 10, 2020. There is also a prayer for stay of execution of the filing and order under Rule 5(2)(b) but I will not delve into it on account of want of jurisdiction.
2. The application is supported by the grounds in its body and a supporting affidavit of the applicant. In summary the applicant's case is that she is the proprietor of all that parcel or piece of land known as NAIROBI/BLOCK 32/584 situate in Golf course estate within Nairobi, "the suit property" which suit property she charged to the 1<sup>st</sup> respondent. That upon failure to repay the loan the 1<sup>st</sup> respondent exercised its statutory power of sale and sold the suit property through a public auction to the 3<sup>rd</sup> and 4<sup>th</sup> respondents on 5<sup>th</sup> November 2019. Aggrieved by the said decision of the 1<sup>st</sup> respondent, the applicant



- approached the High Court on 26<sup>th</sup> February 2020 seeking for interlocutory injunction to restrain the 1<sup>st</sup> respondent from interfering with or transferring the suit property to the 3<sup>rd</sup> and 4<sup>th</sup> respondents.
3. On 10<sup>th</sup> July 2020, the trial judge, (Majanja, J.) delivered a ruling dismissing the application with costs to the respondents. The applicant being aggrieved by the said ruling and order filed the instant application. The reasons she gives for the delay in filing the notice of appeal are that the ruling was meant to be delivered on the 7<sup>th</sup> August 2020 but the same was pushed to 10<sup>th</sup> July 2020. However, the contents of the ruling were not communicated to her in time and she was therefore not able to give instructions to her advocates to lodge an appeal. This was further compounded by the fact that there was the outbreak of Covid-19 Pandemic which made it difficult for her to reach out to her advocates and give instructions regarding the intended appeal. That by the time she contacted her advocates, she was told that the time to do so had lapsed. She further states that the delay was not intentional but inadvertent.
  4. The application is opposed by the 3<sup>rd</sup> and 4<sup>th</sup> respondents through the replying affidavit of the 3<sup>rd</sup> respondent dated 16<sup>th</sup> March 2021. It is their response that the application is incompetent as it is supported by an affidavit which is not dated thus offending Section 5 of the [Oaths and Statutory Declarations Act](#). That the application had been overtaken by events as they were the current registered owners of the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not file any response to the application in the trial court.
  5. In her submissions, the applicant stated that the application was filed on 6<sup>th</sup> August 2020 though the ruling was delivered on 19<sup>th</sup> July 2020 thus there was a delay of one month or thereabouts which was not inordinate. She relies on the case of [Thuita Mwangi Vs. Kenya Airways Ltd](#) [2003]eKLR to submit that the decision on whether or not to extend time is discretionary and that the court ought to consider factors like the length of delay; the reason for the delay; and the chances of the appeal succeeding and lastly, the degree of prejudice to the respondent if the application is granted. That she had sufficiently explained the delay and the application ought to be allowed therefor.
  6. On the other hand, the 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted that the application should not be allowed as the delay was due to the applicant's own indolence. They rely on the case of [Julius Kanau Kathekea Vs. Weruguru Kathekea Ayaga & 2 Others](#) [2013] eKLR for the proposition that the extension of time was not a right of a party but one that was discretionary and only available to a deserving party who must lay the basis for grant of the same. That the applicant had not laid any basis upon which this court can exercise discretion in her favour.
  7. I have considered the application, the affidavits on record, list of authorities, submissions by counsel and the law. Firstly, the applicant has not invoked the proper provisions of the law for the grant of the orders sought. The [Civil Procedure Act](#) and the rules made thereunder cannot be invoked in an application of this nature. Nevertheless, I shall proceed to decide the application on merit as it is clear that it is application for extension of time. The discretion that I am being called upon to exercise in this application is provided for under Rule 4 of the [Court of Appeal Rules](#) in terms inter alia: -  

“The Court may on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a Superior Court, for doing any act authorized or required by these Rules, whether before or after doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
  8. The principles that guide this Court on this sort of application are well settled. The principles are to the effect that the powers of the Court in deciding such an application are discretionary and unfettered. Yet such discretion must be exercised judicially and not capriciously or whimsically. It is therefore upon an



applicant to explain to the satisfaction of the Court that she is entitled to the discretion being exercised in her favour.

In *Wasike Vs. Swala* [1984] KLR 591 this Court stated: -

“ As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors; -

- a. That there is merit in his appeal.
- b. That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and
- c. That the delay has not been inordinate.”

9. The applicant contend that she has an arguable appeal. There is memorandum of appeal which has been annexed to the application raising 11 grounds of appeal, essentially questioning the statutory power of sale exercised by the exercised by the 1<sup>st</sup> respondent. These grounds are neither idle or frivolous. I am therefore satisfied that the appeal is arguable. I am saying so well aware that an arguable appeal is not necessarily one which must succeed.
10. On the issue of delay, I note that the impugned ruling was delivered on July 10, 2020 and this application was filed a month later on August 6, 2020. Rule 75 of the Court Rules provides that a notice of appeal be lodged within 14 days from the date of the impugned judgment and decree. In the scheme of things this is not such an inordinate delay and is therefore excusable. The applicant has given the reason for the delay as being confused after not being informed of the ruling in time, and the Covid-19 Pandemic which factors made it difficult for her to communicate to her counsel and give instructions to appeal. I find the reasons plausible as the courts were closed at some point and movement of people was equally restricted due to the pandemic.
11. On the issue of prejudice, the applicant has not indicted how she will suffer the same but equally the respondents have not indicated how the orders if granted will also prejudice them. After all they are now the registered proprietors of the suit property. Nonetheless I am satisfied that the applicant is likely to suffer prejudice if the application is not granted as she will have been denied her undoubted right of appeal and to challenge the sale of the property.
12. In conclusion, I find that the applicant has made out a case warranting the exercise of my discretion in her favour. The result is that I allow the notice of motion dated July 29, 2020 and direct that the notice of appeal be filed and served within the next fourteen (14) days from the date of this ruling, failing which leave hereby granted shall automatically lapse.
13. Costs will abide the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

