



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 117 OF 2020

BETWEEN

NELSON OMWEGA OISEBE.....APPLICANT

AND

KENYA WOMEN MICROFINANCE BANK.....RESPONDENT

(Being an application for extension of time to file an appeal out of time from the judgment of the High Court of Kenya at Kisii (Majanja, J.) dated 16th April 2019 and for stay of sale by public auction of the applicant's properties

in

Kisii High Court Civil Case No. 19 of 2017)

RULING

1. In a judgment delivered on 16th April 2019, the High Court dismissed the applicant's suit against the respondent in which the applicant had sought to restrain the respondent from exercising its statutory power of sale. Over 17 months later, on 7th October 2020 the applicant filed the present application saying that he is aggrieved by that judgment and intends to appeal it to this Court and seeks extension of time to do so under Rule 4 of the Court of Appeal Rules.
2. I have considered the application, the affidavit sworn by the applicant in support, the submissions by W.O. Ochuka & Company Advocates for the applicant and the numerous authorities cited, and the replying affidavit sworn by Bernard Kiprotich.
3. In *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR* the Supreme Court of Kenya stated that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; and that whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and public interest are considerations to be borne in mind. See also in *Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR*.
4. In this case, the only effort made by the applicant to offer an explanation for the delay of over 17 months is in paragraph 7 of his supporting affidavit where he deposes that he held several meetings and exchanged several correspondences with the respondent in a bid to settle the issues and unfortunately realized that time for filing of the appeal had lapsed.
5. With respect, I am not satisfied that this is a plausible explanation for the delay involved. The applicant was aware of the decision of the High Court in April 2019, and if he was indeed aggrieved, there is nothing that stopped him from filing a notice of appeal even as he engaged with the respondent "to settle issues" as he puts it. The period of delay is long. The reasons for delay are not sufficient. See *Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR*.
6. Although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules, that discretion should be exercised judicially. Each case must be considered on its own facts. In relation to the present case, I am not satisfied that there are sufficient grounds for the exercise of discretion in the applicant's favour.

7. The application fails and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

S. GATEMBU KAIRU, (FCIArb)

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR