



REPUBLIC OF KENYA

THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, JA IN CHAMBERS)

CIVIL APPLICATION NO. 156 OF 2019

SWING LIMITED.....APPELLANT

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....RESPONDENT

(Being an application for leave to file an appeal out of time arising from the Judgment and Decree of the High Court of Kenya at Nairobi (Aburili, J.) dated 4th October, 2018 in Civil Suit No. 142 of 2012

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#### RULING OF THE COURT

1. The application dated 22nd May, 2019 brought under **Rules 4, 42 and 47** of the **Court of Appeal Rules, Section 3A and 3B** of the **Appellate Jurisdiction Act** is for extension of time to file Appeal out of time. The applicant's Advocate filed the Notice of Appeal on 18th October, 2018 which was within 14 days after the delivery of the Judgment by the High Court on 4th October, 2018. The applicant also served the said Notice on the respondent's Advocate on 23rd October, 2018 which was within seven days in compliance with **Rule 75 (2) and 77 (1)** of the **Court of Appeal Rules**.

2. It is contended that the applicant's advocate applied for copies of proceedings on 29th November, 2018 which was within 30 days of the delivery of judgment in terms of Rule 82 (1) of the Court of Appeal Rules. However, the said letter was delivered to the High Court registry on 6th December, 2018 after the expiry of the 30 days. It is submitted the omission was on the part of the applicant's Advocate, in particular the clerk to whom the task of filing that was entrusted. It is therefore, the case of the applicant, that the mistake of its Advocates should not be used to lick it out of a pending appeal with real and serious issues to be determined.

3. On the other hand, it is the case of the respondent that the application is fatally defective on account of the fact, that there is a clear breach of **Rule**

**82 (1)** of the **Court of Appeal Rules**, which states:

**“Subject to Rule 115, an Appeal shall be instituted by lodging in the appropriate registry within 60 days of the date when the Notice of Appeal was lodged –**

- a. a memorandum of appeal, in quadruplicate;**
- b. the record of appeal, in quadruplicate;**
- c. the prescribed fee; and**
- d. security for the costs of the appeal**

**Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery of the appellant of such copy”.**

4. It is therefore submitted by the respondent that no reason was given by the applicant for the inordinate delay and why it failed to comply with the mandatory provisions of the law.

5. I have considered the application together with all documents filed herein. The issue for determination is whether the applicant should be granted leave to file appeal out of time and in so answering that question, I have to address my mind to **Rule 4 of the Court of Appeal Rules**, which grants an unfettered discretion to grant extension of time. The only caveat is that this Court must be satisfied with the explanation and that the cause of delay does not lie with the applicant. No doubt the delay which the applicant describes as unfortunate was caused by its authorized Agent who failed to file within the mandatory timelines.

6. It is clear to me that the failure to lodge the letter applying for proceedings was the mistake of the applicant's Agent who admitted the said mistake. The question is whether the applicant should be penalized for the mistake of its Advocate. It is not the law, that every mistake committed by an Advocate on behalf of its client would be excused. It is also my understanding that a party should not always be punished for the acts or omissions of its lawful agent. The guiding principle is the explanation placed before Court for the alleged omission caused by the agent. The Court has to take into consideration, the length, reasons, chances of the Appeal succeeding and the degree of prejudice to the respondent if the application is granted; no doubt the parameters are not exhaustive or predetermined. The bottom line being that the discretion must be exercised judicially and in order to enhance the faith citizens have in the administration of justice. What I mean is that, the Court should not be overzealous to shut out or drive litigants out of the seat of justice.

7. Having taken into consideration the explanation given by the applicant, I am satisfied that this is a fit case for the exercise of my discretion in favour of the applicant. I do so, by granting the application dated 22nd May, 2019 with no orders as to costs. I direct the applicant to file and serve the Appeal within the next 14 days from the date hereof.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021**

**M. WARSAME**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**