



**IN THE COURT OF APPEAL**

**NAIROBI**

**(CORAM: MURGOR, JA – IN CHAMBERS)**

**CIVIL APPLICATION NO. E 301 OF 2020**

**BETWEEN**

**FAULU MICRO FINANCE BANK LIMITED.....APPLICANT**

**AND**

**JOSEPH KIPNGENO KIRUI.....1<sup>ST</sup> RESPONDENT**

**LIZA CHEBET CHUMO.....2<sup>ND</sup> RESPONDENT**

***(Being an application for extension of time to file the Notice of Appeal, and Memorandum and Record of***

***Appeal out of time and for stay of proceedings in an intended Appeal from the Judgment of the***

***High Court (Commercial & Tax Division) of Kenya at Nairobi Kasango, J)***

***delivered on 3<sup>rd</sup> June 2020 in Civil Appeal No. 12 of 2017))***

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**RULING OF THE COURT**

***The applicant, Faulu Micro Finance Bank Limited*** has brought this Notice of motion dated 18<sup>th</sup> September, 2020 seeking stay of proceedings before the Chief Magistrate's court in *Civil Suit No. 3074 of 2017, Joseph Kipngeno Kirui vs Faulu Micro Finance Bank Limited & Another* and for time to be extended within which to file a Notice of appeal out of time in an intended appeal from the judgment of the High Court delivered on the 3<sup>rd</sup> June, 2020.

The motion brought on the grounds on its face and supported by the affidavit of ***Sheila Maina***, the applicant's Head of Legal sworn on 18<sup>th</sup> September 2020 and on the applicant's written submissions wherein it was contended that the Covid- 19 pandemic had affected the applicant's business, forcing it to undergo restructuring so as to comply with the government's containment directives and regulations, with the result that the decision to appeal took longer than usual due to staffing challenges and its lengthy decision making processes; that the delay in complying with the timelines was not deliberate; that they have an arguable appeal that raises substantial issues of law with a high chance of success; that the respondents will not suffer any prejudice that cannot be remedied with an award of costs. They further asserted that under the Constitution, they had a right to appeal.

As a brief background, ***the 1<sup>st</sup> and 2<sup>nd</sup> respondents, Joseph Kipngeno Kirui and Liza Chebet Chumo***, commenced legal proceedings against the applicant in *Chief Magistrates Civil Suit No 3074 of 2017* seeking temporary injunction against the applicant to restrain it from advertising and selling the property known as Nairobi / Block 111/666, (*the suit property*). By a ruling delivered on 11<sup>th</sup> September 2017 the trial court dismissed the application. The respondents' were aggrieved and appealed to the High Court, and in so doing, filed a Notice of Motion dated 13<sup>th</sup> September 2017 in *Civil Appeal No. 12 of 2017* seeking to have the trial court's ruling set aside and to restrain the applicant from selling or disposing of the suit property pending the hearing and determination of *Chief Magistrates Civil Suit No 3074 of 2017*. The High Court granted the orders that were sought

Aggrieved by the lower court's decision, the applicant intends to file an appeal, and in the meantime has brought this motion seeking for time to be extended so as to enable it file the appeal.

In a replying affidavit sworn by the 1<sup>st</sup> respondent on 16<sup>th</sup> October, 2020, and in written submissions, it was asserted that, the application is frivolous and an abuse of the court process because, the applicant has not provided any compelling reasons for the delay in filing the notice of appeal, furthermore, that the grounds of appeal has no likelihood of success and further, granting the extension of time will be prejudicial to them.

At this juncture it is important to observe that the application for orders of stay of proceedings is not properly before me, and as such I am precluded from determining it. But I will nevertheless proceed to determine the application for extension of time.

Under **Rule 4** of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not whimsically having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. See the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997.**

The judgment was delivered on 3<sup>rd</sup> June 2020, and this motion was brought on 18<sup>th</sup> September 2020. In effect, there is a delay of about three months that requires to be explained.

**Rule 75** of this Court's rules specifies that the Notice of appeal required to be filed in 14 days. The applicant, which has yet to file the Notice, has explained that it has not done so because, the onset of the Covid- 19 Pandemic and the resultant government directives pursuant to which it scaled down its operations, slowed down its ability to obtain the requisite Board and other approvals necessary for filing an appeal in the prescribed time. To try to demonstrate the operational challenges it is facing, it has attached two emails from the Head of Human Resources and the Managing Director dated 13<sup>th</sup> May 2020 and 26<sup>th</sup> May 2020 directing vulnerable staff to work from home.

Needless to say, the delay having been caused by its slow approval process, the applicant has not provided any documentation to demonstrate when it commenced the approval process to file an appeal in respect of this matter, and when the approval was obtained, so as to buttress its explanation. Without provision of such documentation evincing the delays, I am not satisfied that is has been satisfactorily explained.

In addition, I am not altogether satisfied that the intended appeal has a likelihood of success given that it is against an exercise of discretion of the judge of the High Court in granting the orders for injunction sought. And whether the respondents will suffer any prejudice is not apparent from the pleadings.

All told, taking into consideration the foregoing, I decline to allow the application, and hereby order that the Notice of Motion dated 18<sup>th</sup> September, 2020 be and is hereby dismissed with costs to the respondents.

***It is so ordered.***

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.**

**A.K MURGOR**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**