



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 300 OF 2013

BETWEEN

JOSEPHINE NJOKI MWANGI APPLICANT

AND

HOUSING FINANCE COMPANY (K) LTD RESPONDENT

(An application to extend time to file and serve a Notice of Appeal and Record of Appeal out of time in an intended Appeal against the Ruling of (Musinga, J) delivered on 2nd July, 2012 at Milimani

in

H.C.C.S. No. 641 OF 2010)

RULING

1. The applicant seeks an extension of time under Rule 4 of the Rules of this Court within which to file a Notice of Appeal and Record of Appeal. She is aggrieved by the decision of the High Court (Musinga J, as he then was) given on 2nd July 2012 dismissing her application for an order of interlocutory injunction to restrain the respondent from exercising its power of sale under a mortgage pending the hearing and determination of her suit in the High Court. She intends to appeal against that decision but ran out of time to do so.
2. The factors for consideration in exercising the discretionary power under rule 4 of the rules of this Court include the length of delay; the reasons for delay; the degree of prejudice if any that will be caused to the other party if the application is allowed and a consideration whether the applicant has an arguable appeal. There are many decisions of this Court in support of that proposition including Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No. Nai 251 of 1997 and Maritim vs. Kibaru [2005] eKLR; In Muchungi Kiragu vs. James Muchungi Kiragu and another Civil Application No. NAI 356 of 1996 this Court expressed the view that except where the delay is inexcusable, it is wrong to shut out an applicant out of court and to deny him the right of appeal where the intended appeal is arguable. Accordingly, and in order to attract favourable exercise of discretion under rule 4 the applicant needs to demonstrate that the length of delay involved in the circumstances is not inordinate and offer cogent reasons for the delay. She

also has to demonstrate that no prejudice, will be caused to the respondent if the application is allowed and she needs to show that she has an arguable appeal.

3. In support of the application Mr. Nyamai learned counsel for the applicant drew my attention to the grounds appearing on the face of the applicant's application dated 5th December 2012, the contents of the applicant's supporting affidavit and reply to replying affidavit of the applicant. Mr. Nyamai submitted that the applicant was prevented from filing a notice and record of appeal within the prescribed period by reason of her previous advocates failure to institute the appeal despite having been instructed and paid to do so; that her previous advocates falsely represented to her that an appeal and an application for stay had indeed already been filed when in fact that had not been done; that upon instructing her current advocates Ms N. R. Nyamai and Company advocates and upon retrieving her file from her previous advocates on 31st August 2012, her new advocates required time to read the voluminous files and also had to prioritize an application which they filed on 10th September 2012 challenging the auction of the suit property; that the delay in filing the appeal was on account of time lost during the transition between the applicant's previous lawyers and the current lawyers and the need to apply to set aside the irregular and un-procedural auction of the mortgaged property that allegedly occurred on 30th August 2012.
4. It is the applicant's case that the intended appeal has high chances of success and the High Court should have granted the application for injunction because no money is owed to the respondent, which has in fact been overpaid, by an amount of Kshs. 225,936.01; the mortgage debt should in any event have been recovered from the Mortgage Protection Insurance Policy following the death of the mortgagor who was the applicant's husband; the applicant was not served with a notice under section 15(d) of the Auctioneers Rules 1997 and that in the circumstances the learned judge of the High Court should have issued the injunction she sought.
5. Learned counsel for the respondent Mr. L. Onguto while opposing the application relied on the replying affidavit of Geoffrey Kimaita a General Manager of the respondent in which it is deposed that the mortgaged property was sold on 31st August 2012 by which time the amount due was Kshs. 3,828,827.35. Mr. Onguto further submitted that despite the ruling having been delivered on 2nd July 2012, no notice of appeal was filed; that the present application was not filed until 5th December 2012 and even then the same was not served on the respondent until 4th October 2013 which is an indication of bad faith; that despite having been granted a temporary injunction on 2nd July 2012 in order to enable the applicant file a formal application pending appeal, the applicant did not do so; that the delay in filing the present application is inordinate in the circumstances and the reasons given for the delay are not tenable as the applicant was aware what her advocates were doing; that in any event the intended appeal has no merits as the applicant was truly indebted to the respondent and all necessary steps were taken prior to the exercise of the statutory power of sale; that the Mortgage Protection Insurance Policy covered the principal sum only and the insurance company only paid the principal amount and not the arrears.
6. I have considered the application, the affidavits and submissions by learned counsel. In her affidavit in support of the application, the applicant has set out in great detail how after the delivery of the ruling on 2nd July 2012 by Justice Musinga she consulted her advocates and instructed them to lodge an appeal; that she paid the lawyers fees for the intended appeal and in that regard exhibited a receipt issued by her previous advocates Kyalo & Associates for legal fees paid on 16th August 2012; that she held numerous follow up meetings with her advocates to ascertain the status on the matter and received assurances that all was well only to find the property advertised after which she embarked on fire fighting efforts to stop the sale of the suit property that was scheduled to take place on 30th August 2012 and that time was also lost in the course of changing her advocates when she perceived that her previous advocates had a conflict of interest.
7. Whereas the applicant could have moved with greater speed in order to file the present application

earlier than she did on 5th December 2012, I am satisfied that the applicant has offered a reasonable explanation as to why she delayed in making the present application. She appears to have diligently followed up the matter with her previous lawyers and demonstrated that she made payment to those lawyers for purposes of instituting the appeal but that was not done.

8. On the question whether the intended appeal is arguable, the less I say about this the better. As this Court stated in **Wasike vs. Swala [1984] KLR 591** an arguable appeal need not be one with overwhelming probability of success. I am unable to say that the intended appeal is frivolous.
9. For those reasons, I allow the application. The applicant shall within 7 days from the date of delivery of this Ruling file and serve the Notice of Appeal and shall within 60 days from the date of filing the notice of appeal file and serve the record of appeal. In default of either step this order shall stand vacated.
10. The respondent shall in any event have the costs of this application.

Dated and delivered at Nairobi this 28th day of February, 2014.

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

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

REGISTRAR