



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI 299 OF 2012**

**BETWEEN**

**JOSEPHINE NJOKI MWANGI ..... APPLICANT**

**AND**

**HOUSING FINANCE COMPANY OF KENYA 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 (Majanja, J) delivered on 29<sup>th</sup> August, 2012 at Milimani***

**in**

**H.C.C.S. NO. 641 OF 2010**

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**RULING**

1. By an application presented to this Court on 5<sup>th</sup> December 2012 under Rule 4 of the Rules of this Court, the applicant seeks an extension of time within which to file a Notice of Appeal and Record of Appeal. She intends to appeal against the decision of the High Court (Majanja J) given on 29<sup>th</sup> August 2012 dismissing her application for an order of interlocutory injunction in which she had sought to prevent the respondent from exercising its power of sale under a mortgage
2. According to learned counsel for the applicant Mr. Nyamai who relied on the grounds appearing on the face of the applicant's application dated 5<sup>th</sup> December 2012, the supporting affidavit and reply to replying affidavit of the applicant, the applicant was prevented from filing a notice and record of appeal within the prescribed period for reasons that the applicant learnt after the delivery of the impugned ruling and after collecting her file from her previous advocates on 31<sup>st</sup> August 2012 that her signature on the affidavit supporting the application that was the subject of that ruling was forged; that her former advocates Kyalo & Co Advocates failed, despite her instructions and payment of requisite instructions fees to them to do so, to file an appeal from the earlier decision of Musinga J given on 2<sup>nd</sup> July 2012 rejecting her earlier application for interlocutory injunction; that upon instructing her current advocates Ms N. R. Nyamai and Company advocates and upon retrieving her file from her previous advocates on 31<sup>st</sup> August 2012, her new advocates required time to read the voluminous files and also had to prioritize an

application which they filed on 10<sup>th</sup> September 2012 challenging the auction of the mortgaged 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 30<sup>th</sup> August 2012.

3. It is the applicant's case that the intended appeal has high chances of success and that the impugned ruling is bad in law and the lower court should have granted the application for injunction because no money is owed to the respondent, as the applicant overpaid the loan 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 applicant's husband who was the mortgagor; the applicant was not served with a notice under section 15(d) of the Auctioneers Rules 1997 and the learned judge of the High Court was wrong to hold that the applicant's application was res judicata.
4. Opposing the application, learned counsel for the respondent Mr. L. Onguto 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 31<sup>st</sup> 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 29<sup>th</sup> August 2012, no notice of appeal was filed; that the present application was not filed until 5<sup>th</sup> December 2012 and even then the same was not served on the respondent until 4<sup>th</sup> October 2013; that the delay in filing the present application is nearly four months and 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 could not cover arrears.
5. I have considered the application, the affidavits and submissions by learned counsel. In an application for extension of time under rule 4 of the rules of the Court, the Court has unfettered discretion which must however be exercised judiciously. The factors for consideration in exercising that discretion 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 Mutiso v 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 or her the right of appeal where the intended appeal is arguable.
6. Should the Court, in the circumstances of this case exercise its discretion in favour of the applicant? As is evident from the ruling of Justice Majanja delivered on 29<sup>th</sup> August 2012 that is the subject of the intended appeal, the applicant in her application dated 22<sup>nd</sup> August 2012 on the basis of which that ruling was made sought an order of interlocutory injunction to restrain the respondent from selling, transferring, alienating or otherwise interfering with the applicant's possession of the property known as Nairobi/Block 111/16, Koma Rock Estate Nairobi.
7. The application dated 22<sup>nd</sup> August 2012 was filed not long after the delivery of the ruling on the applicant's application dated 27<sup>th</sup> September 2010 in which the applicant sought an interlocutory injunction to restrain the respondent from selling, transferring, alienating or otherwise interfering with the applicant's possession of the property Nairobi/Block 111/16, Koma Rock Estate Nairobi was on 2<sup>nd</sup> July 2012 dismissed by Justice Musinga.
8. In effect, the orders sought by the applicant from the High Court in those two applications were

exactly the same. Justice Majanja held that the application dated 22<sup>nd</sup> August 2012 was res judicata. Counsel for the applicant contends that it is arguable whether the judge was right. That may well be so. For my part, and for purposes of this application, I do not think so. I am not persuaded that the applicant has demonstrated that she has an arguable appeal in that regard.

9. Even if I was to accept, as I was urged to do by counsel for the applicant, that the delay in presenting the present application is not inordinate and that the circumstances surrounding the applicant's decision to change her advocates and the delay occasioned thereby accounts for the lost time, the view I have taken that the intended appeal is not arguable disposes of this application.
10. It is not enough for the applicant to explain the delay or to demonstrate that the other party will suffer not prejudice if the application for extension of time is allowed. The applicant must also demonstrate that the intended appeal is arguable. Just as it would be wrong to shut out an applicant out of court and deny them the right of appeal where the intended appeal is arguable, it is equally wrong to open the door for an appeal that is not arguable.
11. The other factor that has weighed on my mind and fortified my decision is the contention by the applicant that the affidavit in support of the application dated 22<sup>nd</sup> August 2012 from which the ruling the subject of the intended appeal springs from was forged. The effect of that contention is that the application dated 22<sup>nd</sup> August 2012 was presented to court without her authority. In those circumstances, it is incongruous for the applicant to embrace the very application that she disowns by seeking to challenge the resultant decision on appeal.
12. For those reasons I am unable to grant the orders sought. The application is dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of February, 2014.**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

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

**REGISTRAR**