



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 105 OF 2011

BETWEEN

MUTHITHI INVESTMENTS COMPANY LIMITED....APPLICANT

AND

HOUSING FINANCE CO. OF KENYA LIMITED....RESPONDENT

(Being an application for extension of time to file and serve the Record of Appeal in respect of the Judgment and Decree of the High Court of Kenya at Milimani Commercial Courts (Hon. Lady Justice Lesiit) dated 17th July 2009

in

H.C.C.C. No. 1209 of 2002)

RULING

1. On the 17th July 2009, the superior court (**Lesiit, J.**) dismissed the applicant's suit against the respondent and entered judgment for the respondent on the counterclaim claim for Kshs. 3 million together with interest at the prevailing commercial base lending rates from 17th January, 2003 until payment in full. On 23rd July 2009 the applicant lodged a notice of appeal in the superior court. The notice of appeal was served upon the respondent within time. On the same date the applicant applied for certified copies of the proceedings, judgment and decree of the superior court. The judgment and the decree were certified by the Deputy Registrar on 21st September 2010 and collected by the applicant's advocates on 24th September 2010. A certificate of delay certifying the period from 23rd July 2009 to 24th September 2010, as necessary for the preparation and delivery of the typed proceedings, judgment and decree, was duly signed by the Deputy Registrar on the 4th October 2010.

2. The applicant has now come to this court under **Rules 1(2) 4, 42(1) and 42** of the Court of Appeal Rules, and **Section 3A and 3B** of the **Appellate Jurisdiction Act, Cap 9** Laws of Kenya seeking leave for extension of time to file and serve the record of appeal. In the affidavit filed in support of the motion, the applicant's counsel, **John Maina Mburu** explains that the certificate of delay was not collected by his clerk until sometime in December 2010. He attributes this to the fact that the clerk was not informed by the court that the certificate of delay was ready for collection. Counsel further explains the omission to bring the application in good time as accidental and attributable to human error.

3. The respondent objects to the application maintaining that the delay is inordinate and that no credible explanation for the inordinate delay has been given. It is further contended that the applicant has not demonstrated that it has an arguable appeal nor has it placed any material before the court to enable the court exercise its discretion in its favour.

4. In **Fakir Mohamed vs. Joseph Mugambi & 2 others, civil application No. 332 of 2004** which was applied in *Dickson Ndegwa Mbugua vs. City Council of Nairobi & 3 Others [2010] eKLR*, the guidelines for applying Rule 4 of the Court of Appeal Rules, were stated as follows:

“The exercise of this court’s discretion under rule 4 has followed a well beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors – see Mutiso vs. Mwangi Civil Application No. Nai. 255 of 1997, (ur), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igwete vs. Murika M’Ethare & Attorney General Civil Application No. Nai, 8 of 2000 (ur) and Murai vs. Wainaina (No. 4) [1982] KLR 38.”

5. Thus my discretion under **Rule 4** of the Court of Appeal Rules, though unfettered, should be exercised in accordance with the above guidelines. In this case, the applicant has conceded that there was delay in collecting the certificate of delay which was ready on 4th October 2010, but was only collected sometime in December 2010. The explanation for this delay was rather feeble and unconvincing.

6. The advocate’s clerk who is said to have visited the court severally has not sworn any affidavit in support of that contention nor has any evidence been availed to this court about any inquiries made by the applicant’s advocate or the advocate’s clerk for the certificate of delay. Secondly, although the advocate admits that he was informed of the collection of the certificate of delay in December 2010, this application for extension of time was not made until 22nd April 2011. That is almost four months after the certificate was availed.

7. No explanation has been given for the four months delay in bringing the application for extension of time, other than the same being said to be “accidental and attributable to human error”. That explanation does not give any details of the alleged human error nor does it identify the person who was responsible for that human error. It is a feeble excuse which certainly does not provide a satisfactory explanation for the delay.

8. Further, it is noteworthy that although the applicant contended that it has an arguable appeal with overwhelming chances of success, the applicant has not exhibited any draft memorandum of appeal nor has it in any other way demonstrated the presence of an arguable appeal. I concur with the respondent’s counsel that although the decretal sum has already been paid, the respondent will suffer prejudice if the application for extension of time is allowed, and the litigation is reopened, particularly where the applicant has demonstrated such a lackluster attitude. One gets the distinct impression that the applicant is not serious about pursuing the appeal.

9. For the above reasons, I find that the applicant has not established any circumstances that would justify the exercise of my discretion in its favour. Accordingly, I decline to extend time for the applicant to file and serve the record of appeal. I dismiss with costs the motion dated 22nd April 2011.

Dated at Nairobi this 16th day of March, 2012.

H. M. OKWENGU

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JUDGE OF APPEAL