



**IN THE COURT OF APPEAL
AT NAIROBI**

CORAM: O'KUBASU J.A (IN CHAMBERS)

CIVIL APPLICATION NO. NAI.43 OF 2002

BETWEEN

JAMES HERBERTS ODHIAMBO..... APPLICANT

AND

FAR EAST CHINESE MEDICAL CENTRE1ST RESPONDENT

SHELTER INVESTMENT (INTERESTED PARTY)2ND RESPONDENT

(Application for extension of time within which to file
and serve record of appeal against the judgment and
decree of High Court of Kenya at Nairobi (Hon.
Justice Githinji) dated 30th August, 1996

IN

H.C.C.C 1786 OF 1996)

RULING

This is an application by James Herberts Odhiambo in which the following orders are sought:
"1.THAT this Honourable Court be pleased to extend time within which to file and serve the Notice of Appeal and Record of Appeal against the judgment of Hon. Justice E. Githinji delivered on 30th of August, 1996 in the High Court of Kenya at Nairobi Civil Case No. 1706 of 1996. 2.THAT the costs of this second prayer application be in the intended Appeal."

The grounds upon which the application is brought are set out together with supporting affidavit. The intended appeal is against the judgment of Githinji, J. delivered on 30th August, 1996. This application for extension of time was filed in this Court on 1st March, 2002. On the face of it there is a long delay of over five years. The applicant blames his previous advocates for this inordinate delay.

I have carefully perused the documents in support of the application together with the replying affidavits and it would appear that the applicant has come to court rather too late. In an application of this nature the Court is being asked to exercise its unfettered discretion which is intended to be exercise to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice - see Shah v. Mbogo and Another (1967) E.A 116. This application having been brought under Rule 4 of this Court's Rules must be considered in the light of the observations by this

Court in *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* - Civil Application No. NAI 255 of 1997(unreported) in which it was said:-

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first; the length of the delay; secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted".

In this application we find that after judgment of the superior court there were proceedings filed by the applicant's wives in a bid to save the house in question, but that application was dismissed on 22nd November 2001. The house in question was sold in 1997 in a public auction. The house has now been transferred to the purchaser who is the 2nd respondent herein. The applicant's claim over this house was extinguished when the same was transferred to the new purchaser. This fact was recognized by his lawyers. For example in their letter dated 17th October 2001 his lawyers (Migos-Ogamba & Company Advocates) stated inter alia:

"Whereas we appreciate the contents of the court order dated 1st October 2001 and whereas our client is bound to vacate the suit premises on or before 1st November 2001, we hereby seek your considerate indulgence to allow our client to stay in the suit premises until the 31st December 2001."

It would appear that the applicant changed lawyers because only a week after the above quoted letter there was yet another letter dated 23rd October, 2001 from Otieno-Odek & Company Advocates in which this new firm of lawyers stated:-

"Kindly allow our client to stay in the suit premises until 31st December 2001 when the children shall have closed schools."

From the foregoing it would appear that the applicant was pleading to be allowed to remain in the house until 31st December, 2001. He must have acknowledged the fact that the house was no longer his but the property of the purchaser. It is therefore rather surprising that the same applicant should be making an application under rule 4 of the Rules of this Court in respect of the judgment which was delivered way back in 1996.

I sympathise with the applicant's position but this is a court of law. Litigation must have an end. This appears to have come to an end. Extension of time in which to file appeal would only give false hopes to the applicant but burden him with further costs.

In view of the foregoing I find that there is no merit in this application. Consequently the application is dismissed with costs.

Dated and delivered at Nairobi this 2nd day of August, 2002.

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR