



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: O'KUBASU, J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI.127 OF 2001**

BETWEEN

JOSES KILONGIAPPLICANT

AND

1. HOUSING FINANCE COMPANY (K) LTD

2. NAMBAK LIMITEDRESPONDENTS

**(An application for extension of time to file the Notice
of Appeal and Record of Appeal out of time in an
intended appeal from the ruling dated 22nd June 2000
(Justice S.O. Oguk)**

in

H.C.C.C. No.1176 of 1998)

R U L I N G

This is an application brought under Rule 4 of this Court's Rules seeking extension of time in which to file a Notice of Appeal and Record of Appeal out of time. The grounds upon which this application is brought were stated as follows:

- "a) That the ruling which the applicant wants to appeal against was delivered without notice to the applicant. The same having been adjourned on several occasions from 29th day of July 1998 to 29th day of June 2000.
- b) That the applicant's advocate Mrs Muriungi came to know of the ruling in October 2000 when she met with Mr. S.M. Chege counsel for the second defendant who informed her of the ruling.
- c) That the court file has been missing now and then and the same was found in November 2000 when the applicant's counsel was able to read the ruling."

During the hearing of this application on 25th September 2001 Mrs Muriungi for the applicant submitted that a Notice of Appeal could not be filed in time because they were not aware of the ruling.

Mr Mugo for 2nd respondent stated that he could not dispute the facts as set out by the applicant's counsel. His only complaint was that the applicant took too long and did not exercise due diligence.

Under rule 4 of this Court's Rules this Court has unfettered discretion but as it has been stated before this discretion like any other judicial discretion must be exercised on reason and not caprice. The exercise of discretion must not be arbitrary or oppressive.

In Leo Sila Mutiso v. Rose Hellen Wangari Mwangi Civil Application No. NAI. 255 of 1997 (unreported) this Court in dealing with the issue of application for extension of time within which to file and serve Notice of Appeal and Record of Appeal stated inter alia:-

"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."

Having considered explanation given for the delay it would appear that the main reason was that the ruling of the superior court was delivered without notice to the applicant. This led to the delay as it took time before the applicant became aware of the ruling. This fact has not been disputed by the 2nd respondent's counsel. In my view this is a proper case in which I should exercise my discretion in favour of the applicant, as there has been adequate and reasonable explanation of this application and the applicant is granted leave to file a Notice of Appeal and Record of Appeal out of time. The applicant is to file the Notice of Appeal within 7 days from the date of this ruling. The Record of Appeal is to be filed within 21 days from the date the Notice of Appeal is filed. Costs of this application shall be in the intended appeal.

Dated and delivered at Nairobi this 28th day of September, 2001.

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR