



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 192 OF 1999

BETWEEN

1. AMINA MOHAMED

2. IBRAHIM MOHAMEDAPPLICANTS

AND

1. JACKSON GEOFFREY MWAWAZA

2. NATIONAL HOUSING CORPORATION

3. HILDA AGOLA ORIMA

4. MONICA BUSIRI OYARORESPONDENTS

R U L I N G

This is an application under Rule 4 of the Rules of this Court for extension of time to file Notice of Appeal and Record of Appeal. There is only one ground upon which this application is made and it is stated as follows:-

"THAT the delay to file and serve the notice of appeal was caused by the negligence of our Advocate who failed to inform us at all of the hearing date and Judgment of the Superior Court".

The intended appeal is against the judgment of Oguk J delivered on 18th February, 1999, in which the 1st respondent (Jackson Geoffrey Mwawaza) was granted vacant possession of the suit property known as NAIROBI/BLOCK/61/56 plus mesne profits as from 15th March, 1993. In support of this application, there is affidavit of Amina Mohamed. The pertinent paragraphs of that affidavit are as follows:-

"3.THAT I am the daughter of Baria Mohamed alias Fatuma Baria Mohamed Ismael (deceased).
4.THAT my mother owned a house in Kibera NAIROBI/BLOCK 61/56 which she purchased under Tenant Purchase Scheme from National Housing Corporation, the second Respondent/Third party herein. 5.THAT sometimes in 1980 the house was rent to Hilda Agola Orimba at monthly rent.
6.THAT the said Hilda Agola Orimba secretly and without my knowledge or consent sold the house to Monica Bosiri Oyaro the Third Respondent/Third party who later sold it to Jackson Geoffrey Mwawaza the Plaintiff in the High Court and the first Respondent herein. 7.THAT all the

transactions involving change of ownership of this house are fraudulent since the bona fide owner(s) were not party to the purported transfers. -----

12.THAT I did not attend the hearing in the High Court HCCC 2015 of 1994 because my Advocate did not advise me. 13.THAT I came to learn the results of the proceedings when the auctioneers came to me to effect the Court Order. I annex the copy of the order marked "AWI". 14.THAT if I was informed of the hearing date by my Advocates I would have attended the court to challenge the Plaintiff's case. 15.THAT I pray to this Honourable Court to grant me leave file Notice of Appeal and appeal record out of time. 16.THAT the delay herein was occasioned by my Advocate M/s Gade who failed to inform me on the time the results of High Court case No. 2015 of 1994".

In his replying affidavit, Jackson Geoffrey Mwawaza (1st Respondent) states inter alia:- "3.THAT the Applicants have not told the Court the correct position of the case at the superior court. 4.THAT the hearing that I believe the Applicants intend to challenge on appeal was by way of Notice of Motion. The Applicants therefore needed not to attend the hearing but to oppose the application by way of Grounds of Opposition and Replying Affidavit, which indeed was done. See annexure "JGM1". 5.THAT the order sought to be challenged on appeal was given on the 18th February, 1999 and this application was filed on the 23rd July, 1999.

6.THAT the inordinate delay herein has not been explained by the applicants. 7.THAT the Applicants herein have not complied with various Court orders herein in that on the 16th August, 1994 Ringera J as he then was ordered the Applicants to deposit Kshs.30,000/- in Court which they have not done to date. Further on the 13th February, 1995 the late Justice Pall ordered the Applicants to pay Kshs.5,000/- per month in court with effect from 1st March, 1995 which has not been done to date the plaintiffs are therefore in contempt of the said court orders and should not be heard in this application. 8.THAT the mandatory requirements for leave to appeal out of time have not been met by the applicants".

And then there was the replying affidavit of one W.K.B Keitany which was as follows:- "1.THAT I am a legal officer with National Housing Corporation and I have authority to depone hereto. 2.THAT the Corporation was joined as a third party to the proceedings in the Superior Court after the first respondent had sued for possession. 3.THAT the defendant therein, one Baria Ismail had defaulted in her payments to the Corporation having been a tenant - purchasers and the tenant - purchase agreement was terminated and the house repossessed. After such repossession, the same was sold to Hilda Orimba who sold it to Monica Bosibori Oyaro who then sold the same to Jackson Geoffrey Mwawaza. Apart from the fact that the corporation was not involved in any fraud, that the house was repossessed in accordance with contract I verily believe that Baria Ismail had no chance against Jackson Mwawaza a bona fide purchaser with no notice of any alleged fraud.

4.THAT the evidence on record in the Superior Court is unassailable and any appeal filed against the decision of Justice Oguk is doomed to fail".

What is stated in the three affidavits as set out above gives us the background to this application for leave to file Notice of Appeal and Record of Appeal out of time. According to the applicant there was fraud in all the transfers in respect of this property. But the legal officer of National Housing Corporation has shown that there was no fraud. He explained (in his replying affidavit) that the house was repossessed in accordance with the tenant purchase agreement.

Hence, according to the legal officer the applicant here stands no chance of successfully challenging the order of the Superior Court. Then we have the affidavit of Jackson Geoffrey Mwawaza in which it is shown that the applicant did not comply with various orders made by the superior court. In an application of this nature the court is being asked to exercise its discretion. It is upon the applicant to explain to the satisfaction of the court that this discretion should be exercised in his/her favour. In Leo Sila Mutiso v. Rose Hellen Wangari Mwangi Civil App. 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:-

"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".

Applying the above to the facts as revealed in this application, I find that the delay was inordinate. The reason for the delay was that the applicant's advocate failed to inform her. As regards chances of the appeal succeeding, I think in view of what is stated in the replying affidavits of Jackson Geoffrey Mwawaza and Keitany the applicant has no chance. To begin with the tenant-purchase agreement was between National Housing Corporation and the applicant's mother. In other words, the applicant was not a party to that agreement. Then there was default in repayment and hence the house was repossessed. The house has changed ownership and Mwawaza is the fourth owner. In my view, even if there was acceptable explanation for the delay I think to grant leave for extension would only give the applicant false hopes but burden her with further costs. This litigation must indeed be brought to an end.

In view of the foregoing, I am satisfied that this is not a proper case in which I should exercise my discretion in favour of the applicant. Consequently, the application is dismissed with costs.

Dated and delivered at Nairobi this 26th day of May, 2000.

E. O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR