



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: SHAH J.A ( IN CHAMBERS)**

**CIVIL APPLICATION NO.NAI 192 OF 2000**

**BETWEEN**

**MWIHOKO HOUSING CO. LTD.....APPLICANT**

**AND**

**EQUITY BUILDING SOCIETY.....RESPONDENT**

**(Application for extension of time in an intended appeal from the Judgment of the High Court of Kenya at Nairobi (Githinji, J) dated 29th September, 1999**

**in**

**H.C.C.C. NO. 5992 OF 1992)**

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**RULING**

I have before me an application dated 4th July, 2000 brought by way of notice of motion under rule 4 of the Rules of this Court. The applicant, Mwihoko Housing Company Limited (Mwihoko) seeks orders for extension of time to lodge an appeal against the judgment of the superior court (Githinji J) delivered on 29th September, 1999. The judgment was in respect of two suits, consolidated, that is HCCC No 5992 of 1992 and HCCC No 4686 of 1992.

The proceedings in the High Court were conducted on behalf of the applicant by advocates. M/s Mutinda Muthigari & Company Advocates had charge of the conduct of the proceedings on behalf of the respondent. However, the applicant itself lodged a notice of appeal to challenge the judgment of Githinji J on 12th October, 1999. That was in time. The respondent's advocate Mr Kirundi, in his replying affidavit sworn on 28<sup>th</sup> November, 2000, says that "the notice of appeal was filed in the Court of Appeal Registry on 14th October, 1999 two days after the date on which such notice ought to have been filed. There Mr Kirundi errs. A notice of appeal has to be lodged in the superior court within 14 days of the delivery of the decision sought to be appealed against. The record shows it was filed on the 13th day after the date of the decision. Delivery of a copy thereof to this Court on 14th October, 1999 does not vitiate the notice of appeal. It was served within time on Mr Kirundi's firm. These objections therefore are of no substance.

Having filed the notice of appeal in time, the applicant, through its Chairman Mr Stanley Kirima Mbagine, applied for certified copies of proceedings and judgment by a letter dated 12th October, 1999 lodged in the registry of the superior court on 14th October, 1999. This was in time also. According to the

certificate of delay issued by the Principal Deputy Registrar of the superior court the copies of proceedings and judgment were paid for on 14th December, 1999 and that the same were ready for collection and collected on 14th February, 2000. In the normal course of procedural events the intended appeal ought to have been filed by 14<sup>th</sup> day of April, 2000. This was not done and the reason advanced by the applicant for such delay is that the file of its previous advocate was not available to it on account of disagreement between the applicant and its then advocates on certain unsettled issues. Such disagreement led to delay in the filing of the appeal thereby necessitating this application. This application was lodged on 17th July, 2000.

The delay therefore, the applicant says, amounts to some 45 days. But the actual delay in lodging this application amounts to some 94 days old, and not 205 days as calculated by Mr Kirundi.

The applicant knew that it had fallen out with its previous advocates; hence it filed notice of appeal in person; it also applied for copies of proceedings and judgment in person. The applicant's present advocates say, through the affidavit of Mr Thomas Letangule sworn on 4th July, 2000, that they are now ready to lodge the appeal, that is to say, that they now have proper instructions to lodge the appeal. But it has been shown by the respondent that M/s Arusel, Letangule & Company Advocates were briefed prior to 13th April, 2000. By their letter of 13th April, 2000 the said advocates sent a draft decree to M/s Kirundi & Company Advocates for approval.

I am not satisfied that the applicant has properly explained the delay in even lodging this application, let alone the delay in lodging the intended appeal. The explanation proffered is lackadaisical. It is feeble. The applicant was desirous of appealing. It ought to have seen other advocates soon after the date of judgment and probably did so. The copies of proceedings, judgment, exhibits and other relevant documents could have been obtained from the superior court file without recourse to the file with the applicant's previous advocates. Mr Mbagine has deposed to the fact that the applicant had through him sought the original file from Mr Thiongo. He does not say what the unsettled issues were. He says further that he instructed his present advocates in May, 2000 whereas the present advocates sought approval of decree by their letter of 13th April, 2000.

I would also mention, here, that the applicant applied for certified copies of proceedings and judgment when he needed uncertified copies only. It appears that uncertified copies were available for collection on 14<sup>th</sup> December, 2000 as deposed to by Mr Letangule in his affidavit sworn on 4th July 2000. If such be the case the appeal ought to have otherwise been lodged by 11th March, 2000 not counting the Christmas vacation period.

Miss Kamau who appeared for the respondent drew my attention to the fact that a copy of this application was not served upon her office until 11th day of October, 2000. This statement by Miss Kamau was not challenged by Mr Letangule who in fact accepted that fact. The delay in serving this application on M/s Kirundi & Company is inordinate. I should have thought that in the given circumstances of this matter the present advocates for the applicant ought to have moved with alacrity.

It is not good enough to blame a previous advocate on record to say that his file was not availed to the applicant for some "unsettled issues". The exact dispute, as far as possible, ought to be shown. This has not been done.

There is another hurdle which the applicant has to meet. It says that several third parties were affected by the decision of the superior court and they are in possession of some portion of the suit land. These are '18 or so' persons who have erected permanent building thereon as pointed out by the learned judge in his judgment. It was, I think, for the applicant to serve its notice of appeal on them as mandated by rule 76(1) of the Rules. That has not been done. I was told that these eighteen persons have filed another suit. That may be so but they are parties directly affected by the intended appeal.

I appreciate I have unfettered discretion to extend time as sought. But that discretion can only be exercised if circumstances of the case permit me to do so. I cannot blindly extend time even if I am minded to say that the applicants may have an arguable appeal. The judgment of the superior court was

delivered some three years after close of case. That by itself is inglorious.

Coming to the crunch I am not satisfied that the delay, which is inordinately high, has been satisfactorily explained. I dismiss this application with costs.

**Dated and delivered at Nairobi this 22nd day of December, 2000.**

**A.B. SHAH**

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**JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**