



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPL. NO. 36 OF 2020

IN THE MATTER OF THE ESTATE OF KHAMIS MWINYIKAI RAMDHAN AKA KHAMIS MWINYIKAI (DECEASED)

AMINA RAMADHAN MWINYIKAI1ST APPLICANT

HALIMA RAMADHAN MWINYIKAI.....2ND APPLICANT

SOFIA RAMADHAN MWINYIKAI..... 3RD APPLICANT

KHAMIS RAMADHAN MWINYIKAI..... 4TH APPLICANT

VERSUS

MARYAM KHAMIS MWINYIKAI..... RESPONDENT

Coram: Hon. Justice R. Nyakundi

Marende Necheza Advocate for the Applicant

Matata & Mwabonje Advocates for the respondent

RULING

The applicant filed a notice of motion dated 18.12.2020 expressed to be brought under Section 1A, 1B, 3A and 95 of the Civil Procedure Rules, Order 40 Rule 2, Order 50 Rule 6 and Order 51 Rule (1) of the Civil Procedure Rules and Section 7 of the Appellate Jurisdictions Act Cap 9 of the Laws of Kenya seeking the following orders:

- (1). That the applicants be granted leave to file their memorandum of appeal out of time.
- (2). That this Honourable Court do make any other order it deems fit in their circumstances.

The application is supported with an affidavit of **Khamis Mwinyikai** and the grounds on the face of the motion. The application is opposed by the respondent in her replying affidavit filed in Court on 8.1.2021.

I have considered the notice of motion and corresponding affidavit giving reasons for the delay and further the objection raised by the respondent. The core issue here is whether the applicants have satisfied the threshold issue to be granted the orders sought herein.

Determination

The Law

Section 79(G) of the Civil Procedure Act provides

“the conceptual framework on filing of appeals from the subordinate Court to the High Court under the provisions as it stands, an aggrieved party with the order, Ruling or Judgment of the Lower Court has a thirty (30) day period to prefer an appeal.”

The fall back for appeals preferred out of time being the proviso of the Section in which an applicant must demonstrate sufficient or good cause to be granted leave to file an appeal out of time.

The proper basis for determining the specific nature of the application and the test to be met relating to the application for extension of time is as illuminated in the cases of **First American Bank of Kenya Ltd v Gulab P. Shah & 2 others HCCC No. 2255 of 2000 {2002} 1 EA 65, Salat v IEBC & another {2014} eKLR** in determining the application for and against extension of time. Its all vested in the discretion of the Court to be judged in every case and underpinned on the following factors.

- 1. First, the length of the delay.**
- 2. Secondly, the reasons for the delay.**
- 3. Thirdly, the chances of the appeal succeeding if the application is granted**
- 4. Fourthly, the degree of prejudice to the respondent if the application is granted and**
- 5. Fifth, whether there is a good reason for the failure to file an appeal out of time.**

Applying the above principles to the instant case, the affidavit expounds on the nature and reasons for inadvertence resulting in the expiry of the time of appeal the Ruling of the Kadhis Court. It is all attributed to downscaling of the Courts operations due to the COVID – 19 pandemic.

Secondly, the failure by the trial Court to furnish the applicant with copy of the impugned Ruling to form the basis of the memorandum of appeal. Thirdly, the intended appeal in question has high chances of success as its challenging the jurisdiction of the Kadhis Court to entertain a claim over land.

A correct reading of the authorities both of superior Courts show that the Court should take into account all the circumstances of a particular case so as to determine what would be the overdue interest of justice to the parties. The Court is striking a balance between the compelling interest of the parties, on one hand and the principles applicable within the civil justice system, to safeguard the core principle that the provisions of the Court on time are not mere targets to be aimed at but binding legal requirements to be met for fair administration of justice.

The position, in this case seems to me to answer the question in explaining the reasons for the delay and that the appeal has high chances of success. As the affidavit evidence reveals the scourge of COVID -19 pandemic threatened the socio, economic and political fabric of our society. In Kenya all the instruments and organs of state scaled down their operations impacting on service delivery.

Further as it is the norm, parties to a suit are entitled to a certified copy of a Ruling or Judgment to enable them deal with issues arising therein in the decision of the Court.

According, to the applicants, it was the duty of the Court of Law to try and furnish a litigant to the dispute a copy of the decision which contains the grounds for determination in the strict sense. The absence of the impugned Ruling or lack of it may render the memorandum of appeal vague, ambiguous or uncertain with equal fatal infirmity to the intended appellant.

From the details of the application, the matter in dispute before the trial Court is still at the interlocutory stage. The applicant should not be ordinarily denied an opportunity to ventilate the claim on appeal on its merits because of the lapse of time, the effect of which no prejudice to the respondent has been demonstrated.

I think on the facts its right to exercise discretion in favour of the application for extension of time to file an appeal out of time. Accordingly, the draft memorandum be deemed as duly filed within time.

I would therefore on that part stay proceedings before the Kadhis Court pending the hearing and determination of the intended appeal.

DATED SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEBRUARY, 2021

.....

R. NYAKUNDI

JUDGE.

NB: This Ruling has been dispatched electronically to the respective emails of the advocates in the matter

(info@matatamwabonje.com and marendenecheza@gmail.com ibrahimondieki@gmail.com)