



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS CIVIL APPLICATION NO 17 OF 2020

KADUBO YARSO & ANOTHER....PLAINTIFF

VERSUS

ABDI ALI ABDI KOROBA.....DEFENDANT

R U L I N G

1. This is one of those matters which beg that the need for Rules under Section 8 of the Kadhis' Courts Act be promulgated and operationalized at the earliest opportunity. It demonstrates how litigants are troubled on how to approach the Kadhis' courts in matters of succession a practice that make uniformity and predictability of proceedings before those court very difficult.
2. There was filed before Kadhis' Court at Garbatula, Miscellaneous Application No. 6 of 2020, between the parties herein, on which matter an application was filed under a certificate of urgency seeking among other orders, an injunction to stop the current applicant from interfering with the livestock and estate of the deceased and a prayer that custody of the estate be given to the respondent.
3. The application was heard *ex-parte* in the first instance and *ex-parte* orders issued with a date for *inter-partes* hearing being fixed. Not so much material is availed but it appears that the matter was in court on 14.11.2020 when the orders now sought to be challenged were issued.
4. The reasons given on the face of the application and the Affidavit sworn in support are that the applicants are the brothers to the deceased who are in custody of the estate property and that they had delayed in filing the appeal because they were bereaved in the intervening period and proceedings were certified late. It was also stressed that the applicants were financially unable to engage an advocate until they sold livestock to get money. The appeal is said to be arguable because the presiding Kadhi is accused of bias by failure to record most of their evidence and doctored evidence in favour of the respondent who they dispute having been the husband to the deceased.
5. The application was opposed by the respondent by the Replying Affidavit in which the capacity of the 1st applicant to swear the Affidavit on behalf of the second is refuted, it being contended that the subject judgment was delivered in the presence of the two applicants when both were duly informed of their right of appeal within 14 days and that there was a design to delay the matter because there was no evidence to show that they lost two relatives not even the dates of such deaths. The jurisdiction of the court to grant stay was contested on the basis that the matter is *res judicata*; that the appeal has no prospects of success; that there is no substantial loss demonstrated in that, no allegations were made of the inability by the respondents to effect a refund.
6. When the matter was placed before the judge on 30.6.2020, it was ordered that it be canvassed by way of written submissions pursuant to which orders, the applicants filed submissions on 15.9.2020 with the Respondent's submissions being filed on 21.9.2020.
7. I have noted that in their submissions, the applicants have attached documents which essentially cannot be evidence. Yet in the application, not so much material was availed. That is a practice that must be discouraged in that the paucity of material to the application to support critical allegations like the strength of the case only make it difficult or impossible to make an informed and just decision in the matter.
8. On the other hand, submissions are opinion rendered to court by a party or counsel on the facts as applied to the law but are never evidence. I however take the view and opinion that in the matter at trial not everything was done elegantly but rather in an undesirable manner over all the way beginning with the pleadings filed.
9. There is a matter I consider deserve a comment before I consider the merits of the application. It concerns the way the matter was initiated. I note that the litigation was commenced in a miscellaneous manner and it would appear that such miscellaneous proceedings and pleadings have ended upon a determination that vests the estate upon the respondents. From the order dated 13.6.2020, I gather that the entire process was commenced by an application seeking injunction and vesting of the estate upon the respondents and no more.

10. In my view, the Kadhis' court is mandated by section 8 of the Act to apply the Civil Procedure Act and Rules in their conduct of proceedings. The Civil Procedure Act demands that proceedings be commenced in the manner prescribed by the Rules. Those rules do not provide the mode for initiating succession proceedings because that is covered by the law of succession act and the rules made thereunder. There being no specific rule, the commonest modes of initiating a suit is being a plaint or petition is more desirable. Miscellaneous applications, however, must remain for the prescribed proceedings like, judicial review applications, applications for determination of costs between advocates and client and applications for extension of time like the current one. It is not the mode to institute substantive proceedings in which entitlement by alleged beneficiaries to an estate is to be established. Miscellaneous applications ought to address straight forward issues and not protracted matters.

11. On the merits, the primary prayer is for leave to file an appeal out of time. That prayer can only be determined by asking the question whether the delay was inordinate and if the same has been explained to the satisfaction of the court. In *Leo Sila Mutiso v. Hellen Wangari Mwangi CA 251 of 1997 cited with approval in ELISHA JUMA OWUOR v WALTER MBOYA ONYANGO & another [2012] eKLR*, the Court of Appeal set the thresholds to be four, namely; *the length of delay, the reason for the delay, possibilities or chances of the appeal succeeding if the application is granted, and, the degree of prejudice to the respondent if the application is granted.*

12. The decision sought to be challenged was delivered on the 14.11.2019 and the current application was brought on the 25.02.2020. That period is, to my mind, neither inordinate nor unreasonable. I also consider that the reasons given for that delay being bereavement and lack of finances are plausible. In considering the arguability of the appeal I consider the same not to be frivolous but to present questions that are important for the courts determination. I have equally weighed the benefit to be derived by grant of leave as opposed to denial and I find that the scales tilt in favour of the grant for I see no prejudice or hardship that stand to visit the respondent. On those findings I do exercise my discretion in favour of the applicant by extending time to file an appeal to this court. Let the memorandum of appeal be filed and served within 7 days from the date of this ruling.

13. The application also seeks an order of stay pending appeal and one of the key considerations is that the pending appeal be arguable. I have found that the appeal is indeed arguable when regard is heard to the manner the matter was brought.

14. I consider that at the hearing of the appeal it will interest the court hearing the matter to determine if indeed the prayers sought in the application were adequate for purposes of identifying the property of the estate; identifying the persons entitled to inherit from the estate and the shares of each such person. I do find that there are arguable points to be raised at trial and that the appeal is not frivolous.

15. The next consideration is whether there is the risk of the appellant suffering a substantial loss that would render the appeal nugatory. I consider this to be a matter for succession and the parties have chosen the Kadhis' court as the forum for dispute resolution. The property disclosed is said to be livestock. If I decline to grant stay, and the livestock, whose particulars and numbers are not revealed are handed over to the respondent, there can be no certainty that should the appeal be concluded, in favour of the applicant, the livestock will still be there for the successful party to take over. That is a development that I would consider to be irreversible. If not reversible then it has the potential to make the litigation nugatory. Such eventuality needs to be avoided to make the litigation field plain and even.

16. I however note that the applicant confirms being in custody of the animals and I do consider that in such circumstances the applicant should get a stay on terms so that even the respondent is secured should the appeal end in his favour. I consider that this is a matter in which stay ought to be granted one term. I direct that as a condition for stay the applicants shall:-

i. Within 14 days from today, file an undertaking drawn and witnessed counsel, guaranteeing never to dispose or part with possession of the said livestock and disclose the particulars of the livestock and the numbers.

ii. Within 30 days from today, file and serve Record of Appeal as well as Submissions in respect of the appeal.

- Time shall be off of essence and on default to comply with any of the terms the stay hereby granted shall stood lapsed.**

iii. Upon service with the Record and Submissions, the respondent shall also file and served submissions so that the matter be mentioned on 10th may 2021 for further directions.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF FEBRUARY, 2021

PATRICK J.O OTIENO

JUDGE