



In re Estate of Zaituni Hassan Rajab (Deceased) (Miscellaneous Case E008 of 2020) [2021] KEHC 9768 (KLR) (30 April 2021) (Ruling)

Neutral citation: [2021] KEHC 9768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CASE E008 OF 2020**

JN ONYIEGO, J

APRIL 30, 2021

IN THE MATTER OF THE ESTATE OF ZAITUNI HASSAN RAJAB (DECEASED)

RULING

1. By a Notice of Motion dated 4th November, 2020 the applicant herein appointed this court on 5th November, 2020 seeking orders that;
 - (a) This application be certified urgent and service be dispensed with in the first instance.
 - (b) The applicant be granted leave to file their memorandum of appeal notice out of time
 - (c) That the draft memorandum of appeal annexed herein be deemed as properly filed upon payment of the requisite court fees/charges.
2. The application is anchored grounds cited thereof and an affidavit sworn on 4th November, 2020 by the applicant. It is the applicant's case that the judgment sought to be appealed against was delivered before the Chief Kadhi's court on 3rd October, 2019. That he subsequently filed an appeal at the High court being Civil Appeal No 38 of 2019.
3. That they filed an application for stay before the Kadhi's court and the same was granted on condition that he deposit 4 million in court. Having failed to meet the said condition he opted to withdraw the appeal. That when the second respondent appeal to the Kadhi's court that judgment of 3rd October, 2019 be reinstated the Honorable court delivered a ruling dated 20th July, 2020 allowing the respondents application validity its orders for depositing the security and reinstating the judgment as it was and giving additional orders.
4. He further stated that, he was not made aware of the ruling date and was only made aware of the same on 28th October, 2020 when they attended court. He jolted the learned Kadhi for having cut the land which comprised part of the estate. He averred that, had he been made aware of the ruling, he would have filed his memorandum of appeal by 20th August, 2020. He urged that he has filed the application within reasonable time and aht the delay is not in ordinate.



5. In reply Hakim Cleophas Mwarumba the second respondent herein filed a replying affidavit sworn on 10th December, 2020 opposing the application stating that;
6. A delay of more than one year since judgment was delivered is not reasonable; application is fatally defective as it does not meet the threshold for the court todiscretion
7. He further stated that the application is brought in bad faith as he is already benefiting from the estate hence the reason why he does not want itHe further stated that , the applicant having failed to ..the suit property is trying to frustrate the 2nd respondent from implementing the judgment.
8. When the matter came up for hearing partes agreed to canvass the same through written submission. Consequently, the applicant filed his on 23rd February,2021 through the firm of Marende and company advocates. Despite being given time to file his submission, the respondent represented by the firm of Mwadzoyo did not file any .The 1st respondent did not file anything in respect.

Submissions by the applicant

9. M/s Kyalo holding brief for Onduki for the applicant basically relied on the averments contained in the affidavit in support of the application and the submissions filed on 22nd February, 2021
10. Counsel submitted that the delay in filing the intended appeal is not inordinate.
11. Learned counsel invited the court consider the provision for granting leave to appeal out of time asin the case of *Nicholas Kiptoo Arap Korir Salat v IEBC and 7 others* (2004)e KLR where the court considered the principles as; intention of lie is notof a party; it is within courts discretion; there must be reasonable cause for delay; any prejudice would arise by granting the order; whether appeal has been filed without reasonable delay.”
12. According to the applicant’s submissions. The application was filed without unreasonable delay and that there is good reason offered for the delay.
13. On the issue whether the delay was inordinate and whether the applicant will suffer prejudice if the order is granted counsel submitted that there will be not prejudice .In support of this preposition no reliance was placed in the case of *Mursal Guleid & others v Daniel Kioki Musau* (2026) e KLR where the court found delay of 25 days was not inordinate and aht tothis preposition further learned counsel referred to the case of *Kenya alliance insurance Co. Ltd v Julius Rem Mutabari* (2028) e KLR where he court held aht if there is delay, the court should consider whether in the end justice will be attained by granting the order.

Determination.

14. I have considered the application herein, affidavit in support and the annexure thereof. I have also considered he respondent’s response as well as the written submissions by the applicant. The only issue for determination is whether the applicant has met the threshold for grant of leave to appeal out of time. For clarity purposes. I will state that, from the record, it is not very clear on the face of the undated draft memorandum of appeal annexed as to which decision is being appealed against. Equally, in the notice of motion the subject of this ruling at the particulars section the decision to be opposed against is not stated.
15. However, from the reading of the affidavit in support, at paragraph 2 one can discern the decision being appealed against is the judgement of the Kadhi’s court delivered on 3rd October,2019. This is contrary to the argument in the supporting affidavit that, the delay in filing the appeal by the lack of



knowledge on the date the ruling made by the Kadhi on 20th July, 2019 was to be delivered. Further the letter arguments I do agree with the 2nd respondent that, the applicant does not actually which decision he is appealing from or against.

16. Be that as it may, I will proceed from theas contained in the affidavit in support that the reason being challenged is the judgment by the Kadhi delivered on 3rd October 2019.
17. It isupon the applicant to convince the court that he has filed the application without unreasonable delay; the application is pur...through to justify the court exercise its discretion in his favour? That the delay is justified; that the respondent will not suffer any prejudice if the orders are granted and that ..it will be in the interest of justice so to grant.
18. The law guiding the extension of time to appeal out of time is successfully captured under Order 79 of the Civil Procure Act which provides that;

“ Every appeal from a subordinate court to high court should be filed within a period of thirty days from the date of the decree or order appealed against,from such period any time the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the ...or order. Provided that an appeal may be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for the filing of the appeal in time.”
19. There is operation of case law in this era of extenuation of time to appeal out of time. Courts have time and again consequently had out principles for consideration before a court would ..time on the case of First American Bank of Kenya Ltd v Gilbert P Shab and 2 Others Nairobi (Milimani) HCC No 225 of 200(200 3 /EA65 the court set out the factors for consideration before deciding whether or not to grant such application as follows;

(i) The explanation if any for the delay; (ii) the merits of the contemplated action, whether the matter is arguable one deciding a day in court or whether it is fra...one more would only result in the delay of the cause of justice(iii) whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of aforementioned excuses of discretion in favour of the applicant”.
20. Similar position was held in the case of Nicholas Kiptoo Arap Korir Salat v IEBC and 7 others (*Supra*)
21. In the instant case, the applicant is not quite sure of the decision he wants to appeal against.
22.going by what I said, the impinged decision is the judgment delivered on 3rd October, 2019. The applicant has concentrated in ... that the date that the ruling delivered on 20th July, 2020 was not communicated in advance to him nor his counsel. Thus, submits is inordinate, as the decision being appealed if the judgment of 3rd October, 2019. The onlygiven is that, the first filed and appeal being Civil Appeal No. 38/219 but later withdrawn it. He attached a copy of the memorandum of appeal in respect of that appeal filed on 4th October, 2019. The same was allegedly withdrawn when he failed to despite security of 4 million as ordered by the Kadhi. before stay orders could issue. Under Order 62 rule 6 of the, whose decree or order stay appealed from or against can issue a stay order and equally a court which an appeal is being referred can issue stay. if then this court refused to grant stay, the appellant was at liberty to move the High court being the court which an appeal was being preferred to.
23. Be that as it may, the court was not told when the appeal was withdrawn to be able to assess why it took so long to file an appeal. As things stand, there is no justification why the appeal was not filed since 3rd October, 2019 until 5th November, 2010 when the court is being moved to grant leave.



24. If the applicant filed appeal No 398/2019, it means, he has the necessary material to appeal but decided to abandon and all together withdraw the appeal. He was only woken up when the 2nd respondent got some favorable orders before the Kahdi's court on 20th July, 2020 when the order for depositing 4 million security was valid. If it was for the 2nd respondent's litigationto the orders of 20th July 2020 the applicant could not have bothered to litigate the judgment of 3rd October,2019. This isabuse of the court process. The applicant can not stand court time from the 20th July 2019 as that is not the decision he intends to appeal against. Time stated running from 3rd October 2019 which translated to more than one year. I do not find any good ground for this delay which I find inordinate.
25. Indeed, ligation could come to an end and there must be certainty of court pro.....(See *Jasbus Sigh Rai and 2 Others v Taxlocan Sigh Rai and 4 others* (2007) e KLR
26. As concerns, whether the appeal is Matrious and arguable., one would have to look a the grounds of appeal in the draft memorandum of appeal which is not even dated. The grounds of appeal referred to a disputed property to which.
27. According to the petition before the Kadhi's court, presented by the applicant, petitioner, the sought properties are Plot no. XV/306 and Plot No. 31311/MN which were jointly owned by his mother 1/3 share and the respondent his mother 2/3 share.
28. However, the court its judgment fond that Plot No. 313 share 11/MN was the subject of ownership despite before the Environment and Land Court. The court therein directed that distribution of that property to await the finding of the Environment and Land Court. With that in mind, this court is in agreement with the Kahdi's reasoning herein. I do not find the appeal arguable on this subject.
29. As regard the Plot No306 the court found that the applicant was entitled to hisat 1/3 and respondent 2/3.
30. The court having found that it was the applicant and his siblings who were staying in that property although sold by the respondent to the interested party who also participated in the proceedings, it gave the appellat opportunity to ..out the beneficial interest of the respondent by re..... the proceeds 10% within 90 days in default, the procedure to day in court. Unfortunately, the appellat has not met the condition hence the contemplated appeal.
31. With this judgment, the applicant's right ofhas been ..and no opportunity to share out the property which is a house without land as the availed land does not belong to them. In my view and without disclosing out the ...of the intended appl the appeal does not seem to be arguable .
32. To grant the orders sought will be prejudicial to the respondent who must enjoy the fruits of his judgment. See *Macharia t/a Macharia and Co. Advocates v East African Standard (No.2)* (200) 2 e KLR where the court held aht a sufficient litigant is entitled to the fruits of judgment.
33. In view of he ...circumstances of this case, I do not find it reasonable for me to exercise my discretion in his favor. Accordingly, the application is hereby dismissed with costs to the respondent.

DATE, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 30TH DAY OF APRIL, 2021

J. N. ONYIEGO

JUDGE

