



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 90 OF 2017

FARHIYA IBRAHIM.....APPELLANT

VERSUS

AMINA GENI ISMAEL.....1ST RESPONDENT

ISMAEL MOHAMED.....2ND RESPONDENT

FATUMA OMAR MOHAMED.....3RD RESPONDENT

RULING

1. The Appellant, Farhiya Ibrahim by her application dated 21.12.17 seeks the following orders:

1. THAT this Honourable Court be pleased to enlarge and extend time within which the Appellant may file and serve the Memorandum of Appeal against the Judgment of the Honourable Senior Resident Kadhi A. I. Hussein dated the 12th of June, 2017 in the Kadhi's Court Succession Case No. 6 of 2016 Nairobi Amina Geni Ismael and 2 others vs Farhiya Ibrahim.

2. THAT this Honourable Court be pleased to set the time within which the Memorandum of Appeal may be filed.

3. THAT the costs of and incidental to this application abide by the results of the Intended Appeal.

2. The Appellant averred in her affidavit sworn on 21.12.17 that being aggrieved by the judgment of the Hon. Kadhi, she instructed her advocate to apply for stay of execution and review of the judgment; that the application was dismissed by the Hon. Kadhi without hearing the Appellant; that she was unwell in Moyale from June 2017 until October 2017 and therefore unable to appeal within the requisite timeframe; that the delay in bringing the Application is not inordinate; that the intended appeal has an overwhelming chance of success and that the Respondents will suffer no prejudice if the orders sought are granted.

3. The Application was opposed vide an affidavit of Amina Geni Ismael, the 1st Respondent, sworn on 27.4.18. She averred that the Application is calculated to circumvent the said judgment and deny the Respondents their rightful share of inheritance in the estate of the deceased. She averred that the Appellant was on 5.4.18 committed to civil jail for disobeying the orders of the Court of 11.1.17 and that her application should not be entertained until she purges her contempt. She urged that the Application be dismissed as it is an abuse of the Court process.

4. I have given due consideration to the Application, the rival affidavits and submissions filed. Application is expressed to be brought under the provisions of Sections 1A, 1B, 3A, 3B, 65(1)(c) and 95 of the Civil Procedure Act and all other enabling provisions of the law. The Application arises from a succession petition in the Kadhi's Court at Nairobi. Being a succession matter, the governing law is the Law of Succession Act and the Probate and Administration Rules. By dint of Rule 63 of the Rules, the aforesaid provisions of the Civil Procedure Act are not applicable herein.

5. The appellate jurisdiction of this Court in respect of decisions of Kadhis Courts is stipulated in Section 50 of the Law of Succession Act which provides:

50. Appeals to High Court

(1) An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.

(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.

6. The Law of Succession Act does not stipulate the time within which such an appeal ought to be filed. Section 58 of the Interpretation and General Provisions Act is however instructive:

“Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises”.

7. Although the time for filing an appeal from the Kadhi's Court to this Court is not stipulated in the Law of Succession Act, such appeal must be filed without unreasonable delay. Where there has been delay in filing an appeal, the Court has powers to enlarge the time for filing the same upon such terms as the justice of the case may require. Order 50 Rule 6 of the Civil Procedure Rules, which is applicable herein provides:

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

8. It is trite law that an order for extension of the time to file an appeal is discretionary. Such discretion must however be exercised judicially. The factors to be considered in an application such as the present one, were set out by the Court of Appeal in Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR as follows:

“For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable.

9. The Court notes that the judgment that the Appellant seeks to be appeal against was delivered on 12.6.17. The Application was filed on 27.12.17, over 6 months later. What this Court must determine is whether the explanation given by the Appellant for the delay is plausible. The reasons advanced by the Appellant for the delay in filing the Appeal, is that she was unwell in Moyale from June to October 2017 and therefore unable to get the judgment and file the appeal within the stipulated time. However, no evidence by way of medical reports was placed before the Court to support this contention. Indeed, no explanation has been given as to why the Appellant did not move to court in November when she recovered from her alleged illness and waited until 27.12.17 to file the present application. As the maxim goes, equity aids the diligent, not the indolent.

10. In the case of Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR, Joel Ngugi, J. stated:

The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

11. In the instant Application there was delay of over 6 months. The explanation given by the Appellant for the delay is unsubstantiated and unsatisfactory and the delay has not been reasonably explained to the satisfaction of the Court. The Appellant has not placed before Court any or sufficient material to persuade the Court to exercise its discretion in her favour.

12. In light of the foregoing, it is my finding that the Application dated 21.12.17 is unmerited and is accordingly dismissed. This being a family matter, each party to bear own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 31ST DAY OF MAY, 2021

.....

M. THANDE

JUDGE

In the presence of: -

.....**for the Appellant**

.....**for the Respondents**

