



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**(FAMILY DIVISION)**  
**FAMILY APPEAL NO.19 OF 2018**

**MOHAMED ISSA SULEIMAN**

**ABDULREHMAN ISSA SULEIMAN**

**ZUBEDA ISSA SULEIMAN**

**KHADIJA ISSA SULEIMAN**

**MARIAM ISSA SULEIMAN**

**ASIYA ISSA SULEIMAN.....APPELLANTS/RESPONDENTS**

**VERSUS**

**ABDILLAHI ISSA SULEIMAN**

**OMAR ISSA SULEIMAN.....RESPONDENTS/APPLICANTS**

**RULING**

1. What is before this honourable court for determination is a Notice of Motion application dated 25<sup>th</sup> January ,2021 supported by the affidavit of Abdillahi Issa Suleiman sworn on the same day seeking the following orders;

**a. That the appeal be struck out /dismissed for want of prosecution.**

**b. That the appellants bear the costs.**

2. The application is premised on grounds that; the memorandum of appeal was filed on 20<sup>th</sup> April ,2018 and a request for typed proceeding was done by the appellants on 9<sup>th</sup> October 2019 through a letter dated 8<sup>th</sup> October 2019 which was never served upon the respondents; that the appellants have not prosecuted the matter nor filed a record of appeal for a period of 3 years after filing the memorandum of appeal; that the delay in prosecution of the appeal is inordinate and inexcusable and as such the appeal ought to be struck out/dissmised for want of prosecution ;that it is in the interest of justice and fairness that the application be allowed as prayed.

3. In response, the Appellants/Respondents filed a replying affidavit sworn on 9<sup>th</sup> march 2021 by Mohamed Issa Suleiman stating that they had filed a memorandum of appeal on 20<sup>th</sup> April, 2018 within the required 30 days and orally applied for certified copies of judgement and proceedings. That they made up follow up through a letter dated 8<sup>th</sup> October, 2019 but all in vain.

4. The Appellants/Respondents further stated that the obligation to provide proceedings under section 79G of the Civil Procedure Act rests with the Kadhi's Court and not them. That they have made several inquiries at the Kadhi's Court registry staff who informed them that the file is at the typing pool pending typing of proceedings. Further, that they applied for copies of handwritten proceedings for purposes of assisting in typing the same which they did but were advised that the judiciary could not accept proceedings privately typed.

5. In their oral submissions, both counsel reiterated the position in their respective affidavits in support or in opposition to the application.

## Analysis and determination

6. I have considered the application herein, response thereof and oral submissions by both counsel. The only issue for determination is whether the respondents/applicants have raised sufficient reasons to deserve the orders sought.

7. The appellate jurisdiction of this Court in respect of decisions of Kadhis Courts is stipulated in Section 50 (2) of the Law of Succession Act which provides:

**“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”.**

8. The Act does not stipulate the time within which such an appeal ought to be filed or indeed when the record of appeal shall 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”.**

9. In Mohamed Baishe v Tima Hassan Urema & others; Tima Mohamed Kombo & another (Interested Parties) [2020] eKLR the court stated that;

**“Although the time for filing the record of appeal is not stipulated in the Act, such record must be filed without unreasonable delay. A delay of over 1 year is in my view inordinate. In the meantime, the Appellant is enjoying stay orders granted by the Kadhi’s Court. As stated by the Appellant, justice cuts both ways. All parties to a suit are entitled to the fair hearing as guaranteed by Article 50 of the Constitution which provides at Clause (1): every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

10. As stated above, although rule 63 of the Probate and Administration rules does not provide for the application of order 42 of the civil procedure rules, several judicial precedents have pursuant to rule 73 of the P and A rules leaned towards the application of Section 79B of the civil procedure Act and order 42 of the Civil Procedure Rules to determine relevant applications under the law of succession. To that extent, it is incumbent upon the respondents to prove that they did comply with Order 42 rule 10 and 11 which requires them to have caused the matter within 30 days of registration of the appeal to be cause listed before a judge for directions under Section 79B.

11. The respondents should not shift blame to the court by hiding behind order 42 rule 35 of the Civil Procedure Rules that an appeal cannot be dismissed for want of prosecution before the court gives directions. Be that as it may, it is upon the court to determine whether the period of over three years is unreasonable. By all standards, the period is unreasonable and in the absence of any reasonable explanation the memorandum of appeal can be dismissed. See Mohamed Baishe v Tima Hassan Urema & others; Tima Mohamed Kombo & another (interested parties) [2020] eKLR where the court held,

**“To file an appeal on 15.2.19 and fail to file a record of appeal a year and 2 months later is tantamount to thwarting the Applicants’ right to enjoy the fruit of their judgment.”**

12. Is there reasonable explanation for the delay? In the case of Eastern Province Transporters Ltd v Rongai Workshop and Transporters Ltd and another (2014)eKLR and Ikta v Kyumbu(1984)KLR the test to be employed before dismissal for want of prosecution was set out as follows;

**“The test to be applied in application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can still be done despite the delay.**

**Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice still can be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of the discretion of the court”**

13. Indeed, where substantive Justice will be done without prejudicing any party by extending time for prosecution of the appeal, it is upon the court to exercise its wide discretionary powers to uphold the interest of justice. See Malcolm Bell v Hon. Daniel Toroitich Arap moi and another(2013)eKLR where the Supreme Court stated that;

**“Interest of justice as a criteria of decision making by the Supreme Court and other courts is already declared by the constitution in the national values and principles of governance in Article 10”**

14. The memorandum of appeal herein was filed on 20<sup>th</sup> April, 2018 and the judgement being appealed against was delivered on 23<sup>rd</sup> march 2018 which was within the stipulated time for filing an appeal. Proceedings were allegedly applied for orally in court upon delivery of the impugned decision. The appellant again wrote to the court vide a letter dated 8<sup>th</sup> October, 2019 requesting for certified copies of proceedings. Since then there has been little progress till the filing of this application on the 27<sup>th</sup> January, 2021.

15. However, the Appellants/ Respondents indicated that their effort to obtain handwritten proceedings and typing them privately for purposes of proof reading by judiciary staff and certification was frustrated by the court’s refusal to accept such effort. A copy of handwritten

proceedings was attached as proof of such effort.

16. After assessing the circumstances surrounding inability to prosecute this appeal for such a long period, there is a shared blame between the trial court and the respondents. However, this court being a custodian of justice is persuaded by the effort made by the respondents in trying to facilitate the process of typing proceedings but in vain. I do take judicial notice that there is a shortage of secretaries in Mombasa law courts but that is not an excuse to occasion such a prolonged delay.

17. In the interest of justice, I will exercise my discretion in favour of the respondents by dismissing the application with orders that;

**a. The deputy Registrar to call for typed proceedings and original court record in respect of the Mombasa Kadhi's case No.97 of 2017 within 30 days**

**b. That the record of appeal be served upon the appellants/respondents within the said 30 days**

**c. Parties to appear before the Deputy Registrar on 30<sup>th</sup> September 2021 to confirm compliance**

**d. Deputy Registrar to place the lower court record before the trial judge on 13<sup>th</sup> October 2021 for further directions.**

**e. Costs shall be in the cause.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31<sup>ST</sup> DAY OF AUGUST 2021**

.....

**J.N.ONYIEGO**

**JUDGE**