# REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**MISC. APPLICATION NO. 1 OF 2020**

**MARIAM MOHAMED MBARUKU..........................................................APPLICANT**

**VERSUS**

**HAMISI MZEE ALI.................................................................................RESPONDENT**

**RULING**

1. Vide Kadhi Court Mombasa succession petition No. 160/08, Hamis Mzee Ali the respondent herein petitioned for determination of the estate heirs and shares in respect of the estate of Mariam Mbaruku. The petitioner also sought leave to sell the succession share. Named as the defendant in the petition was Mariam Mohamed Mbaruku the applicant herein. Judgment was entered and delivered on 13th February 2014.

2. Aggrieved by the judgment thereof, the respondent/applicant sought review of the same vide the application dated 21st March 2014 claiming that there was an error on the face of the record. The respondent's/applicant's review application was dismissed before the Kadhi's court on 5th June 2014 after finding that there was no error nor mistake apparent on the face of the record.

**3.** Dissatisfied with the said ruling, the respondent/applicant lodged an appeal to this court vide a memorandum of appeal dated 1st October 2019 in HCC Appeal No. 19/2014. After hearing the appeal, the court pronounced itself through a ruling dated 4th August 2017 thus affirming the Kadhi's holding hence dismissing the appeal.

4. Further aggrieved by the High Court's decision, the applicant lodged an appeal to the Court of Appeal vide Civil Appeal No. 84/18. Upon hearing the appeal, the court of appeal dismissed the same on 11th July 2019 after agreeing with the High Court's decision.

5. Armed with the determination to overturn the Kadhi's judgment delivered on 13th February 2014, the applicant moved to this court vide a notice of motion dated 1st October 2019 and filed on 31st January 2020 seeking orders as follows:

> **(1) Spent.**
>
> **(2) The honourable court be pleased to grant the applicant leave to file appeal out of time against the judgment of honourable Principal Kadhi Abdulahim H. Athman delivered on 13th February 2014.**
>
> **(3) That the costs of this application be provided for.**

6. The application is based on grounds set out on the face of it and further amplified by an affidavit in support sworn on 16th February 2019 by the applicant. Basically, the application is anchored on the ground that, the delay in filing an appeal against the said judgment was occasioned by the filing of a review application which the High Court and Court of Appeal found to be improper.

7. According to the applicant, failure to file an appeal was a mistake which is excusable. She averred that; the appeal sought to be filed is arguable; that the delay in filing the application is not inordinate and that the respondent will not suffer any prejudice if the application is allowed.

8. In response, the respondent filed grounds of opposition dated 16th March 2020 referring to an application dated 18th October 2020 which I believe is a mistake as it should read 1st October 2019, stating that; the application offends the purpose of finality and that litigation must come to an end; the court is functus officio as it had determined the issue at hand on 4th August 2017; the application is filed after inordinate delay and that, the application is misconceived, ill advised, vexatious and abuse of the court process.

9. When the application came up for hearing, parties agreed to dispose the same through written submissions. Consequently, the applicant

through the firm of Khatib and Co. Advocates filed their submissions on 24th May 2021. Mr. Khatib reiterated the content contained in the affidavit in support of the application. He contended that the cause for the delay is excusable and that the period taken before filing the appeal is reasonable.

10. Learned counsel submitted that counsel's mistake should not be visited on a litigant. In support of this submission, the court was referred to the holding in the case of **George Odhiambo Omwidha vs Co-operative Bank of Kenya Ltd (2018) eKLR** where the court held that leave to appeal should be granted where primafacie it appears that there are grounds which merit serious judicial consideration. Learned counsel went further to submit that mistakes of an advocate should not be visited upon a litigant. To buttress this point, the court was referred to the finding in the case of **J.G. Builders vs Plan International (2015) eKLR**.

11. Concerning the issue whether the appeal is meritorious, counsel submitted that the Kadhi's Court had no jurisdiction to order for sale of the estate a fact that the High Court agreed with. According to Mr. Khatib, the Kadhi had no jurisdiction to make the orders he did hence an arguable appeal. Counsel relied on the finding of Justice Nyarangi in the case of **Owners of Motor Vessel "LillianS"vs Caltex Oil Limited (K) (1989) eKLR** where the learned Judge stated that, where a court finds that it has no jurisdiction to determine a matter, it should down its tools and make no further step.

12. On his part, the respondent through the firm of Nyongesa Advocates filed his submissions on 2nd June 2021 adopting his grounds of opposition. It was submitted that the applicant having exhausted the avenue for review is precluded from preferring an appeal against the same decision.

13. Counsel contended that under Section 50 of the Civil Procedure Act and Order 45 of Civil Procedure Rules, an appeal and a review cannot be preferred and prosecuted concurrently. In support of this proposition, counsel placed reliance on the holding in the case of **Serephen Nyasani Menge vs Rispah Onsase (2018) eKLR** where the court held that, a proper reading of Section 80 of the Act and Order 45 rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. Further reference was made in respect to the case of **Ziporah Moraa vs David Okioma and another (2020) eKLR** where the court found that a party who opts to seek review cannot switch to an appeal after hitting a dead end.

14. Regarding the aspect of inordinate delay, counsel urged that an appeal ought to have been filed within 30 days from the date of delivery of the impugned order or decision pursuant to Section 79G of the CPRS. That it is was incumbent upon the applicant to convince the court that there was a reasonable ground for extension of time. In support of this proposition, the court was referred to the holding in the case of **Dilpack Kenya Limited vs William Muthama Kitonyi (2019) e KLR** where the court held that if the appeal is time barred, the court is deemed to dismiss the appeal even at the risk of injustice or hardship.

15. In support of the proposition that litigation must come to an end, counsel relied on the holding in **Karatina Municipal Council & Another vs Kanyi Karoki (2017) eKLR** .

**Analysis and determination**

16. I have considered the application herein, grounds of opposition and rival submissions by both counsel. The only issue that emerge for determination is; whether the applicant has established sufficient ground for enlargement of time to appeal out of time.

17. There is no dispute that the impugned judgment was delivered on 13th February 2014. It is now over 7 years since the date of delivery. The time frame for appeals from subordinate courts is set out under Section 79G of the CPRS which provides that;

> **"Every appeal from a subordinate court to the high court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delay to the application of a copy of the decree or order provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."**

18. From the face of it, a period of over 7 years since the date of delivery of the impugned judgment is definitely an abnormal delay. However, the applicant tried to justify the delay by stating that it was occasioned by the filing of a review application instead of the appeal. Whereas it is true that the applicant did file a review before the Kadhi's court, then moved to the High Court and Court of Appeal, he was blamed for not preferring the appeal straight away.

19. Whose mistake was it in taking a wrong route? According to Mr. Khatib, it was the mistake of counsel which should not be visited on his client. As it is often said, choices have consequences. If the applicant through her counsel misapprehended the law and did follow a wrong process or procedure all the way to the Court of Appeal, only to hit a rock and bounce back, she cannot burden an innocent opposing party by starting afresh the appeal process.

20. It is not always that advocate's mistakes cannot be visited on a litigant. Where an advocate fails to take diligent steps to prosecute his client's case, he cannot run away from responsibility. Even when advised by the High Court that a review application was not the proper process, they still proceeded to the Court of Appeal. Worse still, even after the Court of Appeal delivered its judgment on 11th July 2019, the applicant moved this court on 31st January 2020 another 5 month's delay down the line.

21. See **Jaber Mohsen Ali & Another vs Priscillah Boit & Another E & C No. 200/2012 (2014) eKLR** where the court stated that for delay to be declared unreasonable it will depend on circumstances of each case and that even one day's delay can be unreasonable. Similarly, in **Civil Appeal No. 433/2015** in the matter of the **Judiciary of Kenya vs Three Star Contractors Ltd. (2020) eKLR** the court found three month's delay as unreasonable.

22. It is trite that the power to extend time by the court is purely discretionary. However, it is incumbent upon the applicant to prove that; he or she deserves the order; that the appeal is filed within reasonable time; there is good reason for the delay and that there are high chances of the appeal succeeding. See **First American Bank of Kenya Ltd vs Gulab P. Shah & 2 Others Nairobi (Milimani) HCC No. 2255 of 2000 (2002) 1 EABS** where the court set three elements for consideration before granting leave to appeal out of time as hereunder:

> **(a) The explanation if any for the delay**
>
> **(b) The merits of the contemplated action; Whether the matter is an arguable one deserving a day in court or, whether it is frivolous one which would only result in the delay of the cause of justice.**
>
> **(c) Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of favourable exercise of discretion in favour of the applicant."**

23. Similar position was held in the case of **Annah Mwihaki Wairimu vs Hannah Wanja Wairuru (2017) eKLR** quoting with approval the holding in **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Appeal No. Nai 255 of 1997 (UR)** where the court stated as follows:

> **"It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court take into account in deciding whether to grant an extension of time are; first the length of the delay; secondly the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; fourthly, the degree of prejudice to the respondent if the application is granted."**

24. As already stated, the period of 7 years and another 5 months after the Court of Appeal dismissed the appeal is indeed inordinate and not reasonable.

25. The claim and admission by the applicant that she made a mistake by choosing to take the review route is not an excuse to subject the respondent to another round of litigation. If the applicant chose the review approach, he cannot be allowed to start a fresh the appeal process. To allow such legal process would amount to practice by gambling.

26. The applicant cannot be allowed to litigate on both the review application and the appeal process. He must choose on either. A review is not a substitute to an appeal and vice versa. See **Pancras T. Swai vs Kenya Breweries Limited (2014) eKLR**. I do agree with Onyango J in **Ziporah Moraa vs David Okioma & Another (Supra)** where the learned Judge observed that;

> **"…The applicant was well aware of the options available to her and she knowingly opted to seek redress by way of review. It would be improper for her to now back track and switch to an appeal as her mode of redress after reaching a dead end in her initial option. She made her bed and now she must lie on it."**

27. In view of the above holding, I must agree with the respondent that litigation must come to an end so that the person in whose favour the impugned judgment is made should enjoy the fruits of his judgment. Courts should not be partners in further delaying delivery of justice in such circumstances. This is a matter commenced the year 2008. It is now 13 years down the line and beneficiaries are yet to enjoy their share of the estate. This matter should be brought to an end.

28. As to whether the appeal is merited, it will not serve any purpose as it is the issue of lack of jurisdiction by the Kadhi's Court which is already overtaken by events by the sale of the property and the concern beneficiaries have already benefited. Due to the prolonged period taken since judgment was delivered, it will be prejudicial to start overturning the tables now. The applicant should have obtained stay all along. I do not wish to delve on the merits of the appeal which in any event is overshadowed with the inordinate delay. Once there is a finding of inordinate delay, it matters not whether the appeal is arguable or meritorious. For those reasons, that ground remains a shadow of itself.

29. Having found that there is no justification for enlargement of time, I am inclined to dismiss the application with costs to the respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF OCTOBER 2021.**

**J.N. ONYIEGO**

**JUDGE**