



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 21 OF 2018

HUSSEIN HASSAN MAALIM.....APPELLANT/APPLICANT

VERSUS

OSMAN HASSAN MAALIM.....RESPONDENT

RULING

1. By Notice of Motion dated 30/7/2019 the appellant seeks the orders of:

§ **Stay of Kadhi's Court Succession Cause No. 2 of 2017, Wajir.**

§ **Stay of this court's judgement delivered on 21/5/2019.**

§ **The applicant wants now advocate Saluny to take over this matter from Balgesa Abdi & Co. Advocate.**

§ **Extension of time to file notice of appeal against this court's judgement delivered on 21/5/2019.**

§ **Stay of this court's judgement execution.**

§ **Costs.**

2. The same is based on Orders 9 rule 9, 42 rule 6, Order 51 rule 1 of the Civil Procedure Rules, 2010.

3. Section 7 of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya. The same is anchored on the grounds:

o **That after the delivery of judgement of this court on 21/5/2019. The Applicant/appellant instructed the Firm of Balgesa Advocates to appeal against the same. The same instructions were not executed thus notice of appeal not filed todate.**

o **Thus after discovering above omission the applicant lodged instant application on 31/7/2019 appointed Saluny Advocates. The delay is occasioned applicant former advocate in implementing applicant's instructions.**

4. The grounds are supported by the affidavits of Hussein Hassan Maalim sworn on 30/7/2019 which reiterates what is contained in the grounds aforesaid.

5. The respondent opposes the application via a replying affidavit he swore and filed on 26/9/2019. The same in short is to the effect that the delay in filing the notice of appeal is not explained nor is there demonstrated prejudice to be suffered by the applicant.

ISSUES, ANALYSIS AND DETERMINATION

6. After going through materials placed before me, I find the singular issue is; **whether the factors applicable in extension of time to lodge appeal out of time have been met?**

7. The factors to be considered were stated in **Fakir Mohammed v. Joseph Mugambi & 2 others [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04))** where it was held that;

"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so

long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”

8. The principles set out by this Court upon which the judicial discretion may be exercised are as stated in the case of *Mwangi v Kenya Airways Ltd (2003) KRL 486*:

“Over the years, the Court has set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1977) (unreported), the Court expressed itself thus:

“It is now well 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 takes 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; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

9. I have examined the application, the affidavits in support of the application, the replying affidavit, the authorities and the law. I am guided by the case of *Wasike vs Swala [1984] KLR 591* where this Court stated:

“As Rule 4 now provides that the Court may extend the time or such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:-

a) That there is merit in his appeal.

b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and

c) That the delay has not been inordinate.”

10. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.

11. I find that the delay in filing the notice of appeal is not explained nor is there demonstrated prejudice to be suffered by the applicant. The period of over two months i.e. 21/5/019 to 30/7/019 has not been plausibly explained. When was the new advocate instructed and when did the applicant realize the omission of the former advocate?

12. There is no demonstrated merit of the intended appeal to meet one of the prescribed factors to be considered in extension of time sought.

13. Thus the court finds **no merit in application and same is dismissed with no orders as to costs.**

DATED, DELIVERED AND SIGNED AT GARISSA THIS 29TH DAY OF JANUARY, 2020.

C. KARIUKI

JUDGE