REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

HC NO. 26 OF 2016 (OS)

IN THE MATTER OF:THE TRUSTEE ACT

IN THE MATTER OF: THE WAKF OF MWANA MISHI BINTI AZIZ BIN JUMA

IN THE MATTER OF:APPOINTMENT OF NEW TRUSTEES

BETWEEN

ALIYA ZAHRAN.....APPLICANT

VERSUS

1. **KHADIJA KHAMIS SHAFI**
2. **KULTHUM KHAMIS SHAFI**
3. **FADHILA ZAHRAN MOHAMED**
4. **SHAFFA KHAMIS SHAFFI .....RESPONDENTS**

RULING

1.The Respondents herein have by way of a Preliminary Objection dated 15.1.18 objected to the Application dated 26.7.17 and filed on 14.8.17 by the Applicant herein. In the Application, the Applicant seeks orders that the execution/enforcement of the Ruling and Order made on 30.6.17 be stayed pending the hearing and determination of the intended appeal. The Applicant also seeks costs.

2. The Applicant avers that the intended appeal is arguable and if stay is not granted, the same will be rendered nugatory. It is the Applicant's case that the orders made on 30.6.17 appointed the 1st and 3rd Respondents as trustees of the Wakf of Mwana Mishi Binti Aziz Bin Juma yet they are not beneficiaries of the Wakf. The Applicant is the only surviving beneficiary. The effect of the order violates Article 40 of the Constitution by irregularly and unlawfully made the Respondents beneficiaries of the Wakf

3. The Respondents have raised the following objections to the Application:

1) The Applicant has not complied with the requirements for filing an appeal.

2) That the intended appeal is a waste of time as it is way out of the stipulated time frame and the Appellant/Respondent has not even applied for leave to be filed out of time.

3) That the Applicant's application does not have chances of success should the appeal be allowed.

4) That the entire application is a nullity as it is based on an appeal that is a nullity.

4. The Respondents in their submissions contend that the Applicant filed a notice of appeal on 14.7.17 but to date more than 180 days later, no appeal has been preferred as required by law. This offends Rule 82 of the Court of Appeal Rules. There is no appeal nor intended appeal lodged at the Court of Appeal to warrant stay of execution. It was further submitted that the intended appeal is by virtue of Rule 83 deemed withdrawn. Further, the draft memorandum of appeal exhibited and marked A-2 in the affidavit of the Applicant is filed in this same Court

which has no appellate jurisdiction in the matter herein. The Respondents submitted that the Application is a nullity as it is based on an intended appeal that is a nullity and it ought to be dismissed.

5. The Applicant submitted that the preliminary objection is incompetent as it fails the test set out in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696. According to the Applicant the Respondents have not demonstrated how the Applicant has violated the requirements for filing an appeal. The Applicant contends that the ground that the Applicant is out of time in filing the Appeal is misconceived because the Respondent does not compute time. Time for filing appeal has not lapsed. The notice of appeal having been filed on 14.7.17 within 14 days from the ruling. 60 days for lodging the appeal would have expired on 30.8.17. The application for copies of proceedings was filed on 14.5.17 accordingly, under Rule 82(1)(d) time stopped running on 14.7.17. An application for leave to file appeal out of time would be filed in the Court of Appeal which has unfettered discretion. The Respondents have no right to compel the Applicant to file an appeal within or outside time. Further, the question as to whether the appeal is arguable is not a pure point of law. Further, the question before the Court is whether stay may be granted and not the competency of the appeal which is for the Court of Appeal to decide. The Applicant urged the Court to dismiss the preliminary objection.

6. I have considered the Application, the Preliminary Objection, the rival submissions and the authorities cited. In order to determine whether the Respondents' Preliminary Objection should be upheld, it is necessary to consider whether the same meets the test set out by Sir Charles Newbold in the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 in which he rendered himself thus:

> ***"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop."***

7. The first 2 grounds will be considered together due to their conceptual similarities. The Respondents assert that the Applicant has not complied with the requirements for filing an appeal and further that the intended appeal is a waste of time as it is way out of the stipulated time frame and the Applicant has not even applied for leave to be filed out of time. The law governing the filing of an appeal from the High Court is set out in the Court of Appeal Rules. Rule 75 provides as follows:

> ***(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.***
>
> ***(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.***

8. The Ruling/order in respect of which stay is sought was delivered on 30.6.17. A notice of appeal was filed in this Court on 14.7.17. The filing of the notice of appeal was therefore filed within the stipulated period. Rule 82 further makes provision for institution of appeals as follows:

> ***"(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—***
>
> ***(a) a memorandum of appeal, in quadruplicate***
>
> ***(b) the record of appeal, in quadruplicate;***
>
> ***(c) the prescribed fee; and***
>
> ***(d) security for the costs of the appeal***
>
> ***Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy."***

9. It is the Respondents' submission that the Applicant has not instituted the appeal to date more than 60 days from the filing of the notice of appeal as required by the Rules. The above rule contains a proviso *to wit* that if a party has made an application for a copy of proceedings within 30 days of the decision then the period it takes for the copy to be prepared and delivered shall be excluded in the computation of the time within which appeal ought to be filed. The Applicant claims that the application for copies of proceedings was filed on 14.5.17. The Respondents however argue that the said application for copies was for filing submissions. The issue as to whether the copies applied for were for submissions or for the intended appeal is factual. Further, to determine what period if any should be excluded in the computation of the time within which the intended appeal is to be instituted would require interrogation and enquiry.

10. The Respondents argue that failure to file an appeal to date offends Rule 82 of the Court of Appeal Rules. They argue that no appeal nor intended appeal lodged at the Court of Appeal to warrant stay of execution and further no application to enlarge the time has been filed. It was further submitted that the intended appeal is by virtue of Rule 83 deemed withdrawn. Rule 83 of the Court of Appeal Rules states:

> ***"If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have***

withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served."

11. While the foregoing rule provides that a party who fails to institute an appeal within the stipulated time shall be deemed to have withdrawn his notice of appeal, it is not for this Court to make such order. The jurisdiction under Rule 83 is vested in the Court of Appeal and this Court may not make any order contemplated in the said rule. Further an application to enlarge time for filing the appeal can only be filed in the Court of Appeal and not in this Court. In the circumstances, this ground of objection fails. Further, to determine whether the Appellant has complied with the provisions of Rule 82 is not a pure point of law as such determination would require ascertainment through interrogation and enquiry.

12. The Respondents contend that the appeal does not have chances of success. Whether the Appeal has any chance of success or not is clearly a factual matter which needs interrogation and inquiry. It is not a pure point of law.

13. On the assertion that that the entire application is a nullity, the Respondents take issue with the heading of the exhibited draft memorandum of appeal which indicates that the same is to be filed in this Court which has no appellate jurisdiction in the matter. Further that the draft memorandum of appeal is not in Form F as required by Rule 86(3). The Applicant explains this as an error on the face of the draft memorandum of Appeal that can be excused and relies on Article 159 of the Constitution. Article 159(2)(d) of the Constitution of Kenya 2010 provides:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(d) justice shall be administered without undue regard to procedural technicalities;"

14. I have noted that the draft memorandum of appeal annexed to the Applicant's Supporting Affidavit, paragraph 6 of which states:

"That I believe that the intended appeal is an arguable one as demonstrated by the Draft Memorandum of Appeal. Annexed and marked as "A-2" is the Draft Memorandum of Appeal."

From the foregoing, notwithstanding that the heading of the draft memorandum of appeal reads the "High Court of " and not the "Court of Appeal", the intention is clear that it is an intended appeal against *"the Ruling and Order of the Honourable M. Thande delivered on the 30/6/2017 in HCC. No. 26 of 2016 (OS)"*. I am satisfied that this is an error which can be overlooked. I am also persuaded that nonconformity of the draft memorandum of appeal to Form F, which in any event is a draft, is a procedural technicality to which the Court must not give undue regard. I do therefore find that upholding the Preliminary Objection on this ground would be tantamount to allowing the technicality trump the primary objective of dispensing substantive justice to the parties which would be an impediment to justice contrary to the injunction in Article 159(2)(d) of the Constitution.

15. As stated above, the issues raised by the Respondents are not pure points of law as they require to be ascertained through interrogation and enquiry. The Preliminary Objection therefore fails the test as it has raised factual issues and not a pure point of law. Sir Charles Newbold in the Mukisa Biscuit case (supra) opined further:

"The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop."

16. This is evidently a clear case of improper raising of a preliminary objection and has served to unnecessarily delay the matter herein and increase costs. The issues raised will be best canvassed at the hearing of the Application which should proceed to be heard on merit. In the result, I find that the Preliminary Objection lacks merit and the same is hereby dismissed. I direct that the Application dated 26.7.17 be fixed for hearing *interpartes* for the expeditious disposal thereof. Costs shall be in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 9th day of March 2018

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M. THANDE

JUDGE

In the presence of: -

…… for the Applicant

…… for the Respondents

…….…….. Court Assistant