



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

MISC. APPLICATION NO. 30 OF 2016

FIRDAUS MUSA ABDULKARIM.....APPELLANT/APPLICANT

VERSUS

NASSOR ABDALLA

ABDALLA NASSOR ABDALLA

ABDULAZIZ NASSOR ABDALLA

ABUBAKAR NASSOR ABDALLA.....RESPONDENTS

RULING

1. By a Notice of Motion dated 26.9.16, the Applicant seeks the following orders:

1. Spent.

2. Spent.

3. THAT the execution of the order in Succession Cause No. 202, Firdaus Musa Abdulkarim -vs- Nassor Abdalla & 3 Others made on 10th March 2016, be stayed pending hearing and determination of the Intended Appeal

4. THAT the Applicants be granted leave to appeal out of time against the whole judgment in Succession Cause No. 202, Firdaus Musa Abdulkarim -vs- Nassor Abdalla & 3 Others delivered on 13th August, 2015 and subsequent Ruling delivered on made on 10th March, 2016.

5. THAT leave granted in prayer (4) above does operate as stay of all proceedings.

6. THAT this Honourable Court be pleased to give such other or further orders and directions as it may deem fit and just.

7. THAT the costs of and incidental to this application do abide the results of the Intended Appeal herein.

2. The Applicant is the widow of Mohamed Nassor Abdalla (the Deceased) whose estate was the subject of the aforesaid Succession Cause. The Deceased died on 6.10.12 and was survived by his father the 1st Respondent, his mother, the widow, the Applicant, a son and 7 daughters some of whom are minors. The other Respondents are the Deceased's brothers. The Applicant filed Succession Cause No. 202 of 2012 seeking inter alia determination of the estate and heirs of the Deceased and their respective shares therein as well as distribution according to Islamic law. She also sought orders a restraining the Respondents from interfering or disposing of the estate of the Deceased.

3. In a judgment of 13.8.15, the Hon. Kadhi determined the properties of the state, the heirs of the Deceased and their respective shares in his estate. The parents were to get 16.6% each, the Applicant was to get 12.5%, the son was to get 12% while the daughters were to get 6% each. The Court further directed *inter alia* that the Applicant was to account for the income of 3 houses, and all proceeds of the estate was to be deposited in a joint account of the parties' advocates for distribution to the heirs in the determined shares. Valuation of the assets was to be done to facilitate distribution and further no asset would be disposed of before final distribution.

4. In the Order of 16.3.16, the Hon Kadhi restrained the Applicant from collecting rent and appointed an agent to do so. The agent was to pay the rent to the beneficiaries according to the aforesaid determined shares and further to file regular statements in Court.

5. The Applicant avers that the delay in filing an appeal was occasioned by the fact that due to unavailability of funds the counsel she had instructed counsel to file the appeal failed to do so. She avers that she has an arguable appeal with high chances of success and that the delay in filing the appeal was as a result of circumstances beyond her control.

6. The Respondents by way of Grounds of Opposition dated 14.11.16 oppose the Application terming it an abuse of the Court process. According to them, the unreasonable delay in filing the appeal has not been explained. The Applicant has disobeyed the Kadhi's Court orders and stay of the orders will allow the Applicant to continue intermeddling with the estate at the expense of the Respondents and the beneficiaries.

7. The 1st Respondent in a Replying Affidavit sworn on 16.11.16 avers that the Applicant failed to deposit the proceeds of the estate in a joint account as ordered by the Court and prompting the Respondents to file the application leading to the orders of 10.3.16. The Applicant has not shown any letters of instructions to advocates to file the appeal. The Respondents contend that the Applicant has partially complied with the order of 10.3.16 as she refrained from collecting rent from some of the houses of the estate and has asked the appointed agent to give her the share of the rent collected due to her. The Applicant has changed advocates 3 time and that the Application is meant to circumvent contempt of court proceedings filed by the 1st Respondent.

8. I have considered the Application, rival affidavits, submissions as well as the authorities cited. It is trite law that an order to grant leave to file an appeal out of time 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. This Application arises from a succession petition in the Kadhi's Court. Section 50(2) of the Law of Succession Act 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”.

10. While the above provision provides no time within which appeal ought to be filed, such appeal must be filed within reasonable time. This is supported by Section 58 of the Interpretation and General Provisions Act which provides:

“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”.

11. It is not disputed that there has been delay filing the application herein. The orders sought to be appealed against were made on 13.8.15 and 16.3.16 while the Application was filed on 28.9.16. The first order was made over 1 year and 1 month before the Application was filed while the second order made over 6 months before the Application was filed. In my view there was inordinate delay.

12. The Applicant in a bid to explain the delay in filing the Application cited lack of funds as a result of the decision of the Hon. Kadhi. Though she instructed counsel to file an appeal on both decisions, lack of funds resulted in the said counsel not attending Court. The Hon. Kadhi orders in the Judgment that the proceeds of the estate shall be deposited in a joint account held the parties' advocates for distribution to the heirs according to their determined shares. The Applicant and her children were collectively entitled to 66.8% of the estate. I therefore fail to understand how the decision of the Hon. Kadhi would have resulted in the Applicant not having funds. Further, it would appear from the Ruling of 10.3.16 that the Applicant continued to collect rent up to and including 10.3.16 when the Hon. Kadhi restrained her from doing so. The lack of funds in my view is just an excuse for the delay in filing the application in a timeous manner. The delay which I have found to be inordinate has not been explained to the satisfaction of this Court.

13. The Applicant claims that the Appeal is arguable and has high chances of success. Where there inordinate delay in filing an appeal and the reason proffered by the Applicant is not plausible as in the present case, it matters not whether the appeal has high chances of success. In so stating I am guided by the Court of Appeal in the Aviation Cargo Support Limited (supra) where the Court went on to state:

“The delay is inordinate and has not been explained. I so find. Even where an appeal is meritorious, if the delay is too inordinate and has not been explained at all, leave ought not to be granted to lodge record of appeal out of time.”

14. The Applicant cited the case of Macdonald v Moor (A244-205) [2015] NAHCMD 235 in support of the Application where the Court stated that the interests of minors should not be held to ransom for the sake of legal niceties or jurisdictional formalism. With respect, what was before that Court for consideration was an application for variation of an order for custody and access to the minor children of the parties therein. The application before me seeks to enlarge the time for filing an appeal in respect of a succession matter. The authority is therefore relevant in the circumstances.

15. In view of the foregoing, I am not persuaded that the Application herein is merited. The explanation given for the inordinate delay in filing this Application is unconvincing and the Court rejects the same. The Application dated 26.9.16 is therefore dismissed. Each party to bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 27th day of April 2018

M. THANDE

JUDGE

In the presence of: -

.....**for the Applicant**

.....**for the Respondent**

.....**Court Assistant**