



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

MISC. APPLICATION NO. 30 OF 2017

JUMA KIBWANA JUMA..... APPELLANT/APPLICANT

VERSUS

ABDILLAHI KIBWANA JUMA

MWINYI KIBWANA JUMA.....RESPONDENTS

RULING

1. By a Notice of Motion dated 25.9.17, the Appellant/Applicant seeks the following orders:

1. Spent

2. THAT the Honourable Court be pleased to grant the Applicant leave to appeal out of time.

3. THAT there be a temporary stay of execution pending the hearing and determination of this application.

4. THAT the Memorandum of Appeal dated 25th Septemebr 2017 be deemed as duly filed upon payment of the requisite court fees.

5. THAT there be stay of execution pending the hearing and determination of the Appellant's appeal herein.

6. THAT the costs of this application be provided for.

2. The record shows that orders were issued in a ruling of 28.2.17 in Mombasa Kadhi's Court Succession Cause No. 80 of 2010, directing the Appellant/Applicant to vacate premises in Plot No. 20/19 at Chaani. This was to facilitate the distribution of the property to him and other beneficiaries which distribution had been determined in a judgment of the Court of 23.8.14. It is this ruling and order that the Juma Kibwana Juma Appellant/Applicant seeks to appeal against.

3. The grounds upon which the Application is predicated are set out in the Appellant/Applicant's affidavit sworn on 25.9.17. The Appellant/Applicant avers that having not agreed with the judgment which he claims was delivered *ex parte*, he on 24.10.16 filed an application for review and or setting aside of the same which was dismissed by the ruling of 28.2.17. He now seeks to appeal against both the judgment and the ruling. The reasons advanced by the Appellant/Applicant for the delay in filing the appeal are that it took him some time to organize funds to hire another lawyer. He accuses his advocates of failing to protect his interests and he felt that they had been compromised. The delay was further occasioned by the proceedings which are yet to be typed. His appeal has high chances of success and if execution is carried out he stands to suffer irreparable and substantial loss and the appeal will be rendered nugatory. He further claims that the Respondent has commenced execution against him vide a notice to show cause dated 25.8.17 and warrant for his arrest was issued on 19.9.17. If he is evicted from the house and land he will be rendered homeless.

4. The Application is opposed. In his Replying Affidavit sworn on 13.12.17, the 1st Respondent Abdillahi Kibwana Juma avers that the Application is an abuse of the Court process. He was the Plaintiff in the matter before the Kadhi's Court while the 2nd Respondent and the Appellant/Applicant were the Defendants. All parties fully participated in the proceedings. The Hon. Kadhi distributed the estate in accordance to Islamic Sharia and all were in agreement The Appellant/Applicant agreed to buy the other beneficiaries shares in the 2nd house. The Appellant/Applicant participated in the proceedings and was represented by Nyabena & Co. Advocates from commencement of the matter till judgment. Thereafter, he was represented by Paul O. Buti at the time of conducting joint valuation. After the matter was finalized, he appointed Khatib & Company and now has F. M. Mwawasi advocate. The Appellant/Applicant received his share of the proceeds of sale of the 1st property. On 19.9.16 the Court ordered the Appellant/Applicant to vacate the property which he has disobeyed.

5. The 2nd Respondent Mwinyi Kibwana Juma by his Replying affidavit sworn on 14.12.17 averred that the Application is brought in bad faith and is an abuse of the Court process. The matter in the Kadhi's Court where both he and the Appellant/Applicant were Defendants while the 1st Respondent was the Plaintiff was finalized. All of them actively participated in the proceedings and the shares in the property were distributed in accordance with Islamic Sharia. The Appellant/Applicant agreed to the distribution and offered to buy the shares of the other parties. The Application is intended to ensure that other heirs do not benefit from the estate of their father. Following the distribution, one property was sold and all benefitted from the proceeds. However the Appellant/Applicant wants to benefit from the remaining property to the exclusion of other beneficiaries. The Appellant/Applicant has disobeyed the Kadhi's Court order of 19.9.16 to vacate the property. He urged the Court not to aid the Appellant/Applicant who has deliberately and intentionally disobeyed Court orders.

6. In his grounds of opposition dated 14.12.17, the 2nd Respondent states that the Appellant/Applicant's hiding behind his advocates' inaction is tantamount to "admission on collusion" and an abuse of the court process. The Appellant/Applicant is adopting obstructionist and delaying tactics and has waited for 8 months to file the Application in an attempt to circumvent the Kadhi Court's orders and prejudice the Respondents. The matter herein involves affects other beneficiaries of the estate besides the parties hereto and all had agreed upon the distribution of the estate. Litigation must come to an end and this Application is mischievous.

7. I have given due consideration to the Application and the submissions by the parties as well as the authorities cited. This Application arises from a succession petition in the Kadhi's Court. The Application is expressed to be brought *inter alia* under the provisions of Section 1A, 1B, 65 and 95 of the Civil Procedure Act and Order 42 Rules (1) and (2) of the Civil Procedure Rules. This being a succession matter, by dint of Rule 63 of the Probate and Administration Rules, the aforesaid provisions of the Civil Procedure Act and Rules are not applicable.

8. Section 50 of the Law of Succession Act confers jurisdiction upon this Court to hear appeals from subordinate Courts as follows:

50. Appeals to High Court

1. An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.

2. 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.

9. It is clear from the foregoing that an appeal shall automatically lie to the High Court of any order or decree made by a Kadhi's Court. The decision sought to be appealed against was made by the Kadhi's Court on 28.2.17. The Application herein was filed on 26.9.17. While Section 50 of the Law of Succession Act does not stipulate the time within which an appeal ought to be filed, such appeal must be filed without unreasonable delay. 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".

10. An order for extension of the time to file an appeal 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.

11. The history of this matter as can be gleaned from the record is that distribution of the estate was done by a judgment of the Kadhi's court of 28.8.14. Over 2 years later on 24.10.16, the Appellant/Applicant filed an application for review or setting aside of the judgment which application was dismissed on 28.2.17. The present application to appeal out of time was filed on 26.9.17 which is 6 months late. The reasons advanced by the Appellant/Applicant is that he had to organize funds to seek the services of another lawyer. He also states that the judgment was delivered *ex parte*. He further accuses his advocates of failing to protect his interests and he felt that they had been compromised.

12. In the circumstances of this case, I find a delay of 6 months to be inexcusable. Further, the record shows that the Appellant/Applicant was indeed represented in the Kadhi's Court. He does not provide any evidence of how his advocates failed him nor how they were compromised and by whom. His claim that he was organizing funds to hire yet another advocate is not convincing. For this Court to exercise its discretion in favour of the Appellant/Applicant a plausible explanation to the satisfaction of the Court must be given for the delay. The reason given by the Appellant/Applicant is not persuasive and further the Court has not been told what steps the Appellant/Applicant took to ensure that he came to Court as soon as was practicable.

13. The record further shows that Appellant/Applicant failed to comply with the Court order of 28.2.17. He states in his own affidavit that the Respondent has commenced execution against him vide a notice to show cause dated 25.8.17 and warrant for his arrest was issued on 19.9.17. The Application was filed on 25.9.17 just six days after the warrant of arrest was issued. It would appear to me and indeed to any reasonable person that that the Application was filed to circumvent the warrant of arrest. Nothing has been placed before me to convince me show that the Appellant/Applicant ever intended to file the appeal. He was prompted by the warrant of arrest issued against him. In the premises, the prayer for leave to file appeal out of time is unmerited. It follows therefore that the prayer for stay of execution pending hearing and determination of the intended appeal also fails.

14. In light of the foregoing, it is my finding that the Application dated 25.9.17 lacks merit and the same is hereby dismissed with costs to the Respondents.

DATED, SIGNED and DELIVERED in MOMBASA this 21st day of September, 2018

M. THANDE

JUDGE

In the presence of: -

.....**for the Appellant/Applicant**

..... **for the Respondents**

.....**Court Assistant**