

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPLICATION NO. 32 OF 2016

IN THE MATTER OF: THE ESTATE OF MWATIME JUMA MARO (DECEASED)

AND

IN THE MATTER OF: THE ESTATE PROPERTY KNOWN AS GEDE/DABASO/655

TATU JUMA MARO.....APPLICANT

VERSUS

MOHAMED MALANGA NDEBE.....RESPONDENT

RULING

The application dated 5.7.2016 seeks leave of the court to file an appeal out of time against the judgement of the Hon. Kilifi Kadhi delivered on 16th May, 2016. The application is supported by the affidavit of Tatu Juma Maro sworn on 5th July, 2016. The respondent filed a replying affidavit sworn on 25th September, 2016.

Counsel for the applicant submit that the judgement of the Kadhi was delivered on 16th May, 2016 in Succession Cause Number 4 of 2015. On 8th June, 2016, counsel wrote to the Kilifi Court requesting for typed proceedings. However, no proceedings were supplied. It is submitted that the respondent alleged that he was the deceased's husband yet no marriage certificate was annexed. The property in dispute was bought from proceeds received after the sell of the applicant's parents' property. The applicant resides in Italy and this caused the delay in filing the appeal.

On his part, counsel for the respondent maintains that the applicant participated in the proceedings before the Kadhi. The respondent lived with the deceased for five years before passing on in his hands. The deceased was married to the respondent. The marriage was celebrated at the Kikambala Mosque and was presided over by Imam Masoud in May, 2009. It is also submitted that there has been a delay of five months in filing the application. This delay is inordinate.

The record shows that the Honourable Kadhi delivered his judgement on 16th May, 2016. The current application was filed on 5th July, 2016. This is a period of less than two months. I do find that the delay is not inordinate. Counsel for the applicant also requested for typed proceedings on 8th June, 2016 which proceedings were not supplied. Although the respondent maintains that the applicant does not need the proceedings to prepare the Memorandum of Appeal, it is evident that one has to read the proceedings before drafting the Memorandum of Appeal. I have seen the handwritten record of the Honourable Kadhi and do note that although it is legible, it would be prudent to obtain the typed proceedings as some sections of the proceedings are not clear.

Apart from the above, I do note that the appeal is arguable. The applicant contends that her late sister was not married to the respondent. There will be need to pursue the appeal so that the applicant's claim can be viewed by another court. The applicant did not testify before the Kadhi's Court. None of the applicant's sisters or brothers testified before the Kadhi's Court. The dispute involves a house which is

alleged to have been owned by the deceased. The applicant maintains that the deceased was not the owner of the house.

In the end, I do find that in the interest of justice, the applicant has to be granted leave to pursue her appeal. The application dated 5th July, 2016 is merited and is hereby allowed. The applicant to file the Memorandum of Appeal within thirty (30) days hereof. Parties shall bare their own costs of the application.

Dated and delivered in Malindi this 31st day of January, 2017.

S.J. CHITEMBWE

JUDGE