



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 40 OF 2017

MWANADIA BARKHALE.....1ST APPLICANT

MWANAISHA BARKHALE.....2ND APPLICANT

MKUU BARKHALE.....3RD APPLICANT

VERSUS

FRATHIMA BARKHALE ABDALLAH.....RESPONDENT

RULING

[NOTICE OF MOTION DATED 29TH SEPTEMBER, 2017]

1. Mwanadia Barkhale, Mwanaisha Barkhale and Mkuu Barkhale, the 1st, 2nd and 3rd applicants have brought the notice of motion dated 29th September, 2017 under sections 1A, 1B, 3, 3A, 79G and 95 of the Civil Procedure Act, and Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. Through the application they seek two main prayers; enlargement of time for filing an appeal and stay of execution of the decree of the Kadhi's Court pending the hearing and determination of the intended appeal.
2. The application is supported by the grounds on its face and the affidavit of Mwanadia Barkhale, the 1st Applicant.
3. In summary, the applicants' case is that the judgement they seek to appeal against was delivered by the Kadhi's Court at Lamu on 11th April, 2017; that they had applied for certified copies of the proceedings and judgement but they had not received the same as at the time of filing the instant application; that the 1st Applicant had taken initiative to photocopy and type the proceedings and avail them for certification but this has not been done; that the proposed appeal raises fundamental legal issues for the interpretation of the court; that the delay is not inordinate in the circumstances; that any prejudice that may be suffered by the Respondent can be remedied with costs; and that it is fair, just and equitable in the circumstances of the case to grant the orders sought.
4. The 1st Applicant avers that their advocate at the trial failed to apply for the stay of execution as a precautionary measure and her own attempt to do so led to the delay. It is her averment that the delay is not inordinate and the appeal has good chances of success as it is based on deprivation of property and the right to own the same. The 1st Applicant stresses that she will suffer irreparable loss if time for filing

appeal is not enlarged and execution stayed as the property belongs to her having been purchased on her behalf by her husband.

5. The Respondent, Frathima Barkhale Abdalla opposed the application through an affidavit sworn on 27th October, 2017. Her averment is that the delay did not emanate from the alleged failure to apply for stay of execution before the trial Court. According to her, the proceedings were certified nine days after the judgement was delivered. Further, that the applicants had made an application for review of the judgement instead of filing an appeal. It is the Respondent's position that in the circumstances of this case the delay is therefore inordinate.

6. The Respondent averred that the property in question belonged to their deceased father and the delay in finalizing the estate exposes her to prejudice.

7. The Respondent further avers that the supporting affidavit of the 1st Applicant does not lay a basis for the issuance of the orders sought. Also, that the applicants filed an application for stay of execution in the Kadhi's Court but failed to prosecute it.

8. The parties' advocates on record made oral submissions in support of their clients' positions. They reiterated the contents of their pleadings with the advocate for the applicants pointing out that the Respondent had attached to her replying affidavit the instant application in support of her averment that the applicants had filed an application for stay of execution before the Kadhi's Court. According to him, the applicants had not filed any application before the Kadhi's Court.

9. The starting point would be to first determine whether the applicants have satisfied this court that it should exercise its discretion and enlarge time for them.

10. In **Ochanda (Suing on his behalf and on behalf of 996 former employees of Telkom Limited) v Telkom Kenya Ltd [2014] KLR – SCK; Motion No. 24 of 2014**, the Supreme Court outlined the principles to be considered in exercising discretion to extend time for filing appeals thus:

“[18] This Court in the *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries & others* Supreme Court Application No. 16 of 2014 (*The Nick Salat Case*) acknowledged that extension of time is a discretionary and a very powerful tool which should be exercised with abundant caution, care and fairness. It should be used judiciously and not whimsically to ensure that the principles enshrined in our Constitution are realized. The Court proceeded to lay down the following under-lying principles to guide the Court, at page 31 thus:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following under-lying principles that a Court should consider in exercise of such discretion:

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

11. The need to explain the reason for the delay to the satisfaction of the court ties up with Section 79G of the Civil Procedure Act, Cap. 21 which requires appeals from the subordinate courts to the High Court to be filed within thirty days from the date of the decision appealed against but with the proviso that an appeal may be admitted out of time if **“the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”** It is thus the duty of an applicant in an application for enlargement of time for filing an appeal to justify the grant of orders by giving cogent reasons for the delay in filing the appeal.

12. Good and sufficient cause can be any of those stated by the Court of Appeal in **Stanley Kaharo Mwangi & 2 others v Kanyamwi Trading Company Limited [2015] eKLR** that:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure 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, (possibly) 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 the 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 factors.”

13. The applicants’ main ground for failing to lodge an appeal in time is that the typed copies of proceedings and judgement were not availed in time. Two grounds stand out in the applicants’ application and they need to be reproduced herein for the record:

“b) THAT, the Applicant then applied for certified copies of the proceedings and Ruling but the same have not been provided to them at all to this day.

c) THAT, the Applicant made frantic efforts to photocopy the proceedings typed them and expected that the Honourable Court shall proceed to certify them in vain.”

14. Through those two paragraphs the applicants squarely lay the blame for the delay in obtaining proceedings and judgement on the trial Court.

15. However, the 1st Applicant in her affidavit in support of the application shifts the blame for the delay in obtaining the proceedings to their counsel at the trial by averring:

“2. THAT, when judgement was delivered on 11th April, 2017, while all Respondents were represented by A.B. Olaba while the Petitioner was represented by HAMZA Advocates, I am informed by Gichana Esq. that, the counsel was duty-bound to apply for stay of execution, certified copies of proceedings and judgement just as a precautionary measure before taking elaborate instructions from the client, which did not happen.

3. THAT, instead, I had to do it myself thereby occasioning delay. I annex the proceedings and Ruling and mark it “MB1”.

16. The Respondent’s reply to the applicants’ averments is that the proceedings were certified on 20th April, 2017, nine days after the judgement was delivered.

17. A perusal of the pleadings and exhibits in this application will show that the applicants lack candour. On the last page of the judgement of the Kadhi, there is a certificate showing that the proceedings were

certified on 20th April, 2017. It is ironical that even as the applicants contended that they were yet to receive certified copies of the proceedings on the date of making the application before this court, the 1st Applicant annexed to her affidavit sworn in support of the application, proceedings and judgement certified on 20th April, 2017. The certified copies of proceedings and judgement were available eight days after the delivery of the judgement on 20th April, 2017.

18. Therefore, the applicants' assertion that they delayed lodging the appeal because of lack of proceedings is not correct. The reason advanced is therefore not sufficient for enlarging time for filing an appeal. Some dishonesty is also apparent in the applicants' pleadings. A court of justice cannot exercise discretion in favour of a party whose hands are not clean.

19. The thirty days within which the applicants were to file their appeal lapsed on 11th May, 2017. This application was filed on 6th October, 2017 almost five months after the time for filing the appeal had lapsed. Not only was the delay inordinate but no reason has been advanced for the delay in applying for the enlargement of time. Time cannot therefore be enlarged in the circumstances of this case.

20. Without enlargement of time, the application for stay of execution becomes moot.

21. For the reasons already stated, the application dated 29th September, 2017 and filed in court 6th October, 2017 fails and is dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 30th day of November, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT