



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 91 OF 2008

ABDUL BIKWASI ALIPLAINTIFF

VERSUS

FAIZA HASSANRESPONDENT

RULING

1. By Notice of Motion filed herein on 7th October, 2008 the applicant seeks orders as follows:-
 - (I) That this application is certified as urgent and service thereof be dispensed with in the first instance.
 - (ii) That pending the hearing and determination of this application interpartes, there be a stay of execution of the

ex-parte orders of the Kadhi evicting the appellant from his land parcel number Nzoia/Kipsoen/464
 - (iii) That leave is granted to file the appeal out of time.
 - (iv) That costs of this application be provided for.
2. The application is premised on the following grounds:-
 - a) That on 1st October, 1996, the Kadhi made orders after only having heard the respondent which orders effectively deprive me of all my property in both Kenya and Uganda.
 - b) That by reason of the said order, the respondent is now registered as the owner of my land known as NZOIA/KIPSOEN/464.
 - c) That the Kadhi has now ordered that I be evicted from my said property and I stand to suffer substantial loss by reason of the said order.
 - d) That I am aggrieved by the said order and leave is necessary to file appeal and I also need an extension of time within which to file the appeal since time has elapsed.
 - e) That no prejudice will be suffered by the respondent if the orders sought are given.

f) That the said order is a nullity in that the appellant was never served with the Summons to enter appearance or at all.

g) That the delay in filing the appeal was inadvertent.

3. Prayers **1, and 2** being spent what remains before this court is mainly **prayer 3**.

Directions were given on 12/5/2014 that the application be canvassed by way of written submissions. Those of the Applicant were received on 21/7/2014 while those of the Respondent were filed on 29/9/2014.

4. The judgment sought to be appealed from was made by a kadhi way back in 1997 following a petition by the applicant's wife the respondent in this case for divorce and partition of the matrimonial property. The kadhi granted the divorce and awarded **LR Nzoia/Kipsoen/464** to the respondent and ordered the applicant to vacate from the same. The applicant did not vacate and the Respondent obtained eviction Orders but the applicant brought this application and obtained a stay of execution of those orders.
5. Section **79 G of the Civil Procedure Act** requires that an appeal be filed within thirty days from the date of the decree or order appealed against but gives the court power to admit appeals out of time **"if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time"**. Faced with a similar application in **Aviation Cargo Support Limited V. St Mark Freight Services Limited (2014) Eklr GBM Kariuki JA**, stated as follows:-

" The order whether or not to grant extension of time or leave to appeal out of time is discretionary. Such discretion is exercised judiciously with a view to doing justice. Each case depends on its own merit. 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. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time."

4. At paragraph **15** of the Supporting affidavit the applicant attributes the delay to the fact that his mistaken belief that he could appeal to another kadhi. However, in the further affidavit sworn on 12/11/2008 he blames the loss of his file for the delay.
5. I have given due consideration to this explanation, but my finding is that the same has no merit. The order that the applicant wishes to appeal from was made way back in **1997** and eleven years had elapsed when he filed this application. Contrary to his ascertainment that he was not notified of the proceedings giving rise to the order, the record shows that he became aware of them on **24/6/1997** when he was taken to court under a warrant of arrest and later released on a bond of ksh. 10,000/-. The record also shows that as far back as the year **2000** he was represented by counsel(**Mr Wafula**) in an application where he sought to transfer the execution proceedings to the High Court at Eldoret. He therefore had legal counsel at his disposal long before he lodged this application. Even the alleged appeal to the Kadhi court which he refers to in his affidavit in support was filed there on **11th December, 2007**. The delay between **1997** and **2007** and then **2008** has not been explained at all. The allegation that the file went missing is but a very weak excuse. How did he obtain the proceedings and the formal order are questions that would beg for an answer. The file must have been availed at some point earlier than the year he swore the further affidavit. To me the issue of missing file came as an afterthought.

6. The upshot is that the delay of 11 years is inordinate and as no plausible explanation has been given for it, this application is found to be devoid of merit and is dismissed with costs to the Respondent.

7. It is so ordered.

Dated, signed and delivered at Kisumu this 19th day of February,2015

E.N. MAINA

JUDGE

In the presence of:

No appearance for Appellant

Miss Alinalwa for Respondent

Moses Okumu – court interpreter