



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**CIVIL APPEAL NO.15 OF 2011**

*(Appeal originating from Kadhi's Succession Cause No.87 of 2008 at Malindi)*

**NURU OMAR MAHENDAN**

**MARIAM OMAR MAHENDAN**

**ANZUN OMAR MAHENDAN**

**MALKIA OMAR MAHENDAN**

**FERRUZ OMAR MAHENDAN ..... APPELLANTS**

**VRS**

**AHMED MOHAMED HONEY ..... RESPONDENT**

**RULING**

The application dated 4/3/2015 seeks the following orders:

1. That this application be certified as urgent and service be dispensed with in the first instance.
2. That status quo prevailing prior to this application in respect to the estate be maintained pending the hearing and determination of this application inter-partes.
3. That the appellants be granted leave to appeal against the whole decision and ruling of the 20th November, 2014 and refile a fresh Notice of Appeal.
4. That costs to this application be provided for.

It is supported by the affidavit of Malkia Omar Mahendan sworn on the same date. The respondent filed a replying affidavit sworn on 13/3/2015. Parties agreed to determine the application by way of written submissions.

The main issues being raised in the application is whether this Honourable court should grant to the applicants leave to appeal against the ruling of this court delivered on 20/11/2014 and therefore allow them to file a fresh notice of appeal. The next issue is whether if the above is granted the existing status quo should be maintained.

I have gone through the proceedings herein. There have been several rulings delivered by this court. The dispute involve the estate of Batuli Omar Mahendan who died in 2006. The respondent is the

widower of the deceased while the appellants are 5 sisters and one brother to the deceased. One of the sisters withdrew from the appeal. The Kadhi delivered his judgment on 27/5/2011. The appellants herein filed their memorandum of appeal dated 30/5/2011 on 31/5/2011. That was within the permitted time to file an appeal. The record shows that an application for stay of execution dated 30/5/2011 was filed seeking stay of execution against the decision of the Kadhi pending the determination of the appeal. This court delivered its ruling on that application on 1/11/2011 and allowed the application on condition that the appellants deposit Ksh.2,000,000/- in an interest earning account within 10 days and that the appeal be listed for hearing within 6 months. It appears that the those orders were not complied with and there was another ruling delivered on 28/2/2012 by Justice Meoli whereby the orders of 1/11/2011 were reviewed. The sum of Ksh.2,000,000/- was reduced to 1,000,000/-. Once again the respondent filed an application dated 28/6/2012 seeking orders of injunction as well as dismissal of the appeal on grounds that the appellants had failed to comply with two previous rulings. The court delivered its ruling on 20/6/2014 and dismissed the appeal with costs. That ruling led to the filing of an appeal before the court of appeal vide appeal no.32 of 2014.

I have carefully gone through the written submissions by the appellants filed on 12/5/2015 as well as the submissions by the respondent filed on 20/4/2015. The appellants contend that they have complied with the seven principles set by the Supreme Court in relation to extension of time. The main reason why this application was filed is because the court of appeal directed the appellants to obtain leave of this court before their appeal can be dealt with. This is alleged to be the reason for the delay. On his part, counsel for the respondent maintain that the applicants have not satisfied the mandatory requirements for granting orders of extension of time as stated by the Supreme Court in the Case of **John Ochanda v Telkom Kenya Ltd (Supreme Court Motion No.4 of 2014)**. It is also submitted that there are no good reasons for the delay, that the grant of leave to file an appeal out of time will prejudice the respondent's right to enjoy the fruits of his judgment and that the appellants have been maliciously dragging this matter in court.

This court dismissed the appeal and the application is only seeking leave to appeal out of time. Once the leave is granted then a fresh notice of appeal can be filed. I have gone through the proceedings of 20/6/2014 when the ruling that is the subject of the appeal was delivered and it shows that counsel for the applicants sought leave to appeal. Justice Meoli, made the following orders:

***“Leave granted and certified copies of proceedings and ruling be supplied.”***

In essence therefore, this court granted the applicants leave to appeal. Section 50 (2) of the Law of Succession Act, Cap.160 state as follows:

***“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.”***

In the Case of **Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another [2014] eKLR** the Court of Appeal stated as follows in relation to the appeals from Kadhi's court.

***“In respect of an order or decree from the Kadhi's court, an appeal lies to the High Court and the decision of the High Court is appealable to this court with prior leave and only in respect of any point of Muslim Law.”***

On the John Ochanda case, the Supreme Court stated seven underlying principles which act as guides to other lower courts in issues relating to extension of time. This seven principles are:

***“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.”*

The appellants' appeal before this court was dismissed on technicalities as opposed to merit. The Court of Appeal simply referred the applicants to come before this court and obtain leave before their appeal can be dealt with.

The applicants withdrew the appeal before the court of appeal and once leave is granted they will have to file a fresh appeal. I have not seen any existing orders stopping the respondent from enjoying the fruits of his judgment. If there are any such orders, then the same are hereby vacated. The applicants are entitled to pursue their appeal. From the time the ruling was delivered on 20/6/2014 to-date is a period of over one year. It is not known when the matter was dealt with by the court of appeal. It has come back to this court and the current application was filed on 4/3/2015. I can not blame the delay entirely on the applicants.

In the end, I do find that the application is merited and is hereby granted in the following terms:

- a) Leave to appeal against the ruling/decision/decreed of 20/6/2014 is granted as prayed.
- b) The applicants to file their fresh notice of appeal within 14 days hereof.
- c) There shall be no orders of stay of execution or status quo being maintained and if any such orders were granted, they are hereby vacated and the respondent is at liberty to enjoy the fruits of his judgment of the Kadhi's Court.
- d) Each party to meet their own costs of this application.

Dated, signed and delivered at Malindi this 15<sup>th</sup> day of June, 2015.

**SAID J. CHITEMBWE**

**JUDGE**