



CIVIL PRACTICE AND PROCEDURE

§ Application for leave to appeal out of time, what court should consider

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CIVIL APPLICATION NO. 14 OF 2011

MARIAM WARFA1ST APPLICANT

FORMER COUNCILLOR MADHEY 2ND APPLICANT

KHADIJA AFFEY 3RD APPLICANT

VERSUS

MAALIM IBRAHIM MOHAMED.....RESPONDENT

RULING

Before court is a Notice of Motion dated 21st February 2011. It seeks the following prayers:-

2. That this honourable court be pleased to grant leave to the applicants to file an appeal out of time.

3. That the Memorandum of Appeal annexed herein be deemed to have been filed on time on payment of the requisite fee.

4. That this honourable court may be pleased to order that there be a stay of execution of the

decree herein pending the hearing and determination of this application.

5. *That this honourable court may be pleased to order that the execution of the decree issued pursuant to the judgment dated 30th April 2010 be stayed pending the hearing and determination of the intended appeal.*

6. *That the respondent be restrained by way of a temporary injunction by himself, his duly authorized agents, servants, assigns, successors, and/or representatives from demolishing, alienating, selling, transferring, taking possession, and/or in any other manner however interfering with the appellants' ownership, physical possession and/or quiet enjoyment of all that parcel of land known as plot number R. 5057, R 4150 and R 1612, situated within the County Council of Wajir pending the hearing and final determination of this application and/or any further orders and/or directions of this honourable court.*

The applicant in his supporting affidavit sworn on his own behalf and on behalf of the first intended appellant stated that he was aggrieved by the judgment delivered in Senior Resident Magistrate Court Wajir in Civil Case No. 5 of 2010. That judgment was delivered on 30th April 2010. Both he and his co-applicant instructed an advocate M/S Othieno Advocates to file an appeal against that judgment. According to the affidavit in support, that advocate filed a notice of appeal at Wajir Magistrate's Court similar to the notice of appeal that is filed when an appeal is being lodged from a High Court decision to the Court of Appeal. I need not state that the notice of appeal filed in Wajir did not conform to the provisions of Order 42 of the Civil Procedure Rules. It is further stated in the supporting affidavit that the applicants instructed the said advocate to file an application of stay pending appeal. It is deponed in their affidavit that whenever they made inquiry from that advocate, they were promised that the same was being sought. It was not until they obtained legal advice from their current advocate that they found out that M/S Othieno & Co. Advocates had not filed an appeal or stay of execution. It is on that basis that the applicant sought before this court leave to file an appeal out of time. Section 79 G of the Civil Procedure Act provides that an appeal from a subordinate court to the High court should be filed within 30 days from the date of the decree order. Judgment of Wajir Magistrate Court was delivered on 30th April 2010. The appeal should have been filed by 29th May 2010. To date, it has not been filed. As required the applicants had adequately explained their delay in filing their appeal. Explanation of such delay is required as was stated in the case **Nderitu Gicheru Vs. Cecilia Gathoni Gatere** Civil Application No. 122 of 2008 as follows:-

“It is now settled law that whenever there is a delay, the party guilty of the same should offer some explanation for it before an extension of time in his favour can be considered Kenya Ports Authority Vs. Silas Obengele Civil Application No. 297 of 2004 (unreported).”

In the case of Reliance Bank Limited (in liquidation) & 2 others Vs. Southern Credit Bank Corporation – Civil Application No. 118 of 2007 (UR 78/2007) R.S.C. Omolo J.A. had this to say:-

“Then there is the delay of 64 days to which I have referred and in my view that delay remains unexplained, and as I have stated, any amount of delay, even if it be one day ought to be explained in some way.” (Emphasis provided)

The applicant seeks the court to exercise its discretion and to grant them leave to file an appeal out of time. The Court of Appeal in the case **Husamuddin Gulamhussein Pothiwalla & Another Vs. Kidogo Basi Housing Corporative Society Limited and 31 others** Civil Appeal No. 330 of 2003 made the following statements about the court's exercise of its discretion.

“.....court’s discretion which must always remain available if the ends of justice shall be met, and where the circumstances of each case so merit.”

The applicant’s prayer for stay of execution pending appeal is defeated by the provisions of order 42 of the Civil Procedure Rules because there is no appeal in existence at present. A stay of execution can only be granted in an appeal from the subordinate court to the High Court where such an appeal has been instituted. In this case, no appeal has been instituted. It is for that reason that the prayers for stay of execution cannot be granted. It should also be noted that Wajir Magistrate’s Court is administratedly under High Court of Nairobi. See Gazette Notice No. 1756 of 27th February 2009. The applicants will therefore have to file their appeal at High Court Nairobi. I grant the following orders:-

- 1. Leave is hereby granted to the applicants to file at the High Court Nairobi their appeal against the judgment of SRM Wajir Civil Case No. 5 of 2010 within 14 days from todays date.***
- 2. Prayers No. 4, 5 and 6 of Notice of Motion dated 21st February 2011 are hereby struck out.***
- 3. There shall be no orders as to costs in respect of the Notice of Motion dated 21st February 2011.***

Dated, signed and delivered at Meru this 17th day of March 2011.

MARY KASANGO
JUDGE