



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE 15 OF 2008

TWALIB ALI SALIM.....PLAINTIFF

VERSUS

ALI SALIM AHMED BASAIDA.....DEFENDANT

R U L I N G

The application dated 2-6-08 is by way of Notice of Motion made under section 79G, 95 Civil Procedure Act, Order XLIX rule 5 of the Civil Procedure Rules seeking that the court do grant leave to the applicant to file appeal after expiry of 30 days, against an order given by the Kadhi's court at Lamu in Miscellaneous Application No. 4 of 2007. It is premised on grounds that the applicant is late by 21 (twenty one) days from the date the certificate of delay dated 2-4-08 was issued.

- (b) The cause of the delay was not intentional but was due to non availability of all registered proprietors of Plot no. Lamu/Block II/23 being the subject matter in question.
- (c) The applicant has now opted to file an appeal without the company of the rest of registered proprietors of the said parcel.

In the affidavit in support of the application he depones that he intends to appeal against the Kadhi's orders canceling registration of Title Deed issued to named persons including the applicant. He explains that upon receiving the proceedings and order on 2-4-08, he verbally communicated to his brothers and requested them to avail themselves so as to raise funds to engage a counsel to conduct the appeal. He has since given up on the inclusion of his brothers who informed him they were not able to engage in the appeal. Upon consulting, his advocate advised him that he could appeal against the order without involving his brothers, but he realized he was late in filing the appeal and hence this application.

He avers that his appeal has high chances of success and if the leave sought to appeal out of time is not granted, then he shall suffer irreparable loss and damages.

The application is opposed and respondent in the replying affidavit states that the application has been overtaken by events as he has already acquired a new title to the land in issue being plot No. Lamu/Block II/23 in his name and that his son Omar Ali Salim is about to acquire title for the portion on which he has built his house and to that extent, the title has been altered – he has annexed copy of the new Title Deed as Ex ASAB1. Respondent avers that he has even sold four portions of the plot Lamu/BlockII/23 to cater for medical expenses as he is ill and in urgent need of treatment and gave another portion of the same plot to the Wakf Commission – he has annexed sale agreements for the sold portions as Ex ASAB 2.

That the applicant was given thirty days to appeal from the ruling by the Kadhi's court on 21-11-07 but the time lapsed. Thereafter, the applicant made an application for stay of execution of the ruling and stay orders were granted on 23-1-08 as per annexure ASAB 3 – this stay was sought on grounds that applicant intended to appeal against the Kadhi's orders.

It is respondent's contention, that by 2-4-08, the proceedings were ready, and the applicant duly collected his copy of the duly certified copies. However applicant did not move to file his appeal in time and so at the lapse of thirty days, respondent applied for a new title and the same was issued on the 3rd June 2008.

It is respondent's further contention that applicant has not been vigilant and the court should not exercise its discretion to allow him to file an appeal out of time. Further that the intended appeal does not even stand chances of success as it is already overtaken by events.

Respondent had filed a further affidavit after leave granted by court had expired and the same is expunged, since respondent did not consider it necessary to seek further leave even at the hearing of the application to admit the same out of time. He could have raised it before hearing began.

In arguing the application, Mr. Michira for the applicant submitted that there is a merited appeal as the Kadhi issued orders in excess of his jurisdiction by ordering cancellation of a Title which had been issued to the applicant and his brothers.

Mr. Michira drew this court's attention to the supplementary affidavit and says respondent is misleading the court as the order intended to be appealed against is the one dated 22-11-07 and that respondent has hurriedly subdivided the parcel in order to quickly benefit from the unlawful or irregular order and so applicant's constitutional right to ownership of property has been infringed.

In response, Mr. Machuka for the respondent submitted that applicant lost his chance, having obtained stay orders after they were extended and a certificate of delay issued.

He argues that there is no reason why applicant failed to seek stay while making his application to be allowed to file appeal out of time. He points out that certain adverse activities have already been undertaken relating to the disposed of portions and the face of the property has completely changed. He submits that there have been latches by the applicant to move this court so as to get the necessary reliefs. As for the explanation about getting his brothers to file the appeal with him, Mr. Machuka states that those are applicant's relatives who live with him and he had a chance to talk to them and persuade them to make a decision in a timely manner and that the intended appeal will not even achieve the goals intended by the applicant.

Mr. Machuka also takes issue with paragraph 11 of the applicant's affidavit which seems to suggest that this court should drop the draft memorandum of appeal and adopt the one annexed to it; saying this is improper way of amending a pleadings. He has cited the case of **Mac Watt Estate Ltd. V Mbwany CA 247 of 2000** which set down the principles on extension of time.

It seems the cause of delay in filing appeal is that applicant was waiting for his brothers to get together, pool their resources so as to instruct a counsel to file and conduct the appeal on their behalf – this never happened and meanwhile time lapsed.

Section 79G of the Civil Procedure Act provides:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparing and delivery to the appellant of a copy of the decree or order”

while order XLIX rule 5 recognizes the court's power to expand time, stating that:

“The court shall have power to enlarge such time ...as the justice of the case may require...”

The certificate of delay was issued on 2-4-08, while the draft memo of appeal is dated 3-9-08, - the appeal ought to have been filed at least by 3rd May 2008 taking into account the period of delay in preparing records by the court.

Is there any good reason to allow for extending of time within which to file the appeal? The applicant was granted stay of execution as he intended to appeal.

The court in Lamu delayed in having the typed copies of proceedings and ruling ready and to that effect, applicant was issued with a certificate of delay but he did nothing to secure the status of the property.

I take note that the subject matter herein involved land and that certain adverse orders were made against the applicant which greatly grieves him. His contention is that he has an arguable appeal because the procedure adopted by the Kadhi in issuing the orders is unknown in law and therefore illegal and applicant should not be allowed to reap from such a situation. So that even if ownership on the property has changed, applicant is persuaded that the appeal has merit. Is the explanation given for the delay satisfactory?

The Macwatt case quoted another decision **Leo Sila Mutiso V Rose Hellen Wangari Mwangi Civil Appeal 251 of 1997 (Nrb)** that:-

“it is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matter which this court takes into account on deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted.”

In the present situation the draft memorandum of appeal is dated 3-9-08

How long surely did it require for applicant to consult his siblings and make up his mind? What caused the delay? – Applicant was hoping to pool resources with his brothers so as to instruct an advocate to take up the appeal, applicant had initially been very diligent in setting matters in motion.

He obtained stay orders and even a certificate of delay – certainly he had interest in pursuing the appeal and he cannot be faulted for trying. I note that the certificate of delay was issued on 2-4-08 so even if period of delay was to be taken into account then there was another five months of unexplained inactivity.

Then there is the applicant’s own undoing averment in paragraph 11 of the supplementary affidavit to the effect that the draft copy of appeal does not contain all the grounds of appeal – so what does that mean? That he has not adequately addressed or is not sure what grounds he wishes to raise on appeal almost ten months later? The applicant is guilty of inordinate delay and latches, it was due to his act of omission that respondent took the opportunity to deal adversely with the property and to allow this appeal to be filed out of time will be prejudicial to respondent and the subsequent individuals who have been affected by the respondent proceeding to execution.

Has the applicant demonstrated that he has an arguable appeal with good chances of success? He insists he does, based on his assertion that the orders made by the Kadhi had no legal basis – respondent says there are no chances of success because the appeal has been overtaken by events, property has been subdivided, sold and adverse developments taken place on the same and the respondent has used the proceeds from the sale for his treatment.

The memorandum of appeal is non specific, simply stating that the learned Kadhi erred in law and fact in violating the Civil Procedure Act and the Limitations of Actions Act – these are a whole range of provisions and it is not clear which particular provisions were violated. The applicant has not demonstrated that he has an arguable appeal with chances of success and so I find no reason whatsoever

to allow the application.

Consequently, the application for enlargement of time is dismissed with costs to the respondent.

Delivered and dated this 17th day of **June 2009** at Malindi.

H. A. Omondi

JUDGE

Mr. Michira for applicant

Mr. Machuka for respondent