



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 398 OF 2007

IN THE MATTER OF: THE ESTATE OF SAID ATHMAN SHERA

(DECEASED)

AISHA SAID ATHMAN PETITIONER

- Versus -

LANGONI SALIM SAID RESPONDENT

A N D

ALI MOHAMED MSUO PURCHASER

Coram: Before Hon. Justice L. Njagi

Court clerk - Ibrahim

Mr. Mwinyi for Applicant

Mr. Mazrui for Respondent

R U L I N G

This application is brought by a notice of motion dated 7th September, 2007, and is made under the provisions of Order XLI rule 4 and Order L rule 1 of the Civil Procedure Rules; and sections 3A, 63(e) and 79G of the Civil Procedure Act. It was filed under a certificate of urgency under which it was certified urgent and service dispensed with in the first instance. The remaining three prayers were for the following orders –

1. That this Honourable Court be pleased to order a stay of execution and all proceedings in the Kadhi's Court Case No. 53 of 2005 pending appeal.
2. That this Honourable Court be pleased to enlarge time and allow the applicant to file appeal out of

time.

3. That the costs of this application be provided for.

The application is supported by the annexed affidavit of LANGONI SALIM SAID and is based on the grounds –

- (a) That the respondent herein wishes to file an appeal against the ruling dated 25th June, 2007.
- (b) That the respondent herein delayed in filing appeal as she had been away in Lamu since the time of the ruling and only came back to Mombasa sometime on 5th September, 2007.
- (c) That though the respondent had been informed of the court's ruling dated 25th June, 2007, she was labouring under the impression that she would first receive money deposited in court to allow her to purchase an alternative home for herself and her children.
- (d) That the applicant learnt on 5th September, 2007, that one ALI MOHAMED MSUO, the purchaser herein, had through an application dated 29th August, 2007 sought vacant possession of the suit premises.
- (e) That the purchaser might commence eviction of the respondent and her minor children any time in execution of a certificate of sale herein.
- (f) That the respondent has n arguable appeal against the petitioner herein and the ends of justice will not be met if execution is not stayed.
- (g) That if execution will not be stayed the respondent will suffer irreparable loss as she will lose her only home, and her children shall be homeless and destitute.

In response to the application, two replying affidavits were sworn and filed by Asha Said Athman and Ali Mohamed Msuo. At the hearing of the application, Mr. Mwinyi appeared for the applicant while Mr. Mazrui appeared for the respondents. Mr. Mwinyi challenged Asha Athman's replying affidavit on the ground that it was filed without instructions from the deponent. Mr. Mazrui made it clear that he would not rely on the affidavit sworn by Asha, but on that sworn by the purchaser, Ali Mohamed Msuo, on 8th November, 2007.

Canvassing the application for the applicant, Mr. Mwinyi conceded that the application for enlargement of time was filed after a delay of about 42 days. He submitted that the delay was not inordinate. The explanation for the delay was that after the ruling sought to be appealed against was delivered, the applicant traveled to Lamu and never came back to Mombasa until around 5th September, 2007, when she was informed that an order had been issued for her eviction from the suit premises. They moved to the Kadhi's Court on 6th September, 2007 for stay, but it was rejected summarily. Then they came to this court. Counsel then outlined the grounds of appeal and submitted that the applicant had an arguable appeal with good chances for success. He further submitted that the applicant would suffer injustice if the defective ruling sought to be appealed against was left to stay. He also contended that the court was still holding money which can be used as the applicant's security, and that if leave was granted, the purchaser would suffer no injustice as the money was still being held by the court. Finally, Mr. Mwinyi submitted that the purchaser had participated in proceedings which were a nullity and therefore he was not a bona fide purchaser for value. On that note, he asked for orders as prayed.

On his part, Mr. Mazrui for the purchaser referred to the conditions upon which a stay of execution may be granted as spelt out in Order XLI rule 4(2) of the Civil Procedure Rules. Referring to the requirement that the application for stay should be made without unreasonable delay, he submitted that the applicant had admitted that she sought the stay out of time and no reasons had been given. Even if she had gone to Lamu as alleged, her advocate was still in Mombasa and knew that they needed to appeal but did not do so. He therefore submitted that the application was outrageously out of time. Regarding the condition as

to provision of security by the applicant, he submitted that it was mischievous for the applicant to offer as security the money which was deposited in court by the purchaser. He urged that if the application was granted, the purchaser would be denied his money, the property paid for and the income therefrom, and therefore the application should fail. However, if the court was minded to indulge her, then sufficient security should be ordered to cater for the interests of the purchaser, and if the court also enlarged the time for filing the appeal, then the purchaser should be awarded the costs.

In a short reply, Mr. Mwinyi stated that the suit premises were the only property of the deceased where the applicant lives with her children.

I have considered the application and the submissions of counsel. Since no appeal has been filed as yet, it is imperative that I should first deal with the issue of whether or not the court should enlarge time to allow the applicant to file the appeal out of time. The relevant law on this point is found in section 79G of the Civil Procedure Act, which stipulates as follows:

“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 ...

Provided 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.”

In this case, the order sought to be appealed against was delivered on 25th June, 2007. The applicant had thirty days from that date in which to file the appeal. She did not do so. She now comes to court seeking enlargement of time in order to allow her to file the appeal out of time. This may be done if, but only if, she satisfies the court that she had good and sufficient cause for not filing the appeal in time. The issue, therefore, is whether she has satisfied this condition.

In paragraphs 3, 4 and 5 of her supporting affidavit, the applicant deposes that her advocates requested for certified copies of proceedings, but the same are yet to be supplied. When the ruling was read on 25th June, 2007, she was under the impression that she would receive her share of the inheritance together with that of her children so that she could purchase another house for them. After the date of the ruling, she traveled to Lamu to attend to a sick relative and did not come back to Mombasa until sometime on 5th September, 2007, when she was informed by her advocate that one Ali Mohamed Msuo had applied to the court for her eviction. These are the reasons that led to the delay in filing the appeal within the statutory period.

I note from the uncertified copy of the extract from the proceedings in the Kadhi's court, which is annexed as an exhibit to the supporting affidavit, that after the ruling was pronounced, learned counsel for the applicant had the presence of mind to apply immediately for certified copies of the proceedings and ruling. But the enthusiasm to appeal seems to have withered with that oral application. Thereafter no steps were taken to ensure that the certified proceedings were obtained expeditiously. Such conduct is not compatible with that of a litigant who is genuinely intent on pressing on appeal. This complacency persisted until it was jolted by the purchaser's application for eviction of the applicant. That application led to the applicant making this application about 21/2 months after the ruling was made, and about six weeks after the expiry of the statutory period for filing the appeal. Such a long lapse of time is not reasonable.

It is stated in the supporting affidavit that although the Applicant's Advocate applied for certified copies of proceedings, the same are yet to be supplied. This is a polite way of laying the blame on the court's door step. I have already observed that the applicant did absolutely nothing to urge the court to expedite the provision of the proceedings even when a little judicious prodding may have been necessary. But quite apart from that, I also note that the applicant has attached to the application a copy of a draft memorandum of appeal in a bid to demonstrate that the proposed appeal has a high probability of success. But nothing has changed. If such a draft memorandum can be prepared now on the strength of photocopies of the proceedings, it could as well have been prepared within the 30 days allowed by 8 section 79G.

Finally, the applicant states that she went to Lamu after the ruling was read, and came back to Mombasa on 5th September, 2007. It is significant that this was the day before the hearing of the purchaser's application for the eviction of the applicant, which makes it a very interesting coincidence. But, no matter. The applicant's absence from Mombasa was not of any consequence. It could not have influenced anything since her physical presence in Mombasa was not a precondition to the filing of the appeal. As long as her Advocates were still in Mombasa, the appeal could have been filed, her absence notwithstanding.

The court's discretion to extend time under section 79G can only be exercised if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. It is only then that other considerations such as the absence of any prejudice can be considered. In my respectful opinion, no good and sufficient cause has been demonstrated in this matter to warrant the enlargement of time within which to file the appeal. I find that there was a lack of due diligence on the part of both the applicant and her advocates in taking steps to ensure that the appeal was lodged in time.

Being of that persuasion, I don't think that I need consider the issue of stay of execution since there is no appeal. But if I had to consider it, I would expect the applicant to satisfy the conditions set out in Order XLI rule 4(2) of the Civil Procedure Rules before qualifying for the grant of stay of execution. This subrule reads as follows –

“No order for stay of execution shall be made under subrule (1) unless –

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

Regarding the twin conditions laid out in paragraph (a), the applicant has not come out clearly as to what substantial loss she will suffer if the suit premises are sold and the proceeds thereof distributed equitably among all the beneficiaries. And even if she had demonstrated any such loss, which she has not, the application was not made timeously. It was made after a long and unreasonable delay.

Secondly, the applicant has not offered any security. The only attempt at making any such offer was with reference to the money deposited in court by the purchaser. Counsel for the applicant told the court that such money “can be used as our security.” That money is not the applicant's money. It should not, therefore, be used as her money. The applicant has therefore failed to satisfy the conditions laid down in Order XLI rule 4(2) for the grant of an order for stay of execution.

Finally, unfettered as the court's discretion may be under section 79G of the Civil Procedure Act, it must be exercised judicially. This is a court of equity. On 29th August, 2007, the Kadhi's court made an order in Kadhi's Court Succession Case No. 53 of 2005, compelling the Applicant to pay the purchaser the latter's rents from June to August, 2007. That order is still to be obeyed. Unless and until it is obeyed, the applicant is not deserving of any equitable relief as she has come to court with unclean hands.

In sum, I don't think that the applicant has made out a case either for enlargement of time within which to file the appeal, or for the grant of a stay

of execution. The application is accordingly dismissed with costs.

Dated and delivered at Mombasa this 18th day of March 2008.

L. NJAGI

JUDGE