

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC CIVIL APP NO. 84 OF 2004

1. HALIMA ABDI MOHAMED

2. ABDI HAMID SHEIKH MOHAMED..... APPLICANTS

VERSUS

HAWA MAALIM IBRAHIM..... RESPONDENT

Coram: Before Hon. Justice Mwera

Magolo for the Applicant

M. Koli for the Respondent

Court clerk – Sango

R U L I N G

By their notice of motion dated 10-2-04 which was brought under SS. 79 G, 3A Civil Procedure Act, the applicants seek orders that they be granted leave to appeal out of time.

Mr. Magolo told this court that the Kadhi at Garissa gave judgement in K.C. No.27 of 2003 on 27-8-03 regarding a certain piece of land known as PLOT NUMBER 107 GARISSA. That both the applicants (being a mother and daughter) occupy this land on which the deceased one ISSACK ABDI FARAH had built a home for them.

That the said Issack had another wife, the respondent who was occupying Plot No.67 in the same town. That the respondent then sued the applicants over the said plot No.107 and got judgement.

That the applicants being dissatisfied with that judgement and acting in person filed Civil Appeal No.166 of 2003 on 27.10.2003. When they instructed Mr. Magolo to take over the appeal, he noticed that it had been filed 2 months after the appeal period expired and without the court's leave. That the applicants were ignorant of the statutory time within which to appeal (30 days) and that appeal was withdrawn. That all the time the respondent has made moves to evict the applicants which action, it seems, will result in hardship and loss to them unless stay orders are granted. That all the time the applicants have been anxious to appeal and made moves though in ignorance and error, in that direction. That as per the draft memorandum of appeal annexed to this application, the applicants have an arguable appeal and therefore the orders sought ought to be granted.

Mr. M. Koli told the court that this application was meant to keep the respondent away from enjoying her fruits of litigation; that the affidavit in support did not state that the 2nd applicant had been authorized to swear it on behalf of the 1st applicant and at its bottom the application did not say on whom it was meant to be served. And that the applicants did not invoke the provisions of 049 r 5 Civil Procedure Rules on extension of time.

Having heard both sides it is noted that even if 049 r 5 Civil Procedure Rules is not invoked, no harm is done as that provision deals with what S.79 G mandates. The application may not bear the note as to who to serve at its bottom but this court does not consider that as a fatality. After all the respondent was served and Mr. Koli Advocate appeared. A stay of the Kadhi's Court orders was sought but without citing the

provisions on staying execution. However looking at the whole matter, this court is inclined to grant the applicants leave to file and serve a memorandum of appeal within 30 days. The dispute is over land left by a deceased relative. Each side should be allowed to litigate over the issue as best possible. Prayers 1 and 2 granted but costs will go to the respondent.

Orders delivered on 17th September, 2004.

J.W. MWERA

JUDGE