



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY APPEAL NO. E004 OF 2020

MOHAMED BAISHE.....APPLICANT

VERSUS

UMMI FAMAU MADI

MWANAAMINA HASSAN UREMA.....RESPONDENTS

AND

TIMA MOHAMED KOMBO

BINA ABDALLA HASSAN.....INTERESTED PARTIES

RULING

1. By a notice of motion dated 9th February, 2021 and filed on 9th February, 2021, the Ummi Famau Madi and Mwanaamina Hassan Urema (hereafter the applicants) moved this court pursuant to Section 1A, 1B, 3A and 79B of the Civil Procedure Act seeking Orders as hereunder;

a. Spent;

b. That this file and Family Appeal No 5/19 be consolidated and heard together and the decision in this appeal to abide the other.

c. That this appeal be struck out for being frivolous, vexatious, a red herring calculated to delay and obstruct the cause of justice.

d. That the appellant do provide security for costs and render accounts on the property occupied by him.

e. That the court do grant any relief (s) it deems fit and expedient to meet the ends of justice.

2. The application is anchored on grounds set out on the face of it and averments contained in the affidavit in support sworn on 9th February, 2021 by Ummi Famau Madi with authority from his co-applicant.

3. It is the applicants' case that vide a ruling delivered on 17th January, 2020 in Family Appeal No 5/2018 between Mohamed Baishe (the appellant) and now the appellant in this file Versus Tima Hassan Urema & others (respondents) and Tima Mohamed Kombo and Bina Abdalla Hassan, the court struck out the appeal pursuant to a notice of motion dated 3rd April, 2019. The said appeal was struck out on the ground that it was filed after a long and unreasonable period of time.

4. The applicants averred that the appellant/respondent has not filed any appeal before the court of appeal despite filing a notice of appeal indicating of his intention to challenge the said ruling. They further stated that, leave granted in family appeal No.5 of 2018 was for the appellant to file an appeal out of time subject to lodging the appeal within 30 days which has not been complied with. That since 18th September 2020 when the orders were granted, 30 days have since lapsed without any action on appeal taken.

5. In response, Mohamed Baishe the appellant /respondent filed a replying affidavit sworn on 18th March 2021 terming the application as defective since it was not fully supported by a duly sworn and commissioned affidavit hence a waste of time.

6. That pursuant to the court's ruling dated 18th September, 2020, he was granted leave to file his appeal out of time within 30 days. That he

proceeded to file a memorandum of appeal under this file on 14th October, 2020 (see annexure MBA-2) and a record of appeal dated 16th October, 2020 (see annexure MBA -3)

7. He stated that he was not aware of Family Appeal No 5/18. Further, that the order of stay granted in the ruling of 18th September 2020 was subject to filing an appeal within 30 days which he has since complied with hence the court should proceed to hear the appeal.

8. In their rejoinder, the applicants did file a supplementary affidavit sworn on 24th March, 2021 by Gichana Advocate counsel for the applicant seeking to correct the erroneous reference of Family Appeal No 5/18 as family Appeal No 5/19. He deponed that there are two appeals in respect of the same subject.

9. During the hearing, Mr Gichana argued that the leave granted in the ruling of 18th September, 2020 was to enable the appellant whose appeal had been struck out in Family No 5/2018 file an appeal to the Court of Appeal within 30 days and not to the High Court. On the other hand, Mr Mwadzogo for the respondents reiterated the averments contained in the replying affidavit. He contended that the appellant had complied with the orders of the court. He however admitted that the appellant has not filed any appeal to the court of appeal. Mr Mwadzogo further admitted that he had not had the opportunity to peruse file No 5/18 as he was not on record then.

10. I have considered the application herein, response thereto and oral submissions by both counsel.

11. Before I endeavor to determine the application, a brief factual background will suffice. Vide a memorandum of appeal dated 15th February, 2018 and filed the same day as family Appeal No 5/18, Mohamed Baishe the appellant/respondent herein sought to challenge the judgment delivered on 16th January, 2018 in Kadhi's Succession Case No 6/2011.

12. The appeal having lied dormant for a long time, the respondents Tima Hassan Urema & others the applicants in this file moved the court seeking to dismiss the appeal for want of prosecution.

13. Having heard the application fully, Justice Thande struck out the appeal on 17th January 2020 for want of prosecution as no record of appeal had been filed for over a year since the memorandum of appeal was filed.

14. Subsequently, the appellant filed an application dated 28th January, 2020 under the same file seeking leave to appeal against the decision of 17th January, 2020 to the court of appeal out of time. Having heard the application fully, the court granted conditional leave vide its ruling of 18th September, 2020 by directing that;

i. Leave to appeal is hereby granted.

ii. Stay of execution of the order of 17th January, 2019 granted in terms that the appeal shall be filed within 30 days from today's date. In default the stay granted shall automatically lapse.

iii. The applicant shall bear the costs.

15. A perusal of the court's ruling dated 18th September, 2020 at paragraph 6 reveals that the applicant /Appellant was seeking leave to appeal to the court of appeal out of time and not to the High Court.

16. It is also clear from the application dated 28th January, 2020 that the appellant was seeking leave to appeal to the Court of Appeal. Indeed, there is a notice of appeal filed on 27th January, 2020 indicating that the appellant intended to Appeal to the Court of Appeal.

17. For all purposes and intent, it is undoubtedly clear that the leave sought and therefore granted conditionally on 18th September, 2020 was for the applicant to appeal to the Court of Appeal within 30 days and stay of execution allowed on condition that the appeal was filed within that period.

18. It is unfortunate that the appellant decided to file Family Appeal No 4/20 against different parties challenging the same decision in the Kadhi's court file No 5/18. How can the appellant pretend that the leave granted was to file an appeal to the high court out of time through the ruling of 18th September, 2020 which is plain and clear on the face of it.

19. For Mr Mwadzogo to claim that he had no idea of what happened in Family Appeal No 5/18 is being dishonest. He is the one who prepared a replying affidavit in response to the application herein attaching the ruling of 18th September 2020 in family Appeal No.5 of 2018. The leave granted in Appeal No.5 of 2018 was to facilitate the appellant file an appeal to the court of appeal. As correctly admitted, there is no appeal filed before the court of appeal to date. On the question that the affidavit in support of the application herein was not commissioned, it was clarified that the court copy has a duly commissioned affidavit.

20. I do agree with Mr Gichana that the appeal herein is an abuse of the court process. It is technically filed to circumvent the orders of 17th January, 2020 and 18th September 2020. In any event, how could the appellant file afresh appeal under this file against fresh parties who were not the respondents in Family Appeal No. 5 of 2018 long after 16th January 2018 when the Kadhi's decision the subject of this appeal was determined. In view of the reasons stated above, the memorandum of appeal and record of appeal filed on 14th October, 2020 and 16th October, 2020 respectively are hereby struck out with costs to the applicants.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11TH DAY OF JUNE, 2021

J. N. ONYIEGO

JUDGE