



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 11 OF 2015

ROCKY JUMA MZEE.....APPELLANT

VERSUS

REHEMA SALIM NDORO.....RESPONDENT

RULING

1. By a Notice of Motion dated 3.10.19, the Respondent/Applicant, Rehema Salim Ndoro seeks extension of time to file a cross appeal out of time against the judgment of 10.4.15 by Hon. Abdulhalim H. Athman, Principal Kadhi, in Mombasa Kadhi Succession Cause No. 31 of 2011.

2. The grounds upon which the Application is predicated as contained in the Application and in the Respondent/Applicant's affidavit sworn on 3.10.19 are that the Respondent/Applicant had before the conclusion of the succession cause, moved from Mombasa to Tezo. She then became ill and owing to a breakdown of communication between her and her advocates, she was unable to give them instructions. She was informed of the import of the judgment, when she visited her advocates on 9.9.19. She is aggrieved by the judgment as the Hon. Kadhi distributed the estate of her mother Fatuma Salim Ndoro 's estate, yet the estate under consideration was that of her father Salim Ndoro Wale. She therefore seeks leave to file a cross-appeal out of time. According to her, the Appellant/Respondent will not suffer any prejudice as he has all along been enjoying exclusive use of the rental income from the estate.

3. Rocky Juma Mzee, the Appellant/Respondent has by his replying affidavit sworn on 10.2.2020, opposed the Application. He averred that contrary to her allegations, the Respondent/Applicant was present when the judgment was delivered. The delay in filing the cross-appeal is inordinate and inexcusable. Further, the draft memorandum of appeal does not disclose any arguable appeal as there is no evidence to prove that the deceased had any property capable of being distributed. The Respondent/Applicant has had notice of the appeal herein since 2015 and this Court should not consider an application brought 4 years late.

4. Directions were taken for filing of written submissions and timelines duly given. However, the Respondent/Applicant did not comply and has to date not filed her submissions.

5. The Application is expressed to be brought under the provisions of Sections 3, 3A, 79G and 95 of the Civil Procedure Act and Orders 22, 42, 50 and 51 of the Civil Procedure Rules and all other enabling provisions of the law. It is noted that the Application arises from a succession petition in the Kadhi's Court at Mombasa in respect of the estate of Salim Ndoro Wale. The governing law relating to succession matters, is the Law of Succession Act. By dint of Rule 63 of the Probate and Administration Rules, the aforesaid provisions of the Civil Procedure Act and the Rules made thereunder, save for Order 50, are not applicable herein.

6. The appellate jurisdiction of this Court in respect of decisions of Kadhis Courts is stipulated in Section 50 of the Law of Succession Act which provides:

50. Appeals to High Court

1. An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.

2. An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.

7. The Law of Succession Act is silent on the time within which an appeal from the Kadhis' Courts ought to be filed in this Court. However, Section 58 of the Interpretation and General Provisions Act provides:

“Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises”.

8. The fact that no timeline for filing an appeal is prescribed under the Law of Succession Act, does not mean that the period is endless. Under Section 58 of the Interpretation and General Provisions Act, such appeal must be filed without unreasonable delay. Parliament recognized that there will be instances when delay will occur in doing an act, and thus clothed the Court with the power to enlarge the time for doing the same and impose conditions. Order 50 Rule 6 of the Civil Procedure Rules provides:

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

9. It is trite law that an order for extension of the time to file an appeal is discretionary. Such discretion must however be exercised judicially. The factors to be considered in an application such as the present one, were set out by the Court of Appeal in Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR as follows:

“For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable.

10. The Judgment in respect of which the Respondent/Applicant seeks leave to file a cross-appeal was delivered by the trial Court on 10.4.15. The Application herein was filed on 3.10.19, about 4½ years later. This by all standards is inordinate delay.

11. As regards the reasons for the delay, in filing the cross-appeal or indeed the Application herein, the Respondent/Applicant stated that she relocated from Mombasa to Tezo during the pendency of the matter in the trial court, became ill and lost touch with her advocates. She became aware of the judgment and its import on 9.9.19 when her health improved and she visited her advocates. Are the reasons advanced by the Respondent/Applicant plausible? To begin with, the record shows that both parties were represented by counsel on 10.4.15, when judgment was delivered. Further, the Respondent/Applicant has not given no details of her alleged illness, such as the period or even the nature or seriousness of the same. Evidence by way of a medical report would have been helpful, but none was availed. It is a rule of evidence that he who alleges must prove. Section 107 of the Evidence Act provides:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

12. The burden of proving that the Respondent/Applicant was unwell and thus unable to give instructions to her advocates lay squarely with her. She however failed to discharge the burden placed upon her. Extension of time is an equitable remedy and a party seeking extension of time must demonstrate, by laying a basis to the satisfaction of the Court, that he is deserving of the same. The Court must not be moved by sympathy. Where an applicant has no valid excuse for delay in filing an appeal, as the Respondent/Applicant in the present case, the Court must dismiss the application. This was the holding in the case of Daphne Parry vs. Murray Alexander Carson [1963] EA 546, where the Court stated:

Though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

13. After the judgment was delivered on 10.4.15, the Respondent/Applicant took no action until 3.10.19. She says that she was advised of the import of the judgment when she visited her advocates' office on 9.9.19 and was aggrieved by the same. This notwithstanding, the Respondent/Applicant took no action until almost a month later on 3.10.19, when she filed the present Application. Further, the record shows that the Respondent/Applicant's advocates had notice of the Appellant/Respondent's appeal as early as May 2019 but failed to attend Court on several occasions. Further, the Respondent/Applicant did not file written submissions in respect of her own Application. This conduct is indicative of a party who is not interested in pursuing her intended cross-appeal or the Appellant/Respondent's appeal.

14. It is emphasized that the prayers sought by the Respondent/Applicant herein are discretionary. The conduct of a party is key in determining whether the Court will exercise its discretion in his favour. The Court of Appeal said as much in the case of Ferruz Omar Mahendan & 4 others v Ahmed Mohamed Honey [2016] eKLR:

Of course, in the exercise of discretion, the court looks at the conduct of the parties in the proceedings. If the conduct of a

party is appalling as in this case, the court will rightly refuse to exercise its discretion in his favour.

15. My finding is that conduct of the Applicant makes her underserving of the orders sought and I decline to exercise my discretion in her favour. In light of the foregoing, the Application dated 3.10.19 lacks merit and the same is hereby dismissed. Costs in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 10th day of July, 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant/Respondent**

..... **for the Respondent/Applicant**

.....

Court

Assistant