



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 43 OF 2018

HAMISI HAMISI MWAKURYA

MWANAKOMBO HAMISI MWACHANGU.....APPLICANTS

VERSUS

NIMALI MOHAMED MWANYOMBO

RAMA HAMISI MWAMADZENGO.....RESPONDENTS

RULING

1. By a Notice of Motion dated 20.11.18, the Applicants Hamisi Hamisi Mwakurya and Mwanakombo Hamisi Mwachangu seek extension of time to file appeal and that the memorandum of appeal filed by them on 31.10.18 be deemed as properly filed.

2. The grounds upon which the Application is predicated are set out in the Application and in the 1st Applicant's affidavit sworn on 20.11.18. The Applicants claim that the Respondents Nimali Mohamed Mwanyombo and Rama Hamisi Mwamadzenge filed an *ex parte* petition in the Kwale Kadhi's Court which petition involves Title No. Kwale/Ukunda/135 (the Property) registered in the name of the Applicants. In a judgment of 24.2.15, the Hon. Kadhi revoked the title to the Property. When the Applicants got wind of the same, they applied for review of the orders raising jurisdictional issues. The Hon. Kadhi in his ruling of 7.2.18 declined to review the order. The delay was caused by the Applicants' former advocates being involved in election petitions. Further, the Hon. Kadhi was on transfer and it took inordinately long for the Applicants to get a copy of the ruling. The Applicants have raised purely jurisdictional questions. No prejudice will be suffered by the Respondents if the orders sought are granted. The Applicants will suffer irreparable harm if the orders are not granted.

3. The Respondents in their grounds of opposition dated 19.12.18 state that the Application is misconceived, frivolous, vexatious, intended to defeat the ends of justice and therefore an abuse of the Court process. The Appeal is intended to deny the Respondents the fruit of their judgment delivered on 24.2.15. The Applicants had all the time since 2015 to file the appeal which they did not. The Applicants' claim that their previous advocate was held up in election petitions holds no water. The Applicants ought to have been diligent in getting typed proceedings to enable them file the appeal. The Respondents urged that the Application be dismissed with costs.

4. In his oral submissions on behalf of the Applicants, Counsel argued that the reasons for delay in filing appeal is that the Respondents went to the Kadhi's Court without involving the Applicants. Their application to be enjoined in the suit was dismissed on 7.2.18. The Applicants' appeal is arguable and they have exhibited the Memorandum of Appeal. The 1st Respondent was removed from the title to the Property which was revoked. The question therefore to be determined is whether the Hon. Kadhi has powers to remove anyone's name from a title. The Respondents will not be prejudiced as the title is in their name. He prayed that the Application be allowed with no order as to costs as the parties are family members.

5. The 1st Respondent argues that it is not just for the Applicant to come to Court now as too much time has passed since 2015 when the decision was made. The 1st Applicant was not removed from the title. The 1st Respondent submitted that the distribution was fair as the Applicants were given their portion of the Property while the Respondents were given their portion. The Hon. Kadhi cancelled title because it was not just for the Property to be given to one party. She opposed the Application and asked for costs. On his part the 2nd Respondent echoed the submissions of the 1st Respondent. He opposes the extension of time as too much time has elapsed since the decision of the Hon. Kadhi.

6. I have given due consideration to the Application and the oral submissions by the Applicants' counsel and the Respondents who are unrepresented. The Application is expressed to be brought under the provisions of Sections 3A and 79G of the Civil Procedure Act and Order 42 and 50 of the Civil Procedure Rules and all other enabling provisions of the law. The Application arises from a succession petition in the Kadhi's Court at Kwale. Being a succession matter, the governing law 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 Rules save for Order 50, are not applicable herein.

7. 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.

8. The Law of Succession Act does not stipulate the time within which such an appeal ought to be filed. Section 58 of the Interpretation and General Provisions Act is however instructive:

“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”.

9. Although the time for filing an appeal from the Kadhi's Court to this Court is not stipulated. Such appeal must be filed without unreasonable delay. Where there has been delay in filing an appeal, the Court has powers to enlarge the time for filing the same upon such terms as the justice of the case may require. 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.

10. 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.

11. The Court notes that the Judgment and Ruling sought to be appealed against were delivered on 24.2.15 and 7.2.18 respectively. The Ruling of 7.2.18 arose from an application for review of the judgment of 24.2.15. The memorandum of appeal was filed on 31.10.18 which is 7 months late. The reasons advanced by the Applicants for the delay in filing the Appeal include that the Hon. Kadhi was on transfer to Lamu and it took inordinately long to get copies of the ruling to get a second opinion on the same. Further, the Applicants' former advocate was involved in election petitions and his inadvertences should not be visited upon the Applicants. The Applicants have further asserted that they have raised purely jurisdictional issues in the Appeal.

12. The delay in filing the appeal is for a period of 7 months. The reasons proffered for the delay are 2. First the Applicants claim that their previous advocates were involved in election petitions. It is however not indicated who these advocates are, the election petitions they were allegedly engaged in and the period in which they were so engaged. This explanation is both inexcusable and unacceptable. The second reason is that the Applicants were unable to obtain the typed ruling as the Hon. Kadhi was on transfer. A transition occasioned by the transfer of a judicial officer may in my view occasion a delay in obtaining a typed copy of a ruling. In the circumstances, I find that a delay of 7 months to be excusable. Further, because the memorandum of appeal has raised issues of jurisdiction of the Kadhi's Court, I take the view that this is an arguable appeal that needs to be canvassed fully before Court.

13. In light of the foregoing, the Application dated 20.11.18 is merited and I make the following orders:

- i) The time to file the appeal herein is hereby extended.
- ii) The memorandum of appeal filed on 31.10.18 is hereby deemed as properly filed.
- iii) The Applicants shall file the record of Appeal within 21 days of the date hereof and in default the orders herein shall lapse.
- iv) The Respondents shall have costs.

DATED, SIGNED and DELIVERED in MOMBASA this 8th day of February 2019

M. THANDE

JUDGE

In the presence of: -

.....**for the Applicants**

.....**for the Respondents**

.....**Court Assistant**