



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 23 OF 2017**

**UBA MWALIMU .....APPELLANT/APPLICANT**

**VERSUS**

**SHEIKHA SHEIKH ABDALLA.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 27.6.17, the Appellant/Applicant seeks the following orders:

**1. THAT** *this Honourable Court be pleased to grant leave to the Applicant to file an Appeal against the decision delivered at Mombasa Kadhi's Court Succession No. 6 of 2007 on 29<sup>th</sup> August 2013 on grounds that there are serious issues of fact and law.*

**2. THAT** *the leave granted be RETROSPECTIVE from the date of Judgment on 29<sup>th</sup> August 2013.*

**3. THAT** *time to Appeal against the decision of the Honourable Kadhi delivered on 29<sup>th</sup> August 2013 be extended.*

2. The record shows that Mombasa Kadhi's Court Succession Cause No. 6 of 2007 was in respect of the estate of Asha Tau a Muslim who died around 1940. In his decision of 29.8.13, the Hon. Kadhi made a determination *inter alia* on the estate, the heirs and directed that a valuation of the property forming the estate be done for final distribution. It is against this decision that the Appellant/Applicant intends file appeal.

3. The grounds upon which the Application is predicated are set out in the Appellant/Applicant's affidavit sworn on 3.7.17. The Appellant/Applicant did not agree with the finding of the Hon. Kadhi; that when the Judgment was delivered, her then advocate was not in attendance and did not explain the contents of the judgment; that it is her sister Fatuma who upon her return from London in December 2015 who advised the Appellant/Applicant to apply for leave to appeal against the Judgment and gave her the funds to engage an advocate; that the Appellant/Applicant's advocate erroneously applied for leave in the Kadhi's Court when in fact it ought to have been filed in this Court; that the mistake of her advocate should not be visited upon her.

4. In her grounds of opposition dated 16.10.17, the Respondent states that an appeal from the lower Court to this Court is to be filed within 30 days of the date of the judgment. It is more than 4 years since the judgment was delivered and no plausible reason has been adduced for the inordinate delay. The Appeal is an afterthought, has no chance of success and is an abuse of the Court process and should be dismissed.

5. I have given due consideration to the Application and the submissions by the parties as well as the authorities cited. This Application arises from a succession petition in the Kadhi's Court. Section 50 of the Law of Succession Act confers jurisdiction upon this Court to hear appeals from subordinate Courts as follows:

**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.**

6. It is clear from the foregoing that an appeal shall automatically lie to the High Court of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim. The decision sought to be appealed against was made by the Kadhi's Court and it relates to the

estate of Aish Tau a deceased Muslim. In the circumstances. Prayer 1 and 2 of the Application are misguided as no leave to appeal to this Court from the Kadhi's Court is required in law.

7. I now turn to prayer 3 of the Application which seeks extension of the time to appeal against the judgment. The judgment of the Hon. Kadhi was delivered on 29.8.13. The Application herein was filed on 4.1.17. Relying on Section 79G of the Civil Procedure Act, the Appellant/Applicant argued that a window has been opened for the extension of time. As stated earlier, this Application arises from a succession petition in the Kadhi's Court. Rule 63 of the Probate and Administration Rules, sets out the provisions of the Civil Procedure Rules that are applicable in succession matters:

**63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules**

**(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.**

8. From the foregoing provision, it is clear that Section 79G of the Civil Procedure Act is not applicable in this matter. This notwithstanding, the Court has jurisdiction to entertain the Application by dint of Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules which provide as follows:

**47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:**

**73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.**

9. While Section 50 of the Law of Succession Act does not stipulate the time within which an appeal ought to be filed, such appeal must be filed without unreasonable delay. This is supported by Section 58 of the Interpretation and General Provisions Act which 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”.**

10. 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. It is not disputed that there has been delay filing the application herein. The judgment sought to be appealed against was delivered on 29.8.13. The Application herein was filed on 4.1.17 over 3 years and 4 months later. It is clear that there was inordinate delay. What this Court must determine is whether the explanation given by the Appellant/Applicant for the inordinate delay is plausible. Her reasons for the delay are that she had all along intended to appeal but that her advocate did not handle the matter diligently and did not always attend Court and was absent on the date of judgment. The Appellant/Applicant cited among others, the case of Philip Chemowolo & Another v Augustine Kubede (1982-88) KAR 103 at 104, where Appaloo JA observed that a party should not suffer the penalty of not having his case heard just because a mistake has been made. The Appellant/Applicant who is 80 years old did not know the outcome of the case. She further states that her new advocate applied for extension of time but in the Kadhi's Court which has no jurisdiction. In sum she submitted that the mistake of her counsel should not be visited upon her.

12. I have looked at the record and I do find that during the hearing when evidence of the parties was taken and indeed on the date judgment was delivered, counsel for the Appellant/Applicant was present in Court. I do not find any evidence that her advocate did not handle the matter well nor that he absented himself from Court during the hearing and judgment. I am therefore not persuaded that the delay was caused due to mistake of counsel. Further I agree with the Respondent's submissions that though the Appellant/Applicant was advised by her sister in December 2015 to apply for leave to appeal, it was not until July 2017 that she filed the present Application 1½ years later.

13. The Appellant/Applicant contends the delay in filing appeal has been explained and cited the case of Kihungi v Kihungi [1989] eKLR where Nyarangi JA observed:

***It has now become a basic concept of land disputes that unless there has been such delay as would make it clearly unreasonable and unjust to reopen the matter, an intending appellant should be allowed to institute an appeal so that this Court is afforded an opportunity to hear and determine once and for all any dispute arising from land. When, as here, it is family land, the added advantage is that upon determination by this Court, peace and harmony in the family affected is restored. Land is a sensitive issue in our country.***

14. I have considered the cited authority and note that the delay in that case was for about 1½ years. Further there was evidence that the applicant therein had instructed her counsel to appeal against the judgment 2 days after it was delivered but her advocate did nothing. There is also evidence that the applicant followed up on the matter with her advocate. Indeed the Judge noted that there was a clear intention of the

applicant to lodge an appeal and disagreed with the respondent's counsel that the intended appeal was an afterthought. In the present case however, the Appellant/Applicant has not demonstrated the steps she took to ensure that this Application came to Court as soon as was practicable. Nyarangi, JA. went on to state:

**In these circumstances the only matter which calls for consideration is whether the delay in bringing the notice of motion is inordinate, inexcusable and remains unexplained. While not disregarding the delay, I do not think it is inordinate. I accept the explanation for the delay.**

15. In the instant Application there was delay of over 3 years and 4 months. This delay is inordinate, inexcusable and remains unexplained to the satisfaction of the Court. In light of the foregoing, it is my finding that the application for leave to appeal out of time is unmerited. The Application dated 27.6.17 is therefore dismissed. Each party to bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 27<sup>th</sup> day of July, 2018**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

.....for the Appellant/Applicant

.....for the Respondent

.....Court Assistant