



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MOMBASA

MISC. CIVIL APPL. NO. 2 OF 2015

1. MOHAMED MOHSEN MOHAMED

2. FATUMA MOHSEN ABDULRAHMAN

[AKA FATUMA AHMED ABDULRAHMAN]

3. HUSSEIN MOHSEN MOHAMED.....APPELLANTS/APPLICANTS

VERSUS

1. IN THE ESTATE OF MOHAMED MOHSEN AL BEITY

2. NOOR MOHSEN MOHAMED.....RESPONDENTS

RULING

1. By a Notice of Motion dated 27/2/15, the appellants seek orders for the grant of leave to appeal out of the time for a judgment of the Kadhi's Court and for stay of execution of the said decision in terms as follows:

1. **THAT** this matter be certified as urgent and service of this Application be dispensed with in the first instance.

2. **THAT** there be a stay of execution of judgment in Kadhi's Court Succession Cause³ No. 171 of 2012 Mombasa pending the hearing and determination of the Application.

3. **THAT there be a stay of execution in Kadhi's Court Succession Cause No. 171 of 2012 Mombasa pending the hearing and determination of the intended appeal on the judgment delivered on 24/4/2014.**

4. **THAT the Honourable court be pleased to grant leave to the Appellant/Applicant to file the Appeal out of time.**

5. **THAT** the costs of this Application be in the Appeal.

2. The application was expressed to be based on grounds set out in the Notice of Motion as follows:

a) Since the delivery of the judgment on 24/4/2014 the Applicant has since instructed us to Appeal against the whole of the judgment.

b) The applicant had advised his previous Advocate to Appeal but his Advocate failed to do so.

c) The Kadhi's Court Succession Cause No. 171 of 2012 Mombasa has already issued a Ruling to execute on the judgment.

d) The intended Appeal by the Appellants/Applicants against the judgment delivered on 24/4/2014 has very good prospects of success.

e) It is the Applicants who stands to lose if a stay is not granted.

f) The amount to be lost by the Applicant is in excess of Kshs. 13,224,374/- and if the same is released to the Respondents then the

property shall not be recoverable and the intended Appeal shall be rendered nugatory as the Respondent has no jobs whatsoever.

g) No prejudice shall be occasioned to the Respondent should the Honourable Court allow this Application.

h) That it is in the interest of justice that the orders be granted as prayed.

3. The applicants set out the fact of the case that they relied on in the SUPPORTING AFFIDAVIT as follows:

1. **That** I am the 1st Appellant herein and I have authority to swear this Affidavit on behalf of my mother and brother who are 2nd and 3rd Appellants respectively.

2. **That** the suit in the Kadhi's Court No. 171 of 2012 Mombasa arose out of a Succession matter pitting myself, my mother and brother on the one hand and my sister on the other hand.

3. **That** judgment was read on 24/4/2014 wherein the court ordered that the property be re-distributed.

4. **That** after due consideration and discussion among my family I have resolved to Appeal the judgment delivered on the 24/4/2014.

5. **That** I spoke to Mr. Khatib Advocate and wrote to him a letter but to my surprise he advised me on the 23/2/2015 that he had not filed an Appeal in this matter. [Annexed is the said letter **marked "MMM1"**]

6. **That** my father MOHSEN MOHAMED ALBEITY died on the 5/8/2011 and a dispute arose as the succession of his properties and I annex hereto pleadings, ruling and judgment in Kadhi's Case No. 171 of 2012 **marked "MMM2"**.

7. **That** some of the properties distributed in the judgment were transferred to myself and my brother prior to my father's death on the 16/10/2002 and 30/9/2003 respectively but were erroneously included in the distribution of his estate and I annex hereto Title Deed **marked "MMM3"**.

8. **That** Plot No. 1749/VI/MN which is a house without land was transferred to me by my father in 2003 and I annex hereto a letter addressed to the tenant marked "MM4" when my father was still alive.

9. **That** my Advocate on record prepared a draft Memorandum of Appeal, appealing against the whole judgment dated 24/4/2014 annexed hereto and **marked "MMM5"**

10. **That** my mother is in Yemen and I was sick with diabetes and therefore could not follow up Mr. Khatib Advocates to ascertain if he had filed the Appeal or not and I annex hereto documents attesting the same **marked "MM6"**

11. **That** we are now making this Application for leave to Appeal out of time and we are also seeking a stay of execution pending the hearing and determination of the said Application and Appeal.

12. **That** if the said stay if not granted then the whole of the Appeal shall be rendered nugatory and the Applicant shall suffer loss and damages once execution is made as the property will be transferred to the Respondent.

13. **That** further if the property is transferred to the Respondent then the same may not be recoverable and or be returned as the Respondent is jobless with very humble means. Annexed hereto is handwritten copy of the judgment showing the occupation of the Respondent and **marked as "MMM7"**.

14. **That** the delay to file the Appeal was not deliberate but was cause by our assumption that our previous Advocate on record had filed the Appeal.

15. **That** the Applicant is willing to abide to any directions of the Court with respect to provision of security as this Honourable Court deems fit.

16. **That** no prejudice shall be occasioned to the Respondent should the Honourable Court allow this Application.

4. By way of response to the application, the 2nd Respondent sought the striking out of the applicant's Notice of Motion of 27/2/15 his own motion dated 31/2/15 from specific orders as follows:

a) The motion on notice filed herein is struck-out on the grounds that:

i) It is incorrectly originated;

ii) The incorrect origination of the action by notice of motion instead of a memorandum of appeal cannot be waived [E vs. E (1970) EA 604]

iii) Not even an amendment of the motion can cure the defect in the proceedings;

iv) High Court is not properly seized of the matter as there is no memorandum of appeal filed upon which an application.

v) It is an abuse of the court process for the applicants to sue the estate of a deceased person without hearing the legal representative [Troustik Union International and Anor vs. Mabeya & Anor [2008] 1KLR [g & f] 730.

b) The costs of this motion and of the suit are awarded to the respondent.

5. By a consent order recorded on 16/6/2015, the question of wrongful inclusion of the Estate of the deceased as Respondent was addressed-

“By consent the applicants do have leave to amend their Notice of Motion dated 27/2/15. The Respondent do have liberty to file any reply suitable to answer the amended motion. The application dated 27/2/15 by the applicants and the Notice of Motion dated 31/3/15 by the Respondent be heard together by way of written submissions.....”

6. The 2nd Respondent did not file any further replying subsequent to the Consent Order of 16/6/15, save the affidavit of NOOR MOHSEN MOHAMED in support of the Notice of Motion of 31st march 2015 where she deponed, principally, as follows:

“2. That I am illiterate and thus advised by my advocate, who advice I believe to be true and correct, that the Notice of Motion dated 27/2/15 is incorrectly originated. The applicants’ are minded to circumvent the appeal process which is expressly provided for, and consequently the application is an abuse of the court process.

3. That the High Court is not properly seized of the matter. The jurisdiction can only be invoked by the filing of a Memorandum of Appeal.

4. That the suit ought to be struck out because it is an abuse of the Court process for the applicants to use a Miscellaneous Application to seek a stay of execution before the [appellate] court, yet there is no appeal filed before court. Moreover, the use of wrong process to approach cannot be waived.

5. That the applicants are also the administrators of the estate of my late father. I read mischief in their suing the estate thereby becoming appellants and respondents in the same cause.

7. In his reply to the Motion to struck out the 1st applicant’s Affidavit sworn a Replying Affidavit sworn on 27/4/15 stating that he had attended a draft Memorandum of appeal which could only be filed upon leave being granted by the court to file the appeal out of time and that the defeat on the citation of the case was occasioned by the Respondents’ own description of the parties in the suit before the Kadhis Court from which the appeal is sought to be filed.

Issue for determination

8. I have considered the written submission filed by the Counsel for the parties herein and taken the two applications together, the Respondents’ Notice of Motion dated, 31/3/15 as a response to the Applicants’ Notice of Motion dated 27/2/15. The hybrid issue that arises is whether the court shall grant extension of time for filing of the appeal from the Judgment of the Kadhi’s Court as prayed in Prayer (4) of the Notice of Motion of 27/2/15 or (whether) the said application shall be struck out for being an abuse of process, it having been filed without filing a Memorandum of Appeal in accordance with the Rules of Court; and whether, if leave is granted, there shall be granted stay of execution pending the hearing and determination of the appeal.

9. It is beyond contest that the High Court must have powers to strike out an appeal which is filed outside the statutory period for filing an appeal without leave of court to do so. This position was emphasized by the Court of Appeal in *Silverstein v. Chesoni* (2002) 1 EA 296, 301, as follows:

“Under [section 79G of the Civil Procedure Act] if an appeal was filed outside the thirty days allowed and no leave of the High Court was obtained to do so, then of necessity, the High Court must have power to strike out the appeal as being incompetent without the necessity of going through a hearing on the merits... [W]e think an incompetent appeal ought to be struck out, not dismissed.”

10. But the case before the court is not the appeal but an application for both leave to appeal out of time and stay of execution pending appeal, as shown in the prayers of the Notice of Motion set in full above.

Determination

Whether leave to file appeal out of time will be granted

11. There is no dispute that there is a right of appeal from decree’s of a Kadhi’s Court to the High Court in section 65 (1) (c) of the Civil Procedure Act and therefore no question of leave to appeal arises but rather one only of leave to appeal out of time. Section 65 (1) (c) provides as follows:

“Appeals from Original Decrees

65. Appeal from other courts

(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—

(a) Deleted by Act No. 10 of 1969, Sch.;

(b) from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact;

(c) **from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors."**

12. With reference to the subject matter of the appeal, Section 50 (2) of the Law of Succession Act provides for appeal 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."

13. With regard to the procedure for the lodging of appeal from the Kadhi's Court, the general provisions relating to appeals under the Civil Procedure Act applies with section 79G providing for appeals to be filed within 30 days from the date of the decree or order appealed from with a proviso for extension of time for **good and sufficient cause** as follows:

"79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having

been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. [Act No. 10 of 1969, s.]

14. The question before the court then turns out to be whether the applicant has demonstrated a "good and sufficient cause" for failure to file the appeal within the period of 30 days from the date of the decree of the Kadhi's Court. In assessing good and sufficient cause for extension of time to lodge an appeal out of time, courts have developed various tests, different only in nomenclature, for the exercise of this discretion judicially. For instance, in the case cited by Counsel for the respondent, **Mariaria and Others v. Matundura** (2004) 2 EA 163, on a single judge application for extension of time to file an appeal in the Court of Appeal, Okubasu, JA held as follows:

"The decision whether or not to extend time for appealing is essentially discretionary. The Court will take into account (1) the length of the delay, (2) the reason for the delay, (3) the chances of the appeal succeeding if the application is granted, and (4) the degree of prejudice to the respondent if the application is granted."

15. I have considered the length of 9 months delay and the reasons for the delay, and couple with the principle that mistake of counsel shall not be visited upon a litigant, I do not find that the explanation of the mother's absence in Yemeni (even though the visa on the passport indicates a 30 day permission to enter) was unreasonable for the two brothers failure to pursue the matter of the appeal with the advocate in their mother's absence after alleged instructions to appeal. In addition, the 1st applicant deponed and attached documents as to his ill health himself making it difficult for him to follow up on the matter with the advocate.

16. I have also considered that there are serious questions to be placed before the appellate court and the appeal cannot be dismissed as showing no arguable case. With respect, I think the test of overwhelming chances of success of the appeal is too high a standard in an application for leave to appeal or to appeal out of time. It is trite that appellate courts require only an arguable case to be presented on appeal, and indeed that one such arguable case suffices.

17. I find a serious question arising whether it was open for the Kadhi's Court to direct the distribution of the estate when it had itself found an issue as to whether the plot 1743 is part of the estate of the deceased and had reserved adjudication on the matter in further subsequent proceedings in the Judgment dated 24/4/2014 sought to be appealed from, as follows:

"ESTATE

"Swahili house on plot Nos. 1743/VI/MN at Magongo

*Parties and heirs, including respondents, agree this property belongs to the estate. The title or official search for the property was not produced. The 2nd respondent produced a transfer where the deceased transferred the same to Ahmed M. Mohamed of Malindi in consideration of Kes 100,000.00 in September 2002. **Issues of land are serious. All doubts must be cleared. Parties are directed to produce search for this property for its confirmation as part of the estate."***

There is also the question as to the ownership of the house on plot No.1749, which if shown not to belong to the estate, as alleged by the applicant, removes the said property for the distribution list.

18. There would, of course, be real prejudice if the property belonging to the applicants were to be distributed to the beneficiaries of the

estate of the deceased, while the respondent cannot show loss that cannot be remedied by an award of money by way of her share in the proceeds or profits emanating from the estate property in the hands of the applicants, who in accordance with the law would be liable to account to the estate, if the distribution of what turns out later to be estate property is stayed on occasion of the appeal.

19. I find that the application for leave to appeal out of time should be granted. The applicant has filed a draft memorandum of appeal, and not, with respect, a duly filed Memorandum of Appeal. Indeed, the supporting affidavit to the application of 27/2/2015 clearly refers to the draft memorandum of appeal at paragraph 9. thereof as such –

*“9. That my Advocate on record prepared **a draft Memorandum of Appeal**, appealing against the whole judgment dated 24/4/2014 annexed hereto and **marked “MMM5”**”*

20. Once leave to file appeal out of time is granted the court will admit the Memorandum of Appeal, pursuant to the provisions of the Proviso of section 79G of the Civil Procedure Act upon payment of the requisite filing fees.

Whether the court will grant an order for stay of execution pending appeal

21. With respect to Counsel for the Respondent, there is no requirement under Order 42 rule 6 of the Civil Procedure Rules for a prior application for stay of execution in the trial court before such an application may be made considered by the appellate court, the High Court in this case. The Provisions of Order 42 rule 6(1) of the Civil procedure Rules 2010 are clear on this score as follows:

*“[Order 42, rule 6.] Stay in case of appeal. 6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, **and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just**, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”*

22. Counsel’s submission appear to have been based on the old position of the Rules before the amendment by LN No. 36 of 2000 which deleted and substituted the following rule (Order XLI Rule 4 (1) of the 1948 Civil Procedure Rules) with the current rule Order 42 Rule 6(1) as set out above.

*“**Order XLI Rule 4 of the Civil Procedure Rules** .*

*4. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order, but the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, **but application shall in every case be made in the first instance to the court from whose decree or order the appeal is taken;** and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”*

23. The old rule had a clear requirement for a prior application before the trial court in the first instance, but here is no requirement for such application in the Civil Procedure Rules established by LN No. 151 of 2010 following on the 2000 amendment. The jurisdiction of the appellate court to consider an application for stay of execution exists whether or not the application for stay of execution shall have been considered by the trial court. This is consistent with the provision with respect to the related order of injunction pending appeal which under Oder 42 rule 6 (6) of the Civil Procedure also introduced by LN No. 36 of 2000, the High Court as an appellate court may grant an injunction without regard to the provision of sub-rule 1 of Order 42 rule 6, as follows:

*“(6) Notwithstanding anything contained in subrule (1) of this rule **the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just** provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”*

Orders

24. Consistently with the overriding objective of the Civil Procedure Act under section 1A and B, there should be no necessity for the intending appellant to file a fresh suit to seek recovery of the property allegedly belonging to the petitioners but distributed by the trial court to other beneficiaries pursuant to the holding in the wholly distinguishable decision of **Saleh Bin Mohamed Bin Omar Bakor v. Noor Binti Sheikh Mohamed Bin Omar Bakor** (1950) EACA 30. In the said case regarding an action for recovery of her share of income from deceased’s immovable property had and received by one beneficiary in a situation where the Public Trustee who had been granted Letters of Administration had completed administration and rendered final accounts but which did not contain reference to such income it was held that –

“A beneficiary was entitled to follow the assets into the hands of the person wrongly receiving them without necessarily revoking the Letters of Administration.”

25. In the present case, unlike **Saleh’s** case the appellant challenges the decree of the Kadhi’s Court on the grounds that the court ordered distribution of non-estate property.

26. The holding of the Court of Appeal in *Sasini Tea and Coffee Ltd v. Obwogi* (2003) EALR 277, 280 supports the position that an application for stay of execution is not incompetent even if filed during the pendency of an application for **leave to appeal**, as follows:

“We are satisfied that once an application for leave to appeal has been made in terms of rule 39 (b) of the Rules of this Court, and a Notice of Appeal has been lodged in accordance with rule 74 of the Rules, this Court has jurisdiction under rule 5(2) (b) of the Rules to entertain an application for stay of execution notwithstanding the fact that at the time the application for stay reaches this Court, the application for leave to appeal is still pending in the superior court. A problem would only arise if the appellant purported to file an appeal before actually obtaining the requisite leave.”

27. In this case, the applicant filed an application for stay of execution under the same application in which he sought a prior order for **leave to appeal out of time**. I do not find that the application was fatal in any way as the court would consider the two prayers contemporaneously but only grant the one after grant of the other, namely, the application for stay of execution pending appeal upon grant of leave to appeal or leave to lodge appeal out of time, as in this case.

ORDERS

28. Having considered the applications before the Court, I find that there exists **a good and sufficient cause** for the grant of leave of court to file appeal out of time, and accordingly will admit the draft Memorandum of Appeal dated 27/2/2015 as duly filed upon payment of the filing fees therefor within seven (7) days from the date hereof, and the Record of Appeal must be filed within 30 days from today.

29. I also consider that the appeal shall be rendered nugatory if the stay of execution is not granted as the respondents may proceed with distribution of suit property on the basis that the same is estate property, the very matter that is the subject of the appeal to the High Court.

30. By way of security, the title documents and income generated from the disputed properties shall be held in an interest earning account in the joint names of the Counsel for the parties to be opened within thirty (30) days, or in default deposited into court pending the hearing and determination of the appeal.

31. Liberty to apply.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2018.

E.K. OGOLA

JUDGE

Appearances

M/S V.N. Okata & Company Advocates for the Appellant/Applicant.

Mr. Stephen Macharia Kimani Advocate for the Respondents.