



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: KOOME, J.A (IN CHAMBERS))**

**CIVIL APPLICATION NO. 90 OF 2018**

**BETWEEN**

**SALIM ABDALLA MAALIM.....APPLICANT**

**AND**

**FAMAU MADI SHOSI.....RESPONDENT**

(Being an application for extension of time within which to file and serve Record of Appeal, and deem the Record of Appeal filed on 2<sup>nd</sup> August, 2018 as properly filed)

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**RULING**

[1] The notice of motion dated 3<sup>rd</sup> August, 2018 is brought under **Rule 4** of the **Court of Appeal Rules**. Salim Abdalla Maalim, (applicant) is seeking extension of time to file and serve the record of appeal as well as the record of appeal which was lodged on the 2<sup>nd</sup> August, 2018 to be deemed as properly filed and served. The applicant also seeks leave to file a supplementary record of appeal to include a certified copy of the decree. The application is supported by the grounds stated thereunder which are further expounded by the supporting affidavits sworn by Hamisi Ali Mwadzogo that was sworn on 3<sup>rd</sup> August, 2018 and a replying affidavit sworn by the applicant on 19<sup>th</sup> September, 2018.

[2] Going by the record before me, on 4<sup>th</sup> May, 2018 **Thande, J.**, delivered a judgment in a succession dispute that involved the estate of Bakari Madi Chosi (deceased) who died on 10<sup>th</sup> November, 2011 regarding a house without land on Plot No. 82/1/MN at Free Town, Kisauni, Mombasa. The dispute was between Famau Madi Shosi (respondent) a brother of the deceased and the applicant who claimed the deceased left a WAKF (charitable gift under Islamic law) in regard to the said land that was to be used by Madrassa tul Baharain after the demise of the deceased. The dispute which was a first appeal from the judgment of Sheikh Afdulhalim Athman, the learned Principal Kadhi in Mombasa was heard by the learned Judge with the help of the Chief Kadhi as an assessor pursuant to the provisions of **Section 65(1) (c)** of the **Civil Procedure Act**.

[3] After considering the matter, the Chief Kadhi was of the opinion that the appeal should be allowed with the result that the matter goes for retrial so as to give the beneficiaries of the deceased an opportunity to be heard. The Judge agreed with the opinion of the Chief Kadhi that the appeal be allowed, however, she went further and ordered the judgment of the trial court be set aside and the estate of the deceased be distributed to the legal heirs of the deceased according to Sharia law.

[4] The applicant was aggrieved by the said judgment and applied for leave to file an appeal and for certified copies of the judgment and proceedings immediately upon delivery of the said judgment. On 14<sup>th</sup> May, 2018 the applicant filed a Notice of Appeal and served it upon the respondent on the 16<sup>th</sup> May, 2018. The applicant was supplied with the certified copies of the judgment and the proceedings on 5<sup>th</sup> July, 2018 but the decree was not signed. Counsel for the applicant detailed the efforts he made as he continuously sought the assistance of the court to have the decree signed without success as the court file went missing. Eventually, he lodged the record of appeal without the certified copy of the decree on 2<sup>nd</sup> August, 2018 within which time the appeal was late by a few days hence the application for extension of time.

[5] The application was opposed; the respondent filed a notice of preliminary objection (this is a strange practice that is emerging and not provided for by the Court Rules) and a replying affidavit sworn by Umi Famau Madi. The respondent contends that the appeal is incompetent and should be struck out with costs as the appeal was filed outside the prescribed time without leave. In the replying affidavit counsel for the respondent faulted the applicant for filing the appeal late arguing that the proceedings and judgment were endorsed by the Deputy Registrar on 5<sup>th</sup> July, 2018 and therefore, there was no reasonable explanation why the decree was not signed. The applicant purported to write a letter on 1<sup>st</sup> August, 2018 after the expiry of the 60 days allowed to file an appeal seeking to have unspecified orders signed which was meant to

hoodwink the Court.

[6] During the plenary hearing, **Mr. Mwadzogo** learned counsel for the applicant, submitted that considering the judgment was given on 4<sup>th</sup> May, 2018 and the proceedings were supplied on 5<sup>th</sup> July, 2018, the record was not filed late as it was within the 60 days period provided under the Rules. However, according to counsel, the instant application was filed out of abundance caution as counsel had not availed a certificate of delay from the registry. The other reason advanced by counsel for the applicant is that the appeal raises a matter of public interest regarding the suit land that is being used as a school and an interpretation of the essentials of WAKF under Islamic law. Also there are issues of law regarding the judgment that need to be clarified by the Court of Appeal. On prejudice, counsel was of the view that the respondent will suffer none as the delay is not inordinate.

[7] On the part of **Mr. Gathuku** learned counsel for the respondent, he urged for dismissal of the application on the grounds that it does not meet the threshold that would invoke this Court's exercise of discretion. Counsel cited the provisions of **Rule 82 (1)** which gives time limits for lodging an appeal; there is no certificate of delay from the registrar. Moreover the applicant failed to offer a reasonable explanation why the decree was not signed when the certified copies of proceedings and judgment were issued. On the arguability of the appeal, counsel stated that the opinion of the Chief Kadhi was a mere opinion and the Judge could not be bound by it. On prejudice, counsel stated that the respondent will greatly be inconvenienced as they continue being alienated from their inheritance being the suit property.

[8] I have considered the rival submissions by both counsel, it is now well settled by a long line of authorities by this Court some of which were cited here that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted. (See ***Mutiso vs. Mwangi*** [1999] 2 EA 231. In other words, **Rule 4** of the **Court of Appeal Rules** donates unfettered discretion and as long as the discretion is exercised judiciously, a single Judge would be entitled to consider any other relevant material.

[9] Is the applicant herein entitled to extension of time? It is common ground that the judgment which is the subject matter of the appeal was delivered on 4<sup>th</sup> May, 2018 and counsel for the applicant applied for proceedings immediately before the Judge. It is also common ground that the proceedings were supplied on 5<sup>th</sup> July, 2018 and the record of appeal was lodged on 2<sup>nd</sup> August, 2018 which was after 60 days since the Judgment was delivered. What is contested by the respondent is whether failure by counsel for the applicant to obtain a certificate of delay and a certified copy of the decree was fatal, and should disentitle the applicant the exercise of this Court's discretion to extend time. Counsel for the applicant submitted that when the proceedings were availed, on 5<sup>th</sup> July, 2018 they did not seek a certificate of delay because they thought it was not necessary since 60 days would have begun to count from 5<sup>th</sup> July, 2018 when the proceedings were availed. To me the delay here is not inordinate, indeed if the applicant had obtained a certificate of delay, there would have been no delay. On the other hand the fact that counsel for the applicant failed to seek a certificate of delay is not a mistake that can be visited upon his client and deny him an opportunity to ventilate his appeal.

[10] I therefore find the explanation for the delay reasonable given that had the applicant sought a certificate of delay from the registry there would have been no delay. On the issue of whether there is an arguable appeal, this is a matter for the full Bench suffice to say that there are issues of law that are discernable in the said judgment regarding a determination of the fundamentals of a wakf bequests *vis-a-vis* the interests of the beneficiaries of the deceased estate. In ***Athuman NusuraJuma vs. Afwa Mohamed Ramadhan, CA No. 227 of 2015***, where it was held that:

**“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.**

The intention of the applicant to seek a second opinion in the Court of Appeal on the interpretation of these nascent issues of Islamic law cannot be termed as frivolous. This is obviously with the usual rider that not all appeals that raise arguable points of law are likely to be successful.

[11] On the issue of prejudice to be suffered by the respondent, if this application is allowed, as noted above, the delay here was not inordinate; the respondent has perhaps been inconvenienced when he was drugged in Court to defend the instant application, that inconvenience can nonetheless be compensated with costs being awarded thereto.

[12] In conclusion I find merit in both prayers that call for the exercise of my discretion. I accordingly extend time and order that the applicant's appeal lodged on 2<sup>nd</sup> August, 2018 be deemed to have been duly filed within time. The applicant is also given 14 days within which to file a supplementary record of appeal to include the missing records. The applicant shall pay the costs of this application to the respondent in any event.

**Dated and delivered at Mombasa this 8<sup>th</sup> day of November, 2018**

**M.K. KOOME**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**